CRIMINAL PROCEDURE

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Table of Contents

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I. INTRODUCTION

During the *Survey* period, June 1, 2007 through May 31, 2008, both the Michigan Court of Appeals and the Michigan Supreme Court engaged in numerous decisions impinging on the law of criminal procedure. In many of the cases, particularly those decided by the Michigan Supreme Court dealing with sentencing and search and seizure law, the opinions are filled with spirited debate if not downright acrimony.

First, it is important to note that the vast majority of cases decided by the Michigan courts during the *Survey* period were initiated by the prosecutor. That prosecutors seek to appeal judicial decisions favoring defendants' constitutional rights and procedural advantages, with such consistent rigor, appears to be nothing short of a concerted effort to significantly impact these areas of the law. This is not the first Survey period in which this prosecutorial trend has been apparent. With this *Survey* period, the trend continues.

Second, the Michigan Supreme Court, with a few significant exceptions, exhibited a concerted effort to align Michigan precedent more closely with federal law with respect to constitutional procedural rights. Again, this is not the first *Survey* period in which the Court's effort has been apparent.

Finally, in the area of sentencing, the Michigan Supreme Court held that Michigan utilizes an indeterminate sentencing scheme. As a result, the Michigan Supreme Court avoided the holding of *Blakely v. Washington*[1] and rendered the decision inapplicable to Michigan's Sentencing Guidelines. The majority of other sentencing cases dealt with substantial and compelling reasons to depart from the applicable guideline range. Notably, the courts reversed a trial court's determination of substantial and compelling reasons to depart below the recommended guideline range, but upheld the trial courts' decisions finding substantial and compelling reasons to depart upward.[2]

II. INVESTIGATION AND DETECTION OF CRIME

The cases decided during the *Survey* period regarding the investigation or detection of criminal activity addressed primarily search and seizure issues or issues dealing with confessions. Significantly, every case regarding search and seizure, interrogations and confessions, and the exclusionary rule were initiated by the prosecution. And most

1. 542 U.S. 296 (2004).
2. *See infra* section VII.B.

notably, in the few situations where the court of appeals decided to exclude evidence based on constitutional violations, the supreme court, without exception, reversed those decisions despite constitutional violations, statutory violations, or other legal improprieties.

A. Search and Seizure

In *People v. Gillam*,[3] the Michigan Supreme Court refused to apply the constructive entry doctrine for purposes of a Fourth Amendment search and seizure analysis where police repeatedly ignored the defendant's refusal to leave his home.[4] Had the Court applied the constructive entry doctrine, the evidence seized by law enforcement would have been inadmissible.[5]

While investigating drug transactions committed by the defendant's alleged accomplice, the police learned that the defendant was on tether.[6] As a result of this investigation, police concluded they possessed probable cause to arrest the defendant.[7] Without first obtaining a warrant, "three plain clothes officers and two uniformed patrol officers" went to the defendant's apartment.[8] Once there, two of the plain clothes officers covered the back of the apartment and the stairwell of the apartment building.[9] The third plain clothes officer and the two uniformed officers knocked on the defendant's door and asked the defendant to come out.[10]

The extent of what happened at the door differed between the defendant and the officers.[11] The undisputed facts, however, indicated that there was an exchange between the police and the defendant where the police repeatedly asked the defendant to leave his home.[12] The trial court believed the defendant's version of events.[13] The trial court concluded that the defendant was coerced into leaving his house.[14] As a result, the court ruled that the officers constructively entered the defendant's home for purposes of a Fourth Amendment search and

3. 479 Mich. 253, 734 N.W.2d 585 (2007).
4. *Id.* at 255, 734 N.W.2d at 586-87.
5. *Id.* at 271, 734 N.W.2d at 594 (Kelly, J., dissenting).
6. *Id.* at 255, 734 N.W.2d at 587.
7. *Id.*
8. *Id.*
9. *Gillam*, 479 Mich. at 255, 734 N.W.2d at 587.
10. *Id.* at 256, 734 N.W.2d at 587.
11. *Id.* at 256-57, 734 N.W.2d at 587-88.
12. *Id.*
13. *Id.* at 257, 734 N.W.2d at 587-88.
14. *Id.* at 257, 734 N.W.2d at 588.

seizure analysis.[15] The court granted the defendant's motion to suppress.[16] In response, based on the court's ruling and the defendant's refusal to plead guilty, the prosecutor declined to proceed. Based on that, the trial court granted the defendant's motion to dismiss.[17] The prosecutor appealed the court's suppression decision.[18] The court of appeals affirmed in an unpublished decision.[19]

In reversing the court of appeals,[20] the Supreme Court acknowledged the long-standing precedent of *Payton v. New York*.[21] In *Payton*, the United States Supreme Court held that the Fourth Amendment prohibits police from making a nonconsensual entry into a suspect's home without a warrant to make a routine felony arrest.[22] One of the long-standing and oft-cited tenets of *Payton* is that the Supreme Court drew a line at the front door of a suspect's house.[23] When law enforcement crosses that line into the home and conducts a search or seizure without a warrant, law enforcement has violated the Fourth Amendment.[24]

The Michigan Supreme Court noted that since *Payton*, the Court of Appeals for the Sixth Circuit has expanded the prohibition of warrantless entries of the home to situations that amount to a constructive entry of the home.[25] Constructive entry occurs when a suspect leaves his home in response to coercive police conduct.[26] The Court noted that the Courts of Appeals for the Third, Ninth, and Tenth Circuits have also recognized the doctrine of constructive entry.[27] But, the Court also pointed out that several courts have rejected the constructive entry doctrine.[28] The Court

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15. *Gillam*, 479 Mich. at 257, 734 N.W.2d at 588.

16. *Id.* at 258, 734 N.W.2d at 588-89.

17. *Id.* at 258-59, 734 N.W.2d at 589.

18. *Id.* at 258-59, 734 N.W.2d 588-89.

19. *Id.* at 259, 734 N.W.2d at 589 (citing People v. Gillam, No. 259122, 2006 WL 859400 (Mich. Ct. App. Apr. 4, 2006)).

20. *Id.* at 266, 734 N.W.2d at 594.

21. 445 U.S. 573 (1980).

22. *Id.* at 576.

23. *Id.* at 590.

24. *Gillam*, 479 Mich. at 260-61, 734 N.W.2d at 590 (citing *Payton*, 445 U.S. at 590) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance of the house. Absent exigent circumstance, that threshold may not reasonably be crossed without a warrant.").

25. *Id.* at 261, 734 N.W.2d at 590.

26. *Id.* (citing United States v. Morgan, 743 F.2d 1158, 1166 (6th Cir. 1984)).

27. *Id.* (citing Sharrar v. Felsing, 128 F.3d 810, 819 (3d Cir. 1997), United States v. Maez, 872 F.2d 1444, 1450 (10th Cir. 1989), United States v. Al-Assawy, 784 F.2d 890, 893 (9th Cir. 1985)).

28. *Id.* (citing Knight v. Jacobson, 300 F.3d 1272, 1277 (11th Cir. 2002), United States v. Carrion, 809 F.2d 1120, 1128 (5th Cir. 1987), United States v. Berkowitz, 927 F.2d 1376, 1386 (7th Cir. 1991)).

stated it was not bound by lower federal court decisions, particularly when "a conflict of authority" exists among the circuits.[29] Instead, when a conflict exists, the Court noted that it "is free to follow the authority it deems most appropriate."[30]

Nonetheless, the Court did focus on several Sixth Circuit cases to distinguish the present case from those where the Sixth Circuit had found a constructive entry violative of the Fourth Amendment.[31] Because, according to the Court, the present case only involved a mere knock on his front door accompanied with a request to exit, the Court stated that *Morgan* was inapposite.[32] In *Morgan*, several officers and patrol cars encircled the suspect's house, strategically blocked the suspect's car with a patrol car and used floodlights and a bullhorn to summon the suspect from his home.[33]

The Court also distinguished *United States v. Saari*[34] from the present case.[35] In *Saari*, four officers, with weapons drawn, surrounded the only entrance to the defendant's home.[36] The officers yelled, "police," instructed the defendant to come outside, and the defendant exited his home with his hands in the air.[37] Because the officers in the instant case did not draw their weapons or use compulsory language, the court held *Saari* inapposite, as well.[38]

Instead, the Court relied on another Sixth Circuit case, *United States v. Thomas*,[39] to support its conclusion that the police did not constructively enter the defendant's home.[40] In *Thomas*, four officers approached the suspect's home in the daytime (two at the front and two at the back), knocked, and asked the suspect to come out.[41] When the suspect answered the door, the police arrested him.[42] The Sixth Circuit held that this was not a constructive entry because the defendant did not

29. *Id.* at 261, 734 N.W.2d at 590 (citing Abela v. General Motors Corp., 469 Mich. 603, 606, 677 N.W.2d 325, 327 (2004)).

30. *Gillam*, 479 Mich. at 261, 734 N.W.2d at 590 (citing *Abela*, 469 Mich. at 606, 677 N.W.2d at 327).

31. *Id.* at 262-63, 734 N.W.2d at 590-91.

32. *Id.* at 263, 734 N.W.2d at 590.

33. *Id.*

34. 272 F.3d 804, 806-07 (6th Cir. 2001).

35. *Gillam*, 479 Mich. at 262-63, 734 N.W.2d at 590-91.

36. *Id.* at 262, 734 N.W.2d at 590-91 (citing *Saari*, 272 F.2d at 806-07).

37. *Id.* at 262, 734 N.W.2d at 291 (citing *Saari*, 272 F.2d at 806-07).

38. *Id.* at 263, 734 N.W.2d at 291.

39. 430 F.3d 274 (6th Cir. 2005).

40. *Gillam*, 479 Mich. at 264, 734 N.W.2d at 591-92.

41. *Id.* at 263-64, 734 N.W.2d at 591 (citing *Thomas*, 430 F.3d at 276).

42. *Id.* at 264, 734 N.W.2d at 591 (citing *Thomas*, 430 F.3d at 276). The defendant refused to speak to the police after he stepped outside. *Id.*

exit his house because of police coercion, physical force, or any other show of police authority.[43]

The Court dismissed the fact that the defendant was on tether and originally refused to leave his home as somewhat of a complication with respect to the constructive entry analysis, the Court ultimately concluded that the court-ordered tether should have made the defendant feel reasonably confident in refusing the officers' request to exit his home.[44]

Justice Kelly, joined by Justice Cavanagh, dissented.[45] Justice Kelly stated that the constructive entry doctrine is widely recognized.[46] Further, Justice Kelly stated that the facts supported a finding that the police had constructively entered the defendant's home when the uniformed "officers created an excited and coercive atmosphere" and refused to accept the "defendant's repeated refusals to leave his" home.[47] As such, Justice Kelly stated that the trial court properly excluded the evidence that was illegally seized pursuant to a warrantless constructive entry.[48] Finally, Justice Kelly was concerned that the majority opinion was setting bad public policy that would encourage people not to answer their doors for police officers.[49]

Following the recent trend in the area of criminal procedure, both federally and in Michigan, the Michigan Supreme Court carved out another situation in which the exclusionary rule will not apply to an otherwise established constitutional violation. In a split decision, the Michigan Supreme Court refused to apply the exclusionary rule where the search warrant and underlying affidavit did not support a finding of probable cause in the case of *People v. Keller.*[50]

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43. *Id.* (citing *Thomas*, 430 F.3d at 275).

44. *Id.* at 265-66, 734 N.W.2d at 592.

45. *Id.* at 270, 734 N.W.2d at 594 (Kelly, J., dissenting).

46. *Gillam*, 479 Mich. at 270, 734 N.W.2d at 594 (Kelly, J., dissenting).

47. *Id.* at 276, 734 N.W.2d at 598 (Kelly, J., dissenting).

48. *Id.* at 278-79, 734 N.W.2d at 599 (Kelly, J., dissenting).

49. *Id.* at 278, 734 N.W.2d at 599 (Kelly J., dissenting). Justice Kelly stated:

> It should be noted, also, that the majority opinion risks establishing bad public policy. It discourages people from opening their door to police officers. Essentially, it signals to the public that it is acceptable for the police to ignore a person's repeated refusals to leave his or her home and sanctuary. Hence, people might conclude that they should not open their doors when they see police officers on the other side. This Court should encourage, not discourage, the public to assist the police in their lawful investigations.

Id.

50. 479 Mich. 467, 469, 739 N.W.2d 505, 507 (2007).

In *Keller*, a private non-profit organization called "Crime Stoppers"[51] "received an anonymous tip that [the] defendants were operating a marijuana growing and distribution operation out of their home."[52] In turn, "Crime Stoppers" turned the information over to the Flint police.[53] In response to receiving the information from "Crime Stoppers," the Flint police set up surveillance over the course of three separate days.[54] During these surveillance periods, the police did not see "any evidence of a marijuana growing and distribution operation."[55] Subsequent to the futile surveillances, the police "conducted a 'trash pull' at [the] defendant's home" and found "a partially burned marijuana cigarette, a green leafy substance on the [out]side of a pizza box" and documents establishing the defendants had a connection to the residence.[56]

Based on their findings from the "trash pull," the police prepared and applied for a warrant to search the defendants' home.[57] The affidavit in support of the warrant declared that the affiant had received information from an anonymous source indicating that large quantities of marijuana were being grown and sold at the defendant's home.[58] The affidavit also relayed the information about the "trash pull" noting where the trash bags were in relation to the residence, where the bags were removed to, and the manner in which the authorities searched the bags.[59] Also, the affidavit explained the items believed to be contraband that were found in the trash.[60] Finally, the affidavit explained that the officer tested the

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51. *Id.* at 469 n.1, 739 N.W.2d at 507 n.1. "Crime stoppers organization" means a private, nonprofit organization that distributes rewards to persons who report to the organization information concerning criminal activity and that forward the information to the appropriate law enforcement agency." *Id.*

52. *Id.* at 469-70, 739 N.W.2d at 507.

53. *Id.* at 470, 739 N.W.2d at 507.

54. *Id.*

55. *Id.* at 470, 739 N.W.2d at 507-08.

56. *Keller*, 479 Mich. at 470, 739 N.W. 2d at 508.

57. *Id.*

58. *Id.* Paragraph seven of the affidavit stated:

> That during the past several weeks, your affiant received an anonymous tip stating that large quantities of marijuana was being sold and manufactured out of 3828 Maryland, City of Flint, Genesee County, Michigan. The tipster also indicated that there is a hidden room used for manufacturing [m]arijuana inside said residence.

Id.

59. *Id.*

60. *Id.* Paragraph eight of the affidavit stated:

> That on November 30, 2004, your affiant removed two (2) trash bags, white in color with red ties that were located on the south side of Maryland, east of the driveway, near the curb of 3828 Maryland. After removing the trash bags your

suspected marijuana and it was positive for marijuana.[61] Based on the information contained in the affidavit, the magistrate authorized a warrant to search the defendant's home.[62]

When the officers searched the defendant's home, they found approximately six ounces of marijuana, firearms, and marijuana smoking paraphernalia.[63] Subsequently, "[b]oth defendants were charged with maintaining a drug house and possession of marijuana."[64] "The district court bound" the defendants over on those charges.[65] The defendants filed motions to suppress the evidence found during the execution of the search warrant arguing that the warrant did not meet the criteria set forth in M.C.L. Section 780.653[66] and that the police misled the magistrate because there was no support for the anonymous tip.[67] Although the trial court concluded that the police violated the statutory requirement as to the credibility or reliability of an unnamed informant, the court ruled that it could not suppress the evidence based on that violation pursuant to *People v. Hawkins*.[68] However, the trial court did rule that the defendants

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affiant transported the bags directly to the office of the City of Flint Police Department. Your affiant and fellow officer Marcus Mahan examined the contents of the trash bags. Found inside the trash bags were one (1) suspected marijuana roach, and a green leafy substance on the side of a pizza box, and several pieces of correspondence addressed to Michael/Melinda Keller of 3828 Maryland.

Id.

61. *Id.* at 471, 739 N.W.2d at 508.

62. *Id.*

63. *Id.*

64. *Id.* The charge for maintaining a drug house is found in MICH. COMP. LAWS ANN. § 333.7405(1)(d) (West 2009). The charge for possession of marijuana is found in MICH. COMP. LAWS ANN. § 333.7406 (West 2009).

65. *Keller*, 479 Mich. at 471, 739 N.W.2d at 508.

66. MICH. COMP. LAWS ANN. § 780.653 (West 2009) provides:

The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

(a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.

(b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

67. *Keller*, 479 Mich. at 471, 739 N.W.2d at 508.

68. *Id.* (citing People v. Hawkins, 468 Mich. 488, 668 N.W.2d 602 (2003)).

could argue the police had violated the statue during the affidavit and authorization process to the jury.[69]

The prosecutor filed an interlocutory appeal objecting to the remedy the trial court employed.[70] Instead of addressing the issue raised by the prosecutor, the court of appeals ruled "that the search warrant and the underlying affidavit" were unsupported by probable cause.[71] Consequently, the court ruled that any evidence obtained pursuant to the search warrant was inadmissible by the operation of the exclusionary rule.[72] In reaching this conclusion, the court relied on two points to support its holding.[73] First, the court noted that the affiant deceivingly informed the magistrate that she directly received the anonymous tip.[74] Second, the evidence found from the trash pull would not lead a reasonable person to conclude that drug trafficking was occurring in the defendants' home.[75] The prosecutor also appealed this decision.[76]

The Michigan Supreme Court addressed whether the affidavit was constitutional and whether, if the affidavit was constitutionally sound, the affidavit conformed to the statutory requirements.[77] Regarding the constitutionality of the search warrant, the Court noted that the court of appeals applied the incorrect standard of review when it reviewed the magistrate's probable cause determination de novo.[78] Instead, the Court stated that a magistrate's decision regarding probable cause is entitled to "great deference by reviewing courts."[79] Additionally, the Court noted that the court of appeals incorrectly analyzed this case as a test of the anonymous source's credibility.[80] The Court stated that the correct standard is to examine all the circumstances set forth in the affidavit to

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69. *Id.* Specifically, the trial court stated that the defendants could "argue to the jury that the police department intentionally violated the law of the State of Michigan; that the police department deliberately conducted or mislead [sic] a magistrate when seeking the search warrant." *Id.*

70. *Id.* at 472, 739 N.W.2d at 509.

71. *Id.*

72. *Id.*

73. *Keller*, 479 Mich. at 472, 739 N.W.2d at 509.

74. *Id.*

75. *Id.* The court also noted that the court of appeals also stated, "[b]ecause the affidavit was insufficient, we would also conclude that the magistrate wholly abandoned his judicial role when he issued the warrant." *Id.* (citing *People v. Keller*, 270 Mich. App. 446, 450, 716 N.W.2d 311 (2006)).

76. *Id.* at 473, 739 N.W.2d at 509.

77. *Id.*

78. *Id.* at 476-77, 739 N.W.2d at 511.

79. *Keller*, 479 Mich. at 476-77, 739 N.W.2d at 511 (citing *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

80. *Id.* at 477, 739 N.W.2d at 511.

determine probable cause, not to limit the analysis to an isolated fact.[81] Regarding the last point, the Court concluded that because the officer performed a trash pull that uncovered evidence of marijuana and evidence of defendant's connection to the home, it was unnecessary to examine "the veracity of the source."[82] The Court characterized the items the officer found in the trash as direct evidence of criminal activity.[83] As a result, the Court concluded that the marijuana established probable cause to search the home.[84]

As to the statutory challenge to the warrant, the Court found no violation.[85] The Court concluded that the anonymous source only triggered the investigation and that it was not the sole basis for the warrant.[86] Instead, the warrant was on the officer's own observations.[87] Applying the severance doctrine and not considering the anonymous source in the probable cause determination, the Court concluded that the police officer's own observations formed the basis of the search warrant.[88] As a result, the Michigan Supreme Court reversed the Michigan Court of Appeal's order suppressing the evidence.[89]

In a rigorous dissent, Justice Cavanagh, joined by Justice Kelly, stated that the search warrant failed to comply with the standards set forth in *Gates* and M.C.L. Section 780.653(b).[90] Justice Cavanagh stated that even under the *Gates* standard, the magistrate must consider the source's knowledge and credibility.[91] Because no knowledge or credibility was established for the source, Justice Cavanagh would disregard the anonymous information.[92] The evidence that remains, Justice Cavanagh argued, hardly supported a finding of probable cause for a marijuana growing and distributing operation.[93]

As for the severance doctrine discussed by the majority, Justice Cavanagh pointed out that the jurisdictions that employ this doctrine do so in those cases where "a significant portion of the warrant is valid."[94]

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81. *Id.* at 477, 739 N.W.2d at 511-12 (citing *Gates*, 462 U.S. at 238).
82. *Id.* at 477, 739 N.W.2d at 512.
83. *Id.*
84. *Id.*
85. *Keller*, 479 Mich. at 481, 739 N.W.2d at 514.
86. *Id.* at 482-83, 739 N.W.2d at 514-15.
87. *Id.* at 482-83, 739 N.W.2d at 515.
88. *Id.* at 483, 739 N.W.2d at 515.
89. *Id.* at 484, 739 N.W.2d at 515.
90. *Id.* at 485, 739 N.W.2d at 516 (Cavanagh, J., dissenting).
91. *Keller*, 479 Mich. at 486, 739 N.W.2d at 516 (Cavanagh, J., dissenting) (citing *Gates*, 462 U.S. at 234).
92. *Id.* at 487, 739 N.W.2d at 517.
93. *Id.* at 486-87, 739 N.W.2d at 517-18 (Cavanagh, J., dissenting).
94. *Id.* at 490, 739 N.W.2d at 518 (Cavanagh, J., dissenting).

Justice Cavanagh opined that the warrant in the instant case was "disproportionately invalid."[95] Justice Cavanagh concluded that the warrant was unsupported by probable cause.[96]

According to Justice Cavanagh, the good faith exception to the exclusionary rule "does not salvage the constitutionality of the search."[97] Police may not rely on the good faith exception when they did not act in objectively reasonable reliance on the warrant.[98] Here, the officers can not reasonably rely on a warrant wholly violating the statutory requirements.[99]

Finally, Justice Cavanagh accused the majority of overlooking the role the anonymous information played in the magistrate's decision regarding probable cause.[100] Justice Cavanagh asserted that the source's information "was an integral part of the magistrate's decision to approve a warrant to search for evidence of distribution."[101] Because the source's information did not aver that the source was credible or that the information was reliable, as such, the affidavit and warrant did not comport with the statute.[102] Therefore, Justice Cavanagh stated the defendant was entitled to relief.[103]

The Michigan Court of Appeals also decided several important search and seizure cases during the *Survey* period, as well.

In *People v. Mungo*,[104] the court of appeals extended the search incident to lawful arrest doctrine, as it applies to automobiles, when a passenger is validly arrested but no probable cause exists to believe the automobile contains contraband or that the driver has committed a crime.[105] In *Mungo*, the prosecutor appealed "the circuit court's order granting [the] defendant's motion to suppress evidence and quash the information."[106]

A police officer stopped the defendant for a traffic violation.[107] Mark Dixon was the only other person in the car at the time the defendant was pulled over.[108] The officer asked both people for their identification "and

95. *Id.* at 490, 739 N.W.2d at 519 (Cavanagh, J., dissenting).
96. *Id.* at 491, 739 N.W.2d at 519 (Cavanagh, J., dissenting).
97. *Keller*, 479 Mich. at 491, 739 N.W.2d at 519 (Cavanagh, J., dissenting).
98. *Id.* at 492, 739 N.W.2d at 519 (Cavanagh, J., dissenting).
99. *Id.* at 492, 739 N.W.2d at 520 (Cavanagh, J., dissenting).
100. *Id.* at 496, 739 N.W.2d at 522 (Cavanagh, J., dissenting).
101. *Id.* at 497, 739 N.W.2d at 522 (Cavanagh, J., dissenting).
102. *Id.*
103. *Keller*, 479 Mich. at 497, 739 N.W.2d at 522 (Cavanagh, J., dissenting).
104. 277 Mich. App. 577, 747 N.W.2d 875 (2008).
105. *Id.* at 578, 747 N.W.2d at 876-77.
106. *Id.* at 578, 747 N.W.2d at 876.
107. *Id.*
108. *Id.*

ran Law Enforcement Information Network (LEIN) checks on both [of them]."[109] As fate would have it, two outstanding warrants existed for the passenger, Mark Dixon's, arrest.[110] The officer arrested Dixon and placed him in the back of his cruiser.[111] The officer then asked the defendant to get out of the car, conducted a patdown, and asked the defendant if he had any weapons.[112] The defendant admitted that he had a gun under the seat and ammunition in the glove box.[113] When the defendant could not produce a permit to carry a concealed weapon, the officer arrested him "for unlawfully carrying a concealed weapon."[114]

The court specifically addressed whether the search incident to lawful arrest rule, as it applies to an automobile, extends to a situation where the passenger is validly arrested and there is no probable cause to believe the car contains any contraband or the driver has engaged in any illegal activity.[115]

The court began its analysis by noting that one enjoys only a limited expectation of privacy in automobiles because of the inherent mobility and increased governmental regulation of automobiles.[116] Because one only enjoys a limited expectation of privacy in an automobile, the automobile exception permits a warrantless search or seizure of an automobile, provided that probable cause exists to believe the automobile contains contraband.[117]

According to the court, the automobile exception did not apply to the facts of the present case because prior to the search, the officer "did not have probable cause to believe" the defendant's car contained contraband.[118] Consequently, the warrantless search of the defendant's automobile could not be upheld based on the automobile exception.[119]

However, the court then turned to the search incident to lawful arrest exception to the warrant requirement.[120] The court reminded that searches that are conducted incident to a lawful arrest are justified to protect the officer's safety by permitting the removal of any weapons the

109. *Id.* at 579, 747 N.W.2d at 877.

110. *Mungo*, 277 Mich. App. at 579, 747 N.W.2d at 877.

111. *Id.*

112. *Id.* at 579 n.1, 747 N.W.2d at 877 n.1.

113. *Id.* The parties did not raise probable cause or *Miranda* issues. *Id.*

114. *Id.* at 580, 747 N.W.2d at 877.

115. *Id.* at 582, 747 N.W.2d at 878.

116. *Mungo*, 277 Mich. at 582-83, 747 N.W.2d at 879 (citing California v. Carney, 471 U.S. 386, 392 (1985), People v. Carter, 250 Mich. App. 510, 517-518, 655 N.W.2d 236, 241 (2002)).

117. *Id.* at 583, 747 N.W.2d at 879 (citing United States v. Ross, 456 U.S. 798 (1982)).

118. *Id.* at 583, 747 N.W.2d at 879.

119. *See id.*

120. *Id.* at 584, 747 N.W.2d at 879-80.

person might use to resist arrest or effectuate an escape *and* to prevent the loss, removal or destruction of evidence.[121] Over time, the Supreme Court extended this rule to allow police officers to "search a vehicle on the basis of the arrest of a recent driver who was already out of the car when the officer made contact."[122] And, the rule was extended to allow the search of the passenger compartment of an automobile when the officer has made a lawful custodial arrest of any occupant of that vehicle.[123]

Ultimately, if the search incident to lawful arrest supports the searches in *Thornton* and *Belton*, then certainly the Fourth Amendment allows police officers to search the interior of an automobile incident to the lawful arrest of its passenger, regardless of whether officers have reason to believe the automobile contains contraband or the operator of the automobile engaged in illegal activity.[124] Consequently, the court of appeals reversed the circuit court's suppression order.[125]

People v. Jones[126] is another example of the Michigan Court of Appeals attempt to align Michigan law with respect to Constitutional protections with federal precedent.[127] In response to this recent judicial trend to parallel the federal system with respect to a constrictive approach to criminal procedural/constitutional protections, prosecutors have heightened their efforts to appeal decisions that suppress evidence based on alleged Fourth Amendment violations. *Jones* demonstrates such an appeal.

In *Jones*, an informant told police that the defendant not only possessed marijuana, but that he was selling it as well.[128] Additionally, the informant told the police that the "defendant had been arrested several times in the past for possessing illegal" drugs, that he kept small amounts of marijuana at his home in Redford Township for personal use, and that the defendant kept larger amounts of drugs at his Detroit home.[129] Police verified the defendant's prior convictions for the misdemeanor offense of "possession of marijuana and two felony

121. *Id.* at 584, 747 N.W.2d at 880 (citing Chimel v. California, 395 U.S. 752, 763 (1969)).

122. *Id.* at 585, 747 N.W.2d at 880 (citing Thornton v. United States, 541 U.S. 615, 622 (2004)).

123. *See* New York v. Belton, 453 U.S. 454, 460 (1981).

124. *Mungo*, 277 Mich. App. at 590-91, 747 N.W.2d at 883.

125. *Id.* at 591.

126. 279 Mich. App 86, 755 N.W.2d 224 (2008).

127. *See id.* at 90-94, 755 N.W.2d at 226-28.

128. *Jones*, 279 Mich. App. at 88, 755 N.W.2d at 225.

129. *Id.*

convictions for delivery/manufacture of" controlled substances.[130] In response to the informant's information, as well as the records check, police took a narcotics dog to the defendant's Detroit address to perform a canine sniff.[131] The dog "alerted" at the front door.[132] Based on the dog's response, "as well as their prior information, the police obtained" search warrants for both of the defendant's premises.[133]

The defendant was ultimately charged with various drugs and weapons charges.[134] Prior to trial, the defendant filed a motion to suppress the items seized from both of his homes.[135] To support his motion, the defendant alleged that the canine sniff of his front door, which indicated the presence of drugs, was an illegal search in violation of his Fourth Amendment rights.[136] Additionally, to distinguish his case from *Illinois v. Caballes*,[137] which held that a canine sniff for the presence of narcotics is not a search for purposes of Fourth Amendment analysis,[138] the defendant relied on *Kyllo v. United States*[139] and *State v. Rabb*,[140] a Florida case that ruled a canine sniff outside a home to detect narcotics inside the home uses extra sensory procedure that violates the firm line at the door of a home.[141] The trial court also relied on *Kyllo* and ruled "that a canine sniff is akin to the use of a thermal imaging device."[142] The trial court, thus, "concluded that the canine sniff is a search that must be supported by" oath or affirmation.[143]

Of course, the court began its analysis by citing to *United States v. Place*[144] and *Illinois v. Caballes*.[145] As the court pointed out, *Place* "held that a canine sniff of a traveler's luggage in" the airport, which only revealed the *presence or absence* of narcotics, was not a search within the meaning of the Fourth Amendment.[146] Also, the Court recognized in *Caballes* that a canine sniff of a defendant's car not only was not a

130. *Id.*
131. *Id.*
132. *Id.*
133. *Jones*, 279 Mich. App. at 88, 755 N.W.2d at 225-26.
134. *Id.* at 88-89, 755 N.W.2d at 226.
135. *Id.* at 89, 755 N.W.2d at 226.
136. *Id.*
137. 543 U.S. 405 (2005).
138. *Id.* at 408-09.
139. 533 U.S. 27 (2001).
140. 920 So.2d 1175 (Fla. Dist. Ct. App. 2006).
141. *Jones*, 279 Mich. App. at 89, 755 N.W.2d at 226.
142. *Id.* at 90, 755 N.W.2d at 226.
143. *Id.*
144. 462 U.S. 696 (1983).
145. *Jones*, 279 Mich. App. at 91-92, 755 N.W.2d at 227.
146. *Id.* at 91, 755 N.W.2d at 227.

search, but that there is no reasonable expectation of privacy in possessing contraband.[147] Distinguishing *Kyllo*, the Court pointed out that *Kyllo* dealt with technology capable of lawful activity within the home as opposed to the unlawful activity in the trunk of a car.[148]

Turning to the facts of the instant case, the court noted that "the canine was lawfully present at the front door."[149] The court concluded that there is "no reasonable expectation of privacy at the entrance to property that is open to the public, including the front porch."[150] Because the defendant had exhibited no outward signs of privacy, such as a fence or gate, on the porch, the police were lawfully present on the porch.[151] As long as the police were on the porch lawfully, the court held that "[a]ny contraband sniffed by the canine while on" the porch, a place open to the public, "fell within the 'canine sniff' rule."[152] Thus, the court ruled the canine sniff was not a search.[153]

Judge Borrello dissented, stating that he would find that the canine sniff of a defendant's home is a search for purposes of Fourth Amendment analysis.[154] Judge Borrello distinguished both *Place* and *Cabballes* as situations that involved canine sniffs that occurred in public places, therefore, he dismissed their applicability to the present case.[155]

Inasmuch as Judge Borrello stated the canine sniff occurred at the defendant's home, he pointed to a Florida Court of Appeals case with similar facts as the instant case, *Raab*.[156] The *Raab* court suppressed evidence seized as a result of a canine sniff at a defendant's home.[157] Consequently, because the canine sniff conducted in the instant case was a sense-enhancing device that effectuated an unreasonable search of the defendant's home, Judge Borrello would affirm the trial court's suppression order.[158]

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147. *Id.* at 92, 755 N.W.2d at 227.

148. *Id.*

149. *Id.* at 94, 755 N.W.2d at 229.

150. *Id.*

151. *Id.* at 94-95, 755 N.W.2d at 229. *See* People v. Custer, 248 Mich. App. 552, 556, 561, 640 N.W.2d 576, 579, 581-82, *on remand*, (2001).

152. *Jones*, 279 Mich. App. at 95, 755 N.W.2d at 229.

153. *Id.*

154. *Id.* at 99, 100, 755 N.W.2d at 232. (Borrello, J., dissenting).

155. *Id.* at 103-05, 755, N.W.2d at 233-35 (Borrello, J., dissenting).

156. *Id.* at 106, 755 N.W.2d at 235 (citing *Rabb*, 920 So.2d at 1182).

157. *Id.* at 106-07, 755 N.W.2d at 235. The *Raab* court relied on *Kyllo* for the premise that a canine sniff is the use of a sense-enhancing device to execute an unreasonable search of the defendant's home. *Id.*

158. *Jones*, 279 Mich. App. at 115, 755 N.W.2d at 240.

B. Interrogations and Confessions

In *People v. Shafier*,[159] the Michigan Court of Appeals, despite the presence of a constitutional error, failed to reverse a defendant's conviction.[160] In *Shafier*, the defendant was charged with several counts of first-degree criminal sexual conduct and several counts of second-degree criminal sexual conduct against his adoptive daughter.[161] According to the arresting officer, at the time of arrest, he immediately provided the defendant with *Miranda* warnings.[162] The arresting officer also testified that the defendant maintained his silence regarding the criminal sexual conduct after he had been advised of his *Miranda* warnings and did not waive *Miranda*.[163] Also, the arresting officer indicated that he did not ask the defendant any questions about the allegations.[164]

Nonetheless, at trial, the prosecutor made numerous blatant references to the defendant's post-*Miranda* silence during his case-in-chief.[165] The prosecutor elicited from the arresting officer that the defendant made no statement at the time of his arrest.[166] When the defendant took the stand in his own defense, the prosecutor cross-examined him about not making any statements to the arresting officer.[167] The prosecutor also asked the defendant if he ever went to the

159. 277 Mich. App. 137, 743 N.W.2d 742 (2007), *cert. granted*, 480 Mich. 1193, 747 N.W.2d 543 (2008). The order granting leave states:

> On order of the Court, the application for leave to appeal the October 30, 2007 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address: (1) whether the defendant's constitutional rights under Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), were violated, (2) whether the claim of error under Doyle was properly preserved at trial, (3) the resulting appropriate standard of review on appeal, and (4) whether any error was harmless under the applicable standard of review.
>
> We further ORDER the Allegan [sic] Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court.
>
> The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Id.

160. *Shafier*, 277 Mich. App. at 143-44, 743 N.W.2d at 745-46.

161. *Id.* at 139, 743 N.W.2d at 743.

162. *Id.* at 140, 743 N.W.2d at 744. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

163. *Shafier*, 277 Mich. App. at 141, 743 N.W.2d at 744.

164. *Id.* at 142, 743 N.W.2d at 745.

165. *Id.* at 140-41, 743 N.W.2d 744-45.

166. *Id.* at 140-41, 743 N.W.2d at 744.

167. *Id.* at 141, 743 N.W.2d at 744.

police or child protective services after his arrest to make a statement.[168] Defense counsel objected to two of three questions the prosecutor asked.[169] Finally, during his closing argument, the prosecutor made repeated comments about the defendant's silence.[170] However, defense counsel did not object to the prosecutor's closing argument.[171]

To begin its analysis, the court confirmed that, under certain circumstances, a prosecutor may violate a defendant's Fourteenth Amendment right to due process when he or she comments on defendant's exercise of his or her "constitutional right to remain silent in the face of accusation."[172] Because the "*Miranda* warnings carry an implicit assurance that silence in reliance on those warnings will not be penalized,"[173] a defendant's silence after he or she has been informed of his or her right to remain silent is typically inadmissible.[174] In the instant case, the record was clear that the arresting officer informed the defendant of his right to remain silent and that the defendant exercised that right.[175] Additionally, the court found that the prosecutor's repeated questioning and references were a deliberate use of the defendant's silence.[176] Consequently, the court found that the prosecutor committed constitutional error.[177]

Despite the objections trial counsel did make, the court declared the issue was unpreserved.[178] Because the court considered the issue unpreserved, reversal was required only if the defendant established a "plain error that affected his substantial rights."[179] To establish plain error, the defendant must show that his, "unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence."[180]

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168. *Id.* at 141, 743 N.W.2d at 744-45.

169. *Shafier*, 277 Mich. App. at 141, 743 N.W.2d at 745.

170. *Id.* at 142, 743 N.W.2d at 745.

171. *Id.*

172. *Id.* at 139-40, 743 N.W.2d at 744 (citing Doyle v. Ohio, 426 U.S. 610, 618-19 (1976), People v. Dennis, 464 Mich. 567, 573-74, 628 N.W.2d 502, 505 (2001), People v. Sain, 407 Mich. 412, 415-16, 285 N.W.2d 772, 774 (1979), People v. Bobo, 390 Mich. 355, 359, 212 N.W.2d 190, 192 (1973)).

173. *Id.* at 140, 743 N.W.2d at 744 (citing *Dennis*, 464 Mich. at 574).

174. *Id.*

175. *Shafier*, 277 Mich. App. at 142, 743 N.W.2d at 745.

176. *Id.* at 143, 743 N.W.2d at 746.

177. *Id.* at 143, 743 N.W.2d at 745.

178. *Id.*

179. *Id.*

180. *Id.* (citing People v. Carines, 460 Mich. 759, 763-64, 597 N.W.2d 130, 138 (1999)).

Ultimately, the court concluded that other evidence existed that provided evidence of guilt.[181] Because of that, the court ruled that the prosecutor's comments did not amount to plain error affecting his substantial rights.[182]

C. Identification

During the *Survey* period, the trend of prosecutorial appeals was not limited to just Fourth Amendment issues. In *People v. Frazier*,[183] in response to the prosecutor's appeal, the Michigan Supreme Court dealt with the effect of ineffective assistance on a defendant's confession and an identification procedure.[184]

In *Frazier*, Kenneth "Haywood told the police that he" "waited in the car while" the defendant and his accomplice went into the victim's house.[185] After hearing two gunshots inside the house, Haywood fled.[186] Subsequently, the police searched the defendant's home and obtained an arrest warrant.[187] The defendant's mother retained a lawyer to represent him.[188] The defendant told his lawyer that although he was present when Cleveland killed "the victims, he did not know that" his companion was going to shoot the victims.[189] The defendant told his lawyer that he wanted to discuss his "noninvolvement" with the police.[190]

The lawyer arranged for the defendant to surrender on the warrant, accompanied the defendant to the station and the arraignment.[191] The prosecutor told both the defendant and his lawyer that he would not enter into any plea agreements.[192] Even so, the defendant insisted on talking to the police.[193] The defendant's lawyer remained present while the police advised the defendant of his *Miranda* warnings, but left before the interrogation began because "he assumed that he could not be present during questioning."[194]

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181. *Shafier*, 277 Mich. App. at 144, 743 N.W.2d at 746.
182. *Id.*
183. 478 Mich. 231, 733 N.W.2d 713 (2007), *cert. denied*, Mich. v. Frazier, 128 S.Ct. 712 (2007).
184. *Frazier*, 478 Mich. at 234-35, 733 N.W.2d at 716.
185. *Id.* at 235-36, 733 N.W.2d at 716.
186. *Id.* at 236, 733 N.W.2d at 716.
187. *Id.*
188. *Id.*
189. *Id.* at 236, 733 N.W.2d at 716-17.
190. *Frazier*, 478 Mich. at 236, 733 N.W.2d at 717.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

During the interrogation, the defendant relayed a different version of events to the police.[195] He admitted that he knew his companion was armed and intended to rob the victims.[196] The defendant also admitted that his companion "paid him two $50 bills."[197] The defendant said "that two street sweepers gave him a ride home after the murders."[198]

The defendant was convicted and his convictions were affirmed on appeal.[199] On the defendant's petition for writ of habeas corpus, the United States District Court for the Eastern District of Michigan ruled that the defendant's confession and the street sweepers' testimony were inadmissible pursuant to the exclusionary rule because the defendant's retained counsel had abandoned defendant during interrogation thereby violating his Sixth Amendment rights.[200] The case was remanded for retrial.[201] The trial court excluded the defendant's confession, but ruled the prosecutor could use the street sweepers' testimony if their identity as witnesses would have been inevitably discovered.[202] The prosecutor appealed the trial court's ruling.[203] The court of appeals affirmed the trial court's exclusionary order, but remanded the case for application of inevitable discovery doctrine.[204]

The Michigan Supreme Court began its analysis by determining the appropriate ineffective counsel standard to apply.[205] The defendant urged the Court to apply the standard enunciated in *United States v. Cronic*.[206] *Cronic* establishes three situations in which counsel's performance is so deficient that courts will presume the defendant was prejudiced.[207] One of the situations that will be presumed prejudicial to a defendant is where there was a "complete denial of counsel" at a critical stage.[208] In *Frazier*,

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195. *Id.* at 236-37, 733 N.W.2d at 717.

196. *Frazier*, 478 Mich. at 236-37, 733 N.W.2d at 717.

197. *Id.* at 237, 733 N.W.2d at 717.

198. *Id.*

199. *Id.* The court of appeals vacated the conviction for armed robbery on double jeopardy grounds. *Id.*

200. *Id.* at 237-38, 733 N.W.2d at 717.

201. *Id.* at 238, 733 N.W.2d at 718.

202. *Frazier*, 478 Mich. at 238, 733 N.W.2d at 718. The court required the prosecutor to establish the identity of the witnesses using sources independent from the defendant's inadmissible statements. *Id.*

203. *Id.*

204. *Id.* at 239, 733 N.W.2d at 718.

205. *Id.* at 240-41, 733 N.W.2d at 719.

206. 466 U.S. 648 (2008).

207. *Frazier*, 478 Mich. at 243, 733 N.W.2d at 720.

208. *Id.* at 243, 733 N.W.2d at 720-21 (citing *Cronic*, 466 U.S. at 659-60). The other two situations involve situations where counsel completely fails to subject the prosecutor's case to a meaningful adversarial test and where counsel is called upon to

counsel left his client at the police station where he was interrogated without the presence or assistance of his lawyer.[209] The Court determined, however, this was not a complete denial of counsel because prior to the interrogation, the defendant lied to his lawyer, insisted on speaking to the police, and the lawyer advised his client of the risks of talking to the police.[210] The Court concluded that because the lawyer's advice to his client was based on the defendant's false claim of innocence, the lawyer cannot be blamed for relying on his client's communications.[211] Because the Court determined the defendant was not actually denied the assistance of counsel at a critical stage, the Court ruled that the *Cronic* effective assistance test was inapplicable.[212]

Instead, the Court discussed the test in *Strickland v. Washington*[213] and concluded this was the correct analysis for this set of facts.[214] The Court stated that most ineffective assistance of counsel claims are analyzed under the *Strickland* test.[215] Pursuant to the *Strickland* test, "counsel is presumed effective."[216] Further, a defendant who claims ineffective assistance under the *Strickland* test bears the burden to show that counsel's "performance fell below objective standards of reasonableness and that it is reasonably probable that the results" would have been different if counsel had been effective.[217] Because the attorney followed his client's instructions with respect to speaking to the police, consulted with his client, and advised him of the risks of talking to the police, the attorney's performance did not fall below an objectively reasonable standard of performance.[218] Failure to show one element of the two-part *Strickland* test is fatal.[219] Therefore, according to the Court, the federal district court's decision that the defendant was entitled to relief without ruling on whether the defendant was actually prejudiced was error.[220] Consequently, the Court vacated the Michigan "Court of Appeals opinion to the extent it" adopted or approved the federal district

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render assistance under circumstances where competent counsel likely would not. *Id.* at 243 n.10, 733 N.W.2d at 721 n.10.

209. *Id.* at 236, 733 N.W.2d at 717.
210. *Id.* at 243-44, 733 N.W.2d at 721.
211. *Id.* at 244, 733 N.W.2d at 721.
212. *Frazier*, 478 Mich. at 244-45, 733 N.W.2d at 721.
213. 466 U.S. 668 (1984).
214. *Frazier*, 478 Mich. at 245, 733 N.W.2d at 721.
215. *Id.* at 243, 733 N.W.2d at 720.
216. *Id.*
217. *Id.* (citing *Strickland*, 466 U.S. at 659).
218. *Id.* at 244-45, 733 N.W.2d at 721.
219. *Id.* at 243, 733 N.W.2d at 720.
220. *Frazier*, 478 Mich. at 246, 733 N.W.2d at 722.

court's ruling on habeas.[221] Nonetheless, the Court acknowledged it was bound by the federal court's order.[222] To that extent, the Court accepted that the defendant's Sixth Amendment rights were violated and his confession was excluded.[223]

However, the Court refused to apply the exclusionary rule to the street sweepers' testimony.[224] The Court noted that suppression of evidence should only be used "as a last resort."[225] The Court also noted that the exclusionary rule's primary purpose is to deter unlawful police conduct.[226] Additionally, the Court stated that the rule has never been used to exclude illegally seized evidence in every type of proceeding.[227] Here, because there was no police misconduct in obtaining the street sweepers' statements, the Court determined the exclusionary rule was inappropriate.[228]

The Court ruled that even if the "defendant's confession had been obtained as a result of police misconduct," excluding the street sweepers' testimony would be an inappropriate remedy because of the attenuation exception to the exclusionary rule.[229] Attenuation occurs when the causal connection between the violation and the evidence is remote.[230] Typically, the connection between police misconduct and the discovery of witnesses is too attenuated to justify application of the exclusionary rule.[231] Referring to *Ceccolini*, the Court concluded that the street sweepers' willingness to testify was not connected to the violation of defendant's right to counsel.[232]

In a highly critical dissent, Justice Cavanagh criticized the majority for its deliberate effort to evade the federal district court's order.[233]

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221. *Id.*

222. *Id.*

223. *Id.* at 246 n.16, 733 N.W.2d at 722 n.16.

224. *Id.* at 247, 733 N.W.2d at 722-23.

225. *Id.* at 247, 733 N.W.2d at 723 (citing Hudson v. Michigan, 547 U.S. 586 (2006)).

226. *Frazier*, 478 Mich. at 247, 733 N.W.2d at 723 (citing United States v. Calandra, 414 U.S. 338, 347 (1974)).

227. *Id.* at 248, 733 N.W.2d at 723 (quoting *Calandra*, 414 U.S. at 348).

228. *Id.* at 251, 733 N.W.2d at 725.

229. *Id.* at 252-53, 733 N.W.2d at 726.

230. *Id.* at 253, 733 N.W.2d at 726 (citing Wong Sun v. United States, 371 U.S. 471, 487 (1963) (quoting Nardone v. United States, 308 U.S. 338, 341 (1939))).

231. *Id.* at 253, 733 N.W.2d at 726 (citing United States v. Ceccolini, 435 U.S. 268, 276-78 (1978)).

232. *Frazier*, 478 Mich. at 254-55, 733 N.W.2d at 726-27 (citing *Ceccolini*, 435 U.S. at 280).

233. *Id.* at 256-57, 733 N.W.2d at 728 (Cavanagh, J., dissenting). Justice Cavanagh wrote:

> From the outset, the majority needlessly criticizes the federal district court's legal analysis. We are bound by the district court's holding that defendant's

Consequently, Justice Cavanagh observed that the majority's statements disavowing the federal district court's ruling are mere dicta.[234] Justice Cavanagh concludes that, even applying the attenuation exception to the exclusionary rule, the street sweepers' testimony should be suppressed because their testimony was derived directly from the interrogation.[235]

III. PRETRIAL PROCEEDINGS

A. Defendant's Request for Psychological Evaluation and Ability to Investigate a Defense

In *People v. Shahideh*,[236] the defendant was arrested for the bludgeoning death of his girlfriend.[237] Prior to trial, the defendant privately retained a psychologist and requested a court order to allow the "psychologist to evaluate him."[238] The purpose of the evaluation was to determine the viability of an insanity defense.[239] The prosecutor objected to the court granting the defendant's request alleging the defendant's failure to comply with M.C.L. Section 768.20a.[240] The trial court ruled that the defendant failed to comply with the statutory notice requirement and denied the defendant's motion.[241]

> incarceration violated the United States Constitution because the interrogation of defendant violated his Sixth Amendment rights. We are equally bound to enforce the remedy the district court ordered-the exclusion of defendant's confession from any retrial. A judgment in a habeas corpus proceeding is res judicata with regard to the issues of law and fact necessary to reach the conclusion that the prisoner was illegally in custody. A state supreme court "may not . . . re-examine and decide a question which has been finally determined by a court of competent jurisdiction in earlier litigation between the parties."

Id. at 257, 733 N.W.2d at 728 (Cavanagh, J., dissenting) (citations omitted).

234. *Id.* at 257-58, 733 N.W.2d at 728 (Cavanagh, J., dissenting).

235. *Id.* at 267, 733 N.W.2d at 733 (Cavanagh, J., dissenting).

236. 277 Mich. App. 111, 743 N.W.2d 233 (2007), *rev'd*, 482 Mich. 1156, 758 N.W.2d 536 (2008).

237. *Shahideh*, 277 Mich. App. at 112, 743 N.W.2d at 235.

238. *Id.* at 112-13, 743 N.W.2d at 235.

239. *Id.* at 113, 743 N.W.2d at 235.

240. *Id.* MICH. COMP. LAWS ANN. § 768.20a (West 2009) states:

> If a defendant in a felony case proposes to offer in his or her defense testimony to establish his or her insanity at the time of an alleged offense, the defendant shall file and serve upon the court and the prosecuting attorney a notice in writing of his or her intention to assert the defense of insanity not less than 30 days before the date set for the trial of the case, or at such other time as the court directs.

Id.

241. *Shahideh*, 277 Mich. App. at 113, 743 N.W.2d at 235.

The defendant did not offer insanity as a defense at trial.[242] Despite no evidence being presented regarding the defendant's sanity, during deliberations, the jury inquired as to whether temporary insanity was a viable defense.[243] The trial court instructed the jury to render its verdict based on the evidence presented at trial, as well as, the law the court provided.[244]

The court of appeals concluded that M.C.L. Section 768.20a sets forth the requisite notice a defendant must provide in order to raise an insanity defense at trial.[245] However, the court concluded that the statutory notice requirement does not apply to the request for an independent psychological examination.[246] The court stated that the plain language of the statute imposes the statutory notice requirement only on those defendants "who plan or intend to raise the insanity defense at trial."[247]

In rendering its opinion, the court closely tied its decision not only to the plain language of the statute, but to the defense counsel's obligation to investigate potential defenses[248] and the defendant's constitutional right to present a defense.[249]

Ultimately, the court remanded the case to the trial court.[250] The court instructed the trial court to authorize the defendant's request to be examined by an independent psychologist to determine the viability of the insanity defense.[251] The court's order also directed that upon completion of the examination, the psychologist should consult with defense counsel.[252] "If the psychologist and defense counsel" determine "there is a triable issue" as to defendant's sanity, the court ordered the trial court to vacate the conviction and proceed to a new trial.[253] If, however, the psychologist and the defense determine that there is not a triable issue as to the defendant's sanity, then the conviction stands.[254]

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242. *Id.*
243. *Id.*
244. *Id.* (returning a guilty verdict).
245. *Id.* at 114, 743 N.W.2d at 236.
246. *Id.*
247. *Shahideh*, 277 Mich. App. at 116, 743 N.W.2d at 237 (quotations omitted).
248. *Id.* at 118-19, 743 N.W.2d at 238.
249. *Id.* at 119, 743 N.W.2d at 239.
250. *Id.* at 121, 743 N.W.2d at 240.
251. *Id.* at 121-22, 743 N.W.2d at 240.
252. *Id.* at 121, 743 N.W.2d at 240.
253. *Shahideh*, 277 Mich. App. at 121-22, 743 N.W.2d at 240.
254. *Id.* at 122, 743 N.W.2d at 240.

B. Bail Bond Forfeiture

In *People v. Moore (In re Forfeiture of Bail Bonds)*,[255] in four consolidated cases, the court considered the propriety of judgments entered against a bonding company based on defendants' forfeited bonds.[256] In each case, the bonding agency appealed the trial court's order to forfeit the surety bonds for each of the defendants after they failed to appear for scheduled hearings and/or trials.[257] The bonding company objected to the orders primarily because the court failed to notify the bonding company of the forfeiture orders in a timely manner.[258] To compensate for the delay, the trial court offset the amount of each judgment proportionate to the length of delay by the court in notifying the bonding company.[259]

The Michigan Court of Appeals declared that the seven-day notice contained in M.C.L. Section 765.28(1)[260] is not mandatory, but instead, it is directory.[261] The court noted that the statute contains no language precluding the trial court from entering a judgment when it fails to give notice within seven days of the defendant's default.[262]

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255. 276 Mich. App. 482, 740 N.W.2d 734 (2007).

256. *Id.* at 483-84, 740 N.W.2d at 736.

257. *Id.* at 489, 740 N.W.2d at 739.

258. *Id.* at 485-86, 740 N.W.2d at 737. The bonding company argued that it had not received adequate time to apprehend and transfer the defendants to the authorities. *Id.*

259. *Id.* at 495-96, 740 N.W.2d at 743.

260. MICH. COMP. LAWS ANN. § 765.28(1) (West 2009) provides:

> If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. After the default is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear. The notice shall be served upon each surety in person or left at the surety's last known business address. Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. Execution shall be awarded and executed upon the judgment in the manner provided for in personal actions.

Id.

261. *Forfeiture of Bail Bond*, 276 Mich. App. at 495, 740 N.W.2d at 742.

262. *Id.*

Likewise, in referring to the statute in effect at the time the trial court entered the judgments,[263] the court ruled that the trial court had the authority to enter a reduced judgment as to each of the forfeited bonds.[264] Because the statute in effect at the time granted the court discretion to enter a judgment in an amount it deemed appropriate, the trial court did not err.[265]

C. Pretrial Delay

In *People v. Walker*,[266] the defendant sought reversal of his conviction based on violations of the 180-day rule and his right to a speedy trial.[267] The defendant also challenged the lower court's ruling with respect to the defendant's motion to suppress evidence.[268]

The defendant was on parole at the time of his arrest.[269] The prosecutor was aware, at the latest by the time of the defendant's arraignment, that he was in the custody of the department of corrections.[270] Nonetheless, his trial did not commence until approximately eighteen months after his arraignment and two years after the offense.[271] As such, the defendant argued the court lost jurisdiction and the case against him should have been dismissed with prejudice.[272]

However, several adjournments occurred to reschedule the motion to suppress.[273] Additionally, the defendant's first lawyer moved to withdraw.[274] The court appointed another lawyer to represent the defendant and the trial date was again adjourned.[275] The defendant's second lawyer filed a motion for the trial judge to recuse herself or alternatively to allow counsel to withdraw, a motion to suppress and a

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263. MICH. COMP. LAWS ANN. § 765.28(1) (amended 2004) stated, "[i]f good cause is not shown, the court shall enter judgment against the surety on the recognizance *for an amount determined appropriate by the court but not more than the full amount of the recognizance*." (emphasis added).

264. *Forfeiture of Bail Bond*, 276 Mich. App. at 496, 740 N.W.2d at 743.

265. *Id.* at 497, 740 N.W.2d at 743-44.

266. 276 Mich. App. 528, 741 N.W.2d 843 (2007), *vacated in part, appeal denied in part*, 480 Mich. 1059, 743 N.W.2d 914 (2008).

267. *Walker*, 276 Mich. App. at 534, 540, 741 N.W.2d at 848, 851.

268. *Id.* at 549, 741 N.W.2d at 856.

269. *Id.* at 531, 741 N.W.2d at 846.

270. *Id.* at 532, 741 N.W.2d at 847.

271. *Id.* at 534, 741 N.W.2d at 848.

272. *Id.*

273. *Walker*, 276 Mich. App. at 532, 741 N.W.2d at 847.

274. *Id.*

275. *Id.*

motion to dismiss.[276] The trial court granted counsel's motion to withdraw.[277] The motions and trial were again adjourned.[278] A third lawyer subsequently filed an appearance.[279] Two days later, the attorney filed a stipulation to adjourn trial.[280] Approximately one month later, the trial court conducted the defendant's motions to dismiss and to suppress.[281] In response to the defendant's motion to dismiss, the prosecutor asserted that 200 days of the delay were attributable to the defendant, that the prosecutor made a good faith effort to bring the case to trial, and the defendant was not prejudiced by the delay.[282]

The court of appeals noted that the purpose of the 180-day rule is to bring prison inmates to trial quickly so that their sentences can run concurrently.[283] A trial court loses jurisdiction over the case if it is not brought to trial within 180 days of notice to the prosecutor regarding the defendant's status.[284] The trial court denied the motion based on a previous exception to the 180-day rule which precluded applicability of the 180-day rule facing mandatory consecutive sentences.[285] Because the defendant was on parole at the time of the offense, and thereby facing consecutive sentences, the trial court applied the previous exception.[286] The court explained that the exception was overruled in *People v. Williams*.[287] Under the *Williams* rule, the 180-day rule applies, with

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276. *Id.*

277. *Id.*

278. *Id.*

279. *Walker*, 276 Mich. App. at 533, 741 N.W.2d at 847.

280. *Id.* The stipulation contained the following language:

> DEFENDANT UNDERSTANDS that under MCR 6.004(D)(1), the "prosecutor must make a good faith effort to bring a criminal charge to trial within 180 days . . . ;" however, Defendant recognizes that his new counsel needs the opportunity to prepare for trial, as well as determine what pre-trial motions should be filed on Defendant's behalf.

Id.

281. *Id.* at 533, 741 N.W.2d at 848.

282. *Id.*

283. *Id.* at 535, 741 N.W.2d at 849.

284. *Walker*, 276 Mich. App. at 536, 741 N.W.2d at 849. MICH. COMP. LAWS ANN. § 780.133 (West 2009) provides:

> In the event that, within the time limitation set forth in section 1 of this act [M.C.L. Section 780.131], action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Id.

285. *Walker*, 276 Mich. App. at 533-34, 741 N.W.2d at 848.

286. *Id.* at 536, 741 N.W.2d at 849.

287. 475 Mich. 245, 248, 716 N.W.2d 208, 210-11 (2006).

certain exceptions for offenses committed by incarcerated or escaped prisoners, to any prisoner awaiting trial.[288] The court concluded that because the defendant "was neither incarcerated nor an escapee at the time of the offense[s]," he was entitled to assert his right to be tried within 180 days.[289]

The court instructed the trial court, on remand, to determine whether the prosecutor had notice, and if so, when the prosecutor received notice that the defendant was an inmate of the department of corrections.[290] The court also noted that, pursuant to *Williams* there is no good-faith exception to the 180-day rule.[291]

Turning to the alleged speedy trial violation, both the federal and Michigan constitutions ensure the defendant a speedy trial.[292] "[A] delay of six months" will trigger an investigation concerning a delay.[293] Defendant bears the burden of showing prejudice "[i]f the total delay was under 18 months."[294] However, "[a] delay that exceeds 18 months is presumed prejudicial, placing the burden on the prosecutor to rebut that presumption."[295] Finally, if the defendant's constitutional right to a speedy trial is violated, the trial court shall dismiss the charges with prejudice.[296]

An examining court must also assess the reasons for the delay.[297]

D. Statutory Construction

In *In re Hutchinson*,[298] the prosecutor appealed a circuit court's order which set aside a juvenile's adjudication of responsibility for two juvenile offenses in a single adjudication order.[299] The trial court based

288. *Walker*, 276 Mich. App. at 537, 741 N.W.2d at 850.

289. *Id.*

290. *Id.* This portion of the opinion, II-C, was vacated by People v. Walker, 480 Mich. 1059, 743 N.W.2d 912 (2008) as dicta.

291. *Id.* at 539-40, 741 N.W.2d at 851. This portion of the opinion, II-D, was vacated by *Walker*, 480 Mich. 1059, 743 N.W.2d 912 (2008) as dicta.

292. *Id.* at 541, 741 N.W.2d at 852 (citing U.S. CONST., amend. VI, MICH. CONST. 1963, art. I, § 20, MICH. COMP. LAWS ANN. § 768.1 (West 2009), MICH. CT. R. 6.004(A)).

293. *Id.* (citing People v. O'Quinn, 185 Mich. App. 40, 47-48, 460 N.W.2d 264 (1990)).

294. *Walker*, 276 Mich. App. at 541, 741 N.W.2d at 852 (citing People v. Cain, 238 Mich. App. 95, 111, 605 N.W.2d 28 (1999)).

295. *Id.* (citing People v. Collins, 388 Mich. 680, 695, 202 N.W.2d 769 (1972), *Cain*, 238 Mich. App. at 112, 605 N.W.2d at 39).

296. *Id.* (citing MICH. CT. RULE 6.004(A)).

297. *Id.* at 541-42, 741 N.W.2d at 852. Unexplained delays, docket congestion, and scheduling delays are charged to the prosecution. *Id.*

298. 278 Mich. App. 108, 748 N.W.2d 604 (2008).

299. *Id.* at 109-10, 748 N.W.2d at 605.

the ruling on its conclusion that "multiple counts in a juvenile petition . . . are considered one adjudication."[300]

The court of appeals noted that the applicable statute[301] renders the juvenile ineligible to have his adjudication set aside because he was adjudicated for two separate offenses.[302] Although the particular section of the statute did not define "offense," the court stated the Michigan Court Rules regarding juvenile proceedings defines "an offense by a juvenile as an act that violates a criminal statute, a criminal ordinance, a traffic law, or a provision of M.C.L. Section 712 A.2(a) or (d)."[303] Therefore, the court concluded that the plain language of the statute affords eligibility to have an adjudication set aside hinges on the number of offenses for which a juvenile has been adjudicated.[304] Therefore, the court reversed the circuit court's order which set aside the juvenile's conviction.[305]

IV. FORFEITURE

Although the Supreme Court decided one case during the *Survey* period that dealt with the forfeiture of illegally seized evidence, the case is a study not in the law of forfeiture as much as it is an illustration of the Michigan Supreme Court's (a significant portion of the bench) flagrant assault on the exclusionary rule.

In *In re Forfeiture of $180,975*,[306] the Michigan Supreme Court addressed whether the exclusionary rule is applicable in a civil forfeiture proceeding where the property subject to forfeiture was illegally seized.[307] In this case, the claimant was driving a rental car on I-94.[308] A Michigan State Trooper stopped the claimant for speeding.[309] The

300. *Id.* at 109, 748 N.W.2d at 605.

301. MICH. COMP. LAWS ANN. § 712A.18e(1) (West 2009) provides:

> Except as provided in subsection (2), *a person who has been adjudicated of not more than 1 juvenile offense* and who has no felony convictions may file an application with the adjudicating court for the entry of an order setting aside the adjudication. A person may have only 1 adjudication set aside under this section.

Id. (empahsis added).

302. *In re Hutchinson*, 278 Mich. App. at 110 n.3, 748 N.W.2d at 606 n.3.

303. *Id.* at 111, 748 N.W.2d at 606 (citing MICH. CT. R. 3.942(D)).

304. *Id.* at 111-12, 748 N.W.2d at 606.

305. *Id.* at 109-10, 748 N.W.2d at 605.

306. 478 Mich. 444, 734 N.W.2d 489 (2007).

307. *Id.* at 446, 734 N.W.2d at 490.

308. *Id.* at 447-48, 734 N.W.2d at 491.

309. *Id.*

claimant's two small children and an adult male were also in the car.[310] After checking the identification of both the claimant and the passenger, the trooper learned that the claimant's license had been suspended and the passenger was a known safety caution.[311] Based on that information, the trooper told the claimant he was going to search the trunk of the car.[312] The trooper found a backpack containing $180,975 in cash.[313]

Pursuant to M.C.L. Section 333.7521(1)(f),[314] the state filed a forfeiture complaint for the cash.[315] The claimant filed a motion to suppress the evidence seized from the backpack alleging that it was illegally seized.[316] The trial court concluded that the cash had been illegally seized because the officer lacked probable cause and lacked consent.[317] Despite suppressing the cash, the trial court allowed the prosecutor to use the suppressed cash, along with other evidence, "for the limited purpose establishing its existence, and the court's in rem jurisdiction over it."[318]

As a result, the prosecutor presented evidence that the claimant "was a drug courier and that the" seized money was intended to purchase illegal drugs.[319] The prosecutor also introduced evidence of the claimant's rental car history and tax records regarding her lack of

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310. *Id.* at 448, 734 N.W.2d at 491.

311. *Id.*

312. *Forfeiture of $180,975*, 478 Mich. at 448, 734 N.W.2d at 491. The male passenger was previously arrested for cocaine possession and weapons offenses. *Id.*

313. *Id.*

314. MICH. COMP. LAWS ANN. § 333.7521(1)(f) (West 2009) provides:

> (1) The following property is subject to forfeiture
>
> (f) Any thing of value that is furnished or intended to be furnished in exchange for a controlled substance, an imitation controlled substance, or other drug in violation of this article that is traceable to an exchange for a controlled substance, an imitation controlled substance, or other drug in violation of this article or that is used or intended to be used to facilitate any violation of this article including, but not limited to, money, negotiable instruments, or securities. To the extent of the interest of an owner, a thing of value is not subject to forfeiture under this subdivision by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent. Any money that is found in close proximity to any property that is subject to forfeiture under subdivision (a), (b), (c), (d), or (e) is presumed to be subject to forfeiture under this subdivision. This presumption may be rebutted by clear and convincing evidence.

Id.

315. *Forfeiture of $180,975*, 478 Mich. at 448, 734 N.W.2d at 491.

316. *Id.*

317. *Id.*

318. *Id.* at 446, 734 N.W.2d at 491 (citing United States v. $639,558, 955 F.2d 712, 715 (D.C. Cir. 1992)).

319. *Id.* at 449, 734 N.W.2d at 492.

substantial income.[320] And finally, the prosecutor introduced testimony from an expert witness in the area of drug trafficking that I-94 is a drug corridor.[321] The trial court authorized the forfeiture based on a finding that the money was intended to purchase illegal drugs.[322] The court of appeals affirmed the forfeiture.[323]

The Court began its analysis by noting that forfeitures pursuant to M.C.L. Section 333.7521[324] are proceedings in rem.[325] As a result, the item seized is the subject of the proceeding, not the person from whom it was seized.[326] Additionally, the Court noted that the exclusionary rule applies "to forfeiture proceedings because forfeiture" hearings are quasi-criminal.[327] And although the prosecutor did not challenge the suppression order, the Court explained, that in its opinion, the United States Supreme Court's precedent regarding the exclusionary rule's applicability to forfeiture proceedings has been "weakened."[328]

With respect to the deterrent function of the exclusionary rule, the Court stated that "the deterrent effect is strongest where the unlawful conduct would result in a criminal penalty."[329] Further, the Court noted, "extending the rule beyond the officer's primary zone of interest would have, at most, only an incremental deterrent effect."[330] Applying these perceived "weaknesses" to the instant case, the Court concluded that

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320. *Id.*

321. *Forfeiture of $180, 975*, 478 Mich. at 449, 734 N.W.2d at 492.

322. *Id.*

323. *Id.*

324. MICH. COMP. LAWS ANN. § 333.7521 (West 2009).

325. *Forfeiture of $180,975*, 478 Mich. at 450, 734 N.W.2d at 492.

326. *Id.* at 450, 734 N.W.2d at 492-93.

327. *Id.* at 451, 734 N.W.2d at 493 (citing One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)).

328. *Id.* The court reviewed several United States Supreme Court opinions addressing the applicability of the exclusionary rule in hearings other than criminal trials. *Id.* For example, United States v. Janis, 428 U.S. 433 (1976), the United States Supreme Court refused to extend the exclusionary rule to a civil federal tax proceeding. *Janis*, 428 U.S. at 454. In that case, the Court noted that the primary purpose of the exclusionary rule is to deter police misconduct. *Id.* In *Janis*, the state court officer who seized the evidence relied in good faith on a defective warrant. *Id.* Applying the balancing test, the Court opined that "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation." *Id.* at 453-54. Similarly, the Court pointed to Pa. Bd. of Probation & Parole v. Scott, 524 U.S. 357, 366-67 (1998) where the United States Supreme Court ruled that the exclusionary rule does not bar admission of evidence at parole revocation hearing even though evidence had been obtained in violation of Fourth Amendment. *Id.*

329. *Forfeiture of $180,975*, 478 Mich. at 452, 734 N.W.2d at 494 (citing *Scott*, 524 U.S. at 368).

330. *Id.*

forfeiture proceedings initiated pursuant to M.C.L. Section 333.7521(1)(f) are contained in the administrative section of the public health code so they do not fall within the officer's primary zone of interest, i.e., to collect evidence to use to obtain a conviction in a criminal trial.[331] Consequently, the Court ruled that exclusionary rule is not a complete bar to bring a forfeiture action against an item that has been illegally seized.[332]

The Court then turned to the manner in which the excluded evidence may be used at the forfeiture hearing.[333] The Court concluded that the illegally seized property that is the subject of the forfeiture may be offered into evidence to establish the court's jurisdiction over the item, as well as to establish the item's existence.[334] But, the Court cautioned that questions about the "excluded evidence should be limited to the circumstances surrounding" the illegally seized evidence.[335] However, the ultimate decision to forfeit the property must be based on "a preponderance of untainted evidence."[336] In the instant case, the Court determined that the forfeiture of the cash was based on a preponderance of untainted evidence.[337]

V. TRIAL PROCEEDINGS

A. Venue

The one case the Michigan courts reviewed during the *Survey* period that dealt with venue was actually couched in the context of an ineffective assistance of counsel claim. Nonetheless, it is worthy of discussion in the venue context.

In *People v. Cline*,[338] the defendant was charged with first-degree vulnerable adult abuse against his wife.[339] The defendant's wife was completely blind and was "a brittle, type I diabetic."[340] One day, while

331. *Id.* at 453-54, 734 N.W.2d at 494.

332. *Id.* at 457-58, 734 N.W.2d at 496.

333. *Id.* at 459, 734 N.W.2d at 497.

334. *Id.*

335. *Forfeiture of $180,975*, 478 Mich. at 460, 734 N.W.2d at 498.

336. *Id.* at 460, 471, 734 N.W.2d at 498, 504.

337. *Id.* at 472, 734 N.W.2d at 504-05.

338. 276 Mich. App. 634, 741 N.W.2d 563 (2007), *appeal denied*, 480 Mich. 1134, 745 N.W.2d (2008).

339. *Cline*, 276 Mich. App. at 635, 741 N.W.2d at 565. *See* MICH. COMP. LAWS ANN. § 750.145n(1) (West 2009). The defendant was charged with 17 counts of vulnerable-adult abuse. *Cline*, 276 Mich. App. at 635, 741 N.W.2d at 565.

340. *Id.* at 636, 741 N.W.2d at 565. "Type I diabetes mellitus is an insulin-dependent form of the disease. Brittle diabetes mellitus is characterized by 'marked fluctuations in

cleaning their apartment, the wife "discovered ropes and a digital camera."[341] Because she was blind, she asked a friend to look at the photos on the camera.[342] The digital camera contained photos showing her hogtied, nude, and lying face down.[343] Apparently there were "three videotapes, one of which depicted several incidences of her being tied up or bound, either naked or scantily clad, with a bag over her head, struggling to breathe."[344] "Defendant appeared in some of the scenes."[345] "Linda did not recall making the videotape, and she did not consent to it."[346] "During a police interview, the defendant stated that, except for one occasion, these activities were consensual and that he was sexually aroused by them."[347]

The defendant claims that his trial counsel was ineffective for failing to request a change of venue.[348] A defendant's conviction will be overturned only, if "under the totality of the circumstances, the defendant's trial was not fundamentally fair" because it was conducted before a panel of partial jurors.[349] With respect to a juror's partiality, it is presumed that jurors, who have sworn under oath that they can be fair and impartial, will honor their oath.[350] The defendant must establish "the actual existence of [a preconceived notion regarding guilt or innocence] in the mind of the juror as will raise the presumption of partiality."[351] Additionally, if potential jurors assure the court they will set aside any preexisting knowledge or "opinions about the case, neither" issue will be grounds for a change of venue.[352]

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blood glucose concentrations that are difficult to control.'" *Id.* at 636 n.1, 741 N.W.2d at 565 n.1 (citations omitted).

341. *Id.* at 636, 741 N.W.2d at 565.

342. *Id.*

343. *Id.*

344. *Cline*, 276 Mich. App. at 636, 741 N.W.2d at 565.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 636-37, 741 N.W.2d at 565.

349. *Id.* at 638, 741 N.W.2d at 566 (quoting People v. DeLisle, 202 Mich. App. 658, 665, 509 N.W.2d 885, 890 (1993) (quoting Murphy v. Florida, 421 U.S. 794, 799 (1975))) (quotations omitted).

350. *Cline*, 276 Mich. App. at 638, 741 N.W.2d at 566 (quoting *DeLisle*, 202 Mich. App. at 663, 509 N.W.2d at 889).

351. *Id.* (quoting *Murphy*, 421 U.S. at 800 (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961))).

352. *Id.* at 638, 741 N.W.2d at 566 (quoting *DeLisle*, 202 Mich. App. at 662, 509 N.W.2d 889).

"[P]retrial publicity, standing alone, does not [support] a change of venue."[353] However, even if jurors have initially indicated their respective impartiality, if the general atmosphere in the community or in the courtroom is so inflamed, the presumption of impartiality can be overcome.[354] Under these circumstances, a defendant must show one of two things to support a change of venue. One, "that there is either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it."[355] Or two, "that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice."[356] The juror is presumed competent to try the case if, although forming an opinion based on media coverage, swears to the court he or she can be impartial and the court is satisfied the juror will be impartial.[357]

To establish inflammatory pretrial publicity sufficient to necessitate a change of venue, the defendant introduced eleven news "articles about his case" that had been published in local newspapers.[358] The court acknowledged that some of the articles provided facts about his case, including the prosecutor's opinion about the case, and some discussed proposed anti-torture legislation initiated in response to his case.[359] Nonetheless, the court ruled that these articles did not establish an inflammatory public atmosphere.[360]

The court also considered whether the number of jurors excused during the selection process could show the community's deep hostility toward a defendant that would warrant a change of venue.[361] In the instant case, 36 percent of the venire was excused during *voir dire*.[362] Nine of the fourteen jurors seated in the case said they had heard about

353. *Id.* at 639, 741 N.W.2d at 566-67 (quoting People v. Passeno, 195 Mich. App. 91, 98, 489 N.W.2d at 152 (1992), *overruled on other grounds*, People v. Bigelow, 229 Mich. App. 218, 581 N.W.2d 744 (1998)).

354. *Id.*

355. *Id.* at 639, 741 N.W.2d at 567 (quoting *Passeno*, 195 Mich. App. at 98, 489 N.W.2d 152).

356. *Cline*, 276 Mich. App. at 639, 741 N.W.2d at 567 (quoting *Passeno*, 195 Mich. App. at 98, 489 N.W.2d 152).

357. *Id.* (quoting *Passeno*, 195 Mich. App. at 98, 489 N.W.2d 152).

358. *Id.* at 639, 741 N.W.2d at 567.

359. *Id.* at 639-40, 741 N.W.2d at 567.

360. *Id.* at 640, 741 N.W.2d at 567.

361. *Id.* at 641, 741 N.W.2d at 568.

362. *Cline*, 276 Mich. App. at 641, 741 N.W.2d at 568. The court indicated that the twenty potential jurors who were excused represented thirty-six percent of the venire, which consisted of fifty-six people. *Id.* at 638, 741 N.W.2d at 566.

the case.[363] Even so, the court ruled that under the "totality of the circumstances," the pretrial publicity and the jurors' knowledge of the case did not overcome the presumption of their impartially, particularly given their assurances.[364] As a result, the court held that change of venue was not warranted.[365] Indeed, it would have been futile for counsel to file such a motion.[366] Therefore, counsel was not ineffective for failing to raise the issue.[367]

B. Witnesses

In *People v. Meconi*,[368] the Michigan Court of Appeals considered what remedy, if any, is available to a defendant when a victim violates a trial court's pretrial sequestration order.[369] The importance of this case is as much in the court's substantive decision as it is to two points of fact. First, this was yet another prosecutorial appeal.[370] Second, the court declined to address a constitutional issue.[371]

Prior to the beginning of the defendant's bench trial for aggravated assault,[372] the trial court issued a sequestration order.[373] The prosecutor and "defense attorney [then] proceeded to make brief opening statements."[374] The prosecutor called the victim as his first witness.[375] At that point, "the court realized that [the victim] had remained in the courtroom during opening statements."[376] The victim told the court that the crime victim's advocate told her to stay in the courtroom.[377]

The trial court ultimately declared a mistrial because the victim "had some taint."[378] Although the trial court believed neither party was at

363. *Id.*
364. *Id.* at 641, 741 N.W.2d at 568.
365. *Id.*
366. *Id.*
367. *Cline*, 276 Mich. App. at 641, 741 N.W.2d at 568.
368. 277 Mich. App. 651, 748 N.W.2d 881 (2008).
369. *Id.* at 651, 746 N.W.2d at 882.
370. *Id.*
371. *Id.*
372. *Id.* at 655, 746 N.W.2d at 884 (Sawyer , J., concurring). *See* MICH. COMP. LAWS ANN. § 750.81a (West 2009).
373. *Meconi*, 277 Mich. App. at 652, 746 N.W.2d at 882. The trial court's sequestration order stated, "[a]nyone who is scheduled to testify, may testify, anticipates, probably could, please stand, leave the courtroom, do not discuss your anticipated testimony, nor our completed testimony until released by the Court." *Id.*
374. *Id.* at 652, 746 N.W.2d at 882.
375. *Id.* at 652-53, 746 N.W.2d at 882.
376. *Id.* at 653, 746 N.W.2d at 882.
377. *Id.*
378. *Meconi*, 277 Mich. App. at 653, 746 N.W.2d at 882.

fault, the court felt a mistrial was the only appropriate remedy.[379] Furthermore, the trial court ruled that the victim's testimony was inadmissible at any retrial.[380]

On appeal, the circuit court at first overruled the trial court's ruling regarding the victim's testimony at the retrial.[381] "However, the circuit court reconsidered its" ruling, reversed itself and denied the prosecutor's leave to appeal.[382] The court of appeals granted the prosecutor's application for leave to appeal.[383]

The purpose of a sequestration order is to prevent a witness from listening to the testimony of other witnesses and then conforming, or changing, his or her testimony accordingly.[384] If a witness violates a sequestration order, the law recognizes three possible sanctions: the court can hold the witness in contempt, the court can allow the lawyers to cross-examine regarding the violation, and the court can preclude the witness from testifying.[385] Generally, courts sparingly use exclusion of the witness's testimony as an appropriate remedy for violation of a sequestration order.[386]

The prosecutor argued that "the victim had a constitutional right to be present at all portions of the trial," thereby rendering crime victims exempt from any sequestration orders.[387] But, the court specifically refused to rule on those grounds, noting that courts have a duty to refrain from deciding constitutional issues when a case can be decided on other grounds.[388] As a result, the court concluded that the trial court abused its discretion by employing the most severe of the available consequences for a sequestration order, i.e., precluding the witness from testifying, particularly when the mistake was innocent.[389]

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379. *Id.*

380. *Id.* at 653, 746 N.W.2d at 882.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Meconi*, 277 Mich. App. at 654, 746 N.W.2d at 883.

385. *Id.* (citing United States v. Hobbs, 31 F.3d 918, 921 (9th Cir. 1994) (citing Holder v. United States, 150 U.S. 91, 92 (1893))).

386. *Id.* at 654, 746 N.W.2d at 883 (citing United States v. Smith, 441 F.3d 254, 263 (4th Cir. 2006) (citing *Hobbs*, 31 F.3d at 921)).

387. *Id.* at 652, 746 N.W.2d at 882.

388. *Id.* at 652-53, 746 N.W.2d at 882-83 (citing Wayne County v. Hathcock, 471 Mich. 445, 456 n.10, 684 N.W.2d 765, 772 n.10 (2004)).

389. *Id.* at 655, 746 N.W.2d at 883.

C. Selection of and Contact with the Jury

In *People v. Hanks*,[390] the court of appeals addressed a defendant's challenge to a trial court's policy that allowed potential jurors to be identified by number instead of by name.[391] The defendant argued that this policy essentially created an anonymous jury and violated his due process rights.[392]

The court noted that an "anonymous" jury is "one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public."[393] The court further noted that an anonymous jury implicates two interests: "(1) the defendant's interest in being able to conduct a meaningful examination of the jury and (2) the defendant's interest in maintaining the presumption of innocence."[394] Finally, the court noted that a defendant will only prevail in challenging an anonymous jury "where the record reflects that" withheld information prevented a "meaningful *voir dire* or that the defendant's presumption of innocence was compromised."[395]

In analyzing whether the defendant has presented a meritorious challenge to an anonymous jury, the court noted that it must look to the type of information that was withheld from the defendant.[396] Certainly, if jurors' names are withheld, they are anonymous in the literal sense of the word.[397] However, reviewing courts must look to more than just the anonymity associated with withholding names to determine whether a defendant's due process rights have been infringed upon.[398] To be an anonymous jury for purposes of implicating due process, biographical information about the jurors must have been withheld.[399] Seemingly, it is the access to juror's biographical information that will assist a defendant in conducting a meaningful *voir dire*.[400] Finally, the court cautioned "trial courts to advise the venire that any use of numbers" instead of

390. 276 Mich. App. 91, 740 N.W.2d 530 (2007), *appeal denied*, People v. Hanks, 480 Mich. 1008, 743 N.W.2d 9 (2008), *habeas corpus petition denied*, Hanks v. Palmer, No. 1:08CV192, 2008 WL 2923425 (W.D. Mich. July 25, 2008).

391. *Hanks*, 276 Mich. App. at 92, 740 N.W.2d at 532.

392. *Id.*

393. *Id.* at 93, 740 N.W.2d at 532 (quoting People v. Williams, 241 Mich. App. 519, 522, 616 N.W.2d 710, 712 (2000)).

394. *Id.* (quoting *Williams*, 241 Mich. App. at 522-23, 616 N.W.2d at 712-13).

395. *Id.*

396. *Id.* at 93-94, 740 N.W.2d at 532-33.

397. *Hanks*, 276 Mich. App. at 93, 740 N.W.2d at 532.

398. *Id.*

399. *Id.* (citing *Williams*, 241 Mich. App. at 523, 616 N.W.2d at 712-13).

400. *Id.*

jurors' names should not be construed negatively against the defendant.[401]

Just as in *Williams*, the defendant in *Hanks* was provided with the juror questionnaires that contained biographical information.[402] Furthermore, both parties conducted extensive voir dire.[403] There was no showing that the jurors inferred anything negative against the defendant by use of the numbers instead of their names.[404] Thus, the "defendant failed to demonstrate that" he was denied the ability to conduct a "meaningful *voir dire* or that his presumption of innocence was compromised."[405] Consequently, the trial court's policy did not violate the defendant's due process rights.[406]

D. Evidentiary Issues

1. Admissibility of Polygraph

In *People v. Kahley*,[407] the "[d]efendant was convicted of first-degree criminal sexual conduct."[408] At trial, a police officer testified that the "defendant refused to take a polygraph examination."[409] The court reviewed the defendant's unpreserved claim for plain error.[410]

The court confirmed that any evidence regarding a defendant's polygraph examination is inadmissible in a criminal prosecution.[411] The court also confirmed that it is plain error to present the results of a polygraph examination to the jury.[412] Hence, the court found that "plain error occurred when the officer testified" about the defendant's refusal to submit to a polygraph examination.[413]

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401. *Id.* at 94, 740 N.W.2d at 533.
402. *Id.*
403. *Hanks*, 276 Mich. App. at 94, 740 N.W.2d at 533.
404. *Id.*
405. *Id.*
406. *Id.*
407. 277 Mich. App. 182, 744 N.W.2d 194 (2007), *appeal denied*, 481 Mich. 882, 748 N.W.2d 880 (2008).
408. *Kahley*, 277 Mich. App. at 183, 744 N.W.2d at 196. *See* MICH. COMP. LAWS ANN. § 750.520b(1)(a) (West 2009).
409. *Kahley*, 277 Mich. App. at 183, 744 N.W.2d at 196.
410. *Id.*
411. *Id.* (citing People v. Jones, 468 Mich. 345, 355, 662 N.W.2d 376, 382 (2003).
412. *Id.* (citing People v. McGhee, 268 Mich. App. 600, 630, 709 N.W.2d 595, 616 (2005), People v. Nash, 244 Mich. App. 93, 97, 625 N.W.2d 87, 91 (2000)).
413. *Id.*

Nonetheless, the court refused to reverse the defendant's conviction.[414] The court noted that not every reference to a polygraph requires reversal.[415] According to the court, "[t]he reference to defendant's refusal to take" the polygraph was brief and unrepeated.[416] The prosecutor did not use the defendant's refusal to take the polygraph as evidence of guilt.[417] The defendant testified that he actually "asked to take a polygraph," but was never afforded the opportunity.[418] Finally, the defendant confessed.[419] Thus, according to the court, reversal was unnecessary.[420]

The defendant also objected to the trial court's admission of evidence pursuant to Michigan Rule of Evidence 404(b).[421] The prosecutor introduced evidence that at the time of the offense, the defendant had, within a four-month period, sexually assaulted the victim, and the defendant's girlfriend's four-year old son.[422] The court ruled that the "other acts" evidence established a common plan or scheme.[423] Consequently, "the probative value of the [bad-acts] evidence was not substantially outweighed by unfair prejudice."[424]

The defendant also claimed that the trial court did not adequately state substantial and compelling reasons to justify departing from the recommended sentencing guideline range.[425] "A substantial and compelling reason [to depart from the recommended guideline range] must be objective and verifiable . . . ."[426] Objective and verifiable means that the reason must be "external to the minds of" those involved and capable of verification.[427] Finally, substantial and compelling reasons exist only in exceptional cases.[428]

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414. *Id.* at 184, 744 N.W.2d at 196.

415. *Kahley*, 277 Mich. App. at 184, 744 N.W.2d at 196 (citing *Nash*, 244 Mich. App. at 98, 625 N.W.2d at 91; People v. Rocha, 110 Mich. App. 1, 8, 312 N.W.2d 657, 660-61 (1981)).

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Kahley*, 277 Mich. App. at 184, 744 N.W.2d at 196.

422. *Id.* at 197, 744 N.W.2d at 197.

423. *Id.*

424. *Id.*

425. *Id.* at 186, 744 N.W.2d at 197.

426. *Id.* (citing People v. Babcock, 469 Mich. 247, 257-58, 666 N.W.2d 231, 237 (2003)).

427. *Kahley*, 277 Mich. App. at 186, 744 N.W.2d at 197.

428. *Id.* at 187, 744 N.W.2d at 198 (citing *Babcock*, 469 Mich. at 257, 666 N.W.2d at 237 (2003)).

In the instant case, the trial court relied on the defendant's perjury at trial as a substantial and compelling reason to depart.[429] The court of appeals noted that perjury is objective and verifiable.[430] The trial court's conclusion that the defendant was a pedophile was also objective and verifiable.[431]

E. Jury Instructions

In *People v. Davis*,[432] the court analyzed several different issues impacting the law of criminal procedure.[433] Perhaps the most in-depth issue presented was the defendant's objections to the trial court's jury instructions.[434] The defendant and his accomplice attempted to rob a liquor store by approaching the owner and placing a note on the counter.[435] The defendant's accomplice was acting like he had a handgun in his pocket and said, "[g]ive me the money, or I'll kill you."[436] "[T]he owner demanded to see" the accomplice's gun.[437] Meanwhile, the owner's fiancé arrived and the accomplice "pointed his pocket at the owner's fiancé."[438] The accomplice's actions were captured on store's surveillance videotape.[439]

The jury convicted the defendant of assault with intent to rob while armed.[440] The defendant challenged the trial court's jury instruction regarding the crime of assault.[441] Regarding the crime of assault, the

429. *Id.*

430. *Id.* at 188, 744 N.W.2d at 198. The court cautioned against using a defendant's perjury in and of itself to support a substantial and compelling reason to depart from the recommended guideline range. To do so, the court reasoned, might warrant a substantial and compelling reason for departure every time a defendant took the stand at trial and was convicted. *Id.*

431. *Id.* The court referred to "The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), with respect to the criteria for pedophilia." *Id.*

432. 277 Mich. App. 676, 747 N.W.2d 555 (2008), *vacated in part, appeal denied in part*, 482 Mich. 978, 755 N.W.2d 186 (2008).

433. *See generally Davis*, 277 Mich. App. 676, 747 N.W.2d 555.

434. *Id.* at 683-89, 747 N.W.2d at 559-62.

435. *Id.* at 678, 747 N.W.2d at 556-57.

436. *Id.* at 678, 747 N.W.2d at 557.

437. *Id.*

438. *Id.*

439. *Davis*, 277 Mich. App. at 679, 747 N.W.2d at 557.

440. *Id.* at 677, 747 N.W.2d at 556. *See* MICH. COMP. LAWS ANN. § 750.89 (West 2009).

441. *Davis*, 277 Mich. App. at 683-84, 747 N.W.2d at 559. The trial court's jury instruction regarding the crime stated, in part: "[a]n assault simply means to engage in some form of threatening conduct which is designed to put another person in fear of being hurt, provided you were close enough to carry it out." *Id.* at 687, 747 N.W.2d at 561. Additionally, the trial court's instruction explained that:

court reiterated that the elements require either an attempted battery or an act that made the victim reasonably apprehend an immediate battery.[442] The court also noted that fear is not a requisite element.[443] Instead, all that is required is an, "inferential determination of whether a rational person in the victim's shoes would have reasonably believed that the defendant's behavior threatened an immediate battery."[444] The court concluded that the trial court's instructions correctly stated the elements of assault.[445]

In rejecting the defendant's claim that the trial court erred by not providing the jury with an instruction for the crime of attempted assault with intent to rob, the court noted that a trial court is not obligated to provide instructions on lesser offenses if the evidence does not support such instruction.[446]

The defendant insisted that he was entitled to resentencing because he was represented by substitute counsel at the sentencing hearing.[447] Because a "defendant does not have an absolute right to" the same counsel at sentencing that represented him at trial, the court rejected this issue.[448]

The defendant objected to the trial court assessing 15 points to OV 10. To assess 15 points, the defendant must display predatory conduct.[449] If "a defendant takes measures to determine the suitability and vulnerability of a particular victim before [committing] the crime,"

> a victim's subjective fear was not as important as [a particular defendant's] intent to scare or intimidate the victim and whether an ordinary person facing the same conduct would reasonably perceive a legitimate threat of harmful contact. The trial court added that if [the defendant's] actions were so unpersuasive and ridiculous that a reasonable person would not have apprehended any real threat of harm from him, then the jury should acquit the defendant.

Id.

442. *Id.* at 684, 747 N.W.2d at 559 (citing People v. Johnson, 407 Mich. 196, 210, 284 N.W.2d 718 (1979) (quoting People v. Sanford, 402 Mich. 460, 479, 265 N.W.2d 1 (1978))).

443. *Id.* (citing *Sanford*, 402 Mich. at 479, 265 N.W.2d 1).

444. *Id.* at 685-86, 747 N.W.2d at 560.

445. *Davis*, 277 Mich. App. at 688, 747 N.W.2d at 562.

446. *Id.* (citing People v. Patskan, 387 Mich. 701, 712-13, 199 N.W.2d at 458 (1972)).

447. *Id.* at 679, 747 N.W.2d at 557.

448. *Id.* at 679-80, 747 N.W.2d at 557 (citing People v. Evans, 156 Mich. App. 68, 401 N.W.2d 312 (1986) (quotations omitted)).

449. *Id.* at 680, 747 N.W.2d at 558. According to MICH. COMP. LAWS ANN. § 777.40(3)(a) (West 2009), predatory conduct is, "preoffense conduct directed at a victim for the primary purpose of victimization."

assessing fifteen points is appropriate.[450] Because the evidence established that the defendant "cased" the store and attempted the robbery after determining that a lone woman made a suitable robbery victim, the trial court's score of 15 points to OV 10 was appropriate.[451]

The court also tersely rejected the defendant's ineffective assistance of counsel claim.[452] The defendant claimed trial counsel was ineffective because he argued that the defendant should be convicted, if at all, of a lesser crime.[453] According to the court, the evidence of defendant's guilt was unassailable.[454] As a result, counsel's trial strategy was sound.[455]

VI. GUILTY PLEAS

A. Withdrawal of Guilty Pleas

In the area of guilty pleas, the Michigan Court of Appeals decided one case and addressed the appropriate standard to withdraw a guilty plea as well as the appropriate standard to review the adequacy of a factual basis.

In *People v. Williams*,[456] the defendant pleaded guilty[457] to four counts of embezzlement[458] and one count of obstruction of justice.[459] The defendant filed a post-judgment motion to withdraw her guilty pleas.[460] The court noted that "a post-judgment motion to withdraw a plea is reviewed for an abuse of discretion resulting in a miscarriage of justice."[461] Additionally, in reviewing the adequacy of the factual basis for a plea, [the reviewing court must examine] whether the factfinder could properly convict" from the facts elicited during the plea hearing.[462] A factual basis can be supported by an inculpatory inference drawn from

450. *Id.* (citing People v. Witherspoon, 257 Mich. App. 329, 335-36, 670 N.W.2d 434 (2003)).

451. *Davis*, 277 Mich. App. at 680-81, 747 N.W.2d at 558.

452. *Id.* at 690, 747 N.W.2d at 563.

453. *Id.* at 689-90, 747 N.W.2d at 562.

454. *Id.* at 690, 747 N.W.2d at 562.

455. *Id.* at 689-90, 747, 747 N.W.2d at 562-63.

456. No. 271870, 2008 WL 183088 (Mich. Ct. App. Jan. 22, 2008) (unpublished), *rev'd*, 481 Mich. 942, 751 N.W.2d 42 (2008).

457. *Williams*, 2008 WL 183088 at *1.

458. MICH. COMP. LAWS ANN. § 750.174a(4)(a) & (5)(a) (West 2009).

459. MICH. COMP. LAWS ANN. § 750.505 (West 2009).

460. *Williams*, 2008 WL 180388 at *1.

461. *Id.* (citing People v. Davidovich, 238 Mich. App. 422, 425, 606 N.W.2d 387, 388-89 (1999)).

462. *Id.* (citing People v. Brownfield, *on remand*, 216 Mich. App. 429, 431, 548 N.W.2d 248, 250 (1996)).

facts the defendant admitted.[463] "Even if the defendant denies an element of the offense, [a] court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says."[464]

With respect to the defendant's guilty pleas to embezzlement, the defendant denied that she was the victim's caretaker or employee, but she did admit that she stood in a relationship of trust with the victim.[465] Because the statute encompasses someone who assumes responsibility for the management of the vulnerable adult's money or property, the court held that the defendant's admission regarding her position of trust provided "a sufficient factual basis to establish" the caregiver element for her plea-based convictions of embezzlement.[466]

However, the court took a different view regarding the defendant's plea-based conviction for obstruction of justice.[467] The court noted that the witness intimidation portion of the obstruction of justice statute includes willfully interfering or attempting to interfere with a witness's ability to attend, testify, or provide information in an official proceeding.[468] Additionally, interference does not require proof of threats, intimidation, or physical interference.[469] During her plea, the defendant acknowledged that she sent the victim a letter requesting that she not proceed with charges against the defendant.[470] Despite the defendant's admission, the court ruled the defendant's request did not amount to intimidation because it did not induce fear.[471] Further, the defendant's request did not amount to interfering with the victim's ability to attend court.[472] Finally, the court stated that the defendant's request did not suggest to the victim that she decline to testify or give information to the authorities.[473] Consequently, the court ruled that the trial court erred in denying the defendant's motion to withdraw her obstruction of justice plea.[474]

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463. *Id.*

464. *Id.* (citing People v. Jones, 190 Mich. App. 509, 511-12, 476 N.W.2d 646, 647 (1991) (citations omitted)).

465. *Id.* at *2.

466. *Williams*, 2008 WL 183088 at *2.

467. *Id.* at *3.

468. *Id.* (citing MICH. COMP. LAWS ANN. § 750.122(6) (West 2009)).

469. *Id.* (citing People v. Green, 255 Mich. App. 426, 438, n.6, 661 N.W.2d 616, 624 n.6 (2003)).

470. *Id.*

471. *Id.*

472. *Williams*, 2008 WL 183088 at *3.

473. *Id.*

474. *Id.* However, on July 2, 2008, outside the dates of this *Survey*, the Michigan Supreme Court reversed the court of appeals decision. Specifically, the court stated:

The defendant also raised a double jeopardy challenge to her multiple convictions.[475] With respect to a double jeopardy challenge, the court noted that both the United States and Michigan Constitutions[476] provide that "[a] person may not be twice placed in jeopardy for a single offense."[477] The court also noted that one of the reasons for the constitutional prohibition against double jeopardy is to protect against multiple punishments for the same offense.[478] It is important to avoid multiple punishments for the same offense in order to ensure that a defendant receives no greater punishment than a legislature intended.[479]

> In People v. Boyd, 174 Mich. 321, 324, 140 N.W. 475 (1913), this Court discussed common-law obstruction of justice, and stated as follows: "At common law, to dissuade or prevent, or to attempt to dissuade or prevent, a witness from attending or testifying upon the trial of a cause is an indictable offense." Actual intimidation of the witness is not required; a defendant is guilty of common-law obstruction of justice who uses an unlawful means to attempt to intentionally dissuade a witness from testifying. In this case, the defendant knowingly violated a no-contact order when she wrote to the victim, asking her to drop the embezzlement charges. In an attempt to conceal her violation of the no-contact order, the defendant put a false return address on the envelope. Given this evidence, a factfinder could properly convict the defendant of common-law obstruction of justice. Accordingly, we REMAND this case to the Genesee Circuit Court for reinstatement of the trial court's order denying the defendant's motion to withdraw her guilty plea to common law obstruction of justice.

Williams, 481 Mich. at 942, 751 N.W.2d at 42 (citations omitted).

475. *Williams*, 2008 WL 183088 at *4.

476. U.S. CONST amend. V; MICH. CONST. 1963, art. I, § 15.

477. *Williams*, 2008 WL 183088 at *4 (quoting People v. Mehall, 454 Mich. 1, 4, 557 N.W.2d 110, 112 (1997) (per curiam)).

478. *Id.* (quoting People v. Nutt, 469 Mich. 565, 574, 677 N.W.2d 1, 6 (2004)).

479. *Id.* (citing People v. Ford, 262 Mich. App. 443, 447-48, 687 N.W.2d 119, 122 (2004); People v. Fox, *on remand*, 232 Mich. App. 541, 556, 591 N.W.2d 384, 392 (1998)). The court also pointed out two recent decisions (contained within this *Survey* period) from the Michigan courts that addressed the prohibition against double jeopardy. Specifically, the court stated:

> In the recently issued opinion of People v. Bobby Smith, 478 Mich. 292; 733 NW2d 351 (2007)], the Michigan Supreme Court . . . concluded "that the ratifiers intended that the term 'same offense' be given the same meaning in the context of the 'multiple punishments' strand of double jeopardy that it ha[d] been given with respect to the 'successive prosecutions' strand." The federal courts, in interpreting the "same offense" language in the context of multiple punishments, first look to determine whether the Legislature expressed a clear intent that multiple punishments be imposed. If the Legislature clearly intended to impose multiple punishments, the imposition of multiple punishments, regardless whether the offenses share the same elements, does not offend the constitutional protections against double jeopardy. If the Legislature has not clearly expressed its intention to impose multiple punishments, federal courts apply the "same elements" test announced in Blockburger v. United States, 284

In the instant case, the legislature clearly intended for the multiple punishments to be imposed.[480] Because the language of the statute used the word "may" in the context of a prosecutor's decision to aggregate, the court concluded that the prosecutor was constitutionally permitted to charge the defendant with four counts of embezzlement.[481]

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

People v. Tesen,[482] stems from a "child protective services investigation" regarding "a complaint that [the] defendant had sexually assaulted his 12-year-old son."[483] The investigating officer referred the matter for a forensic interview consistent with county policy.[484] An assistant prosecuting attorney, who was a member of the forensic

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U.S. 299; 52 S Ct 180; 76 L.Ed.2d 306 (1932). Under the Blockburger "same elements" test, two offenses are not the "same offense" if each requires proof of an element that the other does not. The Smith Court adopted Blockburger as the proper test under Michigan law relative to double jeopardy analysis in the context of multiple punishments[.]

Id. (citing People v. Bobby Smith, 478 Mich. 292, 733 N.W.2d 351, (2007), People v. Chambers, 277 Mich. App. 1, 2-3; 742 N.W.2d 610, 611-12 (2007)).

480. *Id.* at *5. MICH. COMP. LAWS ANN. § 750.174a (1) and (6) (West 2009) state:

(1) A person shall not through fraud, deceit, misrepresentation, coercion, or unjust enrichment obtain or use or attempt to obtain or use a vulnerable adult's money or property to directly or indirectly benefit that person knowing or having reason to know the vulnerable adult is a vulnerable adult. . . .

(6) Except as otherwise provided in this subsection, the values of money or property used or obtained or attempted to be used or obtained in separate incidents pursuant to a scheme or course of conduct within any 12-month period may be aggregated to determine the total value of money or personal property used or obtained or attempted to be used or obtained. If the scheme or course of conduct is directed against only 1 person, no time limit applies to aggregation under this subsection.

Id.

481. *Williams*, 2008 WL 183088 at *5.

482. 276 Mich. App. 134, 739 N.W.2d 689 (2007), *on remand*, People v. Tesen, 477 Mich. 980, 727 N.W.2d 582 (2007), *appeal denied*, People v. Tesen, 480 Mich. 945, 741 N.W.2d 13 (2007).

483. *Tesen*, 276 Mich. App. at 135, 739 N.W.2d at 690.

484. *Id.* at 135-36, 739 N.W.2d at 690-91. The forensic interview was scheduled with CARE (Child Abuse Response Effort) Project. *Id.* at 135-36, 734 N.W.2d at 691.

A CARE interview is a coordinated, multidisciplinary, team-based interview used in investigations of child abuse or neglect. The goal of this forensic interview is to obtain a statement from a child in a developmentally sensitive, unbiased, and truth-seeking manner, that will support accurate and fair decision-making in the criminal justice and child welfare systems.

Id. at 136, 739 N.W.2d at 691.

interview team, conducted the interview.[485] Five other members of the team observed all, or part, of the scheduled interview.[486] The assistant prosecutor was subsequently assigned to prosecute the case.[487] Prior to the preliminary examination, the defendant moved to disqualify the prosecutor alleging that the prosecutor was a material witness.[488] The district court judge denied the motion.[489] After the defendant was bound over to circuit court, the defendant renewed his motion to disqualify the prosecutor.[490] The circuit court granted the motion and entered an order disqualifying the prosecutor.[491]

The prosecutor appealed claiming that the circuit court was barred by res judicata from considering the issue.[492] The Michigan Court of Appeals disagreed.[493] The court noted that although the district court had ruled on the prosecutor's participation as counsel in the preliminary examination, it had not ruled on the prosecutor's participation in any subsequent proceedings outside the district court.[494]

The prosecutor also claimed that the circuit erred by disqualifying him from the proceedings.[495] The court noted that whether a prosecutor can be disqualified from trying a felony child sexual abuse case because he or she took a lead role in the forensic interview was an issue of first impression in Michigan.[496] The court did not reduce or rescind a prosecutor's ability to interview prospective witnesses.[497] But, the court did note that a prosecutor should ensure that such interviews are conducted in the presence of a third party.[498] Further, lawyers are prohibited from being advocates at a trial where they are likely to be a necessary witness.[499]

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485. *Id.* at 136, 739 N.W.2d at 691.
486. *Id.*
487. *Tesen*, 276 Mich. App. at 136, 739 N.W.2d at 691.
488. *Id.*
489. *Id.* at 138, 739 N.W.2d at 692.
490. *Id.* at 139, 739 N.W.2d at 692.
491. *Id.* at 140, 739 N.W.2d at 693.
492. *Id.*
493. *Tesen*, 276 Mich. App. at 140, 739 N.W.2d at 693.
494. *Id.* at 140-41, 739 N.W.2d at 693.
495. *Id.* at 141, 739 N.W.2d at 693.
496. *Id.* at 141-42, 739 N.W.2d at 694.
497. *Id.*
498. *Id.*
499. *Tesen*, 276 Mich. App. at 141-42, 739 N.W.2d at 694. Specifically, the court referred to the Michigan Rules of Professional Conduct which prohibit attorneys from acting as advocates at trials where they are likely to be necessary witnesses. MICH. R. PROF'L CONDUCT 3.7 provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

However, "[t]he party seeking disqualification . . . bears the burden of showing that the attorney is a necessary witness."[500] The court acknowledged that no Michigan decision specifically defines the meaning of "necessary witness."[501] But, the courts have held that a witness is *not* a necessary witness "if the substance of their testimony can be elicited from other witnesses and the party seeking disqualification did not previously state an intent to call the attorney as a witness."[502] Here, because none of the five witnesses who watched the prosecutor interview the child victim can testify as to his qualifications, "how many forensic interviews he has conducted," his training relative to forensic interviews, and "how and why he developed the questions and hypotheses" he did during the interview, the prosecutor was a necessary witness.[503] Consequently, the court affirmed the circuit court's disqualification order.[504]

In *People v. Petri*,[505] the Michigan Court of Appeals rebuked the defendant's numerous claims of ineffective assistance of counsel.[506] A jury convicted the defendant of second-degree criminal sexual conduct for illegal sexual contact with a victim under the age of thirteen.[507]

The defendant claimed his lawyer was ineffective for failing to object to the admissibility of his two prior convictions for second-degree criminal sexual conduct pursuant to Michigan Rule of Evidence 404(b).[508] The court, however, disregarded this argument.[509] The court noted that the defendant's prior sexual conduct convictions were admissible pursuant to statute.[510]

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(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

Id.

500. *Tesen*, 276 Mich. App. at 144, 739 N.W.2d at 695 (citing *In re* Susser Estate, 254 Mich. App. 232, 237-38, 657 N.W.2d 147, 151 (2002)).

501. *Id.*

502. *Id.* (citing Smith v. Arc-Mation, Inc., 402 Mich. 115, 119, 261 N.W.2d 713, 716 (1978)).

503. *Id.* at 144-45, 739 N.W.2d at 695.

504. *Id.* at 145, 739 N.W.2d at 695.

505. 279 Mich. App. 407, 760 N.W.2d 882 (2008), *appeal denied*, 482 Mich. 1186, 758 N.W.2d 562 (2008).

506. *Petri*, 279 Mich. App. at 412-14, 760 N.W.2d at 886-87.

507. *Id.* at 409, 760 N.W.2d at 884.

508. *Id.* at 411, 760 N.W.2d at 885.

509. *Id.*

510. *Id.* at 411, 760 N.W.2d at 885-86. MICH. COMP. LAWS. ANN. § 768.27a (West 2009) provides, in relevant part:

The defendant's remaining three claims of ineffective assistance of counsel were likewise dismissed in short order.[511] The court stated that defense counsel was not ineffective for not cross-examining the detective thoroughly enough, for not objecting to the detective's reference to the defendant "grooming" his victim, and for stipulating to certified copies of the record.[512]

The defendant also challenged the trial court's refusal to disqualify the prosecutor.[513] Although the prosecutor interviewed the victim in this case, another trained forensic interviewer observed the interview.[514] As such, the prosecutor was not a necessary witness as described in *Tesen*.[515]

The defendant's next argument was that the trial court erred in departing upward from the recommended sentencing guideline range.[516] The court noted that it is permissible for a trial court to depart upward using factors already taken into account by the guidelines provided "*the court finds from facts contained in the record . . . that the characteristic has been given inadequate or disproportionate weight.*"[517]

The defendant's final argument was that he should be resentenced because the court enhanced his sentence based on factors he neither plead nor admitted "nor proven to a jury beyond a reasonable doubt."[518] The court dismissed this argument based on the decision of *People v. McCuller*,[519] in which the Michigan Supreme Court ruled that "*Blakely* does not apply to Michigan's indeterminate sentencing scheme."[520]

> (1) Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

Id.

511. *Petri*, 279 Mich. App. at 413-15, 760 N.W.2d at 886-88.

512. *Id.* at 415, 760 N.W.2d at 888.

513. *Id.* at 417, 760 N.W.2d at 888.

514. *Id.* at 418, 760 N.W.2d at 889.

515. *Id.* at 419, 760 N.W.2d at 890.

516. *Id.* at 420, 760 N.W.2d at 890.

517. *Petri*, 279 Mich. App. at 422, 760 N.W.2d at 891 (citing MICH. COMP. LAWS ANN. § 769.34(3)(b) (West 2009)).

518. *Id.* at 423, 760 N.W.2d at 891.

519. 479 Mich. 672, 739 N.W.2d 563 (2007).

520. *Petri*, 279 Mich. App. at 423, 760 N.W.2d at 892.

VIII. SENTENCING

As has been the trend for the past several years, sentencing issues have received a great deal of attention in both the Michigan Court of Appeals and the Michigan Supreme Court. This *Survey* period provided no exception as the courts continued to address the impact, if any, of *Blakely v. Washington*[521] on the Michigan sentencing guidelines.

A. Appellate Review and Blakely *Matters*

In *McCuller v. Michigan*,[522] the United States Supreme Court vacated the defendant's sentence and remanded the case to the Michigan Supreme Court.[523] In the remand order, the high court directed the Michigan Supreme Court to consider the case under its recent decision, *Cunningham v. California*.[524]

In *Cunningham*, the defendant was "convicted of continuous sexual abuse of a child under the age of 14."[525] As a result, California's determinate sentencing law provided for three possible sentencing levels described as lower, middle, and upper with corresponding sentence ranges of six, twelve, or sixteen years respectively.[526] The statute in question required the court to impose a sentence in the middle term unless the court found that circumstances of aggravation or mitigation existed.[527] The Court determined that, for *Apprendi* purposes, the statutory maximum was a twelve year sentence associated with the middle range because that was the range that applied based solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.[528]

Nonetheless, the trial court sentenced the defendant to the upper term of sixteen years after it found aggravating factors existed, namely the particular vulnerability of the victim, the defendant's violent conduct, and the danger the defendant posed to the community.[529] The Supreme Court held California's determinate sentencing law violated

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521. 542 U.S. 296 (2004).
522. 549 U.S. 1197 (2007) ("*McCuller II*").
523. *Id.*
524. 549 U.S. 270 (2007).
525. *Id.* at 275.
526. *Id.*
527. *Id.*
528. *McCuller*, 479 Mich. at 686, 739 N.W.2d at 571 (citing *Cunningham*, 549 U.S. at 288).
529. *Cunningham*, 549 U.S. at 270.

Apprendi's[530] bright-line rule because it allowed a factor to increase the maximum penalty that was not found by the jury, admitted by the defendant, or prior record.[531]

Justice Corrigan, writing for the five-judge majority, ardently maintained that the Michigan sentencing scheme differs significantly from California's determinate sentencing law.[532] Notably, the Supreme Court recognized that Michigan is an indeterminate sentencing state whereas California's sentencing scheme is determinate.[533] As such, the majority ruled that, "a sentencing court does not violate *Blakely* by engaging in judicial fact-finding to score the OV's to calculate a defendant's recommended minimum sentence range, even when the defendant's PRV score alone would have placed him in an intermediate sanction cell."[534]

Justice Kelly authored a spirited dissent.[535] In her dissent, Justice Kelly chastises the majority for, in essence, ruling that the United States Supreme Court did not understand Michigan's sentencing guideline scheme.[536] Justice Kelly stated the Michigan sentencing guidelines should be held unconstitutional as applied in the instant case.[537] Judge Kelly also indicated that the United States Supreme Court's order indicated a Sixth Amendment problem exists with Michigan's sentencing guidelines.[538]

The two companion cases to *McCuller*, *People v. Harper*[539] and *People v. Burns*[540] were consolidated for appeal.[541] Again, writing for a five-judge majority, Justice Corrigan refused to consider intermediate sanction cells as maximum sentences for purposes of *Blakely* analysis.[542] Instead, consistent with *McCuller*, the Court ruled that Michigan's indeterminate sentencing scheme uses the guidelines only to determine a potential minimum sentence.[543] Consequently, an indeterminate sanction cell did not constitute a maximum sentence for purposes of *Blakely*.[544]

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530. 530 U.S. 466 (2000).
531. *Cunningham*, 549 U.S. at 288-89.
532. *McCuller*, 479 Mich. 688, 739 N.W.2d at 572.
533. *Id.*
534. *Id.* at 686, 739 N.W.2d at 571.
535. *Id.* at 698, 739 N.W.2d at 577 (Kelly, J., dissenting).
536. *Id.* at 699, 739 N.W.2d at 577-78 (Kelly, J., dissenting).
537. *Id.* at 751, 739 N.W.2d at 606 (Kelly, J., dissenting).
538. *McCuller*, 479 Mich. at 761, 739 N.W.2d at 605-06 (Kelly, J., dissenting).
539. 479 Mich. 599, 739 N.W.2d 523 (2007), *cert. denied*, 128 S. Ct. 1444 (2008).
540. *Id.*
541. *Harper*, 479 Mich. at 603, 739 N.W.2d at 526.
542. *Id.*
543. *Id.* at 603-04, 739 N.W.2d at 526-27.
544. *Id.* at 603, 739 N.W.2d at 526.

Additionally, the Court held that even if the indeterminate sanction cell was the effective maximum, in the instant cases, the trial court's departures were based on "overwhelming evidence of such that [the court was] convinced beyond a reasonable doubt that a jury would have reached the same result."[545]

Justice Kelly again wrote a strenuous dissent.[546] Justice Kelly wrote that because the trial court's departure, with respect to Harper's sentence, was based on facts neither admitted by the defendant nor presented to a jury, the sentence violated the Sixth Amendment.[547] Finally, Justice Kelly stated, "[i]n its effort to save the Michigan sentencing guidelines, the majority fails to pay respect to the United States Supreme Court's Sixth Amendment precedent. When this precedent is properly applied, it becomes apparent that a major restructuring of Michigan's sentencing guidelines is in order."[548]

B. Guidelines

Several cases during the *Survey* period dealt with the issue of substantial and compelling reasons to depart from the sentencing guidelines. In *People v. Young*,[549] the prosecutor alleged that the trial court abused its discretion when it found substantial and compelling reasons to depart below the sentencing guidelines when imposing sentence for defendant convicted of armed robbery.[550] The court of appeals agreed and remanded the case for resentencing.[551]

In *Young*, the defendant was convicted of armed robbery.[552] The court noted that the possible maximum penalty for armed robbery is life in prison "or any term of years."[553] Additionally, the court noted that armed robbery is an offense which is subject to the applicability of the sentencing guidelines.[554] The court also reminded of the long-standing notion that trial courts "must impose a minimum sentence within the" applicable sentencing guideline range.[555] Trial courts may sentence

545. *Id.* at 604, 739 N.W.2d at 527.
546. *Id.* at 646, 739 N.W.2d at 549 (Kelly, J., dissenting).
547. *Harper*, 479 Mich. at 671, 752 N.W.2d at 563 (Kelly, J., dissenting).
548. *Id.* (Kelly, J., dissenting).
549. 276 Mich. App. 446, 740 N.W.2d 347 (2007), *appeal denied*, 480 Mich. 1076, 744 N.W.2d 167 (2008).
550. *Young*, 276 Mich. App. at 447, 740 N.W.2d at 349.
551. *Id.* at 447-48, 740 N.W.2d at 349.
552. *Id.* at 448, 740 N.W.2d at 349.
553. *Id.*
554. *Id.*
555. *Id.* (citing MICH. COMP. LAWS ANN. § 769.34(2) (West 2009); People v. Babcock, 469 Mich. 247, 666 N.W.2d 231 (2003)).

outside the applicable guideline range, but only "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure."[556]

In *Young*, the applicable guideline range for the defendant called for prison term of twenty-one to thirty-five months.[557] Due to the defendant's criminal history and the nature of the offense, the probation officer recommended the court impose a sentence of twenty-one to sixty months.[558] Despite the applicable guideline range and the probation officer's recommendation, the trial court sentenced the defendant to a nine-month jail term.[559] In support of the sentence imposed, the trial court found substantial and compelling reasons existed to justify a departure from the applicable guideline range.[560] Specifically, the trial court found the following factors: (1) "the size of the knife," (2) "defendant's lack of a criminal history" and "the fact that [he] did not commit any further offenses after the armed robbery," (3) defendant "maintained a continuous work record," (4) defendant's young age, and (5) defendant's cooperation with law enforcement.[561]

The court stated that three things that must be present to satisfy the definition of "substantial and compelling": (1) "an objective and verifiable reason that keenly or irresistibly grabs our attention," (2) "is of considerable worth in deciding the length of a sentence," and (3) "exists only in exceptional cases."[562] Finally, the court cautioned that "[t]o be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed."[563]

The court then turned to analyzing the particular factors addressed by the trial court.[564] As to the knife, the court disagreed with the trial court's conclusion that the small size of the knife presented a mitigating factor.[565] The court noted that OV 1 and OV 2 address the use of a

556. *Young*, 276 Mich. App. at 448, 740 N.W.2d at 349 (citing MICH. COMP. LAWS ANN. § 769.34(3) (West 2009)).

557. *Id.* at 449, 740 N.W.2d at 349.

558. *Id.*

559. *Id.*

560. *Id.*

561. *Id.* at 449, 740 N.W.2d at 349.

562. *Young*, 276 Mich. App. at 449-50, 740 N.W.2d at 350 (citing *Babcock*, 469 Mich. at 258, 666 N.W.2d 231 (quoting People v. Fields, 448 Mich. 58, 62, 67-68, 528 N.W.2d 176 (1995))).

563. *Id.* at 450, 740 N.W.2d at 350 (quoting People v. Havens, 268 Mich. App. 15, 17, 706 N.W.2d 210 (2005)).

564. *Id.*

565. *Id.*

weapon during the commission of the offense.[566] If a factor has already been taken into account in determining the appropriate sentence range, the court cannot use that factor as a basis for departure unless it was "given inadequate or disproportionate weight."[567] The court did not assess any points to OV 1.[568] The court properly assessed five points to OV 2 because the use of the knife.[569] This put the defendant at lowest possible level and did not affect defendant's minimum sentence.[570] Thus, the sentence cannot be considered disproportionate, and the trial court abused discretion.[571]

With respect to the defendant's criminal history, he was at lowest possible guideline range for a Class A offense.[572] Therefore, that factor was not inadequately or disproportionately considered.[573] So, it was inappropriate for consideration for substantial and compelling departure.[574]

The defendant's age and his cooperation with law enforcement were not substantial and compelling reasons, and thus could not be used to depart from the recommended guideline range.[575]

People v. Horn,[576] involved a defendant's convictions for kidnapping and sexual assault against his estranged wife.[577] The defendant objected to the trial court's upward departure from the recommended minimum sentence range because the trial court's reasons were subjective and that they were already taken into account by the guidelines.[578]

In upholding the trial court's upward departure, the court ruled that while the defendant's future dangerousness is not objective and verifiable, the facts underlying it "are not categorically excluded as proper reasons for an upward departure."[579] The court also stated that the facts in the present case indicated "the factor of repetitive acts of escalating violence against a specific victim is not adequately considered

566. *Id.*
567. *Id. See* MICH. COMP. LAWS ANN. § 769.34(3)(b) (West 2009).
568. *Young*, 276 Mich. App. at 451, 740 N.W.2d at 351.
569. *Id.* at 452, 740 N.W.2d at 351.
570. *Id.*
571. *Id.* at 452-53, 740 N.W.2d at 351.
572. *Id.* at 455, 740 N.W.2d at 352.
573. *Id.* at 455, 740 N.W.2d at 352-53.
574. *Young*, 276 Mich. App. at 455-56, 740 N.W.2d at 353.
575. *Id.* at 457-58, 740 N.W.2d at 353-54.
576. 279 Mich. App. 31, 755 N.W.2d 212 (2008), *appeal denied*, 482 Mich. 1033, 757 N.W.2d 111 (2008).
577. *Horn*, 279 Mich. App. at 32-33, 755 N.W.2d at 216.
578. *Id.* at 33, 755 N.W.2d at 216.
579. *Id.* at 45, 755 N.W.2d at 223.

by the guidelines."[580] Therefore, the court concluded that the trial court was justified in relying on "defendant's repeated criminal assault upon his wife and his relentless attempts to brutalize and kill his wife presage future violence and aggression" as factors to substantiate an upward departure.[581]

IX. DOUBLE JEOPARDY

In *People v. Smith*,[582] the Michigan Supreme Court overruled its *People v. Robideau*[583] decision.[584] It is significant to note that this is another example of the prosecutor appealing a lower court's decision that ruled in favor of upholding a defendant's constitutional rights.

In *Smith*, the "defendant was convicted of two counts of first-degree felony murder."[585] The predicate felony was larceny.[586] The defendant was also convicted of two counts of armed robbery[587] and four counts of possession of a firearm during the commission of a felony.[588] The court of appeals agreed with the defendant's assertion that his convictions for both felony murder and armed robbery violated his protection against double jeopardy.[589]

The Michigan Supreme Court held that "*Blockburger* sets forth the proper test to determine when multiple punishments are barred on double jeopardy grounds.[590] The Court stated that "[b]ecause each of the crimes for which defendant here was convicted, first-degree felony murder and armed robbery, has an element that the other does not, they are not the 'same offense.'"[591] Therefore, the Court concluded that the "defendant may be punished for each" offense.[592]

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580. *Id.* at 46-47, 755 N.W.2d at 223.
581. *Id.* at 47, 755 N.W.2d at 224.
582. 478 Mich. 292, 733 N.W.2d 351 (2007).
583. 419 Mich. 458, 355 N.W.2d 592 (1984).
584. *Smith*, 478 Mich. at 324, 733 N.W.2d at 368.
585. *Id.* at 352, 733 N.W.2d at 295. *See* MICH. COMP. LAWS ANN. § 750.316(1)(b) (West 2009).
586. *Smith*, 478 Mich. at 352, 733 N.W.2d at 295.
587. *Id. See* MICH. COMP. LAWS ANN. § 750.529 (West 2009).
588. *Smith*, 478 Mich. at 352, 733 N.W.2d at 295. *See* MICH. COMP. LAWS ANN. § 750.227b (West 2009).
589. *Smith*, 478 Mich. at 353, 733 N.W.2d at 295.
590. *Id.* at 353, 733 N.W.2d at 296.
591. *Id.*
592. *Id.*

Justice Kelly and Justice Cavanagh each wrote a dissenting opinion.[593] In particular, Justice Kelly assessed that the majority was chipping away at the protections provided by the Double Jeopardy Clause of the Michigan Constitution.[594]

Justice Kelly concluded that insufficient evidence existed at trial to establish that the defendant committed separate larceny and armed robbery offenses.[595]

A few months later, the Michigan Court of Appeals had the opportunity to apply the "same element" double jeopardy test adopted in *People v. Smith* by the Michigan Supreme Court in *People v. Chambers*.[596] In *Chambers*, the defendant claimed that his convictions, and respective sentences for armed robbery and felonious assault violated his protections against double jeopardy.[597] Although the court acknowledged that the constitutional provisions that protect against double jeopardy preclude a defendant from being punished multiple times for the same offense,[598] the court found that the defendant could be punished for both armed robbery and felonious assault.[599]

Michigan has adopted the *Blockburger v. United States*[600] test as the appropriate test for double jeopardy analysis.[601] According to *Blockburger*, two offenses are not the "same offense," for purposes of a double jeopardy analysis "if each requires proof of an element that the other does not."[602]

The court examined the elements of armed robbery and felonious assault.[603] The court determined that the elements of armed robbery are that the defendant used force or violence or assaulted or put someone in fear while committing a larceny of any money or other property, and that

> the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably

593. *Id.* at 331, 733 N.W.2d at 371 (Kelly, J., dissenting); *id.* at 325, 733 N.W.2d at 368 (Cavanagh, J., dissenting).

594. *Id.* at 331, 733 N.W.2d at 371-72 (Kelly, J., dissenting).

595. *Smith*, 478 Mich. at 331, 733 N.W.2d at 372.

596. 277 Mich. App. 1, 742 N.W.2d 610.

597. *Id.* at 2, 742 N.W.2d at 612.

598. *Id.* at 4-5, 742 N.W.2d at 613.

599. *Id.* at 11-12, 742 N.W.2d at 616.

600. 284 U.S. 299 (1932).

601. *Smith*, 478 Mich. at 324, 733 N.W.2d at 368.

602. *Chambers*, 277 Mich. App. at 5, 742 N.W.2d at 613 (quoting *Blockburger*, 284 U.S. at 300, 307.

603. *Id.* at 6-8, 742, N.W.2d at 613-14.

> believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon.[604]

The court stated that "the elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery."[605] Although these crimes share similar elements, the court concluded they are not the same offense because they each contain an element that the other does not.[606] Notably, armed robbery requires an element pertaining to larceny that felonious assault does not and felonious assault requires an element pertaining to the use of a dangerous weapon that armed robbery does not.[607] Consequently, the court concluded that the defendant's convictions and relative sentences for the crimes of armed robbery and felonious assault did not violate the protection against double jeopardy.[608]

X. CONCLUSION

During the *Survey* period, prosecutors continued to consistently and methodically appeal lower court decisions that suppressed evidence based on constitutional violations. Prosecutors achieved great success in their effort to minimize the applicability of the exclusionary rule to constitutional violations. This prosecutorial activity was met with well-received enthusiasm by majorities of both the Michigan Court of Appeals and the Michigan Supreme Court. Both courts continued their recent trend in aligning Michigan law more succinctly to federal precedent.

However, in light of the strenuous dissents authored by Justices Kelly and Cavanagh in several of the *Survey* cases, the trend to limit constitutional protections and to minimize the applicability of the exclusionary rule may be in for a substantial overhaul given that Justice Kelly has replaced Justice Taylor as Chief Judge.

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604. *Id.* at 7, 742 N.W.2d at 614. The court stated that "the elements arise from a plain reading of the statutes when MCL 750.529 and MCL 750.530 are read in conjunction." *Id.* at 8, 742 N.W.2d at 614.

605. *Id.* at 8, 742 N.W.2d at 615 (citing People v. Avant, 235 Mich. App. 499, 505, 597 N.W.2d 864, 869 (1999).

606. *Id.* at 8-9, 742 N.W.2d at 615.

607. *Id.*

608. *Chambers*, 277 Mich. App. at 9, 742 N.W.2d at 615.