

Appeals & Opinions Benchbook

*Content formerly part of the original MJI Circuit Court
Benchbook*



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Michigan Supreme Court

- The Honorable Bridget Mary McCormack, *Chief Justice*
- The Honorable David F. Viviano, *Chief Justice Pro Tem*
- The Honorable Elizabeth T. Clement, *MJI Supervising Justice*
- The Honorable Stephen J. Markman, the Honorable Brian K. Zahra, the Honorable Richard H. Bernstein, and the Honorable Megan K. Cavanagh, *Justices*
- The Honorable Milton L. Mack, Jr., *State Court Administrator*
- Mr. Thomas P. Clement, *Supreme Court General Counsel*
- Mr. Larry S. Royster, *Supreme Court Chief of Staff*

Michigan Judicial Institute Staff

- Dawn F. McCarty, *Director*
- Alessa Boes, *Research Attorney Specialist*
- Amanda Clark, *Judicial Education Analyst*
- Anne M. DeMarco, *Program Assistant*
- Rachael Drenovsky, *Learning Center Coordinator*
- Amy Feinauer, *Program Assistant*
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- Corrie S. Schmidt-Parker, *Research Attorney*
- Danielle Stackpole, *Research Attorney*
- Peter C. Stathakis, *Program Manager*
- Cathy Weitzel, *Training & Development Specialist*

Statements in this benchbook represent the professional judgment of the author and are not intended to be authoritative statements by the justices of the Michigan Supreme Court. This benchbook was created in 2013 from material that was initially published in 2009. The text has been revised, reordered, and updated through September 18, 2019.

Note on Precedential Value

“A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this court rule.” [MCR 7.215\(J\)\(1\)](#).

Several cases in this book have been reversed or overruled in part and/or to the extent that they contained a specific holding on one issue or another. Generally, trial courts are bound by decisions of the Court of Appeals “until another panel of the Court of Appeals or [the Supreme] Court rules otherwise[.]” *In re Hague*, 412 Mich 532, 552 (1982). While a case that has been fully reversed or overruled is no longer binding precedent, it is less clear when an opinion is not reversed or overruled in its entirety. Some cases state that “an overruled proposition in a case is no reason to ignore all other holdings in the case.” *People v Carson*, 220 Mich App 662, 672 (1996). See also *Stein v Home-Owners Ins Co*, 303 Mich App 382, 389 (2013) (distinguishing between reversals in their entirety and reversals in part). But see *Dunn v Detroit Inter-Ins Exch*, 254 Mich App 256, 262 (2002), citing [MCR 7.215\(J\)\(1\)](#) and stating that “a prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” See also *People v James (Joel)*, 326 Mich App 98 (2018) (citing *Dunn* and [MCR 7.215\(J\)\(1\)](#) and stating that the decision, “*People v Crear*, 242 Mich App 158, 165-166 (2000), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008), . . . [was] not binding”). Note that *Stein* specifically distinguished its holding from the *Dunn* holding because the precedent discussed in *Dunn* involved a reversal in its entirety while the precedent discussed in *Stein* involved a reversal in part.

The Michigan Judicial Institute endeavors to present accurate, binding precedent when discussing substantive legal issues. Because it is unclear how subsequent case history may affect the precedential value of a particular opinion, trial courts should proceed with caution when relying on cases that have negative subsequent history. The analysis presented in a case that is not binding may still be persuasive. See generally, *Dunn*, 254 Mich App at 264-266.

Acknowledgments

The *Appeals & Opinions Benchbook* derives from the *Michigan Circuit Court Benchbook: Civil Proceedings* and *Michigan Circuit Court Benchbook: Criminal Proceedings*, and contains much of the information that was previously found in the first and last chapters of those publications. The *Michigan Circuit Court Benchbook* was originally authored by Judge J. Richardson Johnson, 9th Circuit Court. In 2009, the *Michigan Circuit Court Benchbook* was revised and broken into three volumes: *Circuit Court Benchbook: Civil Proceedings—Revised Edition*; *Circuit Court Benchbook: Criminal Proceedings—Revised Edition*; and *Evidence Benchbook*. The three volumes were revised by MJI Research Attorneys Sarah Roth and Lisa Schmitz.

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Chapter 1: General Appellate Issues

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1.1 Basis for Parties' Positions

A. Party Must State Basis For Claim

“A party may not merely state a position and then leave it to [the reviewing court] to discover and rationalize the basis for the claim.” *People v Milstead*, 250 Mich App 391, 408 n 8 (2002), quoting *People v Mackle*, 241 Mich App 583, 604 n 4 (2000).

B. Party Must Provide Record Supporting Claim

“It is the appellant’s obligation to secure the complete transcript of all proceedings in the lower court unless production of the full transcript is excused by order of the trial court or by stipulation of the parties. [The Michigan] Court [of Appeals] limits its review to the record provided on appeal and will not consider any alleged evidence or testimony that is not supported by the record presented to the Court for review.” *Admiral Ins v Columbia Cas Ins*, 194 Mich App 300, 305 (1992).

1.2 Doctrines of Collateral Estoppel, Res Judicata, and Law of the Case

A. Collateral Estoppel¹

Collateral estoppel refers to “issue preclusion,” and “precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined.” *People v Gates (Gregory)*, 434 Mich 146, 154 n 7 (1990); *Topps Toeller, Inc v Lansing*, 47 Mich App 720, 727 (1973) (collateral estoppel “bars the relitigation of issues previously decided when such issues are raised in a subsequent suit by the same parties based upon a different cause of action). “Generally, the proponent of the application of collateral estoppel must show ‘that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.’” *People v Trakhtenberg*, 493 Mich 38, 48 (2012), quoting *Estes v Titus*, 481 Mich 573, 585 (2008). See also *Monat v State Farm Ins Co*, 469 Mich 679, 682-684 (2004).

¹ For discussion of the “rule of mandate,” which requires a lower court to strictly comply with the scope of an appellate remand order, see [Section 1.6\(B\)](#).

“[T]he common ultimate issues ‘must be identical, and not merely similar,’ and additionally ‘must have been both actually and necessarily litigated.’” *People v Zitka*, 325 Mich App 38, 45 (2018), quoting *Rental Props Owners Ass’n of Kent Co v Kent Co Treas*, 308 Mich App 498, 529 (2014). In addition, collateral estoppel requires “the same parties, or parties in privy” to have a full and fair opportunity to litigate the issue. *Zitka*, 325 Mich App at 46. “A party is one who was directly interested in the subject matter and had a right to defend or to control the proceedings and to appeal from the judgment, while a privy one is one who, after the judgment, has an interest in the matter affected by the judgment through one of the parties[.]” *Rental Props Owners Ass’n of Kent Co*, 308 Mich App at 529-530. Further, collateral estoppel does not apply where the purposes of the two proceedings are “so fundamentally different that application of collateral estoppel would be contrary to sound public policy.” *Gates*, 434 Mich at 161.

“[C]ollateral estoppel ‘must be applied so as to strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a *full and fair* adjudication of the issues involved in their claims.’” *Trakhtenberg*, 493 Mich at 50, quoting *Storey v Meijer, Inc*, 431 Mich 368, 372 (1988).²

Criminal Prosecutions and Double Jeopardy. “In criminal prosecutions, as in civil litigation, the issue-preclusion [component of the Double Jeopardy Clause] means that ‘when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.’” *Bravo-Fernandez v United States*, 580 US ___, ___ (2016), quoting *Ashe v Swenson*, 397 US 436, 443 (1970). “Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally[.]” and “[i]n order for collateral estoppel to operate as a bar to a subsequent prosecution, the jury in the earlier [] proceeding must *necessarily* have determined that [the] defendant was not guilty of the [crime] charged in the prosecutor’s complaint.” *Gates (Gregory)*, 434 Mich at 158. “Particularly where it appears that a jury’s verdict is the result of compromise, compassion, lenity, or misunderstanding of the governing law, the Government’s inability to gain [appellate] review ‘strongly militates against giving an acquittal [issue] preclusive effect.’” *Bravo-Fernandez*, 580 US at ___ (citation omitted; second alteration in original). “The inability of a court to determine upon what basis an acquitting jury reached its verdict, is, by itself, enough to preclude the defense of collateral estoppel.” *Gates (Gregory)*, 434 Mich at 158. “The verdict in the first

² For more information on collateral estoppel as it relates to civil cases, see the Michigan Judicial Institute’s [Civil Proceedings Benchbook](#), Chapter 2.

proceeding need not explicitly have addressed the issue to be precluded, however. The fact that a verdict is a general verdict may make the determination of what issues have been decided problematic, but it does not automatically bar the application of collateral estoppel." *Id.*, citing *Ashe*, 397 US at 444.

"[A]n appellate court's vacatur of a conviction [does not] alter[] issue-preclusion analysis under the Double Jeopardy Clause[;]" accordingly, if "a jury returns inconsistent verdicts, convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact[,] and an appellate court vacates the conviction for legal error unrelated to the verdicts' inconsistency, retrial on the charge resulting in conviction is not barred by the Double Jeopardy Clause "when [the] verdict inconsistency renders unanswerable 'what the jury necessarily decided.'" *Bravo-Fernandez*, 580 US at ___ (citation omitted). Accordingly, where the jury returned inconsistent verdicts by convicting the petitioners of bribery but acquitting them of two related charges that were dependent on the standalone bribery offense and turned on the same contested issue of fact, the issue-preclusion component of the Double Jeopardy Clause did not bar a subsequent prosecution for bribery after the appellate court vacated the bribery convictions for instructional error. *Id.* at ___. Under these circumstances, the petitioners could not "establish the factual predicate necessary to preclude the Government from retrying them on the standalone [bribery] charges—namely, that the jury in the first proceeding actually decided that they did not violate the federal bribery statute." *Id.* at ___, ___ n 6, abrogating *People v Wilson (Dwayne)*, 496 Mich 91, 105-107 (2014) (which held that the collateral-estoppel strand of Double Jeopardy Clause jurisprudence barred retrial for felony murder where the defendant was convicted of felony murder but inconsistently acquitted of the only underlying felony supporting the felony murder charge, and the felony murder conviction was reversed on appeal for legal error).³

Cross-Over Estoppel. Cross-over estoppel is "the application of collateral estoppel in the civil-to-criminal context." *Zitka*, 325 Mich App at 45, quoting *Trakhtenberg*, 493 Mich at 48. "[I]n the body of case law applying [the] principle [of collateral estoppel,] the vast majority of cases involve the applicability of collateral estoppel where there are two civil proceedings. Cases involving 'cross-over estoppel,' where an issue adjudicated in a civil proceeding is claimed to be precluded in a subsequent criminal proceeding, or vice versa, are relatively recent and rare." *Gates (Gregory)*, 434 Mich at 155. Although the Supreme Court "has recognized the

³ For additional discussion of double jeopardy, see the Michigan Judicial Institute's [Criminal Proceedings Benchbook, Vol. 1](#), Chapter 9.

application of collateral estoppel in the civil-to-criminal context,” it “has cautioned *against* its use.” *People v Ali*, ___ Mich App ___, ___ (2019) (quotation marks and citation omitted).

In *Gates (Gregory)*, 434 Mich at 150-151, 165, the Michigan Supreme Court held that because the defendant’s guilt or innocence was not necessarily determined by a jury verdict of “no jurisdiction” in a child protective proceeding, the doctrine of collateral estoppel did not preclude the subsequent criminal prosecution of the defendant for criminal sexual conduct. “Although varying individual constitutional interests are at stake in [criminal and child protective] proceedings, it nevertheless remains true that these proceedings are fundamentally different: one is civil, the other criminal; they both serve different purposes and implicate different state interests . . .; each involves different burdens of proof and different procedural requirements; and criminal proceedings tend to be more adversarial in nature.” *Ali*, ___ Mich App at ___. Applying the rationale set forth in *Gates*, the *Ali* Court concluded that “factual findings made by a court in a child protective proceeding do not have collateral estoppel effect in a subsequent criminal proceeding.” *Id.* at ___.

In *Trakhtenberg*, 493 Mich at 42, 48-51, the Michigan Supreme Court held that “[‘cross-over’] collateral estoppel [could not] be applied to preclude review of a criminal defendant’s claim of ineffective assistance of counsel when a prior civil judgment held that defense counsel’s performance did not amount to malpractice,” because “[the] defendant did not have a full and fair opportunity to litigate his [ineffective assistance of counsel] claim in the [prior] malpractice proceeding.” Noting that “[s]everal Court of Appeals opinions have held that a criminal defense attorney may rely on the doctrine of collateral estoppel in order to avoid malpractice liability when a full and fair determination was made in a previous criminal action that the same client had received effective assistance of counsel,”⁴ the *Trakhtenberg* Court stated that it nevertheless “must hesitate to apply collateral estoppel . . . when the government seeks to apply collateral estoppel to preclude a *criminal* defendant’s claim of ineffective assistance of counsel in light of a prior *civil* judgment that defense counsel did not commit malpractice.” *Id.* at 48.

The trial court abused its discretion in granting the defendants’ motion to quash on the basis of collateral estoppel because the legality of the defendants’ actions under state criminal law was not actually litigated in the prior civil litigation involving compliance with local ordinances. *Zitka*, 325 Mich App at 46, 47. Additionally, the criminal action did not involve the same parties or privity

⁴ “See, e.g., *Barrow v Pritchard*, 235 Mich App 478, 484-485 (1999).” *Trakhtenberg*, 493 Mich at 48.

because the state lacked a protectable interest in a civil action brought under local ordinance. *Id.* at 46, 47.

B. Res Judicata⁵

Res judicata refers to “claims preclusion,” which covers the preclusive effect of a judgment upon a subsequent proceeding on the basis of the same cause of action.” *Gates (Gregory)*, 434 Mich at 154 n 7; *Topps Toeller, Inc*, 47 Mich App at 727 (res judicata “bars the reinstatement of the same cause of action by the same parties in a subsequent suit”).

In a criminal proceeding, “dismissal of a prosecution at a preliminary examination raises no bar under res judicata . . . to a subsequent prosecution.” *People v Hayden*, 205 Mich App 412, 414 (1994).

C. Law of the Case

“The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case.” *Ashker v Ford Motor Co*, 245 Mich App 9, 13 (2001) (internal citation omitted). See also *Zaremba Equip, Inc v Harco Nat’l Ins Co*, 302 Mich App 7, 16 (2013), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454 (1981) (“if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same”). “The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” *Ashker*, 245 Mich App at 13. Law of the case accords “finality to the litigated issues until the cause of action is fully litigated, including retrials or appeals, and the superseding doctrines of res judicata and collateral estoppel become effective.” *Topps-Toeller, Inc, v Lansing*, 47 Mich App 720, 729 (1973).

“[C]ourts have some discretion when applying the law-of-the-case doctrine under certain circumstances.” *Ingham Co v Mich Co Rd Comm Self-Ins Pool (On Remand)*, ___ Mich App ___, ___ (2019). See, e.g., *Locricchio v Evening News Ass’n*, 438 Mich 84, 109-110 (1991)

⁵ For more information on res judicata as it relates to civil cases, see the Michigan Judicial Institute’s [Civil Proceedings Benchbook](#), Chapter 2.

(noting that there are instances where “the law of the case doctrine must yield to a competing doctrine”); *People v Phillips (After Second Remand)*, 227 Mich App 28, 34 (1997) (“declin[ing] to apply a doctrine designed for judicial convenience in fairly administering the obligation to do justice so as to work an injustice”). “[T]he doctrine does not preclude reconsideration of a question if there has been an intervening change of law. For this exception to apply, the change of law must occur after the initial decision of the appellate court.” *Ashker*, 245 Mich App at 13 (internal citation omitted).

“[T]he law-of-the-case doctrine [does] not apply to claims that were not decided on the merits[.]” *Brownlow v McCall Enterprises, Inc*, 315 Mich App 103, 112 (2016). Therefore, “the law of the case doctrine does not apply [to] prior orders denying leave to appeal [that] were not rulings on the merits of the issues presented.” *People v Poole*, 497 Mich 1022, 1022 (2015). See also *Lawrence v 48th Dist Ct*, 560 F3d 475, 479 (CA 6, 2009) (noting that “[u]nder Michigan law, a court can consider itself bound by a decision rendered in the denial of a leave to appeal as law of the case where the denial of the leave to appeal came on the merits of the case”). Additionally, “[w]here an order of summary [disposition] is reversed and the case is returned for trial because an issue of material fact exists, the law of the case doctrine does not apply to the second appeal because the first appeal was not decided on the merits.” *Brownlow*, 315 Mich App at 112, quoting *Borkus v Mich Nat’l Bank*, 117 Mich App 662, 666 (1982). However, “application of the law-of-the-case doctrine [is not barred] whenever there is a grant of summary disposition based on the presence of factual questions[.]” *Brownlow*, 315 Mich App at 113 (holding that where the Court of Appeals “previously ruled there was sufficient evidence of causation to go to a jury,” “the law-of-the-case doctrine applie[d] to the issue of causation,” and “the trial court [on remand] erred by holding that defendant could seek summary disposition regarding causation”) (citations omitted; emphasis added).

The law of the case doctrine does not apply to trial courts. *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 52-53 (2005) (trial court possessed unrestricted discretion in reviewing prior decisions made by the court). The doctrine also does not apply to arbitration proceedings. *Cipriano v Cipriano*, 289 Mich App 361, 375 (2010).

A party’s assertion that an appellate court’s prior decision was wrong “is not sufficient [reason] to justify ignoring the law-of-the-case doctrine[.]” *Ingham Co*, ___ Mich App at ___. While the law of the case doctrine generally applies without regard to whether a prior determination was correct, “in criminal cases, a trial court retains the power to grant a new trial at any time where ‘justice has not been done.’” *People v Herrera (On Remand)*, 204 Mich App 333,

340 (1994), quoting [MCL 770.1](#). “[I]n criminal cases the law of the case doctrine does not automatically doom the defendant’s arguments or automatically render them frivolous and worthy of sanctions.” *Herrera*, 204 Mich App at 341.

Under the law of the case doctrine, “the trial court may not take action that is inconsistent with the judgment of th[e Court of Appeals],” and “[w]here the trial court misapprehends the law to be applied, an abuse of discretion occurs.” *Augustine v Allstate Ins Co*, 292 Mich App 408, 425 (2011), quoting *Bynum v ESAB Group, Inc*, 467 Mich 280, 283 (2002) (trial court abused its discretion where it misapprehended the law to be applied, its action was inconsistent with the Court of Appeals’ remand directive, and it failed to properly apply case law as explicitly directed by the Court of Appeals).⁶

Standard of Review. Whether the law of the case doctrine applies is a question of law subject to de novo review. *Ashker*, 245 Mich App at 13.

1.3 Establishing a Record for Review

A. Bench Trial

“In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” [MCR 2.517\(A\)\(1\)](#).

“Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.” [MCR 2.517\(A\)\(2\)](#). Findings of fact are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. *People v Legg*, 197 Mich App 131, 134-135 (1992); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176 (1995).

“The court may state the findings and conclusions on the record or include them in a written opinion.” [MCR 2.517\(A\)\(3\)](#).

Committee Tip:

Knowing the applicable law makes finding the relevant facts easier. Consider ordering counsel to provide proposed findings of fact and

⁶ For discussion of the “rule of mandate,” which is similar to, but distinct from, the law of the case doctrine, and which requires a lower court to strictly comply with the scope of an appellate remand order, see [Section 1.6\(B\)](#).

conclusions of law before the trial. Utilize the jury instructions for the conclusions of law. It is also useful to state what is not at issue.

In a criminal bench trial, while it is unnecessary for “[t]he court [to] make specific findings of fact regarding each element of the [charged] crime, *Legg*, 197 Mich App at 134, the court’s opinion should “manifest[] a finding” that a criminal defendant committed the charged crime. *People v Davis (Melvin)*, 146 Mich App 537, 550-551 (1985). “A trial judge may not go outside the record in hearing a case . . . [and] can assume no greater prerogatives than if a jury were impaneled to determine the facts.” *People v Grable*, 57 Mich App 184, 186 (1974). A trial judge’s findings and verdict must be consistent; waiver breaks (in a bench trial, a trial judge acquitting a defendant of a charge despite being convinced of guilt beyond a reasonable doubt as to that charge as a reward for waiving a jury trial), are impermissible. *People v Ellis (Tyrone)*, 468 Mich 25, 26-28 (2003).

“[N]either party to a criminal case may effectively waive the requirement that the trial court find the facts specially and state separately its conclusions of law” *People v Smith (Keith)*, 101 Mich App 110, 117 (1980).

B. Required Findings of Fact/Conclusions of Law in Criminal Cases

“Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule.” [MCR 2.517\(A\)\(4\)](#).

Specific rules that impose a “finding” requirement include, but are not limited to:

- **Joint representation of criminal defendants**—[MCR 6.005\(F\)\(3\)](#) (“[t]he court may not permit the joint representation unless [it] finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding”).
- **Directed verdict of acquittal**—[MCR 6.419\(F\)](#) (“[t]he court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal”).
- **Motion for a new trial**—[MCR 6.431\(B\)](#) (“[t]he court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record”).

- **Probation revocation hearings**—[MCR 6.445\(E\)\(2\)](#) (“[a]t the conclusion of the hearing the court must make findings in accordance with [MCR 6.403](#)”).

Other instances in which fact-finding is necessary include, but are not limited to:

- **Impeachment by evidence of conviction of crime**—[MRE 609\(b\)](#) (“[t]he court must articulate, on the record, the analysis of each factor”).
- **Testimony by experts**—[MRE 702](#) (“[i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify . . .”). Trial judges are required to act as gatekeepers and must exclude unreliable expert testimony. Staff Comment to 2004 Amendment to [MRE 702](#).
- **Deviating from the Legislative Sentencing Guidelines**—*People v Lockridge*, 498 Mich 358, 392 (2015)⁷ (in order to facilitate appellate review for reasonableness, the court must justify any sentence imposed outside the advisory minimum guidelines range).
- **Batson**⁸ **challenges**—*People v Bell (Marlon)*, 473 Mich 275, 300 (2005) (“trial courts are well advised to articulate and thoroughly analyze each of the three steps set forth in *Batson* . . . in determining whether peremptory challenges were improperly exercised”).
- **Walker hearings**—*People v Walker (Lee)*, 374 Mich 331, 338 (1965) (“the trial judge, on the basis of [a] separate hearing and record made, determines [whether the defendant’s] confession was . . . voluntarily given”)⁹.
- **Wade**¹⁰ **hearings**—*People v Kachar*, 400 Mich 78, 97 (1977) (“the trial court must state on the record the reasons for determining whether the prosecution has established by

⁷ Previously, sentencing courts were required to articulate “a substantial and compelling reason” to depart from the sentencing guidelines range. [MCL 769.34\(3\)](#). However, in 2015, the Michigan Supreme Court held that “Michigan’s sentencing guidelines . . . [are] constitutionally deficient[]” and “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in [MCL 769.34\(3\)](#).” *Lockridge*, 498 Mich at 364, 391. For discussion of *Lockridge*, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 6.

⁸ *Batson v Kentucky*, 476 US 79 (1986). See the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 1*, Chapter 12, for more information on *Batson*.

⁹ See the Michigan Judicial Institute’s *Evidence Benchbook*, Chapter 3, for more information on *Walker* hearings.

¹⁰ *United States v Wade (Billy)*, 388 US 218 (1967). See the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9, for more information on in-court identification.

clear and convincing evidence that the in-court identification has a sufficient independent basis to purge the taint caused by the illegal confrontation”).

- ***Ginther* hearings**—*People v Ginther*, 390 Mich 436, 441-442 (1973) (“[w]hen a defendant asserts that his assigned lawyer is not adequate or diligent or . . . that his lawyer is disinterested, the judge should hear [the] claim and, if there is a factual dispute, take testimony and state his findings and conclusion”) ¹¹.
- **Entrapment hearings**—*People v Juillet*, 439 Mich 34, 61 (1991) (“when the defense of entrapment is raised, the trial court must conduct an evidentiary hearing outside the presence of the jury . . . [and] must make specific findings of fact on the entrapment issue”) ¹².

C. Required Findings of Fact/Conclusions of Law in Civil Cases

“Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule.” [MCR 2.517\(A\)\(4\)](#).

Specific rules that impose a “finding” requirement include, but are not limited to:

- Order for adjournment—[MCR 2.503\(D\)\(1\)](#) (“the [court’s] written or oral] order must state the reason for the adjournment”)
- Involuntary dismissal—[MCR 2.504\(B\)\(2\)](#) (“[i]f the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in [MCR 2.517](#)”)
- Jury instructions—[MCR 2.512\(D\)\(3\)](#) (where the Committee on Model Civil Jury Instructions or the Committee on Model Criminal Jury Instructions recommends that no instruction be given, “the court shall not give an instruction unless it specifically finds for reasons stated on the record that (a) the instruction is necessary to state the applicable law correctly, and (b) the matter is not adequately covered by other pertinent model jury instructions[.]”)

¹¹ See the Michigan Judicial Institute’s [Criminal Proceedings Benchbook, Vol. 3](#), Chapter 1, for more information on *Ginther* hearings.

¹² See the Michigan Judicial Institute’s [Criminal Proceedings Benchbook, Vol. 1](#), Chapter 10, for more information on entrapment hearings.

- Motion for a new trial—[MCR 2.611\(F\)](#) (“[t]he court shall give a concise statement of the reasons for the ruling, either in an order or opinion filed in the action or on the record”)
- Hearings and trials—[MCR 3.210\(D\)](#) (“the court must make findings of fact as provided in [MCR 2.517](#), except that (1) findings of fact and conclusions of law are required on contested postjudgment motions to modify a final judgment or order; and (2) the court may distribute pension, retirement, and other deferred compensation rights with a qualified domestic relations order, without first making a finding with regard to the value of those rights”)
- Determining interests in land—[MCR 3.411\(D\)](#) (“the court shall make findings determining the disputed rights in and title to the premises”) and [MCR 3.411\(E\)](#) (“the court shall hear evidence and make findings, determining the value of the use of the premises”)

Other instances in which fact-finding is necessary include, but are not limited to:

- Impeachment by evidence of conviction of crime—[MRE 609\(b\)](#) (“[t]he court must articulate, on the record, the analysis of each factor”)
- Testimony by experts—[MRE 702](#) (“[i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify”). Trial judges are required to act as gatekeepers and must exclude unreliable expert testimony. Staff Comment to 2004 Amendment to [MRE 702](#).
- Contempt proceedings—*In re Contempt of Calcutt*, 184 Mich App 749, 758 (1990) (“[s]ince civil contempt actions are tried by the court without a jury, [the court] must make findings of fact, state its conclusions of law, and direct entry of the appropriate judgment”)

D. On Remand

“The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just:

“(5) remand the case to allow additional evidence to be taken[.]” [MCR 7.216\(A\)\(5\)](#).

“The Supreme Court may, at any time, in addition to its general powers[,] . . . enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require[.]” [MCR 7.316\(A\)\(7\)](#). See *People v Thompson (Jerry)*, 431 Mich 853, 854 (1988) (Supreme Court remanded case to circuit court for a hearing on the defendant’s *Batson* claim).

Committee Tip:

Be sure to answer the questions presented in remand orders.

1.4 Judicial Discretion

Many decisions of a judge are discretionary, and are reviewed for an abuse of that discretion. It is prudent for the judge to recognize his or her discretion when making those types of decisions. “At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.” *People v Babcock*, 469 Mich 247, 269 (2003). “When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court’s judgment.” *Id.* at 269. “An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes.” *Id.*

1.5 Precedent

A. Vertical Stare Decisis

“The doctrine of vertical stare decisis . . . is the doctrine that a court must strictly follow decisions handed down by higher courts within the same jurisdiction.” *In re AGD*, ___ Mich App ___, ___ (2019) (punctuation marks, quotation marks, and citation omitted). Where the Legislature amends a statutory provision, the Michigan Court of Appeals “remains bound to follow the Supreme Court’s interpretation of [the] since-amended statute if the intervening amendment merely ‘undermined’ the foundations of the Supreme Court’s prior decision, but not if the intervening amendment ‘clearly . . . superseded’ the Supreme Court’s interpretation.” *Id.* at ___. Where the “Legislature has entirely repealed or amended a statute

to expressly repudiate a court decision, . . . lower courts have the power to make decisions without being bound by prior cases that were decided under the now-repudiated previous positive law." *Id.* at ___, quoting *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191 n 32 (2016). However, "where the operative statutory language interpreted by the Supreme Court in the previous case remains the same after amendment, the intervening amendment of the statute does not clearly overrule or supersede the Supreme Court's prior interpretation." *In re AGD*, ___ Mich App at ___.

B. Michigan Supreme Court

A Supreme Court decision is controlling if it is the decision of a majority of the justices who were sitting on the case. *Negri v Slotkin*, 397 Mich 105, 110 (1976). "Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation." *Id.* at 109.

Michigan Supreme Court orders "constitute binding precedent to the extent they can be understood as having a holding based on discernible facts and reasoning." *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 219 (2013); see also *People v Giovannini*, 271 Mich App 409, 414 (2006). Furthermore, if a Michigan Supreme Court order "can be understood as adopting the reasoning of [a] dissenting opinion from [the Court of Appeals,] . . . that dissent consequently constitutes binding precedent despite originally having been unpublished and not binding pursuant to [MCR 7.215\(C\)\(1\)](#)." *Tyra*, 302 Mich App at 219.

C. Michigan Court of Appeals

"A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." [MCR 7.215\(C\)\(2\)](#). "The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." *Id.*

"An unpublished opinion [of the Court of Appeals] is not precedentially binding under the rule of stare decisis." [MCR 7.215\(C\)\(1\)](#). However, if a Michigan Supreme Court order "can be understood as adopting the reasoning of [a] dissenting opinion from [the Court of Appeals,] . . . that dissent consequently constitutes binding precedent despite originally having been unpublished and not binding pursuant to [MCR 7.215\(C\)\(1\)](#)." *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 219 (2013).

“A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.” [MCR 7.215\(J\)\(1\)](#).

“[W]hen the relevant language of a statute is amended, future panels are bound to hold that [MCR 7.215\(J\)](#) does not require them to adhere to earlier opinions that interpreted the pre-amendment version of the statute.” *People v Williams (Zachary)*, 298 Mich App 121, 126 (2012).

D. Circuit Court

A circuit court is not bound by the decision of another circuit court. *People v Hunt*, 171 Mich App 174, 180 (1988).

E. United States Supreme Court

“[S]tate courts are bound by United States Supreme Court decisions construing federal law” *People v Gillam*, 479 Mich 253, 261 (2007). However, a United States Supreme Court decision that is “‘based on federal evidentiary grounds[.]’ . . . is not binding on [state courts].” *People v Clary*, 494 Mich 260, 271 n 7 (2013), quoting *Jenkins v Anderson*, 447 US 231, 237 n 4 (1980), and citing *People v Finley*, 431 Mich 506, 514 (1988).

F. Sixth Circuit Court of Appeals

State courts are not bound by the decisions of lower federal courts construing federal law, and Michigan courts are free to follow or reject their authority. *Gillam*, 479 Mich at 261. See *People v James (Derrick)*, 267 Mich App 675, 680 n 1 (2005) (“[w]e acknowledge the contrary holding of the United States Court of Appeals for the Sixth Circuit . . . [h]owever, we are not bound to follow decisions of federal courts of appeals . . . and we find the Sixth Circuit’s analysis unconvincing”).

G. Attorney General

An attorney general’s opinion is not binding authority. *People v Kildow*, 99 Mich App 446, 449 (1980); however, it can constitute persuasive authority. *Risk v Lincoln Charter Twp Bd of Trustees*, 279 Mich App 389, 398 (2008).

H. Dicta

Obiter dicta means “any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved [or] essential to determination of the case.” *People v Case*, 220 Mich 397, 382-383 (1922). “[O]biter dicta lacks the force of an adjudication and is not binding under the principle of stare decisis.” *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4 (1999).

“Addressing an alternative argument is, in fact, necessary to the disposition of a case and consequently is not obiter dictum.” *People v Jones (Melody)*, 300 Mich App 652, 657 (2013), vacated in part on other grounds 497 Mich 884, 884-885 (2014).¹³

I. Retroactivity of Judicial Decisions

“The general rule in Michigan is that judicial decisions are given complete retroactive effect.” *People v Houlihan*, 474 Mich 958, 959 (2005). “Prospective application is given only to decisions that overrule clear and uncontradicted case law.” *Id.* at 959; see also *People v Johnson (Barbara)*, 302 Mich App 450, 464 (2013). Moreover, “cases that properly interpret statutes, even if prior [caselaw] had held differently, ‘restore[] legitimacy to the law’ and, thus, are ‘not a declaration of a new rule, but . . . a vindication of controlling legal authority[.]’” *Richard v Schneiderman & Sherman, PC*, 294 Mich App 37, 40 (2011), quoting *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 222 (2007) and vacated on other grounds 490 Mich 1001 (2012).¹⁴

“With respect to criminal matters, both the United States Supreme Court and the Michigan Supreme Court consider three factors to determine whether a law should be applied retroactively or prospectively: ‘(1) the purpose of the new rule, (2) the general reliance on the old rule, and (3) the effect on the administration of justice.’” *People v Parker (Charles)*, 267 Mich App 319, 326 (2005), quoting *Lincoln v Gen Motors Corp*, 231 Mich App 262, 309 (1998). “Before applying these factors . . . ‘the decision in question must satisfy a threshold criterion: namely, that the decision clearly establish[es] a new principle of law[.]’” *Parker (Charles)*, 267 Mich App at 326-327, quoting *Lincoln*, 231 Mich App at 310. Prospective application of a holding is appropriate when it decides an issue of first impression and the resolution of the issue was not clearly

¹³For more information on the precedential value of an opinion with negative subsequent history, see our [note](#).

¹⁴For more information on the precedential value of an opinion with negative subsequent history, see our [note](#).

foreshadowed, or when it overrules settled precedent. *Parker (Charles)*, 267 Mich App at 327.

A defendant's right to due process may be violated when "[t]he retroactive application of an unforeseeable interpretation of a criminal statute" works to the defendant's detriment. *Johnson (Barbara)*, 302 Mich App at 464 (citation omitted). "[D]ue process is violated when the retroactive application of a judicial decision acts or operates as an ex post facto law[.]" *Id.* at 464-465, citing *People v Doyle (Michael)*, 451 Mich 93, 100 (1996). However, a defendant is not "deprived of 'due process of law in the sense of fair warning that his contemplated conduct constitutes a crime'" when judicial interpretation of an applicable statute does not have "the effect of criminalizing previously innocent conduct." *Johnson (Barbara)*, 302 Mich App at 465, quoting *Bouie v City of Columbia*, 378 US 347, 355 (1964) (emphasis omitted).

"In *Teague v Lane*, 489 US 288 (1989), the United States Supreme Court set forth the federal standard for determining whether a rule regarding criminal procedure should be applied retroactively to cases in which a defendant's conviction has become final." *People v Maxson (Mark)*, 482 Mich 385, 388 (2008). "*Teague* established the 'general rule' that 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.'" *Maxson (Mark)*, 482 Mich at 388, quoting *Teague*, 489 US at 310.

There are two exceptions to the general retroactivity bar set forth in *Teague*: "courts must give retroactive effect to new substantive rules of constitutional law," and "courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *People v Barnes (Timothy)*, 502 Mich 265, 269 (2018), quoting *Montgomery v Louisiana*, ___ US ___, ___ (2016) (internal quotation marks and citations omitted).

J. Lack of Precedent - Case of First Impression

A *case of first impression* is "a case that presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction." *Sabbagh v Hamilton Psychological Servs, PLC*, ___ Mich App ___, ___ (2019), quoting *Black's Law Dictionary* (11th ed) (finding that an issue remains one of first impression where it has only been addressed by unpublished decisions).

1.6 Remand

A. Authority to Remand

The Court of Appeals is not required to grant every motion to remand. *People v Hernandez (Mario)*, 443 Mich 1, 3 (1993), abrogated on other grounds *People v Mitchell (Charlie)*, 454 Mich 145 (1997). The remand procedure is only available when the issue meets the requirements set out in [MCR 7.211\(C\)](#):

“Within the time provided for filing the appellant’s brief, the appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show: (i) that the issue is one that is of record and that must be initially decided by the trial court; or (ii) that development of a factual record is required for appellate consideration of the issue.” [MCR 7.211\(C\)\(1\)\(a\)](#).

B. Process Upon Remand

1. Jurisdiction

The lower court reacquires jurisdiction when the clerk returns the record to it. *Dep’t of Conservation v Connor*, 321 Mich 648, 654 (1948); *Luscombe v Shedd’s Food Products Corp*, 212 Mich App 537, 541 (1995). See [MCR 7.210\(H\)-\(I\)](#).

2. Scope of Remand Order and Rule of Mandate

“On remand, the trial court may consider and decide any matters left open by the appellate court, and is free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision.” *People v Kennedy*, 384 Mich 339, 343 (1979).

“When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of the order.” *People v Russell (Fred)*, 297 Mich App 707, 714 (2012). The rule of mandate “embodies the well-accepted principle . . . that a lower court must strictly comply with, and may not exceed the scope of, a remand order.” *Int’l Business Machines Corp v Dep’t of Treasury*, 316 Mich App 346, 352 (2016) (citations omitted). “The rule provides that any [lower] court that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than

executing it[.]” and although the lower court may “decide anything not foreclosed by the mandate[.] . . . [it] commits “jurisdictional error” if it takes actions that contradict the mandate.” *Id.* at 352 (noting that “[t]he rule of mandate is similar to, but broader than, the law of the case doctrine[.]” “which is a discretionary doctrine that expresses the general practice of the courts and is not a limit on the power of the courts[.]”) (citations omitted). Accordingly, where the Michigan Supreme Court reversed the decisions of the lower courts in favor of the defendant and remanded to the Court of Claims for entry of an order granting summary disposition in favor of the plaintiff, the Court of Claims lacked authority, on remand, to grant judgment in favor of the defendant on the basis of an intervening change in the law. *Id.* at 349-353 (noting that “[t]he Court of Claims was simply to perform the nondiscretionary, ministerial task of entering judgment in favor of [the plaintiff,]” and concluding that it “erred by taking an action that contradicted the mandate, effectively exceeding the remand’s jurisdictional scope[.]”) (citations omitted).

1.7 Standard of Review

A. Generally

The standard of review reflects the level of deference an appellate court gives to a decision of the lower court.

The standard of review is one of the initial concerns in deciding any appeal. See [MCR 7.212\(C\)\(7\)](#). Generally, the standard of review on appeal will be de novo for questions of law, clearly erroneous for determinations of fact, and abuse of discretion for application of the law to the facts.

B. De Novo

Questions of law are reviewed de novo. *Brackett v Focus Hope, Inc.*, 482 Mich 269, 275 (2008); *People v Sierb*, 456 Mich 519, 522 (1998). Examples of questions of law include the interpretation of statutes, constitutional provisions, *Estes v Titus*, 481 Mich 573, 578-579 (2008); *People v Meconi*, 277 Mich App 651, 659 (2008); *In re Carey*, 241 Mich App 222, 226 (2000), and court rules, *Estes*, 481 Mich at 578-579; *People v Clark (Paul)*, 274 Mich App 248, 251 (2007).

C. Clear Error

A lower court's findings of fact are reviewed for clear error. [MCR 2.613\(C\)](#). See also *Walters v Snyder*, 239 Mich App 453, 456 (2000). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses before it." [MCR 2.613\(C\)](#). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Constr Co*, 272 Mich App 470, 473 (2006). See also *Walters*, 239 Mich App at 456.

D. Abuse of Discretion

"At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269 (2003). See also *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006), which adopted the *Babcock* Court's articulation of the abuse of discretion standard as the default standard in all cases.¹⁵ "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *Babcock*, 469 Mich at 269.

E. Harmless Error

[MCR 2.613\(A\)](#) states as follows:

"(A) Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

An appellate court "err[s] by applying harmless error analysis without first determining whether [a] trial court's order . . . was erroneous." *People v Muhammad*, 498 Mich 909, 909 (2015), citing [MCR 2.613\(A\)](#).

¹⁵ But see *Shulick v Richards*, 273 Mich App 320, 324 (2006), where the Michigan Court of Appeals construed the *Maldonado* holding to mean that "a default abuse of discretion standard of review is an assumed or assigned standard of review unless the law instructs otherwise." For example, cases involving [MCL 722.28](#) (child custody under the Child Custody Act) requires a different standard for abuse of discretion reviews under *Fletcher v Fletcher*, 447 Mich 871 (1994). *Shulick*, 273 Mich App at 324.

Unpreserved error. The appellate court may decline to address an unpreserved error in a civil case. *Booth Newspapers v Univ of Mich Bd of Regents*, 444 Mich 211, 234 (1993). “Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights. To avoid forfeiture under the plain-error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights.” *Rivette v Rose-Molina*, 278 Mich App 327, 328 (2008) (internal citations and quotations omitted). See also [MRE 103\(d\)](#).

“A constitutional challenge to legislation that is not raised and addressed in the record below is not preserved for appellate review. . . . However, [the Court of Appeals] may address unpreserved constitutional questions where no question of fact exists and the interest of justice and judicial economy so dictate.” *STC, Inc v Dep’t of Treas*, 257 Mich App 528, 538 (2003).

F. What Standard of Review Should Be Employed?

“[T]he standard for reviewing error on appeal depends upon two factors: first, whether the error is constitutional or nonconstitutional, and second, whether the error is preserved or forfeited.” *People v Carines*, 460 Mich 750, 773 (1999). Forfeiture is the failure to timely assert a right. *Id.* at 762 n 7. Waiver is the intentional relinquishment or abandonment of a known right. *Id.*

1. Preserved/Constitutional Error

“If the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt.” *Carines*, 460 Mich at 774, citing *People v Anderson (James) (After Remand)*, 446 Mich 392 (1994). “A constitutional error is harmless if “[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.”” *People v Shepherd*, 472 Mich 343, 347 (2005), quoting *People v Mass*, 464 Mich 615, 640 n 29 (2001), quoting *Neder v United States*, 527 US 1, 19 (1999). If the error is structural, automatic reversal is required. *Anderson (James)*, 446 Mich at 404-405.¹⁶ Structural errors include “the total deprivation of the right to trial counsel, an impartial judge, excluding grand jury members who are the same race as [the] defendant, denial of the right to self-representation, denial of the right to a public trial, and a constitutionally improper reasonable doubt instruction.” *Id.* at 405.

2. Preserved/Nonconstitutional Error

“The defendant has the burden of establishing a miscarriage of justice under a ‘more probable than not’ standard.” *Carines*, 460 Mich at 774, quoting *People v Lukity*, 460 Mich 484 (1999). See [MCL 769.26](#) (“[n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice”). See also [MCR 2.613\(A\)](#) (“[a]n error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice”); [MRE 103\(a\)](#).

3. Forfeited/Constitutional or Nonconstitutional Error

The *Carines* plain-error analysis applies to both constitutional and nonconstitutional errors that are not preserved for appellate review.

“Appellate courts may grant relief for unpreserved errors if the proponent of the error can satisfy the ‘plain error’ standard, which has four parts (the ‘*Carines* prongs’). The first three *Carines* prongs require establishing that (1) an error occurred, (2) the error was ‘plain’—i.e., clear or obvious, and (3) the error affected substantial rights—i.e., the outcome of the lower court proceedings was affected. *Carines*, 460 Mich at 763. If the first three elements are satisfied, the fourth *Carines* prong calls upon an appellate court to ‘exercise its discretion in deciding whether to reverse,’ and (4) relief is warranted only when the court determines

¹⁶ See, however, *Weaver v Massachusetts*, 582 US ___, ___ (2017) (holding that although “a violation of the right to a public trial is a structural error[.]” “when a defendant [first] raises [an unpreserved] public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland*[v *Washington*, 466 US 668 (1984),] prejudice is not shown automatically[; i]nstead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or[] . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair[.]”). For discussion of ineffective assistance of counsel, see the Michigan Judicial Institute’s [Criminal Proceedings Benchbook, Vol. 3](#), Chapter 1.

that the plain, forfeited error resulted in the conviction of an actually innocent defendant or “‘seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings’” *Id.* (citation omitted; first alteration in original).” *People v Cain*, 498 Mich 108, 116 (2015).

See also *Carines*, 460 Mich at 774, citing *United States v Olano*, 507 US 725 (1993), and *People v Grant (Andre)*, 445 Mich 535 (1994).

When reviewing an unpreserved claim of error, “courts should . . . engage[] in a fact-intensive and case-specific inquiry under the fourth *Carines* prong to assess whether, in light of any ‘countervailing factors’ on the record, . . . leaving the error unremedied would constitute a miscarriage of justice, i.e., whether the fairness, integrity, or public reputation of the proceedings was seriously affected.” *Cain*, 498 Mich at 128 (internal citation omitted). “Reversal is required only in the most serious cases, those in which the error contributed to the conviction of an actually innocent person or otherwise undermined the fairness and integrity of the process to such a degree that an appellate court cannot countenance that error.” *Id.* at 119, citing *Olano*, 507 US at 736.

“‘What suffices for waiver depends on the nature of the right at issue.’” *People v Vaughn (Joseph)*, 491 Mich 642, 655 (2012), quoting *New York v Hill*, 528 US 110, 114 (2000). Certain constitutional rights, such as the right to counsel and the right to plead not guilty, “fall[] within [an] exceedingly narrow class of rights that are placed outside the general preservation requirements and require a personal and informed waiver.” *Vaughn (Joseph)*, 491 Mich at 654-658 (holding that, “[a]lthough the violation of the right to a public trial is among the limited class of constitutional violations that are structural in nature,” it “‘does not necessarily affect qualitatively the guilt-determining process or the defendant’s ability to participate in the process[,]’” and therefore remains subject to the *Carines* forfeiture analysis) (citation omitted).

See also [MRE 103\(d\)](#) (“[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court”).

“[A] defendant’s inability to satisfy the [*Carines*] plain-error standard in connection with a specific trial court error does not necessarily mean that he or she cannot meet the ineffective-assistance standard regarding counsel’s alleged deficient

performance relating to that same error.”¹⁷ *People v Randolph (Andrew)*, 502 Mich 1, 22 (2018). “Courts must independently analyze each claim, even if the subject of a defendant’s claim relates to the same error.” *Id.* at 22.

G. Right Result—Wrong Reason

The reviewing court need not reverse a lower court’s ruling if the lower court reached the correct result, albeit for the wrong reason. *Burise v City of Pontiac*, 282 Mich App 646, 652 n 3 (2009); *People v McLaughlin*, 258 Mich App 635, 652 n 7 (2003).

1.8 Statutory Construction and Interpretation

A. Generally

General rules of statutory construction are contained within the Michigan Compiled Laws. [MCL 8.3](#) provides that “[i]n the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature.” [MCL 8.3a](#) provides that “[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.” [MCL 8.5](#) provides for severability of a portion of an act found to be invalid by a court.

The Michigan Penal Code contains its own rule of construction. [MCL 750.2](#) states that “[t]he rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.”

The Michigan Court of Appeals has set out the following guiding principles of statutory construction:

“Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *People v Tombs*, 472 Mich 446, 451 (2005) (opinion by Kelly, J.); *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549 (2004). The words contained in a statute provide us with

¹⁷ See the Michigan Judicial Institute’s [Criminal Proceedings Benchbook, Vol. 3](#), Chapter 1, for more information on postjudgment motions and ineffective assistance of counsel.

the most reliable evidence of the Legislature's intent. *Id.* at 549. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id.* We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Bageris v Brandon Twp*, 264 Mich App 156, 162 (2004). 'The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.' *Shinholster*, 471 Mich at 549 (citation omitted). If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. *Tombs*, 472 Mich at 451; *Shinholster*, 471 Mich at 549. 'A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' *Roberts (Lisa) v Mecosta Co Gen Hosp*, 466 Mich 57, 63 (2002). Statutory language, unambiguous on its face, can be rendered ambiguous through its interaction with and relationship to other statutes. *People v Valentin*, 457 Mich 1, 6 (1998). If statutory provisions can be construed in a manner that avoids conflict, then that construction should control the analysis. See *People v Webb*, 458 Mich 265, 274 (1998). 'We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature.'" *Macomb Co Prosecutor v Murphy (Sherri)*, 464 Mich 149, 159-160 (2001). *People v Hill (Brian)*, 269 Mich App 505, 514-515 (2006).

"A provision of law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or 'when it is *equally* susceptible to more than a single meaning.'" *In re Application of Indiana Mich Power Co for a Certificate of Necessity*, 498 Mich 881, 881 (2015), quoting *Mayor of Lansing v MPSC*, 470 Mich 154, 166 (2004).

When construing a statute that "was the result of a voter initiative, [the] goal is to ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself[,] . . . giv[ing] the words of the [statute] their ordinary and plain meaning as would have been understood by the electorate." *People v Kolanek (Kolanek II)*, 491 Mich 382, 397 (2012).

"Where [statutory] terms are undefined, [courts] may consult the dictionary to discern their meaning." *People v Caban*, 275 Mich App

419, 422 (2007). Additionally, in interpreting a word “as used in [a statute] ‘according to the common and approved usage of the language,’” as required under [MCL 8.3a](#), courts may consult the Corpus of Contemporary American English (COCA),¹⁸ which is “a tool that can aid in the discovery of ‘how particular words or phrases are actually used in written or spoken English.’” *People v Harris (Sean)*, 499 Mich 332, 347 (2016) (citation omitted).

B. Conflict, Ambiguity, and Rules of Statutory Construction

Conflict Between Statute and Rule. “Generally, if a court rule conflicts with a statute, the court rule governs when the matter pertains to practice and procedure.” *People v Watkins*, 277 Mich App 358, 363 (2007). “However, to the extent that the statute, as applied, addresses an issue of substantive law, the statute prevails.” *Id.* at 363-364.

“[W]hen a statute and an administrative rule conflict, the statute necessarily controls.” *Grass Lake Improvement Bd v Dep’t of Environmental Quality*, 316 Mich App 356, 366 (2016) (citations omitted).

Doctrine of *Contra Non Valentem*. The equitable doctrine of *contra non valentem*, which provides “that a limitations or prescriptive period does not begin to run against a plaintiff who is unable to act, [usually] because of the defendant’s culpable act, such as concealing material information that would give rise to the plaintiff’s claim[,]” may not be applied “as a means to disregard . . . plain [statutory] language” where “[the] plaintiff [does] not allege[] any unusual circumstance, such as fraud or mutual mistake, which would provide a basis for invoking judicial equitable powers[.]” *Linden v Citizens Ins Co of America*, 308 Mich App 89, 99-101 (2014) (further noting that “[the p]laintiff [had] failed to establish that the doctrine of *contra non valentem* is recognized and applied in Michigan[.]”) (citations omitted).

Doctrine of *In Pari Materia*. “Under the doctrine [of *in pari materia*], statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law.” *People v Mazur*, 497 Mich 302, 313 (2015) (citation omitted). “When there is a conflict between statutes that are read [*in pari materia*], the more recent and more specific statute controls over the older and more general statute.” *People v Buehler*, 477 Mich 18, 26 (2007), abrogated on other grounds by *People v Arnold*, 502 Mich 438, 476 (2018) (citation omitted). See also *Reynolds v Hasbany MD PLLC*,

¹⁸ Accessible at <http://corpus.byu.edu/coca/> (accessed September 1, 2016).

323 Mich App 426, 433-434 (2018) (finding that where two statutes contain jurisdictional conflict, the more specific statute must be interpreted as intending to constitute an exception to the more general statute). However, “[a]n act that incidentally refers to the same subject is not *in pari materia* if its scope and aim are distinct and unconnected.” *Mazur*, 497 Mich at 313 (citation omitted).

“The application of *in pari materia* is not necessarily conditioned on a finding of ambiguity.” *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 73 n 26 (2017) (holding that the Court of Appeals “erred in its narrow utilization of the *in pari materia* canon of construction[,]” and noting that in *Int’l Business Machines Corp v Dep’t of Treasury*, 496 Mich 642, 651-653 (2014) (opinion by Viviano, J.), “the [Michigan Supreme] Court suggested the application of *in pari materia* to resolve a patent conflict between two unambiguous statutes”). However, see *People v Hall (Brandon)*, 499 Mich 446, 458, 464 (2016) (noting that the doctrine of *in pari materia* is a “tie-breaking canon[] of statutory interpretation” that “[does] not apply unless . . . seemingly conflicting statutes are in fact ambiguous[]”).

Doctrine of *Noscitur a Sociis*. “Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: “[i]t is known from its associates”. . . . This doctrine stands for the principle that a word or phrase is given meaning by its context or setting.” *In re LaFrance*, 306 Mich App 713, 725 (2014) (“conclud[ing] that [a] subparagraph [of a statute] . . . must be interpreted in the context of its sister subparagraphs[]”) (citations omitted).

***Expressio Unius est Exclusio Alterius Canon*.** “[T]he canon *expressio unius est exclusio alterius*, which states that the express mention of one thing implies the exclusion of other similar things[,] . . . [should not be applied] to overcome the plain meaning of the words [of a statute].” *People v Garrison*, 495 Mich 362, 372 (2014) (citation omitted).

Last Antecedent Rule. “[T]he last antecedent rule[is] a rule of statutory construction that provides that ‘a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation.’” *Hardaway v Wayne Co*, 494 Mich 423, 427 (2013), quoting *Stanton v Battle Creek*, 466 Mich 611, 616 (2002). “[T]he last antecedent rule should not be applied blindly[;]” for example, it should not be applied if it would render a portion of the statute redundant. *Hardaway*, 494 Mich at 428-429. “Moreover, the last antecedent rule does not mandate a construction based on the shortest antecedent that is grammatically feasible; when applying the last antecedent rule, a court should first consider what are the logical metes and bounds of the ‘last’ antecedent.” *Id.*

at 425, 427-429, 429 n 10 (noting that “[t]he last antecedent is ‘the last word, phrase, or clause that can be made an antecedent *without impairing the meaning of the sentence*[.]’” and holding that “the Court of Appeals . . . improperly applied the last antecedent rule[.]” in construing the unambiguous text of the defendant’s resolution where application of the rule “[took] what [was] grammatically an essential clause[.] . . . and effectively render[ed] it a nonessential clause[.]”) (citations omitted).

Legislative Silence. In general, “courts presume a different intent when a legislature omits words used in a *prior* statute on a similar subject.” *People v English*, 317 Mich App 607, 616 (2016) (citation omitted). This rule of construction “is only applicable when the ‘related statute’ is a prior enactment.” *Id.* at 616; see also *People v Watkins (Lincoln)*, 491 Mich 450, 482 (2012) (noting that “[i]t is one thing to infer legislative intent through silence in a simultaneous or subsequent enactment, but quite another to infer legislative intent through silence in an earlier enactment, which is only ‘silent’ by virtue of the subsequent enactment[.]”); *People v Mullins*, 322 Mich App 151, 165-166 (2017) (noting that “[t]here are likely many reasons—policy- and nonpolicy alike—why the Legislature would choose to amend one section of law without at the same time amending a related section, including interest, resources, politics, attention, etc.”).

Rule of Lenity. “The ‘rule of lenity’ provides that courts should mitigate punishment when the punishment in a criminal statute is unclear.” *People v Denio*, 454 Mich 691, 699 (1997), citing *People v Jahner*, 433 Mich 490, 499-500 (1989). “The rule of lenity applies only if the statute is ambiguous or “in absence of any firm indication of legislative intent.”” *People v Johnson (Barbara)*, 302 Mich App 450, 462 (2013) (quoting *Denio*, 454 Mich at 700 n 12, and holding that “the rule of lenity does not apply when construing the Public Health Code[, [MCL 333.1101 et seq.](#),] because the Legislature mandated in [MCL 333.1111\(2\)](#) that the code’s provisions are to be ‘liberally construed for the protection of the health, safety, and welfare of the people of this state[.]’”) (additional citations omitted); see also *People v Hall (Brandon)*, 499 Mich 446, 458, 464 (2016) (noting that the rule of lenity is a “tie-breaking canon[.] of statutory interpretation” that “[does] not apply unless . . . seemingly conflicting statutes are in fact ambiguous[.]”) (citations omitted).

In determining “whether the Legislature intended a single criminal transaction to give rise to multiple convictions[.]” if “no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended.” *People v Perry (Rodney)*, 317 Mich App 589, 602, 604 (2016) (citations and quotation marks omitted). However, if there is a

“clear indication of legislative intent and [an] absence of ambiguity, the rule of lenity does not apply.” *Id.* at 605-606.

C. Statutory Constitutional Challenges

Statutes are presumed to be constitutional and must be construed as constitutional unless it is readily apparent that they are unconstitutional. *People v Rogers*, 249 Mich App 77, 94 (2001). “Generally, a criminal defendant may not defend on the basis that the charging statute is vague or overbroad where the defendant’s conduct is fairly within the constitutional scope of the statute.” *Id.* at 95. “In determining whether a statute is unconstitutionally vague or overbroad, a reviewing court should consider the entire text of the statute and any judicial constructions of the statute.” *Id.* at 94.

1. Vagueness

A statute may be challenged for vagueness on the following three grounds:

- (1) that it is overbroad and impinges on First Amendment freedoms;
- (2) that it does not provide fair notice of the proscribed conduct; or
- (3) that it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. *Hill (Brian)*, 269 Mich App at 524.

“To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. A statute cannot use terms that require persons of ordinary intelligence to speculate regarding its meaning and differ about its application. For a statute to be sufficiently definite, its meaning must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.” *People v Sands*, 261 Mich App 158, 161 (2004) (internal citations omitted). “A statute is not vague if the meaning of the words in controversy can be fairly ascertained by referring to their generally accepted meaning.” *People v Harris (James)*, 495 Mich 120, 138 (2014), citing *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 516 (2012), and *People v Cavaiani*, 172 Mich App 706, 714 (1988).

“When a vagueness challenge does not involve First Amendment freedoms it must be examined on the basis of the

facts in the case at hand[;] . . . [i]n other words, when a defendant brings an as-applied vagueness challenge to a statute, the defendant is confined to the facts of the case at bar.” *People v Loper*, 299 Mich App 451, 458 (2013).

2. Overbreadth

“Facial overbreadth challenges to statutes have been entertained where a statute (1) attempts to regulate by its terms only spoken words; (2) attempts to regulate the time, place, and manner of expressive conduct, or (3) requires official approval by local functionaries with standardless, discretionary power.

* * *

“A statute may be saved from being found to be facially invalid on overbreadth grounds where it has been or could be afforded a narrow and limiting construction by state courts or if the unconstitutionally overbroad part of the statute can be severed.” *Rogers*, 249 Mich App at 95-96.

D. Retroactivity of Statutes

“The intent of the Legislature governs the determination whether a statute is to be applied prospectively or retroactively. [*Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583 (2001)]. A statute is presumed to operate prospectively ‘unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect.’ *People v Russo*, 439 Mich 584, 594 (1992). Stated differently, a statute is “‘presumed to operate prospectively unless [a] contrary intent is clearly manifested.’” *Lynch*, 463 Mich at 583, quoting *Franks (Larry) v White Pine Copper Division*, 422 Mich 636, 671 (1985); see also *People v Doxey*, 263 Mich App 115, 121 (2004) (“[A]mendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent.”) (citation omitted). However, an exception to this general rule is recognized if a statute is remedial or procedural in nature. *Russo*, 439 Mich at 594; *People v Link*, 225 Mich App 211, 214-215 (1997). A statute is remedial if it is designed to correct an existing oversight in the law or redress an existing grievance, or if it operates in furtherance of an existing remedy and neither creates nor destroys existing rights. *Saylor v Kingsley Area Emergency Ambulance Service*, 238 Mich App 592, 598 (1999); *Buhl v Oak Park*, ___ Mich App ___, ___ (2019) (a legislative amendment is remedial in nature when it is meant address a particular judicial decision, and results in the judicial decision being overruled and reinstating the state of the law as it existed before the judicial decision). A statute that affects or creates

substantive rights is not remedial, and is not given retroactive effect, absent clear indication of legislative intent otherwise. *Lynch*, [463 Mich] at 585." *People v Conyer*, 281 Mich App 526, 529 (2008).

E. Standard of Review

Issues of statutory interpretation are reviewed de novo. *People v Babcock*, 469 Mich 247, 253 (2003).

Chapter 2: Circuit Court Appeals

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Part A: General Procedural Rules & Information

2.1 Appeals to Circuit Court

The circuit court has appellate jurisdiction of appeals from orders and judgments of district and municipal courts; additionally, the circuit court may hear appeals from decisions of administrative agencies, the Michigan Parole Board, and the Secretary of State.¹ [MCR 7.103](#). A circuit court judge may not “review[] on appeal, as a circuit judge, decisions that he rendered while acting as a district court judge.” *People v Ward*, 501 Mich 949 (2018).

The rules in [MCR 7.101 et seq.](#) govern the procedure for appealing to the circuit court. [MCR 7.101\(A\)](#). The rules set out in MCR subchapter 7.101 “do not restrict or enlarge the appellate jurisdiction of the circuit court.” [MCR 7.101\(B\)](#).

A. Jurisdiction

Jurisdiction vests in the circuit court after a claim of appeal is filed or leave to appeal is granted. [MCR 7.107](#); see also [MCL 600.8342\(2\)](#). “The trial court or agency may not set aside or amend the judgment, order, or decision appealed except by circuit court order or as otherwise provided by law. In all other respects, the authority of the trial court or agency is governed by [MCR 7.208\(C\)](#) through [[MCR 7.208\(J\)](#)].” [MCR 7.107](#).

1. Appeals of Right

The circuit court has jurisdiction of an appeal of right filed by an *aggrieved party* from the following:

“(1) a final judgment or final order^[2] of a district or municipal court, except a judgment based on a plea of guilty or nolo contendere;

(2) a final order or decision of an agency governed by the Administrative Procedures Act, [MCL 24.201 et seq.](#); and

¹ See [Part B](#) for discussion of certain specific types of circuit court appeals.

² In a criminal case, a final judgment or final order means an order of dismissal; the original sentence imposed following conviction; a sentence imposed following the grant of a motion for resentencing; a sentence imposed, or order entered, by the trial court following a remand from an appellate court in a prior appeal of right; or a sentence imposed following probation revocation. [MCR 7.202\(6\)\(b\)](#); see [MCR 7.102\(8\)](#).

(3) a final order or decision of an agency from which an appeal of right to the circuit court is provided by law.” [MCR 7.103\(A\)](#).

““To be [an ‘aggrieved party’], one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency.”” *Matthew R Abel, PC v Grossman Investments Co*, 302 Mich App 232, 240 (2013), quoting *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291 (2006) (additional citation omitted). “In addition, . . . an appellant must also demonstrate that the underlying controversy is justiciable.” *Matthew R Abel, PC*, 302 Mich App at 234-237, 240-245 (holding, under former [MCR 7.101\(A\)](#),³ that a nonparty attorney retained by a court-appointed receiver was *aggrieved* by the district court’s postjudgment order awarding the attorney less remuneration than he sought, and that he therefore had standing to appeal the fee award despite his failure to move for intervention in the underlying action).

A district court’s postjudgment order awarding attorney fees or costs constitutes a final order that is appealable as of right to the circuit court. *Matthew R Abel, PC*, 302 Mich App at 234, 243 (applying former [MCR 7.101\(A\)](#)⁴).

2. Appeals by Leave

“The circuit court may grant leave to appeal from[] a judgment or order of a trial court when[:]

(a) no appeal of right exists, or

(b) an appeal of right could have been taken but was not timely filed[.]” [MCR 7.103\(B\)\(1\)](#).

B. Venue

“Appeals from the district court shall be to the circuit court in the county in which the judgment is rendered.” [MCL 600.8342\(1\)](#).

³ The *Matthew R Abel, PC* Court noted that although “the preamendment court rules govern[ed the] case[, t]he fundamental legal principles governing appellate standing remain[ed] unaffected by changes in the language of the applicable court rules[under ADM 2010-19, effective May 1, 2012].” *Matthew R Abel, PC*, 302 Mich App at 238.

⁴ The *Matthew R Abel, PC* Court noted that although “the preamendment court rules govern[ed the] case[, t]he fundamental legal principles governing appellate standing remain[ed] unaffected by changes in the language of the applicable Court Rules[under ADM 2010-19, effective May 1, 2012].” *Matthew R Abel, PC*, 302 Mich App at 238.

On a motion of a party, in an appeal from an order or decision of a state board, commission, or agency authorized to promulgate rules or regulations, the court may order a change of venue for the convenience of the parties or attorneys. [MCR 2.222](#). If the venue of a civil action is improper, the court must change venue if a defendant timely moves, [MCR 2.223\(A\)\(1\)](#), or the court may change venue on its own initiative, [MCR 2.223\(A\)\(2\)](#); however, a plaintiff may not file a motion for a change of venue under [MCR 2.223\(A\)](#), *Dawley v Hall*, 501 Mich 166, 169-170 (2018).

Administrative agencies. Appeals from decisions of agencies governed by the Administrative Procedures Act (APA) “shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county.” [MCL 24.303\(1\)](#). Similarly, an appeal may be filed in the county where the appellant resides or in the circuit court for Ingham county from “any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law.” [MCL 600.631](#).

Criminal cases. “An appeal from an interlocutory judgment or order in a felony, misdemeanor, or ordinance violation may be taken, in the manner provided by court rules, by application for leave to appeal to the same court of which a final judgment in that case would be appealable as a matter of right[.]” [MCL 770.3\(2\)](#).

Michigan Employment Security Act. Venue for appeals under the Michigan Employment Security Act is determined under [MCL 421.38\(1\)](#). [MCR 7.116\(D\)](#).

Michigan Parole Board. “An application for leave to appeal a decision of the parole board may only be filed in the circuit court of the sentencing county under [MCL 791.234\(11\)](#).” [MCR 7.118\(D\)\(4\)](#).⁵

C. Stay of Proceedings and Bond

A motion for bond or stay pending appeal must be decided by the trial court⁶ before it may be filed in the circuit court. [MCR 7.108\(A\)\(1\)](#). “The motion must include a copy of the trial court’s opinion and order and a copy of the transcript of the hearing, unless its production is waived.” *Id.* Except as otherwise provided by rule or law, the circuit court may amend the amount of bond, order an

⁵ See [Section 2.2](#) for discussion of appeals from the Michigan Parole Board.

⁶ *Trial court* means the district or municipal court from which the appeal is taken. [MCR 7.102\(9\)](#).

additional or different bond, require different or additional securities, remand a bond matter to the trial court, grant a stay of proceedings in the trial court, or stay the effect or enforcement of any judgment or order of a trial court “on terms the circuit court deems just.” [MCR 7.108\(A\)\(2\)](#).

1. Civil Proceedings⁷

“Unless otherwise provided by rule, statute, or court order, an execution [in a civil action] may not issue and proceedings may not be taken to enforce an order or judgment until expiration of the time for taking an appeal of right.” [MCR 7.108\(B\)\(1\)](#).

Filing an appeal will not stay execution in a civil action unless:

- (1) the appellant files a stay bond;
- (2) the trial court grants a stay with or without a bond under [MCR 3.604\(L\)](#) (party unable to give bond because of poverty), [MCR 7.209\(E\)\(2\)\(b\)](#) (stay ordered by court “as justice requires or as otherwise provided by statute”), or [MCL 600.2605](#) (party unable to give bond because of poverty). [MCR 7.108\(B\)\(2\)](#).

The bond must:

“(a) recite the names and designations of the parties and the judge in the trial court; identify the parties for whom and against whom judgment was entered; and state the amount of the judgment, including any costs, interest, attorney fees, and sanctions assessed;

(b) contain the promises and conditions that the appellant will:

(i) diligently file and prosecute the appeal to decision taken from the judgment or order stayed, and will perform and satisfy the judgment or order stayed if it is not set aside or reversed;

(ii) perform or satisfy the judgment or order stayed if the appeal is dismissed;

⁷ In a civil infraction proceeding, appeal bond and stay is controlled by [MCR 4.101\(H\)\(1\)](#). See [MCR 7.108\(D\)](#). In some agency appeals, a stay may be granted only under certain conditions. See [MCR 7.119\(E\)](#), [MCR 7.120\(D\)](#), [MCR 7.122\(A\)\(2\)](#), and [MCR 7.123\(E\)](#).

(iii) pay and satisfy any judgment or order entered and any costs assessed against the principal on the bond in the circuit court, Court of Appeals, or Supreme Court; and

(iv) do any other act which is expressly required in the statute authorizing appeal or ordered by the court;

(c) be executed by the appellant along with one or more sufficient sureties as required by [MCR 3.604](#); and

(d) include the conditions provided in [MCR 4.201\(N\)\(4\)](#) if the appeal is from a judgment for the possession of land.” [MCR 7.108\(B\)\(3\)](#).

A copy of the bond must be served on all parties as prescribed in [MCR 2.107](#), and objections must be filed and served within seven days after service of the notice of bond. [MCR 7.108\(B\)\(4\)](#). “If an execution has issued, it is suspended by giving notice of filing of the bond to the officer holding the execution.” [MCR 7.108\(B\)\(7\)](#).

“‘[A] bond is required to secure a stay of proceedings to enforce [a] judgment during [an] appeal[, but] . . . is not a condition of the right to appeal[.]’” therefore, an appellant’s “failure to timely file a bond does not negate his right to appeal[.]” where the circuit court accepts the appellant’s late-posted bond. *Matthew R Abel, PC v Grossman Investments Co*, 302 Mich App 232, 236 n 1 (2013) (applying former [MCR 7.101\(C\)\(2\)\(b\)](#)⁸ and quoting *Wright v Fields*, 412 Mich 227, 228 (1981)).

2. Criminal Proceedings

“A criminal judgment may be executed immediately even though the time for taking an appeal has not elapsed. The granting of bond and its amount are within the discretion of the trial court, subject to the applicable laws and rules on bonds pending appeals in criminal cases.” [MCR 7.108\(C\)\(1\)](#).

If the trial court grants a bond, “the defendant must promise in writing:

⁸ The *Matthew R Abel, PC* Court noted that although “the preamendment court rules govern[ed the] case[, t]he fundamental legal principles governing appellate standing remain[ed] unaffected by changes in the language of the applicable Court Rules[under ADM 2010-19, effective May 1, 2012].” *Matthew R Abel, PC*, 302 Mich App at 238.

- “(a) to prosecute the appeal to decision;
- (b) if the sentence is one of incarceration, to surrender immediately to the county sheriff or as otherwise directed, if the judgment of sentence is affirmed on appeal or if the appeal is dismissed;
- (c) if the sentence is other than one of incarceration, to perform and comply with the judgment of sentence if it is affirmed on appeal or if the appeal is dismissed;
- (d) to appear in the trial court if the case is remanded for retrial or further proceedings or if a conviction is reversed and retrial is allowed;
- (e) to remain in Michigan unless the court gives written approval to leave;
- (f) to notify the trial court clerk in writing of a change of address; and
- (g) to comply with any other conditions imposed by law or the court.” [MCR 7.108\(C\)\(2\)](#).

If a bond is to be filed after conviction, the defendant must give notice to the prosecuting attorney of the time and place the bond will be filed. [MCR 7.108\(C\)\(3\)](#). “The bond is subject to the objection procedure provided in [MCR 3.604](#).” [MCR 7.108\(C\)\(3\)](#).

D. Appeal of Right

In civil cases, timely appeals to the circuit court from final judgments and orders are by right unless a statute authorizes only appeal by leave; all other appeals are by leave. [MCL 600.8342\(2\)](#), [MCR 7.103](#).

In a misdemeanor or ordinance violation case tried in municipal or district court, an aggrieved party generally has a right of appeal from a final order or judgment (except for an order or a judgment based on a plea of guilty or nolo contendere) to the circuit court in the county in which the misdemeanor or ordinance violation was committed. [MCL 770.3\(1\)\(b\)](#); [MCR 7.103\(A\)\(1\)](#).

1. Timing⁹

“The time limit for an appeal of right is jurisdictional.” [MCR 7.104\(A\)](#). An appeal of right must be taken within:

“(1) 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed, or

(2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision, if the motion was filed within:

“(a) the initial 21-day period, or

(b) further time the trial court or agency may have allowed during that 21-day period.”
[MCR 7.104\(A\)\(1\)-\(2\)](#).

However, if a criminal defendant requests appointment of counsel within 21 days after entry of the judgment of sentence, “an appeal of right must be taken within 21 days after entry of an order:

“(a) appointing or denying the appointment of an attorney, or

“(b) denying a timely filed motion described in [\[MCR 7.104\(A\)\]\(2\)](#).” [MCR 7.104\(A\)\(3\)](#).

2. Manner of Filing

For jurisdiction to vest with the circuit court, an appellant must timely file:

- the claim, which must be signed by the appellant or the appellant’s attorney;¹⁰ and
- the filing fee, unless the appellant is indigent. [MCR 7.104\(B\)-\(C\)](#).

In addition, an appellant must “file the following documents with the claim of appeal:”

- a copy of the judgment, order, or decision appealed;

⁹Timing for appeals from agency decisions may be controlled by a more specific court rule or statute. See, e.g., [MCR 7.116\(B\)](#) (appeal of right from decision of the Michigan Compensation Appellate Commission must be taken within 30 days after mailing), [MCL 257.323\(1\)](#) (appeal from Secretary of State’s decision regarding operator’s or chauffeur’s license must be made within 63 days after the determination).

¹⁰ See [MCR 7.104\(C\)\(1\)-\(2\)](#) for additional requirements regarding the form and content of the claim of appeal.

- an indication that the transcript has been ordered or that there is nothing to be transcribed;
- in an agency appeal, a copy of a request or order for a certified copy of the record to be sent to the circuit court;
- a true copy of the bond, if a bond has been filed;
- proof that money, property, or documents have been delivered or deposited as required by law;
- a copy of the register of actions, if any;
- proof that the appeal fee of the trial court or agency has been tendered;
- anything else required by law to be filed; and
- proof that all parties, the trial court or agency, and any other person entitled to notice of the appeal have been served. [MCR 7.104\(D\)](#).

[MCR 7.104\(E\)](#) requires the appellant to timely serve on the trial court from which the appeal is taken:

- a copy of the claim of appeal;
- any fee required by law;
- any bond required by law¹¹; and
- an indication that the transcript has been ordered and payment made or secured, unless there is nothing to be transcribed.

An appellee must file an appearance in the circuit court within 14 days after being served with the claim of appeal. [MCR 7.104\(F\)](#). “An appellee who does not file an appearance is not entitled to notice of further proceedings.” *Id.*

E. Appeal By Leave

[MCR 7.103\(B\)\(1\)](#) provides that a circuit court may grant leave to appeal from a judgment or order if no appeal of right exists or the time for taking an appeal of right has expired.

¹¹ However, an appellant’s “failure to timely file a bond does not negate his right to appeal[]” where the circuit court accepts the appellant’s late-posted bond. *Matthew R Abel, PC v Grossman Investments Co*, 302 Mich App 238, 236 n 1 (2013). See [Section \(C\)](#) for additional discussion of bond requirements.

Civil cases. In civil cases, leave may also be granted by the circuit court to appeal:

“a final order or decision of an agency from which an appeal by leave to the circuit court is provided by law,” [MCR 7.103\(B\)\(2\)](#);

“an interlocutory order or decision of an agency if an appeal of right would have been available for a final order or decision and if waiting to appeal of right would not be an adequate remedy,” [MCR 7.103\(B\)\(3\)](#); and

“a final order or decision of an agency if an appeal of right was not timely filed and a statute authorizes a late appeal,” [MCR 7.103\(B\)\(4\)](#).

Criminal cases. All appeals from final orders and judgments based on guilty or nolo contendere pleas are by application for leave to appeal. [MCL 770.3\(1\)\(d\)](#). Additionally, a party may apply for leave to appeal to the circuit court from an interlocutory judgment or order in a felony, misdemeanor, or ordinance violation case. [MCL 770.3\(2\)](#).¹²

Michigan Parole Board. [MCR 7.103\(B\)\(5\)](#) provides that the circuit court may grant leave to appeal from a decision of the Michigan Parole Board to grant parole.¹³

1. Timing

“An application for leave to appeal must be filed with the clerk of the circuit court within:

“(1) 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed,
or

(2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision if the motion was filed within:

(a) the initial 21-day period, or

¹² Either a criminal defendant or the prosecution may raise an issue related to an interlocutory decision in an appeal of right from a final decision. *People v Torres (Gavino)*, 452 Mich 43, 59 (1996).

¹³ See [Section 2.2](#) for discussion of appeals from the Michigan Parole Board.

(b) such further time as the trial court or agency may have allowed during that 21-day period.” [MCR 7.105\(A\)\(1\)-\(2\)](#).

Additionally, if a defendant who has pleaded guilty or nolo contendere requests appointment of counsel within 21 days after entry of the judgment or sentence, “an application must be filed within 21 days after entry of an order:

“(a) appointing or denying the appointment of an attorney, or

(b) denying a timely filed motion described in [[MCR 7.105\(A\)](#)](2).” [MCR 7.105\(A\)\(3\)](#).

When an appeal of right or an application for leave has not been timely filed, an appellant may file a late application, following the procedures for filing an application for leave, accompanied by a statement of facts explaining the delay. [MCR 7.105\(G\)\(1\)](#). “The answer may challenge the claimed reasons for the delay[, and t]he circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application.” *Id.* A late application may not be filed more than six months after entry of the order, judgment, or decision appealed or an order denying a motion for a new trial, for rehearing or reconsideration, to withdraw a plea, or for other relief from the judgment, order, or decision, if the motion was timely filed. [MCR 7.105\(G\)\(2\)](#).

2. Manner of Filing

To apply for leave to appeal, [MCR 7.105\(B\)](#) requires an appellant to file:

- a signed application for leave to appeal;¹⁴
- a copy of the judgment, order, or decision appealed and the opinion or findings of the trial court or agency;
- in a trial court appeal, a copy of the register of actions;
- in an agency appeal, a copy of a request or order for a certified copy of the record to be sent to the circuit court;
- unless waived by stipulation of the parties or by trial court order, a copy of the relevant transcript or

¹⁴ See [MCR 7.105\(B\)\(1\)\(a\)-\(d\)](#) for additional requirements regarding the content of the application.

portion of transcript,¹⁵ or an indication that a transcript has been ordered or that there is nothing to be transcribed;

- proof that all parties, the trial court or agency, and any other person entitled to notice of the claim have been served¹⁶; and
- the appeal fee, unless the appellant is indigent.

3. Answer

Within 21 days of service of the application, a signed answer that conforms to [MCR 7.212\(D\)](#),¹⁷ and proof of service of the answer, may be filed. [MCR 7.105\(C\)](#).

4. Reply

“Within 7 days after service of the answer, the appellant may file a reply brief that conforms to [MCR 7.212\(G\)](#)^[18].”

5. Decision on Application

The circuit court decides the application without oral argument, unless it otherwise directs. [MCR 7.105\(E\)\(1\)](#). Absent good cause, the decision must be made within 35 days of the filing date. [MCR 7.105\(E\)\(2\)](#).

The court may grant or deny leave to appeal or grant other relief, and it must promptly serve a copy of the order on the parties and the trial court. [MCR 7.105\(E\)\(3\)](#).

If the application is granted, further proceedings are governed by [MCR 7.104](#), except that:

- the appellant need not file a claim of appeal. [MCR 7.105\(E\)\(4\)\(a\)](#);
- within seven days after the order granting leave is entered, the appellant must file the documents

¹⁵ See [MCR 7.105\(B\)\(5\)](#), identifying specific transcripts required, depending on the nature of the appeal.

¹⁶ “If service cannot be reasonably accomplished, the appellant may ask the circuit court to prescribe service under [MCR 2.107\(E\)\[.\]](#)” [MCR 7.105\(B\)\(6\)](#).

¹⁷ [MCR 7.212\(D\)](#) governs the contents of an appellee’s brief filed in the Court of Appeals.

¹⁸ [MCR 7.212\(G\)](#), governing the filing of reply briefs in the Court of Appeals, provides in part that “[r]eply briefs must be confined to rebuttal of the arguments in the appellee’s or cross-appellee’s brief and must be limited to 10 pages, exclusive of tables, indexes, and appendices, and must include a table of contents and an index of authorities.”

required by [MCR 7.104\(D\)](#) and make service on the trial court as required by [MCR 7.104\(E\)](#); and

- an appellee may file a cross appeal claim within 14 days after the court serves the order granting leave to appeal. [MCR 7.105\(E\)\(4\)](#).

“Unless otherwise ordered, the appeal is limited to the issues raised in the application.” [MCR 7.105\(E\)\(5\)](#).

6. Immediate Consideration

“When an appellant requires a decision on an application in fewer than 35 days, the appellant must file a motion for immediate consideration concisely stating why an immediate decision is required.” [MCR 7.105\(F\)](#).

F. Cross Appeal

Any appellee may file a cross appeal when an appeal of right is filed or when the circuit court grants leave to appeal. [MCR 7.106\(A\)\(1\)](#).

1. Timing

A cross appeal must be filed within 14 days after the cross appellant is served with the claim of appeal or after the order granting leave to appeal is entered. [MCR 7.106\(B\)](#); see also [MCR 7.105\(E\)\(4\)\(c\)](#). A party seeking leave to file a cross appeal after that time must proceed under [MCR 7.105\(G\)](#) (governing late appeals; see [Section \(G\)](#)). [MCR 7.106\(F\)](#).

2. Manner of Filing

“To file a cross appeal, the cross appellant must file:

- “(1) a claim of cross appeal in the form required by [MCR 7.104\(C\)](#);
- (2) any required fee;
- (3) a copy of the judgment, order, or decision from which the cross appeal is taken; and
- (4) proof that a copy of the claim of cross appeal was served on all parties.” [MCR 7.106\(C\)](#).

A cross appellant must also must file the documents required by [MCR 7.104\(D\)](#) and make service on the trial court as required by [MCR 7.104\(E\)](#), unless doing so would duplicate

the appellant's filing of the same document. [MCR 7.106\(D\)](#). The cross appellant need not order a transcript or file a court reporter's certificate unless the initial appeal is dismissed. *Id.*

3. Initial Appeal Dismissed

"If the initial appeal is dismissed, the cross appeal may continue." [MCR 7.106\(E\)](#). Within 14 days after the order dismissing the initial appeal, the cross appellant must file either the certificate of the court reporter or recorder if there is a transcript to be produced, or a statement indicating that there is nothing to be transcribed. *Id.*

G. Late Appeals

When an appeal of right or an application for leave has not been timely filed, an appellant may file a late application, following the procedures for filing an application for leave, accompanied by a statement of facts explaining the delay. [MCR 7.105\(G\)\(1\)](#). "The answer may challenge the claimed reasons for the delay[, and t]he circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application." *Id.* A late application may not be filed more than six months after entry of the order, judgment, or decision appealed or an order denying a motion for a new trial, for rehearing or reconsideration, to withdraw a plea, or for other relief from the judgment, order, or decision, if the motion was timely filed. [MCR 7.105\(G\)\(2\)](#).

H. Record on Appeal

"Appeals from the district court shall be on a written transcript of the record made in the district court or on a record settled and agreed to by the parties and approved by the court." [MCL 600.8341](#). See also [MCR 7.109\(A\)](#) ("Appeals to the circuit court are heard on the original record."). "In reviewing whether an agency's decision was supported by competent, material, and substantial evidence on the whole record, a court must review the entire record." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 432 (2017) (citation omitted).

"[T]he record consists of the original papers filed in [the lower] court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." [MCR 7.210\(A\)\(1\)](#); see [MCR 7.109\(A\)\(1\)](#). The record must include the substance of any excluded evidence or the transcript of proceedings

excluding it. [MCR 7.109\(A\)\(3\)](#). The parties may stipulate in writing regarding any matters relevant to the record “if the stipulation is made a part of the record and sent to the circuit court.” [MCR 7.109\(A\)\(4\)](#).

The appellant must serve a copy of the entire record on appeal on each appellee within 14 days after the transcript (or, if no transcript will be filed, the transcript substitute) is filed with the trial court. [MCR 7.109\(F\)](#).¹⁹ The trial court or agency must promptly send the record to the circuit court, along with a certificate identifying the name of the case, listing the papers included, and indicating that the required fees have been paid and any required bond has been filed. [MCR 7.109\(G\)\(1\)](#).²⁰ Weapons, drugs, or money are not be sent unless requested by the circuit court, and the trial court or agency may order the removal of any exhibits from the record. *Id.* The circuit court must send written notice to the parties when it receives the filed record. [MCR 7.109\(G\)\(3\)](#). If a motion is filed before the complete record on appeal is sent to the circuit court, the trial court or agency must, on request, send the circuit court the documents needed to decide the motion. [MCR 7.109\(E\)](#).

I. Motions

1. Generally

“Motion practice in a circuit court appeal is governed by [MCR 2.119](#). Motions may include special motions identified in [MCR 7.211\(C\)](#).^[21] Absent good cause, the court shall decide motions within 28 days after the hearing date.” [MCR 7.110](#).

2. Motions for Rehearing or Reconsideration

A circuit court, acting as an appellate court in review of a district court order or judgment, possesses the authority to reconsider its own previous order or judgment on the matter. *People v Walters (Jayne)*, 266 Mich App 341, 349 (2005). Motions for reconsideration are governed by [MCR 2.119\(F\)](#). [MCR 7.114\(D\)](#).

[MCR 2.119\(F\)\(3\)](#) provides:

¹⁹ See [MCR 7.109\(B\)-\(D\)](#) for detailed rules regarding the filing of the transcript, the duties of the court reporter or recorder, exhibits, and the reproduction of records.

²⁰ See [MCR 7.109\(G\)\(1\)\(a\)-\(f\)](#) and [MCR 7.109\(G\)\(2\)](#) for additional rules regarding the contents of the transmitted record and transcripts. See [MCR 7.109\(H\)](#) for rules regarding the return of the record.

²¹ “Special motions” under [MCR 7.211\(C\)](#) include motions to remand, to dismiss, and to affirm; confessions of error by the prosecutor; and requests for damages or other disciplinary action for bringing vexatious proceedings.

“Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.”

However, “[MCR 2.119(F)(3)] does not categorically prevent a trial court from revisiting an issue even when [a] motion for reconsideration presents the same issue already ruled on; in fact, it allows considerable discretion to correct mistakes.” *Macomb Co Dep’t of Human Servs v Anderson*, 304 Mich App 750, 754 (2014), citing *In re Moukalled Estate*, 269 Mich App 708, 714 (2006); see also *Walters (Jayne)*, 266 Mich App at 350 (adherence to the palpable error provision contained in MCR 2.119(F)(3) is not required; rather, the provision offers guidance to a court by suggesting when it may be appropriate to grant a party’s motion for reconsideration).

A motion for reconsideration or rehearing may not be entertained by a court after entry of an order changing venue to another court, unless the order specifies an effective date. *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 656-662 (2012) (holding that “once a transfer of venue is made, the transferee court has full jurisdiction over the action [under MCL 600.1651] and, therefore, the transferor court has none[; a]ny motion for rehearing or reconsideration would have to be heard by whichever court has jurisdiction over the action at the time the motion is brought, which, after entry of an order changing venue, would be the transferee court[.]”).²²

Where a different judge is seated in the circuit court that issued the ruling or order for which a party seeks reconsideration, the judge reviews the prior court’s factual findings for clear error. *Walters (Jayne)*, 266 Mich App at 352. The fact that the successor judge is reviewing the matter for the first time does not authorize the judge to conduct a de novo review. *Id.* at 352-353.

J. Briefs

“Within 28 days after the circuit court provides written notice under MCR 7.109(G)(3) that the record on appeal is filed with the circuit

²² The *Frankfurth* Court noted that “the better practice might be to make orders changing venue effective as of some reasonable time [after entry of the order].” *Frankfurth*, 297 Mich App at 662.

court, the appellant must file a brief conforming to [MCR 7.212\(C\)](#) and serve it on all other parties to the appeal.” [MCR 7.111\(A\)\(1\)\(a\)](#). The time may be extended by stipulation or by the circuit court, but the filing of a motion to extend the time does not stay the time for filing a brief. *Id.* If an appellant fails to timely file a brief, the appeal may be considered abandoned and the appeal dismissed on 14 days’ notice to the parties. [MCR 7.111\(A\)\(1\)\(b\)](#). The filing of a conforming brief after notice is sent does not preclude dismissal unless the appellant provides a reasonable excuse for the late filing. *Id.*

An appellee may file a brief and must do so within 21 days after being served with the appellant’s brief. [MCR 7.111\(A\)\(2\)](#).

The appellant may file a reply brief within 14 days after service of the appellee’s brief. [MCR 7.111\(A\)\(3\)](#). The reply brief must be served on all other parties to the appeal. *Id.* The circuit court may not abridge the appellant’s right to file a reply brief. *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 442-443 (2017) (holding that the circuit court’s scheduling order, which provided that the claimant-appellant was not entitled to a reply brief, “clearly violated [her] right to file a reply brief under the plain and unambiguous language of [MCR 7.111\(A\)\(3\)](#)[,]” but that she was not entitled to relief because she did not establish that the violation “affected the outcome of the proceedings[.]”).

Timing for briefs in cross appeals is the same as for direct appeals. [MCR 7.111\(A\)\(4\)](#).

All briefs must conform to [MCR 7.212\(B\)](#) (governing length and form of briefs). In addition to these requirements, the appellant’s brief must conform to [MCR 7.212\(C\)](#)²³; the appellee’s brief must conform to [MCR 7.212\(D\)](#)²⁴; and the appellant’s reply brief must conform to [MCR 7.212\(G\)](#).²⁵ [MCR 7.111\(A\)\(1\)\(a\)](#); [MCR 7.111\(A\)\(2\)](#); [MCR 7.111\(A\)\(3\)](#); [MCR 7.111\(B\)](#). “If, on its own initiative or on a party’s motion, the circuit court concludes that a brief does not substantially comply with the requirements in [[MCR 7.111](#)], it may order the party filing the brief to correct the deficiencies within a specified time or it may strike the nonconforming brief.” [MCR 7.111\(D\)](#).

²³ [MCR 7.212\(C\)](#) governs the contents of an appellant’s brief filed in the Court of Appeals.

²⁴ [MCR 7.212\(D\)](#) governs the contents of an appellee’s brief filed in the Court of Appeals.

²⁵ [MCR 7.212\(G\)](#), governing the filing of reply briefs in the Court of Appeals, provides in part that “[r]eply briefs must be confined to rebuttal of the arguments in the appellee’s or cross-appellee’s brief and must be limited to 10 pages, exclusive of tables, indexes, and appendices, and must include a table of contents and an index of authorities.”

A party is entitled to oral argument if it has filed a timely brief with “ORAL ARGUMENT REQUESTED” in capital letters or boldface type on the title page of the brief. [MCR 7.111\(C\)](#). When a party makes a request in accord with [MCR 7.111\(C\)](#), the court must schedule oral argument “unless it concludes that the briefs and record adequately present the facts and legal arguments, and the court’s deliberation would not be significantly aided by oral argument.” [MCR 7.114\(A\)](#). Any party failing to timely file and serve a brief forfeits oral argument, although the court may grant a motion to reinstate oral argument for good cause shown. [MCR 7.111\(A\)\(6\)](#).

K. Dismissal

1. Involuntary

“If the appellant fails to pursue the appeal in conformity with the court rules, the circuit court will notify the parties that the appeal shall be dismissed unless the deficiency is remedied within 14 days after service of the notice.” [MCR 7.113\(A\)\(1\)](#). The appeal may be reinstated if, within 14 days of the involuntary dismissal, the appellant shows mistake, inadvertence, or excusable neglect. [MCR 7.113\(A\)\(2\)](#).

2. Voluntary

If the parties file a signed stipulation agreeing to dismiss the appeal or the appellant files an unopposed motion to withdraw the appeal, the circuit court must enter an order of dismissal. [MCR 7.113\(B\)](#).

3. Notice

Immediately on its entry, a copy of an order dismissing an appeal must be sent to the parties and the trial court. [MCR 7.113\(C\)](#).

L. Decision and Judgment

The circuit court must decide the appeal by either an oral or a written opinion and issue an order. [MCR 7.114\(B\)](#). “The court’s order is its judgment.” *Id.*

A judgment is effective:

- after expiration of the period for filing in the Court of Appeals a timely application for leave to appeal;

- after the Court of Appeals decides a case for which an application for leave is filed; or
- after a time period otherwise ordered by the circuit court or the Court of Appeals. [MCR 7.114\(C\)](#).

Enforcement of the judgment is to be obtained in the trial court or agency after the record is returned as provided in [MCR 7.109\(H\)](#). [MCR 7.114\(C\)](#).

M. Miscellaneous Relief

“In addition to its general appellate powers, the circuit court may grant relief as provided in [MCR 7.216](#) [(authorizing the Court of Appeals to grant various forms of relief, including permitting amendments or additions to the transcript or record, remanding to the trial court, drawing inferences of fact, granting a new trial, or dismissing an appeal or the original proceeding)].” [MCR 7.112](#).

N. Assessment of Costs

[MCR 7.115\(A\)](#) provides that “the prevailing party in a civil case” is generally entitled to costs.

In criminal cases, a defendant is not entitled to an assessment of costs against the prosecution as a “prevailing party” in a successful appeal to a circuit court. *People v Rapp (Rapp II)*, 492 Mich 67, 85-86 (2012), *aff’g People v Rapp (Rapp I)*, 293 Mich App 159, 166-167 (2011). Former [MCR 7.101\(O\)](#) permitted the taxing of costs “as provided in [MCR 2.625\[,\]](#)” but “[MCR 2.625](#) is a rule of civil procedure, which does not apply to a criminal matter[;]” furthermore, [MCL 600.2441](#) “applies only to the taxation of costs in civil matters.” *Rapp II*, 492 Mich at 85. “Accordingly, the Court of Appeals correctly concluded that there is no basis to ‘undermine the broad statutory discretion granted the prosecution in its charging decisions[,]’” and that the circuit court had improperly assessed costs against the prosecution following the reversal of the defendant’s misdemeanor conviction. *Id.* at 86, quoting *Rapp I*, 293 Mich App at 167.

Part B: Types of Appeals

2.2 Appeals from and Objections to Parole Board Decisions

A. Grounds for Grant of Parole

“[A] prisoner’s release on parole is discretionary with the parole board.” [MCL 791.234\(11\)](#). See also [MCL 791.235\(1\)](#). “There is no entitlement to parole.” *Id.* “A prisoner has no constitutionally protected or inherent right to parole, only a hope or expectation of it.” *People v Mack*, 265 Mich App 122, 129 (2005), quoting *Morales v Parole Bd*, 260 Mich App 29, 48 (2003).

“The Legislature has entrusted the decision whether to grant . . . parole to the Parole Board.” *In re Parole of Johnson (Kenneth)*, 219 Mich App 595, 596 (1996). The board must have “reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner’s mental and social attitude, that the prisoner will not become a menace to society or to the public safety.” [MCL 791.233\(1\)\(a\)](#). The Department of Corrections (DOC) “shall promulgate rules under the administrative procedures act of 1969, . . . [MCL 24.201](#) to [[MCL](#)] [24.328](#), that prescribe the parole guidelines.” [MCL 791.233e\(5\)](#). However, the parole board may depart from the guidelines²⁶; in doing so, it must provide, in writing, substantial and compelling objective reasons for the departure. [MCL 791.233e\(6\)](#).²⁷ In addition, “[t]he Board should consider a prisoner’s sentencing offense when determining whether to grant parole to a prisoner, but ‘the Board must also look to the prisoner’s rehabilitation and evolution throughout his or her incarceration.’” *In re Parole of Spears*, 325 Mich App 54, 60 (2018), quoting *In re Elias*, 294 Mich App 507, 544 (2011). However, the parole guidelines set forth in statute “form the backbone of the parole-decision process.” *Spears*, 325 Mich App at 60 quoting *Elias*, 294 Mich App at 512.

To facilitate the decision-making process surrounding the granting of parole (in addition to other purposes), the DOC prepares and considers several reports, including the transition accountability

²⁶A departure may be in the form of denying parole to a prisoner who has a high probability of parole under the guidelines or granting parole to a prisoner who has a low probability of parole under the guidelines. See [MCL 791.233e\(6\)](#).

²⁷Effective December 12, 2018, 2018 PA 339 amended [MCL 791.233e\(6\)](#) to require that the reason for a departure be objective, in addition to substantial and compelling. However, the amendment applies “only to prisoners whose controlling offense was committed on or after [December 12, 2018.]” [MCL 791.233e\(13\)](#). See [MCL 791.233e\(7\)](#) for list of substantial and compelling objective reasons when denying parole to a prisoner who has a high probability of parole under the guidelines (not applicable to prisoners serving a life sentence). [MCL 791.233e](#) does not provide a similar list for departures involving low probability prisoners.

plan (TAP), a phased plan that attempts to integrate a prisoner's transition from prison to the community. *Spears*, 325 Mich App at 61. The Michigan Court of Appeals "has [not] set forth standards relative to a defendant's TAP," except to require that it, among other relevant documents, be considered by the Board when determining whether to grant parole. *Spears*, 325 Mich App at 66, citing *In re Parole of Haeger*, 294 Mich App 549 (2011). In *Haeger*, the Parole Board's grant of parole was properly reversed (in part) because no TAP appeared in the record. *Haeger*, 294 Mich App at 551-552. In *Spears*, the circuit court incorrectly determined that *Haeger* requires a TAP be "current or robust." *Spears*, 325 Mich App at 64. "[R]ather, review [of the Board's decision] should begin by determining whether the Board reviewed a TAP that was prepared for [the] defendant," and if that has occurred, there is no basis for a circuit court to conclude "that the Board . . . failed to consider defendant's readiness for release based on defendant's 'suitable and realistic parole plan.'" *Id.* at 64-65 (citation omitted). "Therefore, the [*Spears*] circuit court, by injecting its own criteria into defendant's TAP, effectively substituted its judgment for that of the Board's when it reversed the Board's grant of parole[.]" *Id.* at 67-68.

"Once the Board enters an order granting parole, it has discretion to rescind that order for cause before the prisoner is released and after the Board conducts an interview with the prisoner." *In re Parole of Hill*, 298 Mich App 404, 411 (2012), citing [MCL 791.236\(2\)](#). "After a prisoner is released on parole, the prisoner remains in the legal custody and control of the Department of Corrections and the Board retains discretion to revoke parole for cause and in accord with statutorily proscribed [sic] procedural guidelines." *In re Parole of Hill*, 298 Mich App at 411; see also [MCL 791.238](#); [MCL 791.240a](#).

A three-member parole board panel, when deciding a prisoner's eligibility for parole, need not meet in collegial discussion before reaching a decision; the panel may circulate a parole applicant's file from one member to another until a decision by at least a majority of the members is reached. *In re Parole of Franciosi*, 231 Mich App 607, 616-617 (1998).

The prisoner, prosecutor, and victim all have the ability to seek judicial review of the parole board's decision. These options are discussed in the following subsections.

B. Appeal from Grant of Parole

Judicial review of the denial of parole by the Michigan Parole Board ("parole board" or "board") is unavailable to Michigan prisoners absent circumstances giving rise to a complaint for habeas corpus or a writ of mandamus to compel compliance with a statutory duty.

Morales, 260 Mich App at 39-42, 52. See also *Jackson (Paul) v Jamrog*, 411 F3d 615, 618, 621 (CA 6, 2005) (“Michigan law [does not authorize] state court review of parole board decisions denying parole”; however, “state inmates wrongfully denied parole on a basis recognized as illegal . . . have access to the courts to seek relief through state habeas actions and mandamus”).²⁸

However, “[t]he action of the parole board in granting a parole is appealable by the prosecutor of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted.” MCL 791.234(11). There is no appeal of right from a parole board decision. MCR 7.118(B); see MCR 7.103(B)(5). Only the prosecutor or a victim may apply for leave to appeal. MCR 7.118(D)(1)(a). Generally, the prisoner will be the appellee; however, the parole board may move to intervene as an appellee. MCR 7.118(D)(1)(c).

MCR 7.118 governs appeals to the circuit court from the parole board. MCR 7.118(A). Unless provided otherwise in MCR 7.118, the rules set out in MCR 7.101—MCR 7.115 apply. MCR 7.118(A).²⁹

1. Application for Leave to Appeal

a. Venue

“An application for leave to appeal a decision of the parole board may only be filed in the circuit court of the sentencing county under MCL 791.234(11).” MCR 7.118(D)(4).

b. Time Requirements

“An application for leave to appeal must be filed within 28 days after the parole board mails a notice of action granting parole and a copy of any written opinion to the prosecutor and the victim, if the victim requested notification under MCL 780.771.” MCR 7.118(D)(2).

A late application for leave to appeal may be filed under MCR 7.105(G). MCR 7.118(E).

²⁸The parole board’s decision to depart from the parole guidelines by denying parole to a prisoner who has a high probability of parole must state in writing substantial and compelling objective reasons for the departure. MCL 791.233e(6). Substantial and compelling objective reasons for departure from the parole guidelines are limited to the circumstances set forth in MCL 791.233e(7).

²⁹ See Part A for discussion of MCR 7.101—MCR 7.115 as generally applicable to criminal appeals to the circuit court. Note, however, that Part A does not include discussion of the rules that apply only to appeals from agencies.

c. Manner of Filing

“An application for leave must comply with [MCR 7.105](#), must include statements of jurisdiction and venue, and must be served on the parole board and the prisoner. If the victim seeks leave, the prosecutor must be served. If the prosecutor seeks leave, the victim must be served if the victim requested notification under [MCL 780.771](#).” [MCR 7.118\(D\)\(3\)](#).³⁰

d. Access to Reports or Guidelines

The prosecutor, the victim, and the prisoner are entitled, upon request, to receive applicable reports and parole guidelines. [MCR 7.118\(C\)](#).

e. Response

The prisoner must be notified, in a form approved by SCAO,³¹ that he or she may respond to the application for leave to appeal through retained counsel or in propria persona. [MCR 7.118\(D\)\(3\)\(b\)\(i\)](#).

2. Appointment of Counsel for the Prisoner

“A prosecutor’s appeal of a parole-release decision is part of the parole process in Michigan, and an inmate’s constitutional liberty interest is not triggered when the [Parole] Board enters [an] order to grant parole; instead, a liberty interest is triggered only after the Board’s order is effectuated and the inmate is released from prison.” *In re Parole of Hill*, 298 Mich App at 430. Accordingly, a prisoner awaiting release on parole has no constitutional right to the appointment of counsel during an appeal from the Parole Board’s decision to grant the prisoner parole. *Id.* at 420-424, 430 (holding, additionally, that [MCR 7.118\(D\)\(3\)\(b\)\(i\)](#), allowing a prisoner to respond to an appeal from a parole release decision “by counsel or in propria persona,” does not violate the Equal Protection Clause by discriminating against indigent prisoners).

Although a prisoner has no constitutional right to the appointment of counsel during an appeal from a Parole Board decision, the circuit court “has discretion to appoint counsel

³⁰ See [MCR 7.118\(D\)\(3\)\(a\)-\(c\)](#) for detailed rules regarding service on the parole board, the victim, the prosecutor, and the prisoner.

³¹ See [SCAO Form CC 404](#), “Notice to Prisoner on Application for Leave to Appeal Decision of Parole Board[,]” which was promulgated under former [MCR 7.104\(D\)\(2\)](#).

for indigent inmates responding to [such] an appeal[.]” *In re Parole of Hill*, 298 Mich App at 427. “[A] circuit court has broad authority to facilitate the fair and orderly disposition of cases and controversies[.]” including “the inherent authority to use funds that [have] already been appropriated to appoint counsel . . . to facilitate the orderly and efficient disposition of [an appeal from a Parole Board decision].” *Id.* at 427, 430 (holding that the circuit court did not abuse its discretion in appointing counsel to represent a prisoner for the pendency of the prosecutor’s appeal from the Parole Board’s order granting parole).

3. Stay of Order of Parole

An order of parole issued under [MCL 791.236](#) must not be executed until 28 days after the notice of action has been mailed. [MCR 7.118\(F\)\(1\)](#).

“If an order [of parole] is issued under [MCL 791.235](#) before completion of appellate proceedings, a stay may be granted in the manner provided by [MCR 7.108](#), except that no bond is required.” [MCR 7.118\(F\)\(2\)](#). The prisoner must be notified, in a form approved by SCAO,³² of this possibility. [MCR 7.118\(D\)\(3\)\(b\)\(ii\)](#).

4. Decision to Grant Leave to Appeal

The circuit court must either make its determination whether to grant leave within 28 days after the application is filed, or enter an order to produce the prisoner for a show cause hearing to determine whether to release the prisoner on parole pending disposition of the appeal. [MCR 7.118\(G\)\(1\)-\(2\)](#).

5. Procedure After Granting Leave to Appeal

“If leave to appeal is granted, [MCR 7.105\(E\)\(4\)](#) [(generally governing the circuit court’s decision on an application for leave to appeal)] applies[.]” together with additional rules specifically governing the record and briefs in parole board appeals. [MCR 7.118\(H\)](#).³³

³² See [SCAO Form CC 404](#), “Notice to Prisoner on Application for Leave to Appeal Decision of Parole Board[.]” which was promulgated under former [MCR 7.104\(D\)\(2\)](#).

³³ See [MCR 7.118\(H\)\(1\)](#) for rules governing the record on appeal from a parole board decision. See [MCR 7.118\(H\)\(2\)](#) for rules that, in addition to the general rules set out in [MCR 7.111](#), govern briefs on appeal from a parole board decision.

a. Burden of Proof

“The appellant has the burden of establishing that the decision of the parole board was

“(a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to [MCL 24.207](#), or

(b) a clear abuse of discretion.” [MCR 7.118\(H\)\(3\)](#).

See also *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 153 (1995) (“[the parole board’s] discretion . . . is not unfettered but . . . is circumscribed by the many requirements of the [applicable statutes][]”).

b. Remand to the Parole Board

The circuit court, on its own motion or a party’s motion, may remand the matter to the parole board for an explanation of its decision. [MCR 7.118\(H\)\(4\)](#). “The parole board shall hear and decide the matter within 28 days of the date of the order, unless the board determines that an adjournment is necessary to obtain evidence or there is other good cause for an adjournment.” [MCR 7.118\(H\)\(4\)\(a\)](#). “The time for filing briefs on appeal under [[MCR 7.118\(H\)\(2\)](#)] is tolled while the matter is pending on remand.” [MCR 7.118\(H\)\(4\)\(b\)](#).

6. Parole Board Responsibility After Reversal or Remand

“If a decision of the parole board is reversed or remanded, the board shall review the matter and take action consistent with the circuit court’s decision within 28 days.” [MCR 7.118\(J\)\(1\)](#).

“If the circuit court order requires the board to undertake further review of the file or to reevaluate its prior decision, the board shall provide the parties with an opportunity to be heard.” [MCR 7.118\(J\)\(2\)](#).

7. Costs

“The expense of preparing and serving the record on appeal may be taxed as costs to a nonprevailing appellant, except that expenses may not be taxed to an indigent party.” [MCR 7.118\(H\)\(1\)\(c\)](#).

8. Appeal from Circuit Court to Court of Appeals

“An appeal of a circuit court decision is by emergency application for leave to appeal to the Court of Appeals under [MCR 7.205\(F\)](#), and the Court of Appeals shall expedite the matter.” [MCR 7.118\(I\)](#).

[MCR 7.118\(J\)\(3\)](#) provides that an appeal to the Court of Appeals does not affect the parole board’s jurisdiction to review the matter upon reversal or remand or to provide for a hearing as set out in [MCR 7.118\(J\)\(1\)-\(2\)](#).

C. Appeal From Parole Revocation

“After a prisoner is released on parole, the prisoner’s parole order is subject to revocation at the discretion of the parole board for cause . . .” [MCL 791.240a\(1\)](#). Because a parole revocation “is not part of a criminal prosecution . . . the full panoply of rights due a defendant in such a proceeding does not apply . . .” *Morrissey v Brewer*, 408 US 471, 480 (1972). In Michigan, Chapter 6 of the Administrative Procedures Act (APA), [MCL 24.301](#) to [MCL 24.306](#), which provides for judicial review of contested cases, applies to Department of Corrections parole revocation hearings. *Penn v Dep’t of Corrections*, 100 Mich App 532, 540 (1980). If the Department of Corrections fails to comply with the timelines for revocation proceedings, the proper remedy is a complaint for an order of mandamus. *Jones (James) v Dep’t of Corrections*, 468 Mich 646, 658 (2003); *Callison v Dep’t of Corrections*, 56 Mich App 260, 264-265 (1974).

A petition for review of a parole revocation decision must be filed in the circuit court within 60 days of the parole revocation. [MCL 24.303](#)—[MCL 24.304](#). However, the APA is not the only avenue of judicial review available to an accused parolee. *Triplett v Deputy Warden*, 142 Mich App 774, 779 (1985). If an accused parolee fails to seek relief in the circuit court within the 60-day APA time limit, he or she may still file an action for habeas corpus. *Id.* at 779; [MCR 3.303](#).

D. Objection to Parole Recommendation in Certain Cases

Before granting parole to a prisoner under [MCL 791.234\(13\)-\(17\)](#) (parole in cases involving certain drug offenses) or [MCL 791.235\(10\)](#) (medical parole), the parole board must provide notice to the prosecuting attorney in the county where the prisoner was convicted. [MCL 791.234\(18\)](#). At the same time, it must notify “any known victim or, in the case of a homicide, the victim’s immediate family” when it is considering medical parole under [MCL 791.235\(10\)](#). [MCL 791.234\(18\)](#).

Within 30 days of receiving this notice, “[t]he prosecuting attorney or victim or, in the case of a homicide, the victim’s immediate family, may object to the parole board’s decision to recommend parole by filing a motion in the circuit court in the county in which the prisoner was convicted[.]” [MCL 791.234\(19\)](#). A motion to object “must be heard by the sentencing judge or the judge’s successor in office.” *Id.* If the prosecutor is objecting, he or she “may seek an independent medical examination of the prisoner being considered for [medical] parole[.]” *Id.* “If an appeal is initiated under this subsection, a subsequent appeal under [[MCL 791.234\(11\)](#)] may not be initiated upon the granting of parole.” [MCL 791.234\(19\)](#).

At a hearing on an objection to the parole board’s recommendation, both of the following apply:

“(a) The prosecutor and the parole board may present evidence in support of or in opposition to the determination that a prisoner is medically frail, including the results of any independent medical examination.

“(b) The sentencing judge or the judge’s successor shall determine whether the prisoner is eligible for parole as a result of being medically frail.” [MCL 791.234\(20\)](#).

The court’s decision “is binding on the parole board with respect to whether a prisoner must be considered medically frail or not.” [MCL 791.234\(21\)](#). However, the court’s decision “is subject to appeal by leave to the court of appeals granted to the department, the prosecuting attorney, or the victim or victim’s immediate family in the case of a homicide.” *Id.*

2.3 Administrative Appeals

Circuit courts are vested with the authority to hear appeals on decisions from administrative agencies or officers. [Const 1963, art 6, § 28](#); [MCL 600.631](#). In general, [MCR 7.101](#) through [MCR 7.115](#) apply to administrative appeals; however, [MCR 7.117](#) through [MCR 7.123](#) provide more specific provisions that control in certain kinds of administrative appeals.

A. Standard of Review

[Const 1963, art 6, § 28](#) states in part:

“All final decisions, findings, rulings, and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-

judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings, and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.”

According to the Michigan Court of Appeals:

“An administrative agency decision is reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence.”
Michigan Ed Ass’n Political Action Comm v Sec’y of State, 241 Mich App 432, 444 (2000).

The Court of Appeals “reviews a lower court’s review of an agency decision to determine ‘whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency’s factual findings.’”
Dignan v Michigan Pub School Employees Ret Bd, 253 Mich App 571, 575 (2002), quoting *Boyd v Civil Service Comm*, 220 Mich App 226, 234 (1996). This is essentially a clearly erroneous standard of review. *Dignan*, 253 Mich App at 575. “‘In reviewing whether an agency’s decision was supported by competent, material, and substantial evidence on the whole record, a court must review the entire record.’” *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 432 (2017) (citation omitted).

Non-Contested Cases. If no hearing is required (i.e., it is not a “contested case”), it is improper for the circuit court or the Court of Appeals to review the evidentiary support for an administrative agency’s determination. *Brandon Sch Dist v Michigan Educ Special Svcs Ass’n*, 191 Mich App 257, 263 (1991). In such cases, “[j]udicial review is not de novo and is limited in scope to a determination whether the action of the agency was authorized by law.” *Id.* at 263. See also *Henderson v Civil Serv Comm*, 321 Mich App 25, 40 (2017) (noting that, under Const 1963, art 6, § 28, “when a hearing is not required, courts review an agency decision only under the ‘authorized by law’ standard, and not also the substantial evidence test[.]”). An agency’s decision is not authorized by law if it “violates a statute [or constitution], exceeds the statutory authority or jurisdiction of the agency, is made after unlawful procedures that

result in material prejudice, or is arbitrary and capricious.” *Brandon*, 191 Mich App at 263; see also *Henderson*, 321 Mich App at 44; *Detroit Pub Sch v Conn*, 308 Mich App 234, 245 (2014); *Northwestern Nat’l Cas Co v Comm’r of Ins*, 231 Mich App 483, 489 (1998). This interpretation, which is similar to the standards set out in [MCL 24.306\(1\)](#) of the Administrative Procedures Act (APA), is “a reasonable articulation of the constitutional standard because it focuses on the agency’s power and authority to act rather than on the objective correctness of its decision.” *Northwestern Nat’l Cas Co*, 231 Mich App at 489. However, see *Henderson*, 321 Mich App at 41 (rejecting the plaintiffs’ “argument that the APA’s competent, material, and substantial evidence standard, [[MCL 24.306\(1\)\(d\)](#)], applie[d]” in an uncontested agency case, and holding that the circuit court “exceed[ed] the authorized-by-law scope of review by reweighing the evidence, making credibility decisions, and substituting its judgment for that of the [Civil Service Commission]”).

Contested Cases. When judicial review of a final decision or order in a contested case is governed by the APA, [MCL 24.306](#) provides:

“(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

- (a) In violation of the constitution or statute.
- (b) In excess of the statutory authority or jurisdiction of the agency.
- (c) Made upon unlawful procedure resulting in material prejudice to a party.
- (d) Not supported by competent, material and substantial evidence on the whole record.
- (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
- (f) Affected by other substantial and material error of law.”

Where “the determination whether [a] hearing officer’s decision is ‘authorized by law,’ [Const 1963, art 6, § 28](#), or in violation of or in excess of statutory authority, [MCL 24.306\(1\)\(a\)](#)]; [MCL 24.306\(1\)\(b\)](#), turns on statutory interpretation[,]” the issue “is a question of law [that the appellate court] reviews de novo.” *Detroit Pub Sch*, 308

Mich App at 246 (citations omitted). “‘Respectful consideration’ of an agency’s statutory interpretation is not akin to ‘deference[;]’ . . . [w]hile an agency’s interpretation can be a helpful aid in construing a statutory provision with a ‘doubtful or obscure’ meaning, [the] courts are responsible for finally deciding whether an agency’s interpretation is erroneous under traditional rules of statutory construction.” *Grass Lake Improvement Bd v Dep’t of Environmental Quality*, 316 Mich App 356, 363 (2016) (citations omitted).

In reviewing a decision of an administrative law judge (ALJ) to award or deny attorney fees and costs under [MCL 24.323\(1\)\(c\)](#) in a contested case under the APA, “whether an argument has ‘legal merit’ is not the proper legal question to be considered by the circuit court[; r]ather, the standard, as set forth in [MCL 24.323\(1\)\(c\)](#), is whether [the agency’s] legal position ‘was devoid of *arguable* legal merit.’” *Grass Lake Improvement Bd*, 316 Mich App at 365 (emphasis added by the Court of Appeals). “‘A claim is not frivolous merely because the party advancing the claim does not prevail on it[;]’ . . . [i]nstead, ‘a claim is devoid of *arguable* legal merit if it is not sufficiently grounded in law or fact, such as when it violates basic, longstanding, and unmistakably evident precedent.’” *Id.* (applying, as “highly persuasive[;]” authority “interpreting the nearly identical language found in [MCL 600.2591\(3\)\(a\)](#)[;]” and holding that the ALJ properly denied the petitioner’s request for attorney fees; “although [the Department of Environmental Quality] did not prevail in the [underlying] contested case,” its “legal position was sufficiently grounded in law as to have at least some arguable legal merit, and hence it was not ‘frivolous’ under [MCL 24.323\(1\)\(c\)](#)[;]”) (citations omitted; quote altered and emphasis added by the Court of Appeals).

B. Application of Court Rules

[MCL 600.631](#) provides:

“An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.”

Specific rules cover appeals from decisions:

- arising under the Michigan Employment Security Act, [MCR 7.116](#),
- of the Michigan Civil Service Commission, [MCR 7.117](#),
- of agencies governed by the Administrative Procedures Act, [MCR 7.119](#),
- regarding licensing under the Michigan Vehicle Code, [MCR 7.120](#),
- of concealed weapon licensing boards, [MCR 7.121](#), and
- regarding zoning ordinance determinations, [MCR 7.122](#).

Appeals from agencies not governed by any of the specific rules proceed as provided by [MCR 7.123](#). Timing is the same as for appeals in civil cases: appeals of right are governed by [MCR 7.104\(A\)](#) and applications for leave to appeal must comply with [MCR 7.105\(A\)](#). The claim of appeal must be signed by the appellant or the appellant's attorney and it must:

“(i) state “[Name of appellant] claims an appeal from the decision on [date] by [name of the agency],” and

(ii) include concise statements of the following:

[A] the nature of the proceedings before the agency;

[B] citation to the statute, rule, or other authority enabling the agency to conduct the proceedings;

[C] citation to the statute or constitutional provision authorizing appellate review of the agency's decision or order in the circuit court; and

[D] the facts on which venue is based.” [MCR 7.123\(B\)\(2\)\(b\)](#).

Applications for leave to appeal must comply with [MCR 7.105](#) and [MCR 7.112\(B\)\(2\)\(b\)\(ii\)](#).

2.4 Michigan Employment Security Act

[MCL 421.38](#) of the Michigan Employment Security Act (MESA) sets forth the scope of judicial review of agency decisions under that act. That statute provides in relevant part:

“(1) The circuit court . . . may review questions of fact and law on the record made before the administrative law judge and the Michigan compensation appellate commission [(MCAC)] involved in a final order or decision of the [MCAC], and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. . . .”

Procedures specific to appeals under the MESA are provided by [MCR 7.116](#). A party must file in the circuit court “an appeal of right from an order or decision of the [MCAC] . . . within 30 days after the mailing of the commission’s decision.” [MCR 7.116\(B\)](#).

Record on appeal. “The circuit court . . . did not err when it considered the certified record presented by the MCAC in its entirety[,]” including “files of the [Michigan Unemployment Insurance Agency (MUIA)] that were not presented to the [administrative law judge (ALJ)],” rather than only the record of proceedings before the ALJ and the MCAC; “[b]ecause [MCR 7.116](#) does not otherwise limit the scope of the record on appeal, the general definition of ‘record on appeal’ from an agency decision in [MCR 7.109\(2\)](#) applies[,]” and “the record before the circuit court [therefore] properly included ‘all documents, files, pleadings, testimony, and opinions and orders’ of the tribunal and the agency.” *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 432-435 (2017) (quoting [MCR 7.210\(A\)\(2\)](#) and noting that “[w]hile this expansive definition seemingly conflicts with the limited scope of the record described in [MCL 421.34](#) and [MCL 421.38](#)[])” of the MESA, a court rule prevails in a purely procedural conflict between a court rule and a statute).

Standard of review. The circuit court “may reverse an order or decision of the [MCAC] only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.” [MCR 7.116\(G\)](#), citing [MCL 421.38\(1\)](#). “Under [Const 1963, art 6, § 28](#) and [MCL 421.38\(1\)](#), a circuit court must review the [MCAC’s] factual findings under the substantial-evidence standard,” but “the interpretation and application of [a] statute to the facts is a question of law.” *Hodge v US Security Assoc, Inc*, 306 Mich App 139, 149, 151 (2014) (citations omitted). “[R]eviewing courts must first determine whether the [MCAC’s] conclusion of law, ‘accepting for this purpose all of the findings of fact’ of the [MCAC], was a legally valid conclusion[;] . . . [i]f it was a legally valid conclusion, reviewing courts then determine whether the findings of fact were supported by the evidence.” *Id.* at 150, 151 (holding that “[d]etermining whether [a decision of the MCAC is] authorized by law [is] within the circuit court’s authority under [Const 1963, art 6, § 28](#) and [MCL 421.38\(1\)](#)”) (citations omitted).

“Substantial evidence is that which a reasonable mind would accept as adequate to support a decision. Substantial evidence is more than a mere scintilla but less than a preponderance of the evidence.” *Trumble’s Rent-L-Center, Inc v MESC*, 197 Mich App 229, 233 (1992). “When a circuit court reviews whether a decision was supported by substantial evidence, it may not invade the province of the [MCAC] as fact-finder, resolve evidentiary disputes, or pass on witness credibility.” *Hodge*, 306 Mich App at 147. “The reviewing court should not substitute its opinion for that of the administrative agency where there is the requisite evidence to support the administrative decision, notwithstanding that the court might have reached a different result had it been sitting as the agency.” *Murphy v Oakland Co Dep’t of Health*, 95 Mich App 337, 339-340 (1980).

2.5 Secretary of State

[MCR 7.120](#) governs appeals to the circuit court under the Michigan Vehicle Code from a final determination by the Secretary of State pertaining to an operator’s license, a chauffeur’s license, a vehicle group designation, or an indorsement.

A person must file a petition for review within 63 days of a final determination by the Secretary of State. [MCL 257.323\(1\)](#); see also [MCR 7.120\(B\)\(1\)](#). However, for good cause shown, the court may allow the person to file the petition within 182 days of the final determination. *Id.*; see also [MCR 7.120\(C\)\(1\)](#).

A. Venue

Reviews of license denial, suspension, revocation, or restriction are brought before the circuit court in the person’s county of residence, or, if the denial or suspension was made pursuant to an arrest for lack of proof of insurance or lack of consent to a chemical test, in the county where the arrest was made. [MCL 257.323\(1\)](#).

B. Manner of Filing

A claim of appeal must conform to the requirements of [MCR 7.104\(C\)\(1\)](#), except that the party aggrieved by the Secretary of State’s decision is the appellant. [MCR 7.120\(B\)\(2\)\(a\)](#).

“The claim of appeal must:

(i) state the appellant’s full name, current address, birth date, and driver’s license number;

(ii) state “[name of appellant] claims an appeal from the decision on [date] by the Secretary of State”; and

(iii) include concise statements of the following:

[A] the nature of any determination by the Secretary of State;

[B] the statute authorizing the Secretary of State's determination;

[C] the subsection of [MCL 257.323](#) under which the appeal is taken; and

[D] the facts on which venue is based." [MCR 7.120\(B\)\(2\)\(b\)](#).

In addition, the claim of appeal must be signed and dated by the appellant or the appellant's attorney as stated in [MCR 7.104\(C\)\(3\)](#). [MCR 7.120\(B\)\(2\)\(c\)](#). The appellant must attach a copy of the determination from which the appeal is taken and any affidavits supporting the claim of appeal. [MCR 7.120\(B\)\(2\)\(d\)](#).

C. Hardship Review Hearing—§ 257.323(3)

A court may order the Secretary of State to issue a restricted license to an individual. [MCL 257.323c\(1\)](#). Under [MCL 257.323\(3\)](#) (and subject to the exceptions listed there), a court may order the Secretary of State to issue a restricted license if a denial, suspension, or restriction (but not a revocation) resulted from:

- physical or mental disability, [MCL 257.303\(1\)\(d\)](#);
- unsafe driving, [MCL 257.320](#);
- driving with a suspended license, [MCL 257.904\(10\)-\(11\)](#)
- driving in violation of a probationary condition, [MCL 257.310d](#); and
- a first violation of [MCL 257.625f](#) (refusal to submit to a chemical test under the implied consent statute).

A court may not issue a restricted license if the person's license has been suspended under [MCL 257.625f](#) within the immediately preceding seven years, or if the person has accumulated 24 points within the preceding two years. [MCL 257.323c\(2\)-\(3\)](#).

Additionally, "the court shall not issue a restricted license to a person to operate a commercial motor vehicle when a vehicle group designation is required to operate that vehicle." [MCL 257.323c\(4\)](#).

The court may require briefs and may enter an order setting a briefing schedule. [MCR 7.120\(F\)\(1\)](#). The court must schedule a

hearing under [MCL 257.323\(2\)](#), [MCR 7.120\(F\)\(2\)](#). “The court may take testimony and examine all the facts and circumstances relating to the denial, suspension, or restriction of the person’s license” [MCL 257.323\(3\)](#); see also [MCR 7.120\(F\)\(2\)](#).

[MCL 257.323a\(1\)](#) provides in relevant part:

“[T]he court may enter an ex parte order staying the suspension or revocation subject to terms and conditions prescribed by the court until the determination of an appeal to the secretary of state or of an appeal or a review by the circuit court”

However, the court is not authorized to enter an ex parte order staying a denial, suspension, or restriction on the basis of hardship. [MCL 257.323a\(2\)](#).

D. Review of Secretary of State’s Determination—§ 257.323(4)

In reviewing a determination of the Secretary of State resulting in a denial, suspension, restriction, or revocation of driving privileges, the court “may determine that the petitioner is eligible for full driving privileges or, if the petitioner is subject to a revocation under [[MCL 257.303](#)], may determine that the petitioner is eligible for restricted driving privileges.” [MCL 257.323\(4\)](#). Before setting aside the Secretary of State’s determination, the court must either make a determination that the petitioner is eligible for full driving privileges according to the criteria set out in [MCL 257.323\(4\)\(a\)](#), or make a determination that the petitioner is eligible for review of a revocation or denial under [MCL 257.303](#) or eligible for restricted driving privileges according to the criteria set out in [MCL 257.323\(4\)\(b\)](#). “Except as otherwise provided in [[MCL 257.323](#)], in reviewing [the Secretary of State’s] determination[,] . . . the court shall confine its consideration to a review of the record prepared under [[MCL 257.322](#) or [MCL 257.625f](#)] or the driving record created under [[MCL 257.204a](#)] for a statutory legal issue[.]” [MCL 257.323\(4\)](#). “Judicial review of an administrative licensing sanction under [[MCL 257.303](#)] shall be governed by the law in effect at the time the offense was committed or attempted.” [MCL 257.320e\(6\)](#).

If the court determines that the petitioner is eligible for restricted driving privileges under [MCL 257.323\(4\)\(b\)](#), the court must issue an order that contains certain information set out in [MCL 257.323\(5\)\(a\)-\(e\)](#), including “[a] requirement that each motor vehicle operated by the petitioner be equipped[, at the petitioner’s expense,] with a properly installed and functioning ignition interlock device for a period of not less than 1 year before the petitioner will be eligible to

return to the secretary of state for a hearing.” [MCL 257.323\(5\)\(b\)](#). The court must also notify the secretary of state of its determination that a petitioner is eligible for restricted driving privileges through the issuance of an order under [MCL 257.323\(5\)](#). [MCL 257.323\(8\)](#). Additionally, if the petitioner intends to operate a vehicle owned by his or her employer, the court must notify the employer of the petitioner’s obligation under [MCL 257.323\(5\)\(b\)](#) to operate a vehicle only if it is equipped with an ignition interlock device. [MCL 257.323\(6\)](#). The court does not “retain jurisdiction over a license issued under [[MCL 257.323](#)].” [MCL 257.323\(8\)](#).

Chapter 3: Opinions

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3.1 Oral Opinions¹

- The facts of the case as found by the judge should be articulated on the record. It is useful to state what facts are not in dispute.
- The issue(s) in the case should be clearly stated by the judge.
- The appropriate standard of review should be enunciated by the judge as the standard used in reaching the decision.
- Any “off-the-record” agreements between the judge and the parties affecting the decision must be delineated on the record.
- The final decision should be clearly stated for the record. Judges must avoid any ambiguity as to the final conclusion, or they risk confusing the appellate court, which will likely result in a remand.

Stating the decision on the record as detailed above helps assure that:

- Litigants and attorneys know the basis of the decision.
- The public has confidence in the fairness of the proceeding and the logic sustaining the ruling.
- The appellate court has an adequate statement of all the pertinent facts and reasoning surrounding the trial judge’s decision, allowing it to grant the trial court the high level of deference deserved in fact-finding matters.

3.2 Written Opinions²

A. Generally

The best opinion is clear, concise, and written in the active voice. This style has been termed the “agent/action” style. This writing style adopts the mandates of the plain language movement. Each sentence assigns responsibility, defines action, and states its consequences. In the following example, the second sentence illustrates the characteristics of the agent/action style.

1. There was aggression in appellant Jones’s pursuit of appellee Smith.

¹See the Michigan Judicial Institute’s [Bench Trial Decision Checklist](#).

²See the Michigan Judicial Institute’s [Bench Trial Decision Checklist](#).

2. Appellant Jones pursued appellee Smith aggressively.

Avoid footnotes, personalizing the argument, and the passive voice. Write to the inevitable conclusion.

B. Specifically

Opinion writing involves four basic steps: research, oral argument, planning the opinion, and writing the opinion.

1. Research

Become familiar with the case by reading the briefs and the case file. Determine whether the briefs appear to accurately state the applicable law. Do any additional research necessary after reading the briefs. The judge and the law clerk should discuss the proposed opinion, examining the structure, rationale, and the result.

2. Oral Argument

A final decision should not be made before oral argument because occasionally the attorneys bring up new issues or information that affects the course of the opinion. However, a rough draft of the opinion can usually be drafted before oral argument.

3. Planning the Opinion

Each type of opinion follows a different format. Develop an outline for the opinion being drafted and have a clear idea of where information will fit into the outline. Determine what issues will be decided. If the case turns on a procedural issue, do not plan an opinion addressing gratuitous substantive issues. However, if the result would be the same, stating so makes the opinion even stronger.

Also, consider your audience and the aim of the opinion. Is the decision primarily for the attorneys, or will another court or administrative agency be looking to the opinion for guidance?

4. Writing the Opinion

Committee Tip:

Good briefing tends to lead to good opinions. Bad briefing makes drafting an opinion more difficult. As a result, drafting an opinion based on bad briefing tends to lead to a poorly written opinion. It may be best to write “from scratch” rather than working from poorly researched, thought out, or written briefs.

An opinion consists of the following parts, which may or may not be labeled.

Introduction: An opening section used to establish the identity of the parties; state how the case came about; identify the dominant issue; and state the court’s resolution of the issue. Starting the opinion in this manner has two advantages: (1) the relevance of the facts that follow is immediately apparent, and (2) the opinion is naturally focused on the crucial issues in the case and is built on that foundation.

Statement of Facts: The statement should identify the who, what, where, when, why, and how of the case in chronological order. It should include all facts relevant to the outcome of the decision in clear, concise language. Avoid quotations, excerpts from pleadings, and citations. The statement of facts constitutes the facts as found by the court. Facts included in the written opinion should be vital and accurate. It is useful to state what facts are not in dispute. Including only essential facts saves the appellate court time and allows it to quickly become familiar with the case. Erroneous “facts” undermine the credibility of the trial court even if the errors are not outcome-determinative.

Issue(s): Sometimes it will be helpful to include a separate section that states the issue(s) being addressed by the court. If used, the statement of the issue(s) should be clear and concise. It is useful to state the issues that are not being argued. Discuss and dispense with multiple issues in order of importance/difficulty. Do not raise or discuss issues that do not exist. Recognize the arguments of the losing party, but do not grant them undeserved attention.

Standard of Review: This section should clearly state the standard the court is applying to the facts in the decision. Citations are a vital part of this section of the opinion.

Discussion (Analysis or Conclusions of Law): This section should start with a concise statement or paragraph setting out the law applicable to the issue at hand. If there is more than one issue, a statement of the applicable law should immediately precede the discussion. Use citations, but avoid string citations and lengthy quotations. After stating the applicable law, apply the law to the facts as stated in the statement of facts, ending with your conclusion.

Conclusion: Succinctly restate a conclusion that includes the reasons for the decision. The restatement is particularly important if multiple issues were addressed in the opinion.

Order: A phrase ordering the decision is a necessary end to the opinion. A typical example is: "It is so ordered."

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