Criminal Proceedings Benchbook, Volume 1, Revised Edition

Content formerly part of the original MJI Circuit Court Benchbook and the MJI Criminal Procedure Monograph Series

•Pretrial Proceedings
•Trial

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Michigan Supreme Court

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- The Honorable David F. Viviano, *Justice*
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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 revised edition was originally published in December 2017. The first edition of this benchbook was originally created in 2013 by consolidating materials that were initially published in 2006, 2009, and 2013. The text has been revised, reordered, and updated through February 21, 2024.

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, vacated, 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, vacated, or overruled is no longer binding precedent, it is less clear when an opinion is not reversed, vacated, 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); *Graham v Foster*, 500 Mich 23, 31 n 4 (2017) (because the Supreme Court vacated a portion of the Court of Appeals decision, "that portion of the Court of Appeals' opinion [had] no precedential effect and the trial court [was] not bound by its reasoning"). 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*, 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 *Criminal Proceedings Benchbook*, *Volume 1*, is part of a three-volume set. The *Criminal Proceedings Benchbook*, *Volume 1*, concerns pretrial and trial matters, the *Criminal Proceedings Benchbook*, *Volume 2*, concerns sentencing, and the *Criminal Proceedings Benchbook*, *Volume 3*, concerns posttrial matters.

This revised edition of the *Criminal Proceedings Benchbook*, *Volume 1*, was authored by MJI Research Attorneys Lisa Schmitz and Kimberly Muschong and was edited by MJI Publications Manager Sarah Roth. The author of this edition was greatly assisted by an editorial advisory committee whose members reviewed draft text and provided valuable feedback. The members of the editorial advisory committee were:

- The Honorable James M. Biernat, Jr., Chief Judge, 16th Circuit Court, Macomb County
- The Honorable Kathleen M. Brickley, Chief Judge, Van Buren County Courts
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The *Criminal Proceedings Benchbooks, Volumes 1 and 2*, derive from the former MJI *Circuit Court Benchbook: Criminal Proceedings* and MJI *Criminal Procedure Monograph Series*. The information from those publications has been combined and reorganized to better serve MJI's core audience.

The MJI *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.

The MJI *Criminal Procedure Monograph* series formerly contained the following titles:

- Monograph 1: *Issuance of Complaints & Arrest Warrants—Fourth Edition*
- Monograph 2: *Issuance of Search Warrants—Fourth Edition*
- Monograph 3: *Misdemeanor Arraignments & Pleas—Third Edition*
- Monograph 4: *Felony Arraignments & Pleas—Third Edition*
- Monograph 5: *Preliminary Examinations—Third Edition*
- Monograph 6: *Pretrial Motions—Third Edition*
- Monograph 7: *Probation Revocation—Fourth Edition*
- Monograph 8: *Felony Sentencing—Revised Edition*
- Monograph 9: *Postconviction Proceedings*

Former MJI *Criminal Procedure Monographs 1-7* were originally authored in 1992 by MJI staff members Leonhard J. Kowalski, Dawn F. McCarty, and Margaret Vroman. The 1992 edition was funded in part by a grant from the W.K. Kellogg Foundation. Subsequent editions of these monographs were revised by MJI Research Attorneys with the assistance of an editorial advisory committee.

Former MJI *Criminal Procedure Monograph 8* was originally authored by former MJI Publications Manager Phoenix Hummel. Ms. Hummel and MJI Research Attorney Lisa Schmitz contributed to the revised edition

and were assisted by an editorial advisory committee. MJI Publications Manager Sarah Roth served as editor.

Former *MJI Criminal Procedure Monograph 9* was originally authored by MJI Research Attorney Lisa Schmitz. Former MJI Publication Manager, Phoenix Hummel, served as editor. In addition, Lisa Schmitz was assisted by an editorial advisory committee.

Using This Benchbook

This benchbook is intended for Michigan judges who handle criminal cases. The purpose of this benchbook is to provide a single source to address issues that may arise while the judge is on the bench. The benchbook is designed to be a quick reference, not an academic discussion. In that context, one of the most difficult challenges is organizing the text so that the user can readily find any topic as it arises.

This book has underlying themes that may assist the user to understand the overarching concepts around which the book is organized. This book is based upon the following concepts:

- The focus is on process rather than substantive law although substantive law is discussed when important or necessary to decision-making and the process as a whole.
- The text covers the routine issues that a judge may face and non-routine issues that require particular care when they arise.
- The text is intended to include the authority the judge needs to have at his or her fingertips to make a decision.
- The text is designed to be read aloud or incorporated in a written decision.
- The text attempts to identify whether the court's decision is discretionary.

With these concepts in mind, the text is organized as follows:

- The format generally follows the sequence of the Michigan Court Rules and the Michigan Rules of Evidence.
- The format generally follows the typical sequence in which issues arise during the course of a case.
- At the beginning of each chapter is a table of contents that lists what is covered in the chapter.
- Sections in each chapter are identified by the word or phrase typically used to identify the topic (a keyword concept).

- The discussion of each topic is designed to move from the general to the specific without undue elaboration.
- If the court is required to consider particular factors when making a decision, every effort has been made to identify the necessary elements.
- Every effort has been made to cite the relevant Michigan law using either the seminal case or the best current authority for a body of law. United States Supreme Court decisions are cited when Michigan courts are bound by that authority and they are the original source. There are references to federal decisions or decisions from other states when no applicable Michigan authority could be located.
- Every effort has been made to cite the source for each statement. If no authority is cited for a proposition, then the statement is the committee's opinion.
- If a proceeding or rule of evidence is based upon a statute, reference to that authority is given in the text.

The **Michigan Judicial Institute (MJI)** was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing educational programs and written materials for Michigan judges and court personnel. In addition to formal seminar offerings, MJI is engaged in a broad range of publication activities, services, and projects that are designed to enhance the professional skills of all those serving in the Michigan court system. MJI welcomes comments and suggestions. Please send them to **Michigan Judicial Institute, Hall of Justice, P.O. Box 30048, Lansing, MI 48909. (517) 373–7171.**

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1.1 Access to Court Proceedings and Records

A. Personal Identifying Information (PII)

"[P]ersonal identifying information is protected and shall not be included in any public document or attachment filed with the court on or after April 1, 2022," unless otherwise provided by the Michigan Court Rules. MCR 1.109(D)(9)(a).

1. Protected PII Defined

An individual's protected PII includes the following:

- date of birth,
- Social Security number or national identification number,
- driver's license number or number of state-issued personal identification card,
- passport number, and
- financial account numbers. MCR 1.109(D)(9)(a)(*i*)-(*v*).

2. Filing and Accessing Protected PII

a. Filing a Document Containing Protected PII

When law or court rule requires protected PII, as it is defined in MCR 1.109(D)(9)(a), to be filed with the court, or when the court finds the information necessary to identify a specific individual in a case, the PII must be provided using the form and manner required by the State Court Administrative Office (SCAO).[1] MCR 1.109(D)(9)(b)(*i*).

Protected PII provided to the court in compliance with the requirements of MCR 1.109(D)(9)(b) must be entered into the case management system according to standards established by the SCAO. MCR 1.109(D)(9)(e). "The information shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not

[1] SCAO Form MC 97, *Protected Personal Identifying Information* (for an individual who is a defendant, respondent, or decedent), and SCAO Form MC 97a, *Addendum to Protected Personal Identifying Information* (for an individual who is a plaintiff, petitioner, or other individual).

be included or displayed as case history under MCR 8.119(D)(1).

Except as otherwise provided in the court rules, when a party is required to provide protected PII in a public document to be filed with the court, the party must redact the protected PII from the document and file the PII form approved by SCAO.[2] MCR 1.109(D)(9)(b)(*iii*). Unredacted protected PII may be included on Uniform Law Citations filed with the court and on proposed orders submitted to the court. *Id*. If a party submits a proposed order to the court that is required to contain unredacted protected PII once issued by the court, the party must not attach the proposed order to another document. *Id*.

The SCAO form must contain the information redacted from the document and must assign an appropriate reference to the information contained in the SCAO form that uniquely associates each item redacted from the document with the corresponding personal identifying information provided on the SCAO form.[3] MCR 1.109(D)(9)(b)(*iii*). When a reference is made in a case to the identifier representing the personal identifying information on the SCAO form, the reference to the identifier is understood to refer to the complete information related to the identifier appearing on the form. *Id*. The SCAO form may include fields for the PII, and the information inserted into the fields will be protected.[4] *Id*.

Providing a Social Security number. When a Social Security number is required to be filed with the court, the number must be limited to the last four digits, except when the documents being filed are required by the

[2]SCAO Form MC 97, *Protected Personal Identifying Information* (for an individual who is a defendant, respondent, or decedent), and SCAO Form MC 97a, *Addendum to Protected Personal Identifying Information* (for an individual who is a plaintiff, petitioner, or other individual).

[3]A specific form for protecting personal identifying information must be filed when a petition is filed in child protective proceedings. See SCAO Form MC 97b, *Protected Personal Identifying Information*. SCAO Form MC 97b is the form listing the birthdates, which are protected PII under MCR 1.109(D)(9)(a), of the children and other parties named on a petition to initiate child protective proceedings. Birthdates appear on SCAO Form MC 97b in fields designated by number and letter. Those number and letter combinations are noted on SCAO Form JC 04b so that actual birthdates do not appear on the petition; instead, the petition contains only the letter and number designation that corresponds to a party's particular birthdate as it is listed on SCAO Form 97b.

[4]Local court forms are prohibited from containing fields in which protected PII may be entered. MCR 1.109(D)(9)(c). A court must not reject a document to be filed, dismiss a case, or otherwise take negative action against a party if the party has failed to provide protected PII on a local court form. *Id*.

Friend of the Court and will not be placed in the court's legal file under MCR 8.119(D). MCR 1.109(D)(9)(b)(*ii*).[5]

b. Amending Protected PII

An individual may amend as of right the protected PII provided in the SCAO form. MCR 1.109(D)(9)(b)(*iii*).

c. Access to a Document Containing Protected PII

Limited access to protected PII. Protected PII under MCR 1.109(D) is nonpublic. MCR 1.109(D)(9)(b)(*iv*). Protected PII is available for purposes of case activity or as otherwise required by law or court rule. *Id*. The protected PII provided is available only to the parties in a case, to interested persons described in the court rules, and to other persons, entities, or agencies authorized by law or court rules to access nonpublic records that have been filed with the court. *Id*.

3. Consenting to the Access of Protected PII

A party may stipulate in writing to permit any person, entity, or agency to access to his or her protected PII. MCR 1.109(D)(9)(b)(*v*)(A). Any person, entity, or agency attempting to access the protected PII must provide the court with the stipulation permitting access. *Id*.

a. Access to a Party's Date of Birth

Obtaining authority to access a party's date of birth. For the purpose of confirming a particular person's identity and with the person's consent, an individual may be authorized to access a party's date of birth without having to present a stipulation as is required under MCR 1.109(D)(9)(b)(*v*)(A) in order to access protected PII. MCR 1.109(D)(9)(b)(*v*)(B)(1).

Possession of the party's consent. The individual authorized to access a birthdate must retain possession of the consent, or the consent must be retained by the entity for which the individual works, or the person or

[5]See also MCR 1.109(D)(10)(b), which provides that a court's dissemination of social security numbers is limited to the purposes permitted under federal or state law. If a request is filed on or after March 1, 2006, for a copy of a public document, "the court must review the document and redact all social security numbers on the copy." *Id*. "This requirement does not apply to certified copies or true copies when they are required by law, or copies made for those uses for which the social security number was provided." *Id*.

organization (or someone acting on their behalf) seeking a party's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(1).

b. List of Individuals Authorized to Access a Party's Date of Birth

SCAO list of authorized individuals. The SCAO will maintain a list of the individuals having the authority to access a party's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(1). To appear on the SCAO list, an individual must provide in writing the name of the entity for which the individual works and an assurance that on each occasion the individual seeks to confirm a party's birthdate, it will be in the course of the individual's work and with the consent of the person whose date of birth is sought. *Id*. The assurance must be updated within every six months from the date of the original submission. *Id*.

Additional information required for placement on the SCAO list. In addition, an individual attempting to be placed on the SCAO list of individuals authorized to access birthdates must provide proof of his or her employer's or hiring entity's professional liability insurance in effect during the time the individual is seeking the person's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(2). The proof of insurance is nonpublic and must be updated upon the expiration or termination of the insurance policy. *Id*.

Court's duty to verify identity. A court must verify the identity of an individual claiming to be authorized to obtain a person's birthdate by matching the name appearing on the individual's state-issued identification card with the individual's name on the SCAO list. MCR 1.109(D)(9)(b)(*v*)(B)(3). Courts and SCOA may create secure, individualized accounts that allow authorized individuals to access a party's date of birth electronically. *Id*. After confirming the identity of the individual seeking information about a person's birthdate, a court must supply the authorized individual with a public register of actions or other public document that includes the person's date of birth. *Id*.

4. No Exemptions for Service of Protected PII

Except by a court order issued under MCR 1.109(D)(9)(b)(*vii*) making the PII confidential, there is no exemption from the requirement that a court or a party serve a nonpublic

document that was filed with the court and includes the protected PII that must be provided to the court as stated in MCR 1.109(D)(9)(b)(*i*). MCR 1.109(D)(9)(b)(*vi*).

5. Protected PII May Be Made Confidential

For just cause found, a court may, on its own motion or by motion of a party, order that PII be made confidential. MCR 1.109(D)(9)(b)(*vii*). The order must identify the person, party, or entity whose access to the PII is restricted. *Id*. When a party's home address or telephone number is made confidential, the court order must provide an alternative address for service on the party or an alternative phone number by which the party may be contacted about case activity. *Id*.

6. Failing to Comply With Requirements to Protect PII

If a party files his or her protected PII in a public document and does not provide the information in the form and manner established by the SCAO under MCR 1.109(D)(9), the party waives the protection available for his or her PII. MCR 1.109(D)(9)(d)(*i*). When a party fails to comply with the requirements of MCR 1.109(D) the court, on its own initiative or by a party's motion, may have the improperly filed documents sealed and order that new documents with redactions be prepared and filed. MCR 1.109(D)(9)(d)(*ii*).

7. Redacting Protected and Unprotected PII

a. Protected PII in Documents Filed With a Court

A person whose protected PII appears in a document filed with the court may request in writing that the protected PII be redacted;[6] if a person makes such a request, the clerk of the court must promptly process the request. MCR 1.109(D)(10)(c)(*i*). No motion fee is required for the request, the request must specify the protected PII to be redacted, and the document must be maintained as a nonpublic document in the case file. *Id*.

b. Unprotected PII in Public Documents Filed With a Court

PII not protected under MCR 1.109 may be redacted or made confidential or nonpublic. MCR 1.109(D)(10)(c)(*ii*).

[6] SCAO Form MC 97r, *Request for Redaction of Protected Personal Identifying Information*.

A party or a person having unprotected PII in a public document filed with the court may, in an ex parte motion using the appropriate SCAO-approved form,[7] request that the court direct the court clerk to redact the information specified by the party or person or to make the information confidential or nonpublic. *Id*. The court has discretion to hold a hearing on the motion. *Id*. The court must enter an order to redact the information or to make the information confidential or nonpublic "if the party or person's privacy interest outweighs the public's interest in the information."[8] *Id*.

c. Protected PII in an Exhibit Offered for Hearing or Trial

Protected PII may be redacted from an exhibit offered at a hearing or a trial when a person or party having protected PII in the exhibit requests in writing to have the PII redacted. MCR 1.109(D)(10)(c)(*iii*). No motion fee is required. *Id*. The person or party seeking redaction must identify in the request the specific protected PII to be redacted, and the request must be maintained as a nonpublic document in the case file. *Id*. The court must order the information redacted "if the party or person's privacy interest outweighs the public's interest in the information." *Id*.

d. Unredacted Protected PII in Transcripts Filed With a Court

Unredacted protected PII may be included on transcripts filed with the court; however, the clerk of the court must redact protected PII if a person submits a written request identifying the page and line number for each place in the transcript where the PII is located. MCR 1.109(D)(10)(c)(*iv*).

8. Responsibility for Redaction

The parties and their attorneys are *solely* responsible for excluding or redacting the PII listed in MCR 1.109(D)(9) from all documents filed with or offered to the court. MCR 1.109(D)(10)(a). There is no requirement that at the time of filing, a court clerk review, redact, or screen documents for PII,

[7] SCAO Form MC 97m, *Ex Parte Motion to Protect Personal Identifying Information*.

[8] SCAO Form MC 97o, *Order Regarding Ex Parte Motion to Protect Personal Identifying Information*.

whether protected or unprotected, without regard to whether the documents are filed electronically or on paper. *Id*.

Except as otherwise provided in the court rules, a court clerk is not required to redact protected PII from documents filed with or offered to the court[9] before providing a copy of the document requested, whether in-person or via the internet, or before making available at the courthouse via a publicly accessible computer that gives a person direct access to the document. MCR 1.109(D)(10)(a).

9. Certifying a Record

"The clerk of the court may certify a redacted record as a true copy of an original record on file with the court by stating that information has been redacted in accordance with law or court rule, or sealed as ordered by the court." MCR 1.109(D)(10)(d).

10. Maintaining a Document After Redacting PII

Documents from which PII has been redacted, or to which access has been restricted, must be maintained according to the standards established by the SCAO. MCR 1.109(D)(10)(e).

B. Videoconferencing

"[C]ourts may determine the manner and extent of the use of videoconferencing technology and may require participants to attend court proceedings by videoconferencing technology." MCR 2.407(B)(2). Proceedings occurring by videoconferencing are "subject to requirements, standards, and guidelines published by the [SCAO] and the criteria set forth in [MCR 2.407(C)]." MCR 2.407(B)(1). MCR 2.407 "does not supersede a participant's ability to participate by telephonic means under MCR 2.402." MCR 2.407(B)(3). See also MCR 6.006(A)(4).

The Michigan Court Rules identify certain proceedings in both circuit and district/municipal court for which videoconferencing technology is the preferred mode. MCR 6.006(B) and MCR 6.006(C). "In all other proceedings, the in-person appearance of the parties, witnesses, and other participants is presumed." MCR 6.006(B)(3); MCR 6.006(C)(2). However, "[a] court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any criminal proceeding." MCR 6.006(A)(2). "The use

[9]This provision applies equally to documents filed with or offered to the court before or after April 1, 2022. MCR 1.109(D)(10)(a).

of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the [SCAO], and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D). Use of videoconferencing technology under MCR 6.006 is subject to MCR 2.704. MCR 6.006(A)(1).

Nothing in the court rules precludes "a participant from requesting to physically appear in person for any proceeding.": MCR 2.407(B)(4). Accordingly, "[i]f there is a request to appear in person, or a participant is found to be unable to adequately use the technology, to hear or understand or be heard or understood, the presiding judge and any attorney of record for said participant must appear in person with the participant for said proceeding. Subject to [MCR 2.407(B)(5)], the court must allow other participants to participate using videoconferencing technology." MCR 2.407(B)(4).

A court may determine "that a case is not suited for videoconferencing, and may require any hearing, even a proceeding categorized as presumptively subject to videoconferencing technology, to be conducted in person." MCR 2.407(B)(5). However, a court must "consider the factors listed in [MCR 2.407(C)]" and "state its decision and reasoning, either in writing or on the record, when requiring in-person proceedings in each case where there is a presumption for the use of videoconferencing technology." MCR 2.407(B)(5)(a)-(b).

"When determining whether to utilize videoconferencing technology," courts must "consider constitutional requirements, in addition to the factors contained in MCR 2.407." MCR 6.006(A)(3). MCR 2.407(C) directs the court to consider the following factors "[i]n determining in a particular case the use of videoconferencing technology and the manner of proceeding with videoconferencing:

> (1) The capabilities of the court and the parties to participate in a videoconference.
>
> (2) Whether a specific articulable prejudice would result.
>
> (3) The convenience of the parties and the proposed witness(es), the cost of producing the witness in person in relation to the importance of the offered testimony, and the potential to increase access to courts by allowing parties and/or their counsel to appear by videoconferencing technology.
>
> (4) Whether the procedure would allow for full

> and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.
>
> (5) Whether the court has reason to believe that the participants in this hearing will not be able to maintain the dignity, solemnity, and decorum of court while using videoconferencing technology, or that the use of videoconferencing technology will undermine the integrity, fairness, or effectiveness of the proceeding.
>
> (6) Whether a physical liberty or other fundamental interest is at stake in the proceeding.
>
> (7) Whether the court can sufficiently control the participants in this hearing or matter so as to effectively extend the courtroom to the remote location.
>
> (8) Whether the use of videoconferencing technology presents the person at a remote location in a diminished or distorted sense that negatively reflects upon the individual at the remote location to persons present in the courtroom.
>
> (9) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.
>
> (10) Whether the parties or witness(es) have waived personal appearance or stipulated to videoconferencing.
>
> (11) The proximity of the videoconferencing request date to the proposed appearance date.
>
> (12) Any other factors that the court may determine to be relevant." MCR 2.407(C).

Courts "must provide reasonable notice to participants of the time and mode of a proceeding. If a proceeding will be held using videoconferencing technology, the court must provide reasonable notice of the way(s) to access that proceeding." MCR 2.407(B)(6). Courts must also "allow a party and their counsel to engage in confidential communication during a proceeding being conducted by

videoconferencing technology." MCR 2.407(B)(7). "If, during the course of a videoconference proceeding, the court or a participant is unable to proceed due to failure of technology, the court must reschedule the proceeding and promptly notify the participants of the rescheduled date and time and whether the proceeding will be held using videoconferencing technology or in person." MCR 2.407(B)(8). "All proceedings that are held using videoconferencing technology or communication equipment must be recorded verbatim by the court with the exception of hearings that are not required to be recorded by law." MCR 2.407(B)(9). "Courts must provide access to a proceeding held using videoconferencing technology to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule." MCR 2.407(B)(10).

"A participant who requests the use of videoconferencing technology shall ensure that the equipment available at the remote location meets the technical and operational standards established by [SCAO]." MCR 2.407(D)(1). Additionally, a "participant who will be using videoconferencing technology must provide the court with the participant's contact information, including mobile phone number(s) and email address(es), in advance of the court date when videoconferencing technology will be used. A court may collect the contact information using an SCAO-approved form. The contact information form used under this provision shall be confidential. An email address for an attorney must be the same address as the one on file with the State Bar of Michigan." MCR 2.407(D)(2). "There is no motion fee for requests submitted under [MCR 2.407]." MCR 2.407(D)(3).

1. Mode of Proceedings in Circuit Court

In circuit court, the use of videoconferencing technology is the preferred mode for "(a) initial arraignments on the information; (b) pretrial conferences; (c) motions pursuant to MCR 2.119; and (d) pleas." MCR 6.006(B)(2). "In all other proceedings, the in-person appearance of the parties, witnesses, and other participants is presumed." MCR 6.006(B)(3).

"Circuit courts may use videoconferencing technology to conduct any non-evidentiary or trial proceeding." MCR 6.006(B)(1). However, MCR 6.006(B)(4) prohibits the use of videoconferencing technology "in bench or jury trials, or any proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court after all parties have had notice and an opportunity to be heard on [its] use[.]"

"Nothing in [MCR 6.006] prevents a defendant, who otherwise has the right to appear in person, from demanding to physically appear in person for any proceeding. If there is a demand to appear in person, or a participant is found to be unable to adequately use the technology, to hear or understand or be heard or understood, the presiding judge and any attorney of record for said participant must appear in person with the participant for said proceeding. Subject to MCR 2.407(B)(5), the court must allow other participants to participate using videoconferencing technology." MCR 6.006(B)(5).

2. Mode of Proceedings in District and Municipal Court

In district and municipal court, the use of videoconferencing technology is the preferred mode for "conducting arraignments and probable cause conferences for in-custody defendants." MCR 6.006(C)(1). "In all other proceedings, the in-person appearance of the parties, witnesses, and other participants is presumed." MCR 6.006(C)(2).

However, "the use of videoconferencing technology shall not be used in evidentiary hearings, bench trials or jury trials, or any criminal proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court." MCR 6.006(C)(3). Nonetheless, "as long as the defendant is either present in the courtroom or has waived the right to be present, district courts may use videoconferencing to take testimony from any witness in a preliminary examination." MCR 6.006(C)(4).

C. Record of Proceedings

MCR 8.108(B)(1) states that a "court reporter or recorder shall attend the court sessions under the direction of the court and take a verbatim record of the following:

> "(a) the voir dire of prospective jurors;
>
> (b) the testimony;
>
> (c) the charge to the jury;
>
> (d) in a jury trial, the opening statements and final arguments;
>
> (e) the reasons given by the court for granting or refusing any motion made by a party during the course of a trial; and

> (f) opinions and orders dictated by the court and other matters as may be prescribed by the court."

MCR 8.108(E) states in part that "[t]he court reporter or recorder shall prepare without delay, in legible English, a transcript of the records taken by him or her (or any part thereof): (1) to any party on request, [or] . . . (2) on order of the trial court." *Id*. If the transcript is prepared in response to a party's request, "[t]he reporter or recorder is entitled to receive the compensation prescribed in the statute on fees from the person who makes the request." MCR 8.108(E)(1). If the transcript is prepared on order of the court, "[t]he court may order the transcript prepared without expense to either party." MCR 8.108(E)(2).

MCR 8.109(A) indicates that a trial court is "authorized to use audio and video recording equipment for making a record of court proceedings" if the equipment meets the standards published by the State Court Administrative Office (SCAO)[10] or is analog equipment that SCAO has approved for use. In addition, trial courts that use audio or video recording equipment "must adhere to the audio and video recording operating standards published by [SCAO]." MCR 8.109(B). Occasionally, proceedings occur without a court reporter present, or with a recording system that was not turned on or did not function correctly. If a settled statement of facts is made and certified as prescribed by MCR 7.210(B)(2), it controls the timing of the appellant's brief in the same manner as would a transcript. MCR 7.212(A)(1)(a)(*iii*).

MCR 7.210(B)(2) provides specific steps for an appellant to follow "[w]hen a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder . . . to settle the record and to cause the filing of a certified settled statement of facts to serve as a substitute for the transcript." "If a criminal defendant discovers during the pendency of an appeal that a transcript is unavailable, the defendant must file 'a motion to settle the record and, where reasonably possible, a proposed statement of facts' to serve as a substitute for the transcript." *People v Craig*, ___ Mich App ___, ___ (2022) (quoting MCR 7.210(B)(2)(a)). "The inability to obtain the transcripts of criminal proceedings may so impede a defendant's right of appeal under Const 1963, art 1, § 20 that a new trial must be ordered." *Craig*, ___ Mich App at ___ (cleaned up). However, the "failure of the State to provide a transcript when, after good faith effort, it cannot physically do so, does not automatically entitle a defendant to a new trial." *Id*. at ___ (quotation marks and citation omitted).

[10] See SCAO's Standards for Digital Video and Audio Recording.

In *Craig*, the defendant alleged that "the trial court may have provided improper jury instructions" and "the possible insufficiency of the evidence to show the kind of 'knowing restraint' needed to prove kidnapping[.]" *Craig*, ___ Mich App at ___. The Court of Appeals observed that "defendant showed sufficient prejudice to warrant a new trial" and "did not baldly assert that the missing transcript *might* reveal the existence of error warranting reversal." *Id*. at ___. "Rather, defendant cited specific facts from the surviving record and the evidentiary hearing to identify multiple possible appellate issues for which, if meritorious, he would otherwise be entitled to a new trial." *Id*. at ___. Because the defendant "identified two potential errors that entitle[d] him to a new trial on all charges, and the absence of the transcript from the trial's third and final day [was] prejudicial and [denied] him the opportunity for a fair appeal," the Court held that the missing transcript deprived defendant of his "constitutional right to an appeal" and "the trial court did not abuse its discretion in granting defendant a new trial[.]" *Id*. at ___.

Committee Tip:

It is of the utmost importance to assure that proceedings are being recorded to avoid situations in which records need to be recreated when courts have failed to record proceedings.

D. Open or Closed Trial

Defendants are entitled to a public trial. US Const, Am VI; Const 1963, art 1, § 20; MCL 600.1420. The right to a public trial extends to pretrial hearings, *Waller v Georgia*, 467 US 39, 43-47 (1984), and the jury selection process, *Presley v Georgia*, 558 US 209, 212-216 (2010). See also *Weaver v Massachusetts*, 582 US ___, ___ (2017). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of responsibility and to the importance of their functions[.]" *People v Davis*, 509 Mich 52, 66 (2022) (quotation marks and citation omitted).

However, "the public-trial right is not unlimited, and circumstances may exist that warrant the closure of a courtroom during any stage of a criminal proceeding." *Davis* 509 Mich at 66. "In order to justify a courtroom closure, there must be an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to

protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id*. at 66-67 ("preventing interference with the jury is . . . an overriding interest") (quotation marks and citation omitted). "The court must identify the particular interest, and threat to that interest along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *People v Veach*, ___ Mich ___, ___ (2023) (cleaned up).

In *Davis*, the Court concluded that the trial court closed the courtroom to the public for the majority of the trial when, "[a]fter a benign interaction between a courtroom observer and a juror on the second day of trial," it "ordered the courtroom closed to all observers except [the victim's] mother for the remainder of the trial." *Davis*, 509 Mich at 58, 68 (further concluding that "the closure was broader than necessary to protect the impartiality of the jury," "failed to consider reasonable alternatives to closing the proceedings," and "the trial court failed to make adequate factual findings to support the closure," rendering the "decision to close the courtroom . . . unjustified"). Although defendant's trial counsel did not object, the Court held that "mere silence in the face of a courtroom closure results in forfeiture, not waiver, of the public trial right." *Id*. at 65. Despite accepting the trial court's assertion that it "did not take any further action to effectuate this closure," the Michigan Supreme Court held that "the unjustified closure nonetheless violated defendant's public-trial right and constituted plain error requiring reversal." *Id*. at 58 (further noting that "the deprivation of a defendant's public-trial right is a structural error" that necessarily affects a defendant's substantial rights; such "structural error presumptively satisfies the plain-error standard's requirements for reversal").

In *Veach*, "the courtroom was closed to all but the parties, their attorneys, the complainant, and the victim advocate during the complainant's trial testimony." *Veach*, ___ Mich at ___. "This was a total closure of the courtroom to the public during a critical phase of the defendant's trial," and "[t]he trial court did not consider any reasonable alternatives to closure on the record as required[.]" *Id*. at ___. The Michigan Supreme Court concluded that the "trial court's sole discernable rationale for closure—that some unidentified observing family members may be sequestered as witnesses—lack[ed] specificity and [was] thus insufficient to support appellate review." *Id*. at ___. The "mere fact of closure during preliminary examination is insufficient to support closure at trial." *Id*. at ___. Accordingly, the Court held that "the trial court's findings of an overriding interest were inadequate to support closure." *Id*. at ___ ("the trial court did not identify an overriding interest"). The *Veach* Court held that defendant was entitled to a new trial because

"defendant's public-trial right was violated" when "the trial court did not consider any alternatives to closure during the complainant's testimony[.]" *Id*. at ___.

E. Gag Orders

The term *gag order* refers to a court order prohibiting attorneys, witnesses, and parties from discussing a case with reporters, or to a court order prohibiting reporters from publishing information related to a case. A court order prohibiting publication of information related to a case is unconstitutional if it imposes a prior restraint on speech. *Nebraska Press Ass'n v Stuart*, 427 US 539, 556 (1976) ("The [United States Supreme] Court has interpreted [First Amendment] guarantees to afford special protection against orders that [impose a prior restraint on speech by] prohibit[ing] the publication or broadcast of particular information or commentary"). See *People v Sledge*, 312 Mich App 516, 537 (2015), in which "[t]he trial court issued a gag order precluding all potential trial participants from making any extrajudicial statement regarding the case to the media or to any person for the purpose of dissemination to the public." The Court of Appeals vacated the gag order, holding that "[t]he overbroad and vague gag order constituted a prior restraint on freedom of speech, freedom of expression, and freedom of the press, and the trial court failed to justify the gag order." *Id*.

MCR 8.116(D)(1) should be followed in assessing whether to issue a gag order prohibiting discussion of the case with reporters:

> "Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless
>
> > (a) a party has filed a written motion that identifies the specific interest to be protected, or the court *sua sponte* has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;
> >
> > (b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
> >
> > (c) the court states on the record the specific reasons for the decision to limit access to the proceeding."

F. Access to Court Files and Records

1. Records

"For purposes of [MCR 8.119(A)], records are as defined in MCR 1.109, MCR 3.218, MCR 3.903, and MCR 8.119(D)-(G)." MCR 8.119(A). "Court records are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules[,]" and "may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules." MCR 1.109(A)(1). MCR 1.109(A)(1)(a) provides that "[c]ourt records include, but are not limited to:

> (*i*) documents, attachments to documents, discovery materials, and other materials filed with the clerk of the court,
>
> (*ii*) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records."

"Discovery materials that are not filed with the clerk of the court are *not* court records. Exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930[11] during the pendency of a proceeding are *not* court records." MCR 1.109(A)(2) (emphasis added).

The clerk of the court is required to "maintain a file of each action," including "all pleadings, process, written opinions and findings, orders, and judgments filed in the action, and any other materials prescribed by court rule, statute, or court order to be filed with the clerk of the court." MCR 8.119(D)(1)(b).

2. Access to Records

MCR 1.109(F) provides that "[r]equests for access to public court records shall be granted in accordance with MCR 8.119(H)." MCR 8.119(H) provides, in part:

[11] MCR 3.930 governs exhibits in juvenile proceedings. See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 21, for discussion of court records in juvenile proceedings.

> "Except as otherwise provided in [MCR 8.119](F),[12] only case records as defined in [MCR 8.119](D) are public records, subject to access in accordance with these rules."[13]

Additionally, MCR 8.119(H)(7) provides that "[u]nless access to a case record or information contained in a record as defined in [MCR 8.119](D) is restricted by statute, court rule, or an order [sealing a record] pursuant to [MCR 8.119](I),[14] any person may inspect that record and may obtain copies as provided in [MCR 8.119](J)."[15]

"Information on set aside convictions is nonpublic and access is limited to a court of competent jurisdiction, an agency of the judicial branch of state government, the department of corrections, a law enforcement agency, a prosecuting attorney, the attorney general, and the governor upon request and only for the purposes identified in MCL 780.623. Access may also be provided to the individual whose conviction was set aside, that individual's attorney, and the victim(s) as defined in MCL 780.623. The court must redact all information related to the set aside conviction or convictions before making the case record available to the public in any format." MCR 8.119(H)(9).

MCR 8.119(G) provides, in part, that "[a]ll court records not included in [MCR 8.119(D)-(F)] are considered administrative and fiscal records or nonrecord materials and are not subject to public access under [MCR 8.119](H)."

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[12] MCR 8.119(F) provides that "[c]ourt recordings, log notes, jury seating charts, and all other records such as tapes, backup tapes, discs, and any other medium used or created in the making of a record of proceedings and kept pursuant to MCR 8.108 are court records and are subject to access in accordance with [MCR 8.119(H)(8)(b)]." MCR 8.119(H)(8)(b), in turn, requires every court, by administrative order, to "establish a policy for whether to provide access for records defined in [MCR 8.119](F) and if access is to be provided, outline the procedure for accessing those records[.]"

[13] MCR 8.119(H)(4) provides that "[i]f a request is made for a public record that is maintained electronically, the court is required to provide a means for access to that record"; "[h]owever, the records cannot be provided through a publicly accessible website if protected personal identifying information has not been redacted from those records." "If a public document prepared or issued by the court on or after April 1, 2022, or a Uniform Law Citation filed with the court on or after April 1, 2022, contains protected personal identifying information, the information must be redacted before it can be provided to the public, whether the document is provided upon request via a paper or electronic copy, or direct access via a publicly accessible computer at the courthouse. Upon receipt by the court on or after April 1, 2022, protected personal identifying information included in a proposed order shall be protected by the court as required under MCR 8.119(H) as if the document was prepared or issued by the court." MCR 8.119(H)(5). See Section 1.1(A) for discussion of protected personal identifying information.

[14] See Section (F)(3) for discussion of sealing records under MCR 8.119(I).

[15] MCR 8.119(J) governs access and reproduction fees.

Administrative Order No. 2006-2, 474 Mich cliv (2006) addresses the confidentiality of social security numbers and management of non-public information contained within public documents.

"[A] court is prohibited from sealing court orders and court opinions under [the plain language of MCR 8.119(I)(6)[16].]" *Jenson v Puste*, 290 Mich App 338, 347 (2010). "Significantly, [MCR 8.119(I)(6)] does not allow a court the authority to exercise discretion in deciding whether to seal [a court order or opinion], unlike the limited discretion that [MCR 8.119(I)(1)] allows when a motion involves other court records." *Jenson*, 290 Mich App at 342-347 (trial court properly held that it did not have the authority to seal a personal protection order (PPO) pursuant to MCR 8.119(I)(6)).

Access to court records can be restricted by the Legislature. *In re Midland Publishing Co, Inc*, 420 Mich 148, 159 (1984). For example, MCL 750.520k allows a court, in a criminal sexual conduct case, to order the suppression of the victim's and actor's names and details of the alleged offense until after the preliminary examination. For a partial listing of statutes, court rules, and cases that restrict public access to court records, see the State Court Administrative Office's *Michigan Trial Court Records Management Standards*.

To determine whether a right of access exists regarding a document, a court should ask whether the document has historically been open to the public and press, and whether access "'plays a significant positive role in the function of the particular process in question.'" *In re People v Atkins*, 444 Mich 737, 740 (1994), quoting *Press-Enterprise Co v Superior Ct of California*, 478 US 1, 8 (1986) (after the defendant was found competent to stand trial, the court provided newspapers with an edited (as opposed to full text) version of the psychiatrist's written report; because competency reports that have not been admitted into evidence have traditionally been viewed as confidential, and public access would not play a significant positive role in the functioning of the particular process in question, the court's denial of full access to the report was affirmed).

"[T]he press has a qualified right of postverdict access to jurors' names and addresses, subject to the trial court's discretion to fashion an order that takes into account the competing interest of juror safety and any other interests that may be implicated by

[16] Formerly MCR 8.119(F)(5), MCR 8.119(I)(6) provides that "[a] court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record." See Section (F)(3) for discussion of sealing records under MCR 8.119(I).

the court's order." *In re Disclosure of Juror Names (People v Mitchell)*, 233 Mich App 604, 630-631 (1999). If a court determines that jurors' safety concerns are "legitimate and reasonable," the court may deny media access to jurors' names and addresses. *Id.* at 630. Jurors' privacy concerns alone are insufficient to deny access to jurors' names. *Id.*

Committee Tips:

Reports and records may be privileged or confidential and their treatment should be scrutinized in each case. Examples are substance abuse evaluations and treatment records, medical records and reports, and psychological/ psychiatric records and reports.

Consider whether access to the record is limited by statute, court order, or court rule. See the Nonpublic and Limited-Access Court Records chart.

Consider whether a filed document can be removed from the file by court order. See MCR 8.119(H).

For other information parties wish to keep confidential, consider having the document marked as an exhibit, reviewed by the court on the record, and then returned to the parties at the conclusion of the proceeding. See MCR 1.109(A)(2); MCR 2.518(A) (exhibits received and accepted into evidence under MCR 2.518 are not court records).

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3. Sealing Court Records

MCR 8.119(I)(1)-(3) provide information on sealing records, as follows:

> "(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts [sic] records, in whole or in part, in any action or proceeding, unless
>
> > (a) a party has filed a written motion that identifies the specific interest to be protected,

> (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
>
> (c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.
>
> (2) In determining whether good cause has been shown, the court must consider,
>
> (a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
>
> (b) the interest of the public.
>
> (3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records."

MCR 8.119(I) is not intended to limit a court's authority to issue protective orders under MCR 2.302(C) for trade secrets, etc. MCR 8.119(I)(8). "A protective order issued under MCR 2.302(C) may authorize parties to file materials under seal in accordance with the provisions of the protective order without the necessity of filing a motion to seal under [MCR 8.119]." MCR 8.119(I)(8).

"[A] court is prohibited from sealing court orders and court opinions under [the plain language of MCR 8.119(I)(6).[17]]" *Jenson v Puste*, 290 Mich App 338, 347 (2010). "Significantly, [MCR 8.119(I)(6)] does not give a court the authority to exercise discretion in deciding whether to seal [a court order or opinion], unlike the limited discretion that [MCR 8.119(I)(1)[18]] allows when a motion involves other court records." *Jenson*, 290 Mich App at 342-347 (trial court properly held that it did not have the authority to seal a personal protection order (PPO) pursuant to MCR 8.119(I)(6)).

"Any person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order. MCR 2.119[19] governs the proceedings on such a motion or objection." MCR 8.119(I)(9).

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[17]Formerly MCR 8.119(F)(5), MCR 8.119(I)(6) provides that "[a] court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record."

[18] Formerly MCR 8.119(F)(1).

If a court grants a motion to seal a court record, the court must send a copy of the order to the Clerk of the Michigan Supreme Court and to the State Court Administrative Office. MCR 8.119(I)(7).

When a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals. MCR 7.211(C)(9)(a). Any requests to view the sealed file will be referred to the trial court. *Id*. MCR 8.119(I) also governs the procedure for sealing a Court of Appeals file. MCR 7.211(C)(9)(c). "Materials that are subject to a motion to seal a Court of Appeals file in whole or in part must be held under seal pending the court's disposition of the motion." MCR 7.211(C)(9)(c).

MCR 8.119(D) sets out procedures to protect the confidentiality of a sealed record:

> "Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court [sealing a record] pursuant to [MCR 8.119](I) must be designated accordingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court under [MCR 8.119](I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed."

See also MCR 2.518(C), which provides:

> "**Confidentiality.** If the court retains discovery materials filed pursuant to MCR 1.109(D) or an exhibit submitted pursuant to [MCR 2.518] after a hearing or trial and the material is confidential as provided by law, court rule, or court order pursuant to MCR 8.119(I), the court must continue to maintain the material in a confidential manner."

4. Record Retention

"The [SCAO] shall establish and maintain records management policies and procedures for the courts, including a records retention and disposal schedule, in accordance with [S]upreme

[19] See the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 4, for a discussion of MCR 2.119.

[C]ourt rules." MCL 600.1428(1). "The record retention and disposal schedule shall be developed and maintained as prescribed in . . . MCL 399.811." MCL 600.1428(1).

"Subject to the records reproduction act, . . . MCL 24.401 to [MCL] 24.406, a court may dispose of any record as prescribed in [MCL 600.1428(1)]." MCL 600.1428(2).

"A record, regardless of its medium, shall not be disposed of until the record has been in the custody of the court for the retention period established under [MCL 600.1428(1)]." MCL 600.1428(3).

MCR 8.119(K) provides:

> "Retention Periods and Disposal of Court Records. For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case file and other case records, (3) court recordings, log notes, jury seating charts, and recording media, and (4) nonrecord material. The records of the trial courts shall be retained in the medium prescribed by MCR 1.109. The records of a trial court may not be disposed of except as authorized by the records retention and disposal schedule and upon order by the chief judge of that court. Before disposing of records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such in the Michigan trial courts approved records retention and disposal schedule. An order disposing of court records shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, Archives of Michigan, and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.811."

For additional information on records management, and for links to records retention and disposal schedules, see the State Court Administrative Office's Records Management website.

5. Access and Reproduction Fees[20]

"A court may not charge a fee to access public case history information or to retrieve or inspect a case document irrespective of the medium in which the record is retained, the manner in which access to the case record is provided (including whether a record is retained onsite or offsite), and the technology used to create, store, retrieve, reproduce, and maintain the case record." MCR 8.119(J)(1). "A court may charge a reproduction fee for a document pursuant to MCL 600.1988, except when required by law or court rule to provide a copy without charge to a person or other entity." MCR 8.119(J)(2). "The court may provide access to its public case records in any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to [MCL] 24.403." MCR 8.119(J)(3).

"Reproduction of a case document means the act of producing a copy of that document through any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to [MCL] 24.403.

> (a) A court may charge only for the actual cost of labor and supplies and the actual use of the system, including printing from a public terminal, to reproduce a case document and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce the document.
>
> (b) If a person wishes to obtain copies of documents in a file, the clerk shall provide copies upon receipt of the actual cost of reproduction.
>
> (c) Except as otherwise directed by statute or court rule, a standard fee may be established, pursuant to [MCR 8.119(H)(8)], for providing copies of documents on file." MCR 8.119(J)(4).

G. Access to Judge

1. Ex Parte Communications

> "A judge shall not initiate, permit, or consider ex parte communications, or consider other

[20]See SCAO Memorandum regarding Court Rule Amendments Pertaining to Court Records, December 6, 2012, for highlights of the comprehensive set of court rule revisions designed to update and clarify various rules pertaining to court records.

communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except" in the limited circumstances set out in Code of Judicial Conduct 3(A)(4). The exceptions include communications for scheduling, administrative matters, consulting with court personnel, and, with the consent of the parties, conferring separately with the parties and their attorneys in an effort to reach resolution. Code of Judicial Conduct. See MCJC 3(A)(4)(a)-(e). The prohibition on ex parte communications with a judge may also apply to nonparties such as probation agents. See *People v Smith*, 423 Mich 427, 459 (1985) (while "[e]x parte communications between probation officers and judges, whether in written or oral form, threaten the ability of counsel to effectively challenge unreliable information and hence threaten a defendant's right to counsel," . . . resentencing [for violating this right] is only necessary when the sentencing judge obtains information about the defendant from the probation officer that is not included in the written presentence report"). A violation of the judicial canons alone cannot constitute a constitutional violation unless the defendant was prejudiced by the communications. *People v Loew*, 340 Mich App 100, 111, 117-118 (2022) (although e-mails between the judge and prosecutor during defendant's trial were not disclosed as required by the judicial canons, the trial court erred in granting a new trial because the e-mails did not provide an advantage to the prosecutor or influence the jury in any way).

Committee Tip:

The prohibition on ex parte communications precludes a judge from obtaining or seeking substantive information without both parties having the opportunity to participate. It is recommended that court staff be carefully trained to intercept prohibited ex parte communications. These communications can include efforts by the parties or other persons interested in the case to contact the judge, contacts with or from police or other agencies, and communications with jurors. The judge also should not view the scene without notifying the

parties, who should have the opportunity to be present.

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2. Judge's Appearance by Video Communication Equipment

"The State Court Administrative Office is authorized . . . to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes. Administrative Order No. 2012-7, 493 Mich cx (2013).

"Notwithstanding any other provision in [MCR 6.006], until further order of the Court, AO No. 2012-7 is suspended." MCR 6.006(E).

H. Standard of Review

A trial court's decision to permit public access to court proceedings and documents is reviewed for an abuse of discretion, in light of the facts and circumstances of the particular case. *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Dorsey*, 268 Mich App 313, 329 (2005), rev'd in part on other grounds 474 Mich 1097 (2006),[21] citing *Nixon v Warner Communications, Inc*, 435 US 589, 599 (1978).

1.2 Form of Address

Parties and attorneys may include a preferred form of address—Ms., Mr., or Mx.—in the name section of a document's caption. MCR 1.109(D)(1)(b). Parties and attorneys may also include one of the following personal pronouns: he/him/his, she/her/hers, or they/them/theirs. *Id*. When addressing, referring to, or identifying a party or attorney, either orally or in writing, courts must use the individual's name, designated salutation or personal pronouns, or other respectful means consistent with the individual's designated salutation or personal pronouns. *Id*.

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

1.3 Attorney Conduct[22]

"A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Preamble to the Michigan Rules of Professional Conduct. "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service." *Id*. "Every lawyer is responsible for observance of the Rules of Professional Conduct[, and a] lawyer should also aid in securing their observance by other lawyers." *Id*. "Neglect of these responsibilities compromises the independence of the profession and public interest in which it serves. *Id*.

A. Disciplinary Proceedings

An attorney is responsible for aiding the administration of justice. An attorney has a duty to uphold the legal process and act in conformity with standards imposed on members of the bar. These standards include the rules of professional responsibility and judicial conduct adopted by the Michigan Supreme Court. MCR 9.103(A). Grounds for discipline are set forth in MCR 9.104.

The authority to supervise and discipline Michigan attorneys derives from the state constitution and rests with the Michigan Supreme Court. *Schlossberg v State Bar Grievance Bd*, 388 Mich 389, 395 (1972). This constitutional responsibility is discharged, in turn, by the Attorney Grievance Commission (acting as the Supreme Court's prosecution arm) and the Attorney Discipline Board (acting as the Supreme Court's adjudicative arm). MCR 9.100 *et seq*.

"Michigan has a long tradition of judicial oversight of the ethical conduct of its court officers." *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 194 (2002). All Michigan judges have an "independent responsibility to supervise the ethical conduct of . . . court officers[.]" *Attorney Gen v Michigan Pub Svc Comm*, 243 Mich App 487, 492 (2000). This tradition is reflected in the Michigan Code of Judicial Conduct. Code of Judicial Conduct, 3(B)(3) provides that "[a] judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Judges, as well as lawyers, are obliged by the MRPC to report

[22] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1, for information related to ineffective assistance of counsel.

attorney misconduct. *Grievance Administrator v Fieger*, 476 Mich 231, 240-241 (2006); MRPC 8.3.

B. Motion to Disqualify Attorney

Although not specifically addressed by court rule, caselaw suggests that the court has the authority to consider a motion to disqualify counsel. *Rymal v Baergen*, 262 Mich App 274, 316-322 (2004); *Evans & Luptak*, 251 Mich App at 193-203. Typically, a motion to disqualify is based on an alleged conflict of interest. See MRPC 1.7 (General Rule), MRPC 1.8 (Prohibited Transactions), and MRPC 1.9 (Former Client). Another potential ground for disqualification may arise if the lawyer is a potential witness. MRPC 3.7. A conflict of interest exists where "the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused." *People v Mayhew*, 236 Mich App 112, 126-127 (1999). A conflict of interest also exists where the prosecutor becomes privy to confidential information while in an attorney-client relationship. *People v Herrick*, 216 Mich App 594, 599 (1996).

C. Standard of Review

Whether a conflict of interest exists is a question of fact that is reviewed for clear error. *Avink v SMG*, 282 Mich App 110, 116 (2009). The application of "ethical norms" to a decision whether to disqualify counsel is reviewed de novo. *Id.*

1.4 Contempt of Court

"Michigan courts have, as an inherent power, the power at common law to punish all contempts of court." *In re Contempt of Dougherty*, 429 Mich 81, 91 n 14 (1987). "This contempt power inheres in the judicial power vested in th[e Michigan Supreme Court], the Court of Appeals, and the circuit and probate courts by Const 1963, art 6, § 1." *Dougherty*, 429 Mich at 91 n 14. MCL 600.1701 defines a court's power to punish contempt by fine or imprisonment or both. Contempt may be either civil or criminal and either direct or indirect. Civil contempt "seeks to change . . . conduct by threatening . . . a penalty if [the contemnor] does not change it[;]" criminal contempt "seeks to punish [the contemnor] for past misdoings which affront the dignity of the court." *Jaikins v Jaikins*, 12 Mich App 115, 120 (1968). Direct contempt occurs in the immediate view and presence of the court; indirect contempt is outside of the immediate view and presence of the court. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 712 (2000).

For a more detailed discussion on contempt of court, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

1.5 Judicial Disqualification

Due process requires an unbiased and impartial decisionmaker. *Cain v Dep't of Corrections*, 451 Mich 470, 497 (1996). "A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B)." Code of Judicial Conduct, 3(C). In addition, a party may ask a judge to disqualify (recuse) himself or herself. MCR 2.003(C)(1) sets out a nonexhaustive list of grounds for the disqualification of a judge.

"Under the Due Process Clause [of the Fourteenth Amendment of the United States Constitution] there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams v Pennsylvania*, 579 US ___, ___ (2016). "No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision[, and w]hen a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." *Id.* at ___ (holding that where a state supreme court justice was formerly involved in a case as the prosecutor and had given his official approval to seek the death penalty against the defendant, the justice's failure to recuse himself from postconviction proceedings in which the defendant sought relief from his conviction and death sentence constituted reversible constitutional error).

"[A]n unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." *Williams*, 579 US at ___ (quoting *Puckett v United States*, 556 US 129, 141 (2009), and holding that "a due process violation arising from the participation of an interested judge is a defect 'not amenable' to harmless-error review, regardless of whether the judge's vote was dispositive[]") (alteration in original).

For a more detailed discussion on judicial disqualification, see the Michigan Judicial Institute's *Judicial Disqualification in Michigan*.

1.6 Pro Se Litigants

In both civil and criminal cases, a party has a right to represent himself or herself. Const 1963, art 1, § 13. See also MCL 600.1430 and MCL 763.1.

Committee Tips:

No special warnings or cautions are required. However, it is good practice to caution the pro se litigant that he or she has a right to consult with and be represented by an attorney and that he or she should not expect special treatment because he or she is a pro se litigant.

The court may reference particular statutes, court rules, or rules of evidence that may have significance in a particular case.

Explain to a pro se litigant that he or she does not have to testify, but if testifying, he or she may be subject to cross-examination.

Although a party has a right to represent himself or herself, an individual may not represent another person or entity. For example, a corporation can only appear through an attorney. *Peters Production, Inc v Desnick Broadcasting Co*, 171 Mich App 283, 287 (1988). Also, a minor's next friend cannot act as the minor's attorney unless he or she is an attorney. *Marquette Prison Warden v Meadows*, 114 Mich App 121, 124 (1982). Finally, a personal representative may not represent an estate. *Shenkman v Bragman*, 261 Mich App 412, 416 (2004).

"[A] person who represents himself or herself cannot recover actual attorney fees even if the pro se individual is a licensed attorney." *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 432 (2007). This is because the phrase *actual attorney fees* requires that an agency relationship exist between an attorney and the attorney's client and that a fee for the attorney's services be a sum of money actually paid or charged. *Id*. at 428, 432. An award of actual attorney fees requires that an attorney be acting on behalf of a client separate from the attorney. *Id*. at 432.

1.7 Interpreters

A. Statutory and Constitutional Rights to Simultaneous Translation

MCL 775.19a provides:

> "If an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to

> understand or speak the English language, the inability to adequately communicate by reason of being mute, or because the person suffers from a speech defect or other physical defect which impairs the person in maintaining his or her rights in the case, the judge shall appoint a qualified person to act as an interpreter. Except as provided in the [Deaf Persons' Interpreters Act, MCL 393.501 *et seq.*], the interpreter shall be compensated for his or her services in the same amount and manner as is provided for interpreters in [MCL 775.19]."

Under MCL 775.19a, a trial court "has an affirmative duty to establish [a] defendant's proficiency in English or appoint an interpreter" where there is record evidence "that [the] defendant [is] incapable of understanding English at a level necessary to effectively participate in his [or her] defense without simultaneous translation of the trial proceedings." *People v Gonzalez-Raymundo*, 308 Mich App 175, 189 (2014) (citations omitted). "[W]hen presented . . . with indications that a defendant may lack sufficient comprehension of the English language, [the trial court should] either satisfy itself of the defendant's proficiency, provide for simultaneous interpretation, or, if the defendant wishes to waive the right to an interpreter, secure the defendant's personal, informed waiver." *Id*. at 193 (citations omitted). A court's "fail[ure] to satisfy this duty[] . . . [may] effectively prevent[] [a] defendant from being truly present at his [or her] trial and arguably interfere[] with his [or her] ability to assist in his [or her] defense, including in the cross-examination of witnesses." *Id*. at 190.

Additionally, "[t]he lack of simultaneous translation [may] implicate[a] defendant's rights to due process of law guaranteed by the United States and Michigan Constitutions." *Gonzalez-Raymundo*, 308 Mich App at 188, citing US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. "Specifically, a defendant has a right to be present at a trial against him[or her] . . . and a defendant's lack of understanding of the proceedings against him [or her] renders him [or her] effectively absent[.]" *Gonzalez-Raymundo*, 308 Mich App at 188 (citations omitted). "In addition, lack of simultaneous translation impairs a defendant's right to confront witnesses against him [or her] and participate in his [or her] own defense." *Id*. (citations omitted). Because the right to simultaneous translation "is . . . not merely statutory as codified by MCL 775.19a, but [also] constitutional, . . . [it is] subject to every reasonable presumption against its loss." *Gonzalez-Raymundo*, 308 Mich App at 188.

B. Appointment of Interpreter for Deaf or Deaf-Blind Person[23]

1. Right to Appointment of Interpreter for Deaf or Deaf-Blind Person Under MCL 393.501 *et seq*.

A deaf or deaf-blind person has the right to a qualified interpreter and to meaningful participation in judicial or investigative proceedings. *People v Brannon*, 194 Mich App 121, 127 (1992); *Bednarski v Bednarksi*, 141 Mich App 15, 19 (1985); MCL 393.503(3); MCL 393.504(1).

"An appointing authority, when it knows a deaf or deaf-blind person is or will be coming before it, shall inform the deaf or deaf-blind person of the right to a qualified interpreter." MCL 393.504(2). See also *Bednarski*, 141 Mich App at 20 ("an appointing authority . . . who knows a deaf person will be coming before it is obliged to inform the deaf person of the right to an interpreter[]").

2. Interpreters in Arrest/Custodial/Interrogation Situations

"If a deaf or deaf-blind person is arrested and taken into custody for any alleged violation of a criminal law of this state, the arresting officer and the officer's supervisor shall procure a qualified interpreter in order to properly interrogate the deaf or deaf-blind person and to interpret the deaf or deaf-blind person's statements." MCL 393.505(1).

"A statement taken from a deaf or deaf-blind person before a qualified interpreter is present is not admissible in court." MCL 393.505(2).

"An evidentiary hearing should be conducted when there is a challenge of the admissibility of a statement from a defendant who asserts he [or she] should have been provided with an interpreter under MCL 393.505." *Brannon*, 194 Mich App at 128. Testimony at the hearing "should center on whether the [alleged deaf] individual lacked the necessary communication skills to make a statement without the aid of an interpreter." *Id*.

[23]Information on interpreters for the deaf is available at http://courts.mi.gov/Administration/admin/op/access/Pages/americans-with-disabilities-act.aspx. For a list of sign language interpreters or accommodations available for the deaf, hard of hearing, and deaf-blind persons, see www.michigan.gov/mdcr/0,4613,7-138-58275_28545---,00.html.

"[A] reviewing court must engage in a two-step analysis when determining whether a defendant's statement is admissible when he [or she] claims he [or she] has a hearing deficiency." *Brannon*, 194 Mich App at 129. "First, if the court finds the defendant is 'deaf,' as defined by [MCL 393.502(b)], then the Legislature has provided that the defendant cannot be interrogated unless he [or she] is provided with an interpreter and that any statement made by a deaf defendant unaided by an interpreter must be automatically excluded." *Brannon*, 194 Mich App at 129. "Second, if the court finds the defendant is not 'deaf,' as provided by [MCL 393.502(b)], the court must still determine whether the hearing-impaired defendant was able to comprehend his [or her] rights and make a knowing and intelligent waiver of his [or her] rights." *Brannon*, 194 Mich App at 129-130.

"Before utilizing a statement made by a hearing-impaired defendant either with or without the assistance of an interpreter, it must be established that the defendant comprehended his [or her] *Miranda*[24] rights and intelligently waived them before making the statement." *Brannon*, 194 Mich App at 130-131. "A waiver is intelligently made when the *Miranda* warnings are explained to the defendant by an interpreter familiar with and competent in the defendant's primary language." *Id*. at 131. "Where a hearing-impaired defendant is subjected to polygraph examination, even greater care must be taken in explaining the rights and questions involved." *Id*. (noting that "the Deaf Persons' Interpreters Act is generally based on the same Fifth Amendment concepts associated with the waiver of rights and the voluntariness of statements[]" and holding that "the basic principles applicable to *Walker*[25] hearings are applicable to hearings under the Deaf Persons' Interpreters Act[]").

3. Determining Whether to Appoint an Interpreter for Deaf or Deaf-Blind Person

e. Appointment for Witness or Party

"In any action before a court or a grand jury where a deaf or deaf-blind person is a participant in the action, either as a plaintiff, defendant, or witness, the court shall appoint a qualified interpreter to interpret the proceedings to the deaf or deaf-blind person, to interpret

[24] *Miranda v Arizona*, 384 US 436 (1966). See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3, for discussion of self-incrimination and *Miranda*.

[25] *People v Walker (On Rehearing)*, 374 Mich 331 (1965).

the deaf or deaf-blind person's testimony or statements, and to assist in preparation of the action with the deaf or deaf-blind person's counsel." MCL 393.503(1).

"In a proceeding before an appointing authority, other than a court, the appointing authority shall appoint a qualified interpreter to interpret the proceedings to the deaf or deaf-blind person and to interpret the deaf or deaf-blind person's testimony or statements in any proceeding before the appointing authority." MCL 393.503(2).

See also *Bednarski*, 141 Mich App at 20 ("[t]he Deaf Persons' Interpreters Act . . . provides for the mandatory appointment of an interpreter in any action before a court or a grand jury where a deaf person is a participant in the action, either as a plaintiff, defendant, or witness, to perform three specific functions: (1) to interpret the proceedings to the deaf person; (2) to interpret the deaf person's testimony or statements; and (3) to assist in preparation of the action with the deaf person[]"). In *Bednarski*, 141 Mich App at 20-21, the defendant was entitled to a new trial where the procedure followed at trial only satisfied the second function set out in MCL 393.503(1). See also *People v Thomas (Michael)*, 441 Mich 879 (1992), where the defendant moved for a new trial on the basis of the court's failure to appoint an interpreter on his behalf "under either the Deaf Persons' Interpreters Act, MCL 393.501 *et seq.*, MCL 775.19a[,] or constitutional principles[.]" The trial court denied the motion, "allud[ing] to the fact that neither the defendant nor the attorneys ever mentioned any need for the court to appoint an interpreter for the defendant." *Thomas (Michael)*, 441 Mich at 879. "However, the record include[d] statements by the court that it was aware that the defendant had a hearing problem at the time [he] waived his right to a jury trial . . . and during the trial itself[.]" *Id*. "The record also contain[ed] an assertion by defense counsel during trial that the defendant was 80% deaf and . . . suggest[ed] that the court appointed an interpreter for the defendant to assist in proceedings in another case that took place at about the same time as or soon after the trial of this matter." *Id*. The Michigan Supreme Court remanded for "supplemental findings as to why an interpreter was not appointed on the defendant's behalf." *Id*.

f. Notification of Need for/Right to Interpreter

"Each deaf or deaf-blind person whose appearance in an action or other proceeding entitles the deaf or deaf-blind person to a qualified interpreter shall provide reasonable notice to the appointing authority of the need of a qualified interpreter before the appearance." MCL 393.504(1).

"Each deaf or deaf-blind person who is entitled to a qualified interpreter as an accommodation under state or federal law shall provide reasonable notice to the appointing authority of the need for a qualified interpreter." MCL 393.504(1).

g. Reasonable Proof of Deafness

"An appointing authority may require a person requesting the appointment of a qualified interpreter to furnish reasonable proof of the person's deafness, if the appointing authority has reason to believe that the person is not deaf or deaf-blind." MCL 393.504(3).

h. Making a Determination

"A trial court's decision regarding whether an individual is a deaf person is based upon factual findings[.]" *Brannon*, 194 Mich App at 127-128.

"A qualified interpreter shall not be appointed unless the appointing authority and the deaf or deaf-blind person make a preliminary determination that the qualified interpreter is able to readily communicate with the deaf or deaf-blind person and to interpret the proceedings in which the deaf or deaf-blind person is involved." MCL 393.503(4). "[T]he record should affirmatively disclose that the required preliminary determination was made." *Bednarski*, 141 Mich App at 22.

"If a qualified interpreter states that the interpreter is unable to render a satisfactory interpretation and that an intermediary interpreter or deaf interpreter will improve the quality of the interpretation, the appointing authority shall appoint an intermediary interpreter or deaf interpreter to assist the qualified interpreter." MCL 393.503(5).

i. Fulfilling Requests

"The appointing authority shall channel requests for qualified interpreters, intermediary interpreters, and deaf interpreters through the division." MCL 393.508(1). "The division shall compile and update annually a listing of qualified interpreters, intermediary interpreters, and deaf interpreters and shall make this listing available to an appointing authority that may need the services of a qualified interpreter, intermediary interpreter, or deaf interpreter as required by [the Deaf Persons' Interpreters Act, MCL 393.501 *et seq*.]" MCL 393.508(2).

Committee Tip:

An ADA Coordinator or contact has been designated in each court to assist with questions or requests regarding accommodations for individuals who are deaf, deaf-blind, or hard of hearing.

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4. Waiver of Right to Interpreter

"The right of a deaf or deaf-blind person to a qualified interpreter shall not be waived except by a request for waiver in writing by the deaf or deaf-blind person." MCL 393.503(3).

"A written waiver of a plaintiff or defendant is subject to the approval of the deaf or deaf-blind person's counsel and the approval of the appointing authority." MCL 393.503(3). See also *Bednarski*, 141 Mich App at 20 ("[a]ny waiver of the right to an interpreter must be in writing by the deaf person).

5. Classifications of Interpreters for Deaf Person[26]

"If an interpreter is required as an accommodation for a deaf or deaf-blind person under state or federal law, the interpreter shall be a qualified interpreter." MCL 393.503a.

[26]On February 22, 2016, the Michigan Department of Civil Rights (MDCR)—Division of Deaf, Deaf-Blind, and Hard of Hearing released its policies and procedures for certified interpreters who provide American Sign Language (ASL) services enforcing Michigan's Deaf Persons' Interpreters Act and the Qualified Interpreter-General Rules. For more information, see http://courts.mi.gov/Administration/SCAO/OfficesPrograms/TCS/Documents/TCS%20Memoranda/TCS-2016-06.pdf.

a. Qualified Interpreter

A *qualified interpreter* is "a person who is certified through the national registry of interpreters for the deaf or certified through the state by the division." MCL 393.502(f).

b. Qualified Oral Interpreter

A *qualified oral interpreter* is "a qualified interpreter who is able to convey information through facial and lip movement." MCL 393.502(g).

c. Qualified Sign Language Interpreter

A *qualified sign language interpreter* is "a qualified interpreter who uses sign language to convey information." MCL 393.502(h).

d. Intermediary Interpreter/Deaf Interpreter

An *intermediary interpreter* or *deaf interpreter* is "any person, including any deaf or deaf-blind person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a deaf or deaf-blind person and a qualified interpreter." MCL 393.502(e).

6. Appointing More Than One Interpreter

In a situation where both parties and several additional witnesses were deaf, the Court of Appeals stated its opinion that "the provisions of [the Deaf Persons' Interpreters Act] require the appointment of an interpreter for each plaintiff and defendant, and a third interpreter for the court, if necessary." *Bednarski*, 141 Mich App at 21.

7. Interpreter Oath or Affirmation

"Before a qualified interpreter participates in any action or other proceeding because of an appointment under [the Deaf Persons' Interpreters Act, MCL 393.501 *et seq.*], the qualified interpreter shall make an oath or affirmation that the qualified interpreter will make a true interpretation in an understandable manner to the deaf or deaf-blind person for whom the qualified interpreter is appointed and that the qualified interpreter will interpret the

statements of the deaf or deaf-blind person in the English language to the best of the interpreter's skill." MCL 393.506(1).

The Court of Appeals noted that MCL 393.506(1) may have been violated where "[p]rior to trial, counsel stipulated that the interpreter would 'paraphrase' the answers of the witnesses to 'expedite' the proceeding." *Bednarski*, 141 Mich App at 22. The Court recognized that "[d]ue to the conceptual nature of sign language, a verbatim translation of oral testimony (or vice versa) may not be possible[;] [h]owever, the very fact of the unavoidable translation difficulty renders the need for accurate and skillful interpretation even more critical." *Id*.

"The appointing authority shall provide recess periods as necessary for the qualified interpreter when the qualified interpreter so indicates." MCL 393.506(1).

"The information that the qualified interpreter, intermediary interpreter, or deaf interpreter gathers from the deaf or deaf-blind person pertaining to any action or other pending proceeding shall at all times remain confidential and privileged, unless the deaf or deaf-blind person executes a written waiver allowing the information to be communicated to other persons and the deaf or deaf-blind person is present at the time the information is communicated." MCL 393.506(2).

8. Interpreter Costs

"A court appointed interpreter, qualified interpreter, intermediary interpreter, or deaf interpreter shall be paid a fee by the court that it determines to be reasonable." MCL 393.507(1).

"A qualified interpreter, intermediary interpreter, or deaf interpreter appointed by an appointing authority other than a court shall be paid a fee by the appointing authority[] . . . out of funds available to the appropriate appointing authority." MCL 393.507(1)-(2).

"In addition, a qualified interpreter, intermediary interpreter, or deaf interpreter shall be paid for his or her actual expenses for travel, meals, and lodging." MCL 393.507(1).

"A qualified interpreter appointed for the deaf or deaf-blind person shall be available for the duration of the deaf or deaf-blind person's participation in the action or other proceeding." MCL 393.507(3).

C. Appointment of Foreign Language Interpreters[27]

1. Right to Appointment of Foreign Language Interpreter Under the Michigan Court Rules

To support access to justice, MCR 1.111 provides for court-appointed foreign language interpreters for limited English proficient (LEP) persons.[28] MCR 1.111 "focuses on the critical legal requirement [of] *meaningful access*[,]" and requires a court "to provide an interpreter for a party or witness if the court determines one is needed for either the party or the witness to meaningfully participate." ADM File No. 2012-03, 495 Mich clvii, clviii-clix (2013). See MCR 1.111(B)(1).

Limited English proficient person means "a person who does not speak English as his or her primary language, and who has a limited ability to read, write, speak, or understand English, and by reason of his or her limitations, is not able to understand and meaningfully participate in the court process." Administrative Order No. 2013-8.

2. Determining Whether to Appoint a Foreign Language Interpreter[29]

"Any doubts as to eligibility for interpreter services should be resolved in favor of appointment of an interpreter." MCR 1.111(F)(6). "At the time of determining eligibility, the court shall inform the party or witness of the penalties for making a false statement. The party has the continuing obligation to inform the court of any change in financial status and, upon request of the court, the party must submit financial information." MCR 1.111(F)(7).

Committee Tips:

A Language Access Coordinator has been designated in each court to assist with questions

[27] For information on Language Access, see https://www.courts.michigan.gov/administration/court-programs/foreign-language-interpreter-certification-program/. For information on requesting a court interpreter, see https://www.courts.michigan.gov/resources-for/the-public/self-represented-litigants/.

[28] For a summary of MCR 1.111, see http://courts.mi.gov/Administration/SCAO/OfficesPrograms/FLI/Documents/MCR_%201_111_RuleSummary.pdf.

[29] See Section 1.7(C) for information on the various types of foreign language interpreters, including when it is appropriate to appoint each one.

or requests regarding appointment of foreign language interpreters.

Whether to appoint multiple interpreters is in the discretion of the trial court. See MCR 1.111(E)(1) and MCR 1.111(F)(3). The court rules were purposefully crafted to allow the trial courts broad discretion to consider all of the facts of any circumstance and decide for themselves. For example, in a situation in which a defendant and a victim both need an interpreter, the court should seriously consider appointing separate interpreters for each. The court should avoid any appearance that proceedings are not equitable.

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a. Appointment for Witness or Party

"If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party." MCR 1.111(B)(1).

"[A] party shall receive interpretation services as necessary for the person 'to meaningfully participate' in any hearing, trial, etc. Fundamental to meaningful participation in preliminary examinations, plea hearings, and trial is the ability to engage in pretrial preparation with trial counsel. Therefore, . . . the broad standard set forth under MCR 1.111(B)(1) mandates interpretation services during pretrial preparations when necessary for a defendant to meaningfully participate in the case or court proceeding." *People v Hoang*, 328 Mich App 45, 58 (2019).

"Notwithstanding the failure of the defendant to request an interpreter, it was [reversible] error to fail to appoint an interpreter [at trial] where the record clearly show[ed] that the defendant spoke no English whatsoever." *People v Sepulveda*, 412 Mich 889 (1981).[30]

[30]Note that this case predates MCR 1.111.

b. Appointment for Person Other than Witness or Party

"The court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." MCR 1.111(B)(2).

c. Determining Whether Services are Necessary for Meaningful Participation

"In order to determine whether the services of a foreign language interpreter are necessary for a person to meaningfully participate under [MCR 1.111(B)(1)], the court shall rely upon a request by an LEP individual (or a request made on behalf of an LEP individual) or prior notice in the record." MCR 1.111(B)(3). "If no such requests have been made, the court may conduct an examination of the person on the record to determine whether such services are necessary." *Id*.

"During the examination, the court may use a foreign language interpreter." MCR 1.111(B)(3). "For purposes of this examination, the court is not required to comply with the requirements of [MCR 1.111(F)] and the foreign language interpreter may participate remotely." MCR 1.111(B)(3).

d. Denying Request for Interpreter

"Any time a court denies a request for the appointment of a foreign language interpreter . . . , it shall do so by written order." MCR 1.111(H)(1). "An LEP individual may immediately request review of the denial of appointment of a foreign language interpreter[.]" MCR 1.111(H)(2). "A request for review must be submitted to the court within 56 days after entry of the order." *Id.*

3. Waiver of Right to Interpreter

"A person may waive the right to a foreign language interpreter established under [MCR 1.111(B)(1)] unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding." MCR 1.111(C). "The court must find on the record that a person's waiver of an interpreter is knowing and voluntary." *Id*. "When accepting the person's waiver, the court may use a foreign language interpreter." *Id*. "For purposes of this waiver, the court

is not required to comply with the requirements of [MCR 1.111(F)] and the foreign language interpreter may participate remotely." MCR 1.111(C).

A defendant does not make "an informed waiver of his [or her] right to receive simultaneous translation during his [or her] trial[]" under MCL 775.19a where there is no indication "that [the] defendant [has] made a personal and informed decision to waive his [or her] right to an interpreter[]" and where "the trial court [does not] ask[] [the] defendant personally whether he [or she] [is] aware of his [or her] constitutional and statutory right to an interpreter[.]" *Gonzalez-Raymundo*, 308 Mich App at 187-189 (holding that defense counsel's assertion that the defendant "went along with" counsel's advice to waive his right to an interpreter "[did not] operate[] to affirmatively waive [the] defendant's rights[]").

4. Classifications of Foreign Language Interpreters

a. Certified Foreign Language Interpreters

"When the court appoints a foreign language interpreter under [MCR 1.111(B)(1)], the court shall appoint a certified foreign language interpreter whenever practicable." MCR 1.111(F)(1).

b. Qualified Foreign Language Interpreters

"If a certified foreign language interpreter is not reasonably available, and after considering the gravity of the proceedings and whether the matter should be rescheduled, the court may appoint a qualified foreign language interpreter who meets the qualifications in [MCR 1.111(A)(6)]." MCR 1.111(F)(1). "The court shall make a record of its reasons for using a qualified foreign language interpreter." *Id*.

c. Other Capable Person

"If neither a certified foreign language interpreter nor a qualified foreign language interpreter is reasonably available, and after considering the gravity of the proceeding and whether the matter should be rescheduled, the court may appoint a person whom the court determines through voir dire to be capable of conveying the intent and content of the speaker's words sufficiently to allow the court to conduct the proceeding

without prejudice to the limited English proficient person." MCR 1.111(F)(2).

d. Court Employee As Foreign Language Interpreter

"A court employee may interpret legal proceedings as follows:

> (a) The court may employ a person as an interpreter. The employee must meet the minimum requirements for [certified foreign language] interpreters established by [MCR 1.111(A)(4)]. The state court administrator may authorize the court to hire a person who does not meet the minimum requirements established by [MCR 1.111(A)(4)] for good cause including the unavailability of a certification test for the foreign language and the absence of certified interpreters for the foreign language in the geographic area in which the court sits. The court seeking authorization from the state court administrator shall provide proof of the employee's competency to act as an interpreter and shall submit a plan for the employee to meet the minimum requirements established by [MCR 1.111(A)(4)] within a reasonable time.
>
> (b) The court may use an employee as an interpreter if the employee meets the minimum requirements for interpreters established by [MCR 1.111] and is not otherwise disqualified." MCR 1.111(E)(2).

5. Appointing More Than One Interpreter

In general, "[t]he court shall appoint a single interpreter for a case or court proceeding." MCR 1.111(F)(3). However, "[t]he court may appoint more than one interpreter after consideration of[:]

- the nature and duration of the proceeding;
- the number of parties in interest and witnesses requiring an interpreter;
- the primary languages of those persons; and

- the quality of the remote technology that may be utilized when deemed necessary by the court to ensure effective communication in any case or court proceeding." MCR 1.111(F)(3) (bullets added).

6. Avoiding Potential Conflicts of Interest

"The court should use all reasonable efforts to avoid potential conflicts of interest when appointing a person as a foreign language interpreter and shall state its reasons on the record for appointing the person if any of the following applies:

> (a) The interpreter is compensated by a business owned or controlled by a party or a witness;
>
> (b) The interpreter is a friend, a family member, or a household member of a party or witness;
>
> (c) The interpreter is a potential witness;
>
> (d) The interpreter is a law enforcement officer;
>
> (e) The interpreter has a pecuniary or other interest in the outcome of the case;
>
> (f) The appointment of the interpreter would not serve to protect a party's rights or ensure the integrity of the proceedings;
>
> (g) The interpreter does have, or may have, a perceived conflict of interest;
>
> (h) The appointment of the interpreter creates an appearance of impropriety." MCR 1.111(E)(1).

7. Recordings

"The court may make a recording of anything said by a foreign language interpreter or a limited English proficient person while testifying or responding to a colloquy during those portions of the proceedings." MCR 1.111(D).

8. Interpreter Oath or Affirmation

"The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following:

> 'Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge

confidential communications, so help you God?'" MCR 1.111(G).

9. Interpreter Costs

"The court may set reasonable compensation for interpreters who are appointed by the court." MCR 1.111(F)(4). "Court-appointed interpreter costs are to be paid out of funds provided by law or by the court." *Id*. See also MCL 775.19a; MCL 775.19.

"If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court for all or a portion of interpretation costs." MCR 1.111(F)(5). "Any time a court . . . orders reimbursement of interpretation costs, it shall do so by written order." MCR 1.111(H)(1). "An LEP individual may immediately request review of . . . an assessment for the reimbursement of interpretation costs." MCR 1.111(H)(2). "A request for review must be submitted to the court within 56 days after entry of the order." *Id*.

Chapter 2: Criminal Jurisdiction and Venue

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2.1 Introduction

This chapter provides an overview of jurisdiction and venue in criminal cases. Part A provides a discussion of jurisdiction principles as generally applicable in all criminal proceedings. Part B more specifically discusses circuit court jurisdiction. Part C provides a comprehensive discussion of district court proceedings, including matters cognizable before district court magistrates. Finally, Part D discusses venue.

Part A: General Principles of Criminal Jurisdiction

2.2 Subject Matter Jurisdiction

"Subject-matter jurisdiction is a legal term of art that concerns a court's authority to hear and determine a case." *People v Scott (On Remand)*, ___ Mich App ___, ___ (2022) (quotation marks and citation omitted). "The authority to hear and determine a case depends on the character or class of the case pending, not on the particular facts of the case." *Id*. at ___. "Subject matter jurisdiction is presumed unless expressly denied by constitution or statute[.]" *People v Goecke*, 457 Mich 442, 458 (1998) (citation omitted). "The courts do not have inherent subject-matter jurisdiction; it is derived instead from our constitutional and statutory provisions." *People v Washington*, 508 Mich 107, 121 (2021).

Because subject matter jurisdiction concerns the court's power to hear a case, it is not subject to forfeiture, waiver, or stipulation. See *United States v Cotton*, 535 US 625, 630 (2002); *People v Lown*, 488 Mich 242, 268 (2011); *People v Eaton*, 184 Mich App 649, 653 (1990). The issue of subject matter jurisdiction "can be raised at any time by any party or the court," *In re Contempt of Dorsey*, 306 Mich App 571, 581 (2014) (citation omitted), and the court is required to recognize that it lacks subject matter jurisdiction, "regardless of whether the parties raised the issue," *People v Clement*, 254 Mich App 387, 394 (2002) (citations omitted).

A "trial court [is] divested of subject-matter jurisdiction when the Court of Appeals assume[s] its appellate jurisdiction over the case." *Washington*, 508 Mich at 122. A defendant's appeal from a trial court's judgment "divest[s] the trial court of subject-matter jurisdiction over those aspects of the case involved in the appeal. When the Court of Appeals render[s a] judgment, . . . jurisdiction remain[s] with the appellate courts until [the Michigan Supreme] Court's disposition of defendant's application for leave to appeal the Court of Appeals' judgment." *Id*. at 126-127.

Applying *Washington* to an interlocutory appeal, the Court of Appeals held that the "trial court undisputedly erred by conducting a trial . . . after we issued our decision on the prosecution's interlocutory appeal but while defendant's application for leave to appeal this Court's decision was pending."*People v Scott (On Remand)*, ___ Mich App ___, ___ (2022) (citing MCR 7.215(F)(1)(a)). Because "the aspect of the case involved in the appeal was the trial court's exclusion of other-acts evidence," the *Scott* Court concluded that "the trial court lacked subject-matter jurisdiction to try defendant while admitting the evidence that was the subject of the leave application before the Supreme Court, and the judgment of sentence [was] void." *Scott*, ___ Mich App at ___.

A "trial court [does] not lack subject-matter jurisdiction to resentence" a defendant "when the Supreme Court simultaneously exercise[s] jurisdiction over a separate but related complaint for superintending control." *People v Johnson*, ___ Mich App ___, ___ (2022). In *Johnson*, the "[t]he trial court erred by concluding that the Supreme Court's exercise of jurisdiction over the complaint for superintending control divested the trial court of subject-matter jurisdiction to resentence" the defendant. *Id.* at ___. The Court of Appeals observed that "unlike in *Washington*, this case involves two separate actions [the criminal case and a complaint seeking superintending control]" and "[a] complaint for superintending control constitutes the filing of a civil action." *Id.* at ___ (cleaned up). "The trial court reasoned that defendant's application for leave to appeal this Court's denial of superintending control conferred jurisdiction to the Supreme Court over defendant's criminal case, such that *Washington* applied and the trial court was divested of subject-matter jurisdiction. But nothing was required to confer jurisdiction to the Supreme Court over the action seeking superintending control." *Id.* at ___ (cleaned up).

The district court generally has jurisdiction over all proceedings involving misdemeanors punishable by a fine or imprisonment not exceeding 1 year, or both, and ordinance and charter violations punishable by a fine or imprisonment, or both; additionally, the district court has jurisdiction over certain preliminary proceedings, such as arraignments and preliminary examinations, in felony cases. MCL 600.8311.[1]

The circuit court generally has jurisdiction over all felony criminal cases and misdemeanor criminal cases punishable by at least one year of imprisonment. See MCL 600.8311; Const 1963, art 6, § 13. A circuit court has subject-matter jurisdiction over a defendant's case once it is bound over by the district court. *Washington*, 508 Mich at 122.

[1] See the Michigan Judicial Institute's table including information on the jurisdiction of district court judges and magistrates over preliminary matters in all criminal proceedings.

"A trial court must dismiss an action when there is a lack of subject-matter jurisdiction, and a party cannot be estopped from raising the issue." *Dorsey*, 306 Mich App at 581 (citation omitted). "'When a court is without jurisdiction of the subject matter, its acts and proceedings are of no force and validity; they are a mere nullity and are void. . . . Thus, an order entered without jurisdiction may be challenged collaterally as well as directly.'" *Clement*, 254 Mich App at 394 (citation omitted).

2.3 Territorial Jurisdiction

Territorial jurisdiction refers to "[t]he authority to exercise jurisdiction over acts that occur outside the state's physical borders[, which] developed as an exception to the rule against extraterritorial jurisdiction." *People v Blume*, 443 Mich 476, 480, 486-487 (1993), superseded in part by statute as stated in *People v Gayheart*, 285 Mich App 202, 209 (2009); see also *Gayheart*, 285 Mich App at 208-210.

"[T]erritorial jurisdiction and venue are two different concepts. '[J]urisdiction refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the place where the prosecution is to be brought or tried.'" *Gayheart*, 285 Mich App at 215-216 (citations omitted).[2] The *Gayheart* Court explained:

> "'The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established,' and '[a]ny attempt to exercise authority beyond those limits' constitutes 'an illegitimate assumption of power.' However, nearly 100 years ago, the United States Supreme Court announced that '[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm[.]' Until 2002, the common-law rule in Michigan[] . . . was that the state could not exercise territorial jurisdiction over criminal conduct committed in another state unless that conduct was intended to have, and did in fact have, 'a detrimental effect within the state.' *Blume*, 443 Mich at 477. The *Blume* Court observed that '[u]nlike some states, Michigan has not enacted legislation generally defining the reach of its criminal statutes.' *Id*. at 480 n 7." *Gayheart*, 285 Mich App at 208 (some citations omitted).

However, in 2002, the Legislature enacted MCL 762.2, which "broadened the scope of Michigan's territorial jurisdiction over criminal matters,

[2] However, there is some necessary overlap; for example, see MCL 600.8312 (governing *venue* based on location of offense) and MCL 762.3 (governing *jurisdiction* based on location of offense). See Part D for discussion of venue in criminal proceedings.

significantly expanding upon the common-law rule explained in *Blume*[, 443 Mich 476]." *Gayheart*, 285 Mich App at 208-209. MCL 762.2 provides:

> "(1) A person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or outside of this state if any of the following circumstances exist:
>
> > (a) He or she commits a criminal offense wholly or partly within this state.
> >
> > (b) His or her conduct constitutes an attempt to commit a criminal offense within this state.
> >
> > (c) His or her conduct constitutes a conspiracy to commit a criminal offense within this state and an act in furtherance of the conspiracy is committed within this state by the offender, or at his or her instigation, or by another member of the conspiracy.
> >
> > (d) A victim of the offense or an employee or agent of a governmental unit posing as a victim resides in this state or is located in this state at the time the criminal offense is committed.
> >
> > (e) The criminal offense produces substantial and detrimental effects within this state.
>
> (2) A criminal offense is considered under [MCL 762.2(1)] to be committed partly within this state if any of the following apply:
>
> > (a) An act constituting an element of the criminal offense is committed within this state.
> >
> > (b) The result or consequences of an act constituting an element of the criminal offense occur within this state.
> >
> > (c) The criminal offense produces consequences that have a materially harmful impact upon the system of government or the community welfare of this state, or results in persons within this state being defrauded or otherwise harmed."

"[P]ursuant to MCL 762.2(1)(a) and [MCL 762.2(2)(a)], Michigan now has statutory territorial jurisdiction 'over any crime where any act constituting an element of the crime is committed within Michigan,' [*People v King (Genevieve)*, 271 Mich App 235, 243 (2006)], even if there is no indication that the accused actually intended the detrimental effects of the offense to be felt in this state." *Gayheart*, 285 Mich App at 209-210.

However, "the Due Process Clause forbids a state from applying its own substantive law to a transaction or occurrence in which the state has insufficient interests or with which the state has insufficient contacts." *Gayheart*, 285 Mich App at 221 (citations omitted). Accordingly, in order "to permit the constitutional exercise of territorial jurisdiction[,]" the state must have "'a significant contact or significant aggregation of contacts' [with the defendant's conduct] so that application of Michigan's criminal law [is] 'neither arbitrary nor fundamentally unfair.'" *Id*. at 217, 220-221, 224-225 (holding that territorial jurisdiction was constitutionally exercised under MCL 762.2(1)(a) and MCL 762.2(2)(a) where "even though the evidence suggested that the fatal blows were struck in Indiana, and despite the discovery of the victim's body in Indiana," the evidence "showed that [the] defendant premeditated the killing, kidnapped the victim, and selected the murder weapon in Michigan[,]" demonstrating that "at least one essential element of both felony murder and premeditated murder was actually committed within the state of Michigan[]") (citations omitted).

"[W]hen the matter of territorial jurisdiction is placed in issue in a given case—and assuming that the trial court has determined that the facts to be offered by the prosecution, if proven, would be legally adequate to confer jurisdiction under MCL 762.2—the prosecution must prove to the trier of fact beyond a reasonable doubt that the alleged act, consequence, or other condition that would confer territorial jurisdiction under MCL 762.2 has in fact occurred within the state of Michigan." *Gayheart*, 285 Mich App at 214. "[L]ike venue, the existence of territorial jurisdiction may be proven by circumstantial evidence." *Id*. at 216 (citations omitted).

In general, state courts in Michigan, not federal courts, "have jurisdiction over a criminal prosecution in which a defendant is a non-Indian, the offense is committed on Indian lands or in Indian country, and the offense is either victimless or the victim is not an Indian." *People v Collins (Stormy)*, 298 Mich App 166, 177 (2012).

2.4 Personal Jurisdiction

Personal jurisdiction "'deals with the authority of the court over particular persons[.]'" *People v Lown*, 488 Mich 242, 269 (2011) (citation omitted). For example, a statute that "requires dismissal of a particular defendant in a particular case when the [statute] is violated[] . . . governs *personal* jurisdiction" rather than subject matter jurisdiction. *Id*. at 268-269 (holding that "the jurisdictional aspect of the 180-day rule, MCL 780.133," pertains to personal jurisdiction over a particular defendant rather than to the court's subject matter jurisdiction). "[A]ny legislative intent to divest jurisdiction once it has properly attached must be clearly and unambiguously stated." *People v Veling*, 443 Mich 23, 32 n 13 (1993) (citation omitted). "[A] party may stipulate to, waive, or implicitly

consent to personal jurisdiction." *Lown*, 488 Mich at 268 (citations and emphasis omitted); see also *People v Eaton*, 184 Mich App 649, 653 (1990).

With respect to juvenile offenders,[3] the family division of circuit court ("Family Division") and the court of general criminal jurisdiction have concurrent jurisdiction over certain classes of cases.[4] The circuit court has jurisdiction over specified juvenile violations as described in MCL 600.606 (automatic waiver proceedings); the Family Division has jurisdiction over a juvenile between the ages of 14 and 18 who is charged with a specified juvenile violation only if the prosecutor files a petition in the Family Division rather than in the court of general criminal jurisdiction. MCL 712A.2(a)(1); *Veling*, 443 Mich at 30-31.[5] The Family Division may waive its jurisdiction over a proceeding in which a juvenile 14, 15, or 16 years of age is accused of an act that if committed by an adult would be a felony (traditional waiver proceedings).[6] MCL 712A.4. The Family Division also has concurrent jurisdiction over proceedings involving 17-year-old wayward minors.[7] MCL 712A.2(d). Additionally, the Family Division has concurrent jurisdiction over "proceedings concerning a juvenile under 18 years of age" if "the juvenile is dependent and is in danger of substantial physical or psychological harm" under certain circumstances, MCL 712A.2(b)(3), including if the juvenile "is alleged to have committed a commercial sexual activity" under MCL 750.462a "or a delinquent act that is the result of force, fraud, coercion, or manipulation exercised by a parent or other adult," MCL 712A.2(b)(3)(C).[8]

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[3] The Family Division of Circuit Court ("Family Division") has jurisdiction over "[c]ases involving juveniles as provided in [the Juvenile Code], MCL 712A.1 to [MCL] 712A.32." MCL 600.1021(1)(e); see also MCL 600.601(4); MCL 600.1001; MCL 712A.1(1)(e). "Except as otherwise provided in [MCL 712A.2(a)(1)]," the Family Division has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court" over a proceeding in which a juvenile under the age of 18 is accused of violating a law or ordinance, MCL 712A.2(a)(1), or of committing a status offense, MCL 712A.2(a)(2)-(4). The Family Division also has jurisdiction over proceedings involving personal protection orders (PPOs), including a PPO proceeding in which a juvenile under the age of 18 is the respondent, MCL 712A.2(h); MCL 600.1021(1)(k). For a complete discussion of jurisdiction over juvenile offenders, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

[4] "A circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction." *People v Kiyoshk*, 493 Mich 923, 923 (2013). A "[d]efendant's age when the offense was committed does not pertain to the 'kind or character' of the case, but rather constitutes a defendant-specific, 'particular fact[].' Whether [a] defendant was of an age that [makes] circuit court jurisdiction appropriate is thus a question of personal jurisdiction." *Kiyoshk*, 493 Mich at 923, quoting *Lown*, 488 Mich at 268, and citing *Veling*, 443 Mich at 31-32 (additional citations omitted).

[5] See Chapter 16 of the Michigan Judicial Institute's *Juvenile Justice Benchbook* for discussion of automatic waiver proceedings.

[6] See Chapter 14 of the Michigan Judicial Institute's *Juvenile Justice Benchbook* for discussion of traditional waiver proceedings.

Part B: Circuit Court Jurisdiction[9]

2.5 Circuit Court's Subject Matter Jurisdiction[10]

The circuit court is the court of general jurisdiction. Const 1963, art 6, § 13; MCL 600.601; MCL 600.605; MCL 767.1; see also *People v Lown*, 488 Mich 242, 268 (2011). It has jurisdiction over all matters not assigned to other courts, except as otherwise provided by the Legislature. Const 1963, art 6, § 13; MCL 600.605. The circuit court may share jurisdiction with other courts under a plan of concurrent jurisdiction and is subject to the requirements of MCL 600.401 *et seq*. "A concurrent jurisdiction plan that was adopted, approved by the [S]upreme [C]ourt, and in effect on December 31, 2012, is considered valid and in compliance with the requirements of [MCL 600.401 *et seq*]." MCL 600.412.[11]

The circuit court has subject matter jurisdiction over felonies and misdemeanors[12] punishable by at least one year of imprisonment.[13] See MCL 600.8311; Const 1963, art 6, § 13; *Lown*, 488 Mich at 268.[14] The circuit court has jurisdiction over these offenses "from the bindover from the district court unless otherwise provided by law." MCR 6.008(B).[15]

MCR 6.008(C)-(E) provide guidance regarding circuit court jurisdiction following bindover in the event that the defendant ultimately pleads guilty to or is convicted of a misdemeanor offense that would normally be cognizable in the district court.

- **Misdemeanor pleas.** "The circuit court retains jurisdiction over any case in which a plea is entered or a verdict rendered to a

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[7] See Chapter 2 of the Michigan Judicial Institute's *Juvenile Justice Benchbook* for discussion of wayward minors.

[8] In addition, the Family Division has ancillary jurisdiction over cases involving guardians and conservators as provided in article 5 of the Estates and Protected Individuals Code (EPIC), MCL 700.5101 *et seq*., and over cases involving mentally ill or developmentally disabled persons under the Mental Health Code, MCL 330.1001 *et seq*. MCL 600.1021(2)(a)-(b).

[9] See the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 2 for a complete discussion of trial court jurisdiction. See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for discussion of jurisdiction over juvenile offenders.

[10] For general discussion of subject matter jurisdiction, see Section 2.2.

[11] See the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 2 for additional discussion of concurrent jurisdiction planning. See also SCAO's concurrent jurisdiction webpage.

[12] See Section 2.7() for discussion of the definitions of felony and misdemeanor.

[13] The district court has jurisdiction over all proceedings involving misdemeanor punishable by a fine or imprisonment not exceeding one year, or both, and ordinance and charter violations punishable by a fine or imprisonment, or both. MCL 600.8311(a)-(b). In addition, the district court has jurisdiction over certain preliminary proceedings involving felonies and circuit court misdemeanors. MCL 600.8311(c)-(f); see also MCR 6.008(A). See Section 2.7 for discussion of district court jurisdiction.

charge that would normally be cognizable in the district court." MCR 6.008(C).

- **Sentencing.** "The circuit court shall sentence all defendants bound over to circuit court on a felony that either plead guilty to, or are found guilty of, a misdemeanor." MCR 6.008(D).

- **Concurrent jurisdiction and probation officers.** "As part of a concurrent jurisdiction plan, the circuit court and district court may enter into an agreement for district court probation officers to prepare the presentence investigation report and supervise on probation defendants who either plead guilty to, or are found guilty of, a misdemeanor in circuit court. The case remains under the jurisdiction of the circuit court." MCR 6.008(E).

2.6 Personal Jurisdiction in Circuit Court[16]

"In personam jurisdiction is vested in the circuit court upon the filing of a return of the magistrate before whom the defendant waived preliminary examination[] or 'before whom the defendant had been examined.'" *People v Goecke*, 457 Mich 442, 458-459 (1998) (citations omitted). "And just as the filing of the magistrate's return confers jurisdiction on the circuit court, . . . it has the effect of *divesting* the district court of jurisdiction[.]" *People v Taylor (Robbie)*, 316 Mich App 52, 54 (2016), citing *People v McGee (Keangela*), 258 Mich App 683, 695 (2003); *People v Sherrod*, 32 Mich App 183, 186 (1971) (emphasis added). "Having once vested in the circuit court, personal jurisdiction is not lost even when a void or improper information is filed." *Goecke*, 457 Mich at 458-459, citing *In re Elliott*, 315 Mich 662, 675 (1946).

"[T]here is a presumption against divesting a [circuit] court of its jurisdiction once it has properly attached, and any doubt is resolved in favor of retaining jurisdiction." *People v Veling*, 443 Mich 23, 32 (1993)

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[14] The Family Division of Circuit Court ("Family Division") has jurisdiction over "[c]ases involving juveniles as provided in [the Juvenile Code], MCL 712A.1 to [MCL] 712A.32." MCL 600.1021(1)(e); see also MCL 600.601(4); MCL 600.1001; MCL 712A.1(1)(e). "Except as otherwise provided in [MCL 712A.2(a)(1)]," the Family Division has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court" over a proceeding in which a juvenile under the age of 18 is accused of violating a law or ordinance, MCL 712A.2(a)(1), or of committing a status offense, MCL 712A.2(a)(2)-(4). The Family Division also has jurisdiction over proceedings involving personal protection orders (PPOs), including a PPO proceeding in which a juvenile under the age of 18 is the respondent, MCL 712A.2(h); MCL 600.1021(1)(k). See Section 2.4 for a brief discussion of personal jurisdiction over juveniles charged with felony offenses. For a complete discussion of jurisdiction over juvenile offenders, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

[15] "The failure of the court to properly document the bindover decision shall not deprive the circuit court of jurisdiction." MCR 6.008(B). See Chapter 7 for discussion of bindover.

[16] For general discussion of personal jurisdiction, see Section 2.4.

(citation omitted); see also *People v Reid (Michael)*, 488 Mich 917, 917 (2010). "Moreover, any legislative intent to divest jurisdiction once it has properly attached must be clearly and unambiguously stated." *Veling*, 443 Mich at 32 n 13 (citation omitted); see also *Reid (Michael)*, 488 Mich at 917. "Having once vested in the circuit court, personal jurisdiction is not lost even when a void or improper information is filed." *Goecke*, 457 Mich at 459 (citation omitted).

"[W]here the circuit court acquires jurisdiction over a defendant because of a felony charge, that jurisdiction is not lost because of a subsequent conviction of a lesser included misdemeanor." *Veling*, 443 Mich at 32-33, citing *People v Schoeneth*, 44 Mich 489, 491 (1880). "Similarly, Michigan courts extend circuit court jurisdiction to all same transaction offenses an adult is alleged to have committed, even though the circuit court had original jurisdiction over only some of the offenses[;] [f]or example, where an adult is charged with a felony and a misdemeanor, the circuit court has jurisdiction to dispose of the entire case, even though a circuit court has no jurisdiction over misdemeanor charges alone." *Veling*, 443 Mich at 33 (citations omitted). See also *Reid (Michael)*, 488 Mich at 917 (reversing "the Court of Appeals['] decision that the circuit court did not have jurisdiction to try the defendant's misdemeanor charge once the felony charge was dismissed on the day of trial[]").

Part C: District Court Proceedings

2.7 District Court Jurisdiction

A. Applicable Definitions of *Felony* and *Misdemeanor*

By statute, an offense designated as a misdemeanor is nevertheless considered a felony for purposes of determining trial-court jurisdiction if it is punishable by more than one year of imprisonment.

- **Felony**. The Michigan Code of Criminal Procedure, MCL 760.1 *et seq.*, defines *felony* as a violation of Michigan's penal law "for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(f); see also MCL 750.7, defining *felony*, for purposes of the Michigan Penal Code, as "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison."

- **Misdemeanor.** The Code of Criminal Procedure defines *misdemeanor* as a violation of Michigan's penal law "that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(n). Some misdemeanors are classified under the Code of Criminal Procedure as *minor offenses*, violations for which the maximum permissible imprisonment does not exceed 92 days and the maximum fine does not exceed $1,000.00. MCL 761.1(m). See also MCL 750.8, defining misdemeanor, for purposes of the Michigan Penal Code, as "any act or omission, not a felony, [that] is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court[.]"

A district court's jurisdiction is limited by MCL 600.8311(a) to misdemeanors that are punishable by not more than one year of imprisonment. However, "circuit court misdemeanors" (sometimes also colloquially referred to as "serious" or "high court" misdemeanors) are punishable by more than one year of imprisonment. Any misdemeanor punishable by more than one year of imprisonment is not cognizable in the district court and is considered a felony for purposes of determining trial-court jurisdiction.

B. Proceedings Over Which District Court Has Jurisdiction

- **One-Year Misdemeanors, Ordinance Violations, and Charter Violations.** The district court has jurisdiction over all proceedings involving misdemeanors punishable by a fine or imprisonment not exceeding 1 year, or both, and ordinance and charter violations punishable by a fine or imprisonment, or both. MCL 600.8311(a)-(b); see also MCR 6.008(A).

- **Arraignments.** In all cases, the district court has jurisdiction to conduct arraignments, set bail, and accept bonds. MCL 600.8311(c).

- **Other Preliminary Proceedings Involving Felonies and "Circuit Court Misdemeanors."** In cases involving felonies and misdemeanors cognizable by the circuit court (misdemeanors punishable by more than one year of imprisonment), the district court has jurisdiction to conduct probable cause conferences, preliminary examinations, and circuit court (post-bindover) arraignments. MCL 600.8311(d)-(f).[17] The district court's jurisdiction over these offenses continues "through the preliminary examination and until the entry of an order to

bind the defendant over to the circuit court." MCR 6.008(A).

Specifically, MCL 600.8311 provides:

> "The district court has jurisdiction of all of the following:
>
> (a) misdemeanors punishable by a fine or imprisonment not exceeding 1 year, or both.
>
> (b) Ordinance and charter violations punishable by a fine or imprisonment, or both.
>
> (c) Arraignments, the fixing of bail and the accepting of bonds.
>
> (d) Probable cause conferences in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the probable cause conference under . . . MCL 766.4.
>
> (e) Preliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the preliminary examination under . . . MCL 766.1[*et seq*]. There shall not be a preliminary examination for any misdemeanor to be tried in a district court.
>
> (f) Circuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under . . . MCL 766.13. . . .[18]"

Additionally, "[a] district judge has the authority to accept a felony plea [and s]hall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties."[19] MCL 766.4(3).[20]

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[17] See the Michigan Judicial Institute's table including information on the jurisdiction of district court judges and magistrates over preliminary matters in all criminal proceedings.

[18] See Chapter 7 for discussion of probable cause conferences, preliminary examinations, and post-bindover arraignments.

[19] However, following bindover, "[t]he circuit court retains jurisdiction over any case in which a plea is entered or a verdict rendered to a charge that would normally be cognizable in the district court." MCR 6.008(C). See Chapter 6 for discussion of pleas.

[20] However, "[s]entencing for felony cases and misdemeanor cases not cognizable by the district court shall be conducted by a circuit judge." MCL 600.8311(f); see also MCL 766.4(3).

A district court has the same power to hear and determine matters within its jurisdiction as does a circuit court over matters within the circuit court's jurisdiction. MCL 600.8317

2.8 Applicable Court Rules

Chapter 6 of the Michigan Court Rules governs criminal procedure. "The rules in subchapters 6.000—6.500, except MCR 6.006(C), govern matters of procedure in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction." MCR 6.001(A). Some of these rules, as well as all of the rules in subchapter 6.600, are specified in MCR 6.001(B) as rules that "govern matters of procedure in criminal cases cognizable in the district courts."

MCR 6.001(E) addresses and resolves any conflict that may exist or arise between the criminal procedure outlined in Chapter 6 of the Michigan Court Rules and any statutory provisions concerning the same procedure:

> "The rules in [Chapter 6] supersede all prior court rules in [Chapter 6] and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in [Chapter 6]."

Additionally, the rules of civil procedure (except to the extent that they clearly apply only to civil actions) apply to criminal cases, unless a statute or court rule provides a similar or different procedure applicable to the circumstances. MCR 6.001(D).

A. Misdemeanors (Criminal Cases Cognizable in District Court)

MCR 6.001(B) provides that the following court rules "govern matters of procedure in criminal cases cognizable in the district courts[:]"

- MCR 6.001—MCR 6.004 (scope, purpose and construction, definitions, and speedy trial);
- MCR 6.005(B)-(C) (indigent defendants);
- MCR 6.006(A) and (C)-(E) (video and audio proceedings);
- MCR 6.101 (the complaint);
- MCR 6.103 (failure to appear);

- MCR 6.104(A) (arraignment without unnecessary delay before a court or by use of two-way interactive video technology and right to assistance of counsel at arraignment);
- MCR 6.105 (voluntary appearance);
- MCR 6.106 (pretrial release);
- MCR 6.009 (use of restraints on a defendant)
- MCR 6.125 (competency hearing);
- MCR 6.202 (disclosure of forensic laboratory report or certificate);
- MCR 6.425(D)(3) (incarceration for nonpayment of court-ordered financial obligations);
- MCR 6.427 (judgment);
- MCR 6.430 (postjudgment motion to amend restitution);
- MCR 6.435 (correcting mistakes);
- MCR 6.440 (disability of judge);
- MCR 6.441 (early probation discharge);
- MCR 6.445 (probation violation and revocation);
- MCR 6.450 (acknowledgment of technical probation violation);
- MCR 6.451 (reinstatement of convictions set aside without application)
- MCR 6.610 (district court criminal procedure);
- MCR 6.615 (misdemeanor cases);
- MCR 6.620 (jury impaneling); and
- MCR 6.625 (appeal and appointment of appellate counsel).

Other rules not specifically mentioned in MCR 6.001(B) may also be instructive in situations in which no court rule specific to district court procedure is supplied elsewhere. See, e.g., MCR 6.104(B) (governing the place of arraignment).

The circuit court generally retains jurisdiction over all proceedings in a case following bindover from the district court, including

proceedings involving misdemeanors that would otherwise be cognizable in the district court. See MCR 6.008(B)-(E).[21]

B. Felonies and Circuit Court Misdemeanors (Criminal Cases Cognizable in Circuit Court)

"The rules in subchapters 6.000—6.500, except MCR 6.006(C), govern matters of procedure in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction." MCR 6.001(A).

The following court rules govern preliminary proceedings that may be conducted by district courts in cases involving felonies and misdemeanors that are not cognizable by the district court:

- MCR 6.008(A) (providing that "[t]he district court has jurisdiction over all misdemeanors and all felonies through the preliminary examination and until the entry of an order to bind the defendant over to the circuit court");
- MCR 6.108 (probable cause conference);
- MCR 6.110 (preliminary examination); and
- MCR 6.111 (circuit court (post-bindover) arraignment in district court).[22]

2.9 Overview of District Court Magistrates' Authority

A district court magistrate may exercise the powers, jurisdiction, and duties of a district court judge if expressly authorized by the Revised Judicature Act, MCL 600.101 *et seq.*, or by another statute. MCL 761.1(*l*). However, "[n]otwithstanding statutory provisions to the contrary, magistrates exercise only those duties expressly authorized by the chief judge of the district or division." MCR 4.401(B). Moreover, "[a]n action taken by a magistrate may be superseded, without formal appeal, by order of a district judge in the district in which the magistrate serves." MCR 4.401(C).

Subject to the chief district judge's approval, district court magistrates generally have the authority to issue arrest warrants and search warrants; fix bail and accept bond; conduct arraignments and accept pleas for specified offenses; conduct probable cause conferences[23]; and impose sentences for specified offenses. MCL 600.8511(a)-(h).

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[21] See Section 2.5 for discussion of circuit court jurisdiction.

[22] See Chapter 7 for discussion of probable cause conferences, preliminary examinations, and post-bindover arraignments.

"Proceedings involving magistrates must be in accordance with relevant statutes and rules." MCR 4.401(A).

Note—*Magistrate* and *District Court Magistrate* Definitions: The terms *magistrate* and *district court magistrate* are not always synonymous. According to the Code of Criminal Procedure, a *magistrate* is a *judge* of the district court or municipal court, and this term does *not* include a district court magistrate. MCL 761.1(*l*). The term *district court magistrate* is specifically used in the Code of Criminal Procedure when the subject matter involves a district court magistrate. See also MCR 6.003(4) (defining *court* or *judicial officer* as "a judge, a magistrate, or a district court magistrate authorized in accordance with the law to perform the functions of a magistrate[]").

A. Appointment of Counsel

Provided the district's chief judge has so authorized, a district court magistrate may "[a]pprove and grant petitions for the appointment of an attorney to represent an indigent defendant accused of any misdemeanor punishable by imprisonment for not more than 1 year or ordinance violation punishable by imprisonment." MCL 600.8513(2)(a). See SCAO Form MC 222, *Request for Court-Appointed Attorney and Order*.

Note—Advice of Rights and Michigan Indigent Defense Commission Act (MIDCA): The MIDCA, MCL 780.981—MCL 780.1003, requires "[t]rial courts [to] assure that each criminal defendant is advised of his or her right to counsel[,]" MCL 780.991(1)(c), and to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . not later than at the defendant's first appearance in court[,]" MCL 780.991(3)(a).[24] See also MCL 775.16.[25]

The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced *for a crime for which an individual may be imprisoned upon conviction*, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(f)(*i*)

[23] A district court magistrate may "conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge." MCL 600.8511(h). See Chapter 7 for discussion of probable cause conferences.

(defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA) (emphasis supplied). See Section 4.4 for discussion of the MIDCA.

B. Summonses, Arrest Warrants, and Search Warrants[26]

If authorized by the chief judge of the district or division, a district court magistrate may issue arrest warrants or summonses for felonies, misdemeanors, and ordinance violations pursuant only to the written authorization of the prosecuting attorney or municipal attorney. MCL 764.1(1)-(2); MCL 600.8511(e); MCR 4.401(B). A district court magistrate needs no authorization to issue a warrant for the arrest of an individual to whom a police officer issued a traffic citation under MCL 257.728 if the individual failed to appear in court when required. MCL 600.8511(e).

A district court magistrate has the jurisdiction and duty "[t]o issue search warrants, if authorized to do so by a district court judge." MCL 600.8511(g). See also MCL 780.651(1); MCL 780.651(3).

C. Arraignments and First Appearances

In addition to limited jurisdiction under MCL 600.8511(a)-(c), as authorized by the chief judge, to "arraign and sentence upon pleas of guilty or nolo contendere" for certain listed violations that are punishable by no more than 93 days' imprisonment,[27] a district court magistrate has jurisdiction, as authorized by the chief judge, to arraign defendants and set bond for certain other offenses, including violations of MCL 257.625 (offenses involving the operation of a motor vehicle while intoxicated or visibly impaired), MCL 257.625m (operation of a commercial motor vehicle by a

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[24]Note also that the Michigan Indigent Defense Commission must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a).

[25] MCL 775.16 provides:

> "When a person charged with having committed a crime appears before a [district court or municipal court judge] without counsel, the person shall be advised of his or her right to have counsel appointed. If the person states that he or she is unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the [MIDCA]." MCL 775.16; see also MCL 761.1(*l*).

[26] See Chapter 3 for a more complete discussion of issuing arrest warrants and search warrants.

[27] See Section 2.9(F) for more information.

person with an unlawful blood alcohol content), MCL 324.81134 (offenses involving the operation of an ORV while under the influence of alcoholic liquor and/or a controlled substance, while visibly impaired, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body),[28] and MCL 324.82128 and MCL 324.82129 (offenses involving the operation of a snowmobile while under the influence of alcoholic liquor and/or a controlled substance, while visibly impaired, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body). MCL 600.8511(b)-(c).

Additionally, MCL 600.8511(d) provides that a district court magistrate, if authorized by the chief judge, has jurisdiction over arraignments for contempt violations and violations of probation when the violation arises directly out of a case in which a judge or district court magistrate conducted the same defendant's arraignment under MCL 600.8511(a), MCL 600.8511(b), or MCL 600.8511(c), or the same defendant's first appearance under MCL 600.8513. MCL 600.8511(d) applies only to offenses punishable by imprisonment for not more than one year, a fine, or both. District court magistrates are not authorized to conduct violation hearings or sentencing hearings, but may set bond and accept pleas. *Id*.

A district court magistrate may also preside over a defendant's "first appearance" in certain circumstances. MCL 600.8513(1) states:

> "When authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination and acceptance of any written demand or waiver of jury trial. However, this section does not authorize a district court magistrate to accept a plea of guilty or nolo contendere not expressly authorized under [MCL 600.8511 or MCL 600.8512a]. A defendant neither demanding nor waiving preliminary examination in writing is deemed to have demanded preliminary examination and a defendant neither demanding nor waiving jury trial in writing is considered to have demanded a jury trial."

[28] Effective March 31, 2015, 2014 PA 405 repealed MCL 324.81135. 2014 PA 405, enacting section 1. However, MCL 600.8511(c) still provides that "the chief judge may authorize the magistrate to arraign defendants and set bond with regard to violations of . . . [MCL 324.81135.]"

D. Fixing Bail and Accepting Bond

If authorized by the chief judge of the district or division, a district court magistrate has a duty "[t]o fix bail and accept bond in all cases." MCL 600.8511(f); MCR 4.401(B).

E. Proceedings Involving Civil Infractions, Misdemeanors, and Ordinance Violations Not Punishable by Imprisonment

To the extent expressly authorized by the chief judge, presiding judge, or only judge of the district, MCL 600.8512a permits a district court magistrate to:

> "(a) Accept an admission of responsibility, decide a motion to set aside a default or withdraw an admission, and order civil sanctions for a civil infraction and order an appropriate civil sanction permitted by the statute or ordinance defining the act or omission.
>
> (b) Accept a plea of guilty or nolo contendere and impose sentence for a misdemeanor or ordinance violation punishable by a fine and which is not punishable by imprisonment by the terms of the statute or ordinance creating the offense."

F. Pleas to Enumerated Offenses Punishable by Imprisonment

1. Offenses Punishable by Not More Than 90 Days' Imprisonment

MCL 600.8511(a) provides that a district court magistrate has the jurisdiction and duty "[t]o arraign and sentence upon pleas of guilty or nolo contendere for violations of the following acts or parts of acts, or a local ordinance substantially corresponding to these acts or parts of acts, when authorized by the chief judge of the district court, if the maximum permissible punishment does not exceed 90 days in jail or a fine, or both:"

- MCL 324.48701—MCL 324.48740 (sport fishing)
- MCL 324.40101—MCL 324.40120 (wildlife conservation)
- MCL 324.80101—MCL 324.80199 (Marine Safety Act)[29]

- MCL 475.1—MCL 479.43 (Motor Carrier Act)
- MCL 480.11—MCL 480.25 (Motor Carrier Safety Act of 1963)
- MCL 287.261—MCL 287.290 (Dog Law of 1919)
- MCL 436.1703 or MCL 436.1915 (Liquor Control Code)
- MCL 324.501—MCL 324.513 (DNR Commission)
- MCL 324.8901—MCL 324.8907 (littering)
- MCL 324.43501—MCL 324.43561 (hunting/fishing licensing)
- MCL 324.73101—MCL 324.73111 (recreational trespass)
- MCL 750.546—MCL 750.552c (willful trespass)[30]

2. Michigan Vehicle Code Violations

If authorized by the chief district judge and if the maximum permissible punishment does not exceed 93 days in jail, a fine, or both, MCL 600.8511(b) permits a district court magistrate to arraign and sentence defendants on pleas of guilty or no contest for violations of the Michigan Vehicle Code (MVC) or violations of local ordinances substantially corresponding to a provision of the MVC.

The district court magistrate's authority to arraign and sentence does not extend to guilty or no contest pleas for violations of MCL 257.625 (offenses involving the operation of a motor vehicle while intoxicated or visibly impaired) and MCL 257.625m (operation of a commercial motor vehicle by a person with an unlawful blood alcohol content), and local ordinances substantially corresponding to those provisions; however, a district court magistrate may be authorized to arraign defendants and set bond for violations of MCL 257.625 and MCL 257.625m or substantially corresponding local ordinances. MCL 600.8511(b).

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[29] See Section 5.10 for a detailed discussion of arrest and arraignment procedure for a violation of the Marine Safety Act.

[30] Effective March 14, 2016, 2015 PA 211 repealed MCL 750.546—MCL 750.551; however, MCL 600.8511(a) has not yet been amended to reflect these changes.

3. ORV and Snowmobile Violations

If authorized by the chief district judge and if the maximum permissible punishment does not exceed 93 days in jail, a fine, or both, MCL 600.8511(c) permits a district court magistrate to arraign and sentence defendants on pleas of guilty or no contest for violations of MCL 324.81101—MCL 324.81150 (ORV licensing) and MCL 324.82101—MCL 324.82160 (snowmobiles) or violations of a local ordinance substantially corresponding to one of these statutory provisions.

The district court magistrate's authority to arraign and sentence does not extend to guilty or no contest pleas for violations of MCL 324.81134 (offenses involving the operation of an ORV while under the influence of alcoholic liquor and/or a controlled substance, while visibly impaired, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body),[31] MCL 324.82128 and MCL 324.82129 (offenses involving the operation of a snowmobile while under the influence of alcoholic liquor and/or a controlled substance, while visibly impaired, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body), or a local ordinance substantially corresponding to one of these statutory provisions; however, the chief judge may authorize a district court magistrate to arraign defendants and set bond for violations under these statutes. MCL 600.8511(c).

G. Probable Cause Conferences[32]

District court magistrates have jurisdiction "[t]o conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge." MCL 600.8511(h); see also MCR 6.108(B) ("[a] district court magistrate may conduct probable cause conferences when authorized to do so by the chief district judge and may conduct all matters allowed at the probable cause conference, except taking pleas and imposing sentences unless permitted by statute to take pleas or impose sentences[]").

See also MCL 766.1, which provides, in relevant part:

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[31] Effective March 31, 2015, 2014 PA 405 repealed MCL 324.81135. 2014 PA 405, enacting section 1. However, MCL 600.8511(c) still provides that "the chief judge may authorize the magistrate to arraign defendants and set bond with regard to violations of . . . [MCL 324.81135.]"

[32] See Chapter 7 for discussion of probable cause conferences.

> "A district court magistrate . . . shall not preside at a preliminary examination or accept a plea of guilty or nolo contendere to an offense or impose a sentence except as otherwise authorized by . . . [MCL 600.8511(a)-(c)]."

H. Appeal From District Court Magistrate's Ruling

A party may appeal as of right any decision of the district court magistrate to the district court in which the magistrate serves. MCR 4.401(D). The appeal must be in writing, must be made within seven days of the entry of the decision being appealed, and should substantially comply with the form outlined in MCR 7.104. MCR 4.401(D). Except as otherwise provided by statute or court rule, no fee is required to file an appeal of a district court magistrate's ruling. *Id*. The district court hears the matter de novo. *Id*.

2.10 Record Requirements

Except as provided by law or supreme court rule, all proceedings in district court must be recorded. MCL 600.8331.

MCR 6.610(C) provides that unless a writing is permitted, a verbatim record must be made of the district court proceedings listed in MCR 6.610(D) and MCR 6.610(F)-(G).[33] MCR 6.610(D) governs arraignments in misdemeanor cases and provides that a writing may be used to inform a defendant of the offense, the maximum sentence, and the defendant's rights. MCR 6.610(F) addresses pleas of guilty or nolo contendere and similarly allows a defendant to be informed of his or her rights in writing. If a defendant is informed of his or her rights in writing, "the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights." MCR 6.610(F)(4). A writing may **not** be used to satisfy the record requirements of a sentencing proceeding under MCR 6.610(G).

MCR 6.104(F) expressly mandates that "[a] verbatim record must be made of the arraignment" for a felony or a misdemeanor cognizable in the circuit court.

[33]Formerly MCR 6.610(E)-(F). See ADM File No. 2018-23, effective May 1, 2020. MCR 6.610(C) was not amended to reflect this change.

Part D: Venue

2.11 Venue: General Principles

"The general venue rule is that defendants should be tried in the county where the crime was committed. '[E]xcept as the legislature for the furtherance of justice has otherwise provided reasonably and within the requirements of due process, the trial should be by a jury of the county or city where the offense was committed.'" *People v Houthoofd*, 487 Mich 568, 579 (2010) (citations omitted).

Venue is prescribed by statute and is generally dependent upon the location of the criminal conduct.[34] See MCL 600.8312. Additionally, certain statutes establish venue for offenses that may involve more than one location. See, e.g., MCL 762.8 (felony consisting of two or more acts); MCL 762.10 (embezzlement); MCL 762.10c (identity theft).

"[T]erritorial jurisdiction and venue are two different concepts. '[J]urisdiction refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the place where the prosecution is to be brought or tried.'" *People v Gayheart*, 285 Mich App 202, 215-216 (2009) (citations omitted).

"[V]enue is not an essential element of a criminal offense[.]" *Gayheart*, 285 Mich App at 216 (citations omitted). However, "the determination of venue is a question of fact for the jury, and the existence of venue 'must be proved by the prosecutor beyond a reasonable doubt[.]'" *Id*. (citations omitted). The existence of venue may be proven by circumstantial evidence and reasonable inferences drawn from the evidence. *Id*. (citations omitted).

2.12 Determination of Proper Venue

A. General Rules Based on Political District and Location of Criminal Conduct

Common Law. "The general venue rule is derived from the common law" and requires a criminal trial to be tried by a jury in the county or city where the crime was committed. *People v McBurrows*, 504 Mich 308, 314 (2019). However, statutes exist that contain "certain exceptions to or expansions of the 'general rule,' allowing venue in locations besides the location provided for int he 'general rule.'" *Id*. at 313. Accordingly, "identifying a proper venue

[34] See Section 2.12.

is a two-step process: first, [the court] must identify the proper venue under the general rule; second, [it] must determine whether the statutes on which the People rely permit departure from the general rule." *Id*. at 313-314. "[T]o identify where defendant's crime was committed, [the court] must scrutinize the statute creating defendant's offense." *Id*. at 317. Two common ways to identify the prohibited conduct are to analyze the key verbs in the statute or inquire into the nature of the offense. *Id*. (holding "a violation of MCL 750.317a [(delivery of a controlled substance causing death)] occurs at the place of the delivery of the controlled substance," rather than where the death occurred, because the statute punishes the act of inserting the controlled substance into the stream of commerce; "[t]hat consequences are felt elsewhere is immaterial, even if those consequences are required elements of the offense").

MCL 600.8312 sets out general venue rules based on the type of district in which the criminal conduct took place.

First-Class Districts. For criminal actions in first-class districts, the proper venue is the county where the violation took place. MCL 600.8312(1). A *first-class district* is "a district consisting of 1 or more counties and in which each county comprising the district is responsible for maintaining, financing and operating the district court within its respective county[.]" MCL 600.8103(1).

Second-Class Districts. For criminal actions in second-class districts, the proper venue is in the district where the violation took place. MCL 600.8312(2). A *second-class district* is "a district consisting of a group of political subdivisions within a county and in which the county where such political subdivisions are situated is responsible for maintaining, financing and operating the district court[.]" MCL 600.8103(2).

Third-Class Districts. For criminal actions in third-class districts, the proper venue is "in the political subdivision where the violation took place, except that when the violation is alleged to have taken place within a political subdivision where the court is not required to sit, the action may be tried in any political subdivision within the district where the court is required to sit." MCL 600.8312(3). A *third class district* is "a district consisting of 1 or more political subdivisions within a county and in which each political subdivision comprising the district is responsible for maintaining, financing and operating the district court within its respective political subdivision[.]" MCL 600.8103(3).

Other Exceptions. Several statutes provide exceptions to the general rule that venue is appropriate in the county in which the crime was committed. See *McBurrows*, 504 Mich at 313-314. The following subsections address some of these exceptions.

B. Criminal Conduct Near County Boundary Lines

When an offense is committed within one mile of the boundary line between two counties, the prosecution may take place in either county. MCL 762.3(1) provides:

> "Any offense committed on the boundary line of 2 counties, or within 1 mile of the dividing line between them, may be alleged in the indictment to have been committed, and may be prosecuted and punished in either county."

Additionally, with respect to criminal offenses cognizable in the district court, MCL 600.8312(4)(a) provides that if the "offense is committed on the boundary of 2 or more counties, districts, or political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts, or political subdivisions concerned." See also MCL 762.3(3)(a).

C. Acts Occurring at More Than One Location

1. Felony Consisting of Two or More Acts

MCL 762.8 provides:

> "Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect."

For venue to be proper under the portion of MCL 762.8 providing for venue "in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect," there must be evidence that the defendant *intended* the effect of his or her criminal actions to occur in that county. *People v McBurrows*, 504 Mich 308, 326-327 (2019). "For MCL 762.8 to apply, there must have been an 'act[] done in the perpetration of [that] felony' in [the county where the crime is charged].'" *McBurrows*, 504 Mich at 327, quoting MCL 762.8 (first alteration in the original). "[T]he Legislature's use of the word 'perpetration' serves to limit the application of MCL 762.8 to the conduct of a criminal actor or his agent." *McBurrows*, 504 Mich at 328.

In *McBurrows*, 504 Mich at 312, the defendant was charged in Monroe County with one count of delivery of a controlled

substance (heroin mixed with fentanyl) causing death, MCL 750.317a. Although the victim ultimately died in Monroe County as a result of fentanyl toxicity, the drug transaction took place in Wayne County between defendant and an intermediary, who later provided the drugs to the victim. *McBurrows*, 504 Mich at 311. Where there was no allegation "that defendant endeavored to deliver [a] controlled substance to the decedent, or that he intended the decedent's death, . . . MCL 762.8 [was] not an adequate basis for establishing venue in Monroe County . . . because the decedent's acts (which were necessary to complete the elements of the offense) were unconnected to defendant's and therefore did not implicate the decedent or make him culpable for defendant's behavior." *McBurrows*, 504 Mich at 328.

2. Fatal Force and Death in Different Counties

MCL 762.5 provides:

> "If any mortal wound shall be given or other violence or injury shall be inflicted, or any poison shall be administered in 1 county by means whereof death shall ensue in another county, the offense may be prosecuted and punished in either county."

In *People v McBurrows*, 504 Mich 308, 312 (2019), the defendant was charged in Monroe County with one count of delivery of a controlled substance (heroin mixed with fentanyl) causing death, MCL 750.317a. Although the victim ultimately died in Monroe County as a result of fentanyl toxicity, the drug transaction took place in Wayne County between defendant and an intermediary, who later provided the drugs to the victim. *McBurrows*, 504 Mich at 311. The Michigan Supreme Court concluded that venue was improper in Monroe County because "venue under MCL 762.5 requires more direct interaction with the victim[.]" *McBurrows*, 504 Mich at 326 ("[d]efendant neither imposed anything *on* the decedent nor gave anything *to* the decedent"). "The statute requires that a mortal wound be *inflicted*, or a poison be *administered*." *Id.* (distinguishing *People v Southwick*, 272 Mich 258, 260 (1935), where venue was proper in the county where death occurred because "the defendant doctor provided [the decedent] with unlawful medical treatment").

3. Criminal Conduct Involving Identity Theft and Related Offenses

Under MCL 762.10c, conduct prohibited by MCL 762.10c(2) may be prosecuted in any one of the following jurisdictions:

- where the offense occurred.
- where the information used to commit the violation was illegally used.
- where the victim resides.

MCL 762.10c(2) states that the jurisdiction described in MCL 762.10c(1) "applies to conduct prohibited under 1 or more of the following laws and to conduct that is done in furtherance of or arising from the same transaction as conduct prohibited under 1 or more of the following laws:"

- MCL 445.61—MCL 445.79c (Identity Theft Protection Act).
- Former MCL 750.285 (identity theft).
- MCL 28.295 (prohibited conduct relating to official state personal identification cards).
- MCL 257.310(7) (prohibited conduct relating to driver licenses).
- MCL 257.903 (false certification under Michigan Vehicle Code).
- MCL 750.157n—MCL 750.157r, MCL 750.157v, and MCL 750.157w (criminal use of financial transaction device).
- MCL 750.218 (false pretenses with intent to defraud).
- MCL 750.219a (obtaining telecommunications services with intent to avoid being charged).
- MCL 750.219e (preparing/submitting unauthorized loan application).
- MCL 750.248 (prohibited conduct relating to public records).
- MCL 750.248a (uttering/publishing a false, forged, altered, or counterfeit financial transaction device with intent to injure or defraud another person).

- MCL 750.249 (knowingly uttering/publishing as true a false, forged, altered, or counterfeit record or other instrument).
- MCL 750.362 (larceny by conversion).
- MCL 750.363 (larceny by false personation).
- MCL 750.539k (unauthorized use of a financial transaction device to secretly or surreptitiously capture or transmit personal identifying information.

If an individual is charged with multiple counts of identity theft under MCL 445.61—MCL 445.79c, or secretly or surreptitiously capturing or transmitting personal identifying information from a transaction that involves the use of a financial transaction device by a person who is not a party to a transaction under MCL 750.539k, and the violations could be prosecuted in more than one jurisdiction, all violations may be properly prosecuted in any of the applicable jurisdictions. MCL 762.10c(3).

4. Accessory After the Fact

Because commission of the underlying crime is an element of any accessory after the fact charge, the prosecution of such a charge is proper in the county where the underlying crime was committed, even when the actual assistance was rendered in a county different from the county in which the underlying crime occurred. *People v King (Genevieve)*, 271 Mich App 235, 237, 242-243 (2006), citing MCL 762.8. Similarly, even when the assistance was rendered in a state other than Michigan, jurisdiction to try a defendant charged with accessory after the fact lies in Michigan because "MCL 762.2(2)(a) provides that Michigan has jurisdiction over any crime where any act constituting an element of the crime is committed within Michigan." *King (Genevieve)*, 271 Mich App at 243.[35]

5. Aiding and Abetting

Under MCL 767.39, defendants may "'be prosecuted, indicted, [and] tried . . . as if [they] had directly committed'" the offense that they are charged with aiding and abetting. *People v White*, 509 Mich 96, 102 (2022), quoting MCL 767.39. "Under this law, aiding and abetting is not a distinct criminal act; rather, it is a theory of prosecution that imposes vicarious criminal liability

[35] See Section 2.3 for additional discussion of MCL 762.2.

> on an accomplice for the acts of the principal." *Id*. at 102. "The text of MCL 767.39 does not require that a defendant have any knowledge of the *location* of the offense [the defendant] aids or abets; having procured, counseled, aided, or abetted in the commission of the offense, the defendant can be prosecuted as if [the defendant] had directly committed such offense, such as in the venue where the offense was directly committed." *White*, 509 Mich at 104 (cleaned up). Accordingly, "the county in which the criminal act of the principal occurred is a proper venue" "for a criminal prosecution under an aiding and abetting theory."*Id*. at 96, 99 (holding that the proper venue for prosecution of defendant under the aiding and abetting statute was Livingston County where the principal—charged with delivery of a controlled substance causing death—allegedly purchased the controlled substance from defendant in Macomb County but delivered the controlled substance in Livingston County).

D. Location of Offense Impossible to Determine

MCL 762.3(2) provides:

> "If it appears to the attorney general that a felony has been committed within the state and that it is impossible to determine within which county it occurred, the offense may be alleged in the indictment to have been committed and may be prosecuted and punished in such county as the attorney general designates. The state shall bear all expenses of such prosecution. The responsibility and the authority with reference to all steps in the prosecution of such case shall be the same, as between the prosecuting attorney of the county so designated and the attorney general, as though it were an established fact that the alleged criminal acts, if committed at all, were committed within that county."

Additionally, with respect to criminal offenses cognizable in the district court, MCL 600.8312(4)(b) provides that if the "offense is committed in or upon any railroad train, automobile, aircraft, vessel, or other conveyance in transit, and it cannot readily be determined in which county, district, or political subdivision the offense was committed, venue is proper in any county, district, or political subdivision through or over which the conveyance passed in the course of its journey." See also MCL 762.3(3)(b).

Furthermore, with respect to proceedings in the district court, MCL 762.3(3)(c) provides:

> "With regard to state offenses cognizable by the examining magistrate and to examinations conducted for offenses not cognizable by the examining magistrate, the following special provisions apply:
>
> * * *
>
> (c) Except as otherwise provided in [MCL 762.3(3)(b)], if it appears to the attorney general that the alleged state offense has been committed within the state and that it is impossible to determine within which county, district or political subdivision it occurred, the violation may be alleged to have been committed and may be prosecuted and punished or the examination conducted in such county, district or political subdivision as the attorney general designates. The responsibility and the authority with reference to all steps in the prosecution of such case shall be the same, as between the prosecuting attorney of the county so designated and the attorney general, as though it were an established fact that the alleged criminal acts, if committed at all, were committed within that county, district or political subdivision."

E. Proceedings in District Court

Special venue rules apply with respect to criminal offenses cognizable in the district court and to preliminary examinations conducted in the district court. MCL 600.8312(4) provides:

> "With regard to state criminal violations cognizable by the district court, the following special provisions shall apply:
>
> (a) If an offense is committed on the boundary of 2 or more counties, districts, or political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts, or political subdivisions concerned.
>
> (b) If an offense is committed in or upon any railroad train, automobile, aircraft, vessel, or other conveyance in transit, and it cannot readily be determined in which county, district, or political subdivision the offense was committed, venue is proper in any county, district, or political

> subdivision through or over which the conveyance passed in the course of its journey."

MCL 762.3(3) provides:

> "With regard to state offenses cognizable by the examining magistrate and to examinations conducted for offenses not cognizable by the examining magistrate, the following special provisions apply:
>
> (a) If an offense is committed on the boundary of 2 or more counties, districts or political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned.
>
> (b) If an offense is committed in or upon any railroad train, automobile, aircraft, vessel or other conveyance in transit, and it cannot readily be determined in which county, district or political subdivision the offense was committed, venue is proper in any county, district or political subdivision through or over which the conveyance passed in the course of its journey.
>
> (c) Except as otherwise provided in [MCL 762.3(3)(b)], if it appears to the attorney general that the alleged state offense has been committed within the state and that it is impossible to determine within which county, district or political subdivision it occurred, the violation may be alleged to have been committed and may be prosecuted and punished or the examination conducted in such county, district or political subdivision as the attorney general designates. The responsibility and the authority with reference to all steps in the prosecution of such case shall be the same, as between the prosecuting attorney of the county so designated and the attorney general, as though it were an established fact that the alleged criminal acts, if committed at all, were committed within that county, district or political subdivision."

A district court has no authority to grant a motion for change of venue before a preliminary examination is held. *In re Attorney General*, 129 Mich App 128, 132 (1983). MCL 762.7, the statute granting courts of record authority to change venue in criminal

cases, is only applicable to circuit courts in felony cases. *In re Attorney General*, 129 Mich App at 131.[36]

2.13 Sufficiency of Evidence to Prove Venue

"[V]enue is not an essential element of a criminal offense[.]" *People v Gayheart*, 285 Mich App 202, 216 (2009) (citations omitted). However, "the determination of venue is a question of fact for the jury, and the existence of venue 'must be proved by the prosecutor beyond a reasonable doubt[.]'" *Id*. (citations omitted). The existence of venue may be proven by circumstantial evidence and reasonable inferences drawn from the evidence. *Id*. (citations omitted).

"In general, a court may take judicial notice of the locations of political subdivisions of the state." *People v Smith (Roy)*, 28 Mich App 656, 657 (1974). "Venue has been held to be established when the crime has been shown to have been committed in a township located within a particular county, even though no mention of the county was made." *Id*. at 658. In *Smith (Roy)*, the trial court properly denied the defendant's motion to quash the information "on the ground that the prosecution failed to prove venue in Wayne County at the preliminary examination" where the evidence introduced at the preliminary examination "indicated that the offense took place in the city of Taylor[,] . . . [and] the trial court took judicial notice of the fact that Taylor is a city in Wayne County." *Id*. at 657.

2.14 Motion to Change Venue

A. Generally

Venue in a criminal case may be changed "upon good cause shown by either party." MCL 762.7. Generally, defendants must be tried in the county where the crime is committed. MCL 600.8312.[37] "[U]nfair and prejudicial news comment on pending trials has become increasingly prevalent," and "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influence." *Sheppard (Samuel) v Maxwell*, 384 US 333, 362 (1966).

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[36] See Section 2.14.

[37] However, certain exceptions apply as provided by statute. See, e.g., MCL 762.8 (providing that "[w]henever a felony consists or is the culmination of [two] or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect[;]" MCL 762.3(3)(a) (providing that "[i]f an offense is committed on the boundary of [two] or more counties, districts or political subdivisions or within [one] mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned[]"). See Section 2.12.

The moving party has the burden of showing good cause for a change of venue. MCL 762.7. "The burden of establishing that prospective jurors have been influenced by pretrial publicity is on the party seeking the change of venue, and merely showing that jurors have been exposed to pretrial publicity is not in itself sufficient." *People v Florinchi*, 84 Mich App 128, 135 (1978). "'[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.'" *Skilling v United States*, 561 US 358, 384 (2010), quoting *Nebraska Press Ass'n v Stuart*, 427 US 539, 554 (1976) ("news stories about Enron did not present the kind of vivid, unforgettable information [the United States Supreme Court] ha[s] recognized as particularly likely to produce prejudice, and [the trial city's] size and diversity diluted the media's impact"). The focus is on whether the moving party can secure a fair and impartial trial in the jurisdiction where the action is brought. *In re Attorney General*, 129 Mich App 128, 133 (1983). Convenience of the parties and witnesses does not constitute good cause. *Id.* at 133, 135.

Where potential jurors swear that they will put aside preexisting knowledge and opinions about the case and that they will be able to decide the case impartially based on the evidence at trial, such preexisting knowledge and opinions do not constitute good cause justifying a change of venue. *People v DeLisle*, 202 Mich App 658, 662-663 (1993).

"Federal precedent has used two approaches to determine whether the failure to grant a change in venue is an abuse of discretion. Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *People v Jendrzejewski*, 455 Mich 495, 500-501 (1997).

In *People v Cline*, 276 Mich App 634, 638-642 (2007), the Court of Appeals reviewed the circumstances of the defendant's case in light of the standards set out in *DeLisle*, 202 Mich App 658, and *Jendrzejewski*, 455 Mich 495, to determine whether the defendant's counsel was ineffective for failing to bring a motion for change of venue. In *Cline*, 276 Mich App at 638-642, the totality of the circumstances surrounding the jury selection—including the fact that nine out of the selected jury panel of 14 heard about the case before trial, and 11 local newspaper articles about the case were published—did not overcome the jurors' assurances that they could decide the case impartially.

B. Timing

It is the preferred practice for the trial court to defer ruling on a motion for change of venue until after jury selection has been attempted in the original county. *People v Harvey (Wayne)*, 167 Mich App 734, 741 (1988).

A district court has no authority to grant a motion for change of venue before a preliminary examination is held. *In re Attorney General*, 129 Mich App 128, 132 (1983). MCL 762.7, the statute granting courts of record authority to change venue in criminal cases, is only applicable to circuit courts in felony cases. *In re Attorney General*, 129 Mich App at 131.

C. Order

An order for change of venue must be entered on a SCAO approved form. MCR 2.226(A); MCR 6.001(D). If the order "is not prepared as required under [MCR 2.226(A)], and the order lacks the information necessary for the receiving court to determine under which rule the transfer was ordered, the clerk of the receiving court shall refuse to accept the transfer and shall prepare a notice of refusal on a form approved by the [SCAO] and return the case to the transferring court for a proper order within seven business days of receipt of the transfer order." MCR 2.226(B); MCR 6.001(D). Upon receipt of a refusal to accept a transfered case under MCR 2.226(B), the transferring court must "prepare a proper order in accordance with [MCR 2.226(A)] and retransfer the case within seven business days." MCR 2.226(C); MCR 6.001(D).

2.15 Standard of Review for Venue Error

A trial court's determination regarding the existence of venue in a criminal prosecution is reviewed de novo. *People v Webbs*, 263 Mich App 531, 533 (2004), superseded in part on other grounds by 2013 PA 128, effective October 9, 2013.

A trial court's ruling on a motion for change of venue is reviewed for an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500 (1997).

"No verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury." MCL 767.45(1)(c).

"[B]ecause a venue error is not a constitutional structural error, [it] is subject to a harmless error analysis under MCL 769.26. . . . Moreover,

MCL 600.1645 explicitly provides that no judgment shall be voided solely on the basis of improper venue." *People v Houthoofd*, 487 Mich 568, 593-594 (2010). See *People v Boshell*, 337 Mich App 322, 339 (2021) (finding "venue was improper for [the] charges" under MCL 762.8 (felony consisting of two or more acts), but declining "to disturb [the] convictions because the error was harmless").

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Part A: Electronic Filing

3.1 Electronic Filing[1]

"Electronic filing [(e-filing)] and electronic service of documents is governed by [MCR 1.109(G)] and the policies and standards of the State Court Administrative Office." MCR 1.109(D)(7). Courts must implement e-filing and electronic service capabilities in accordance with MCR 1.109, and comply with standards established by the State Court Administrative Office. MCR 1.109(G)(2). "Confidential and nonpublic information or documents and sealed documents that are electronically filed or electronically served must be filed or served in compliance with these standards to ensure secure transmission or the information." *Id*.

Courts must:

- accept e-filings and allow electronic service of documents;
- comply with the e-filing guidelines and plans approved by the State Court Administrative Office; and
- maintain electronic documents in accordance with the standards established by the State Court Administrative Office. MCR 1.109(G)(3)(a)(*i*)-(*iii*).

"[C]ourts that seek permission to mandate that all litigants e-File [must] first submit an e-Filing Access Plan for approval by the State Court Administrative Office." Administrative Order No. 2019-2, 504 Mich lxxix (2019). "Each plan must conform to the model promulgated by the State Court Administrator and ensure access to at least one computer workstation per county." *Id*. "The State Court Administrative Office may revoke approval of an e-Filing Access Plan due to litigant grievances." *Id*.

Courts must accommodate the filing and serving of materials that cannot be done so electronically. MCR 1.109(G)(3)(c). "The clerk of the court shall convert to electronic format certain documents filed on paper in accordance with the electronic filing implementation plans established by [SCAO]." MCR 1.109(G)(3)(d). "A court may electronically send any notice, order, opinion, or other document issued by the court in that case by means of the electronic-filing system. MCR 1.109(G)(3)(e). MCR 1.109(G)(3)(e) does not "eliminate any responsibility of a party, under these rules, to serve documents that have been issued by the court." *Id*. Attorneys must electronically file documents for required case types in courts that have implemented electronic filing, unless the attorney is

[1] See the MiFile webpage for more information on Michigan's e-filing system.

exempt from e-filing under MCR 1.109(G)(3)(h) because of a disability. MCR 1.109(G)(3)(f). "All other filers are required to electronically file documents only in courts that have been granted approval to mandate electronic filing by the State Court Administrative Office[.]" *Id*. See Section 3.1(A)(3) for information on exemptions from e-filing mandates.

"There is only one official court record, regardless whether original or suitable-duplicate and regardless of the medium." MCR 8.119(D)(4). "Documents electronically filed with the court or generated electronically by the court are original records and are the official court record. A paper printout of any electronically filed or generated document is a copy and is a nonrecord for purposes of records retention and disposal." *Id*.

A. Electronic Filing Process

1. General Provisions

Authorized users must electronically provide specified case information, including e-mail addresses for achieving e-service.[2] MCR 1.109(G)(5)(a)(*i*). The authorized user is responsible for ensuring that a filing has been received by the e-filing system, and must immediately notify the clerk of the court if it is discovered that the version of the document available for viewing through the e-filing system does not depict the document as submitted (and to resubmit the document if necessary). MCR 1.109(G)(5)(a)(*ii*). The authorized user may file a motion with the court pursuant to MCR 1.109(G)(7) if a controversy arises between the clerk of the court and the authorized user.[3] MCR 1.109(G)(5)(a)(*ii*).

If the court rejects a submitted document pursuant to MCR 8.119(C), the clerk must notify the authorized user of the rejection and the reason for the rejection. MCR 1.109(G)(5)(a)(*iii*). The rejection must be recorded in an e-filing transaction (from the court to the authorized user), but the rejected document does not become part of the official court record. *Id*.

2. Timing

"A document submitted electronically is deemed filed with the court when the transmission to the electronic-filing system is completed and the required filing fees have been paid or

[2]See Section 3.1(B) for additional information on electronic service process.

[3]See Section 3.1(C) for additional information on transmission failures.

waived." MCR 1.109(G)(5)(b). "If a document is submitted with a request to waive the filing fees, no fees will be charged at the time of filing and the document is deemed filed on the date the document was submitted to the court." *Id*. "A transmission is completed when the transaction is recorded as prescribed in [MCR 1.109(G)(5)(c)]." MCR 1.109(G)(5)(b). The filing date is the date the document was submitted, regardless of the date the clerk of the court accepts the filing. *Id*. A document submitted at or before 11:59 p.m. of a business day is deemed filed on that business day. *Id*. "Any document submitted on a Saturday, Sunday, legal holiday, or other day on which the court is closed pursuant to court order is deemed filed on the next business day." *Id*.

3. Exemptions from Mandatory E-Filing

"Where electronic filing is mandated, a party may file paper documents with that court and be served with paper documents according to [MCR 1.109(G)(6)(a)(*ii*)] if the party can demonstrate good cause for an exemption." MCR 1.109(G)(3)(g). "For purposes of [MCR 1.109], a court shall consider the following factors in determining whether the party has demonstrated good cause:

> (*i*) Whether the person has a lack of reliable access to an electronic device that includes access to the Internet;
>
> (*ii*) Whether the person must travel an unreasonable distance to access a public computer or has limited access to transportation and is unable to access the e-Filing system from home;
>
> (*iii*) Whether the person has the technical ability to use and understand email and electronic filing software;
>
> (*iv*) Whether access from a home computer system or the ability to gain access at a public computer terminal present a safety issue for the person;
>
> (*v*) Any other relevant factor raised by a person." MCR 1.109(G)(3)(g).

"Upon request, the following persons are exempt from electronic filing without the need to demonstrate good cause:

> (*i*) a person who has a disability as defined under the Americans with Disabilities Act that prevents

> or limits the person's ability to use the electronic filing system;
>
> (*ii*) a person who has limited English proficiency that prevents or limits the person's ability to use the electronic filing system; and
>
> (*iii*) a party who is confined by governmental authority, including but not limited to an individual who is incarcerated in a jail or prison facility, detained in a juvenile facility, or committed to a medical or mental health facility." MCR 1.109(G)(3)(h).

An exemption request must be filed (in paper) on a SCAO approved form, verified under MCR 1.109(D)(3), and no fee may be charged for the request. MCR 1.109(G)(3)(i)(*i*). "The request must specify the reasons that prevent the individual from filing electronically" and may be supported with documents. *Id*. "If the individual filed paper documents at the same time as the request for exemption under [MCR 1.109(G)(3)(i), the clerk shall process the documents for filing. If the documents meet the filing requirements of [MCR 1.109(D)], they will be considered filed on the day they were submitted." MCR 1.109(G)(3)(j).

A request for exemption from e-filing under MCR 1.109(G)(3)(h) must "be approved by the clerk of the court on a form approved by [SCAO]." MCR 1.109(G)(3)(i)(*ii*). If the clerk is unable to grant an exemption, the clerk must immediately submit the request for judicial review. *Id*. A judge is required to review requests made under MCR 1.109(G)(3)(g) and MCR 1.109(G)(3)(h)(*i*), and any requests not granted by the clerk. MCR 1.109(G)(3)(i)(*ii*). A court must "issue an order granting or denying the request within two business days of the date the request was filed." *Id*. The clerk "must hand deliver or promptly mail the clerk approval granted or order entered under [MCR 1.109(G)(3)(i) to the individual. MCR 1.109(G)(3)(k). The request, any supporting documentation, and the clerk approval or order must be placed in the case file. *Id*. "If there is no case file, the documents must be maintained in a group file." *Id*. "If the request was made under [MCR 1.109(G)(3)(h)(*i*)], both the Request for Exemption from Use of MiFILE and the Request for Reasonable Accomodations [sic], along with any supporting documentation and the clerk approval or order shall be maintained confidentially." MCR 1.109(G)(3)(k).

> "An exemption granted under [MCR 1.109] is valid only for the court in which it was filed and for the life of the case unless the individual exempted from filing electronically registers with the electronic-filing system." MCR 1.109(G)(3)(l). An individual who waives exemption (by registering with the electronic-filing system) "becomes subject to the rules of electronic filing and the requirements of the electronic-filing system. An individual who waives an exemption . . . may file another request for exemption." *Id*.

B. Electronic-Service Process

Service of process of case initiating documents must be made in accordance with the rules and laws applicable to the particular case type. MCR 1.109(G)(6)(a)(*i*).

Generally, service of process of all other documents e-filed must be performed through the e-filing system. MCR 1.109(G)(6)(a)(*ii)*. However, service must be made by any other method required by Michigan Court Rules if a party has been exempted from electronic filing or has not registered with the electronic-filing system. *Id*. "Delivery of documents through the electronic-filing system in conformity with [the Michigan Court Rules] is valid and effective personal service and is proof of service. MCR 1.109(G)(6)(a)(*iii*). "Except for service of process of initiating documents and as otherwise directed by the court or court rule, service may be performed simultaneously with filing." MCR 1.109(G)(6)(a)(*iv*). "When a court rule permits service by mail, service may be accomplished electronically under [MCR 1.109(G)(6)]." MCR 1.109(G)(6)(a)(*v*).

Parties and attorneys are required to file with the court and serve on other parties or attorneys a written notice of a change in contact information, which includes name, physical address, mailing address, phone number, and email address (when required). MCR 1.109(D)(11)(a). The written notice of changed contact information must be served in accordance with MCR 2.107(C) or MCR 1.109(G)(6)(a). MCR 1.109(D)(11)(a). The clerk of the court must update the case caption with the modified contact information; however, the case title shall not be modified as a result of a change of name. MCR 1.109(D)(11)(b). The court and parties to the case must send or serve subsequent documents to the new mailing address as required by MCR 2.107(C) or the new email address as required by MCR 1.109(G)(6)(a). MCR 1.109(D)(11)(c).

"A document served electronically through the electronic-filing system in conformity with all applicable requirements of this rule is considered served when the transmission to the recipient's email

address is completed. A transmission is completed when the transaction is recorded as prescribed in [MCR 1.109(G)(6)(c)]." MCR 1.109(G)(6)(b).

C. Transmission Failures

"In the event the electronic-filing system fails to transmit a document submitted for filing, the authorized user may file a motion requesting that the court enter an order permitting the document to be deemed filed on the date it was first attempted to be sent electronically." MCR 1.109(G)(7)(a). "The authorized user must prove to the court's satisfaction that:

> (*i*) the filing was attempted at the time asserted by the authorized user;
>
> (*ii*) the electronic-filing system failed to transmit the electronic document; and
>
> (*iii*) the transmission failure was not caused, in whole or in part, by any action or inaction of the authorized user. A transmission failure caused by a problem with the filer's telephone line, ISP, hardware, or software shall be attributed to the filer." MCR 1.109(G)(7)(a)(*i*)-(*iii*).

"Electronic service by the electronic-filing system is complete upon transmission as defined in [MCR 1.109(G)(6)(b)] unless the person or entity making service learns that the attempted service did not reach the intended recipient." MCR 1.109(G)(7)(d). "If the transmission is undeliverable, the person or entity responsible for serving the document must immediately serve by regular mail under MCR 2.107(C)(3) or by delivery under MCR 2.107(C)(1) or [MCR 2.107(C)(2)] the document and a copy of the notice indicating that the transmission was undeliverable"; "[t]he person or entity must also include a copy of the notice when filing proof of service with the court under [MCR 1.109(G)]." MCR 1.109(G)(7)(d)(*i*). "A recipient who is served with a notice under [MCR 1.109(G)(7)(d)(*i*)] should ensure the electronic filing system reflects their current email address." MCR 1.109(G)(7)(d)(*ii*).

If the e-filing system fails to transmit a document selected for service and that document is deemed necessary to ensure due process rights are protected, the State Court Administrator must "provide notice to the affected persons in either of the following ways:

> (*i*) file, as a nonparty, a notice of defective service in each affected case and, as deemed appropriate, serve the notice, or

> (*ii*) send notice of a system-wide transmission failure to each affected system user." MCR 1.109(G)(7)(e).

"If notice is provided under [MCR 1.109(G)(7)(e)], the clerk of the court where the affected case is filed must enter the event in the case history in accordance with MCR 8.119(D)(1)(a)." MCR 1.109(G)(7)(f). A fee must "not be assessed on a motion filed claiming that rights in the case were adversely affected by transmission failure of a document selected for service." MCR 1.109(G)(7)(g).

Part B: Complaints, Arrests[4], and Summonses

3.2 Arrest

A. Purpose and Function of an Arrest Warrant

The purpose of an arrest warrant is to bring the defendant to appear before the court on an accusation charged in a complaint. See MCL 764.1b. A complaint is the charging instrument which, once accepted by the court, formally sets forth the charge against the defendant and constitutes the basis for all further action to be taken by the court in the case. See MCL 761.1(c). The complaint recites the substance of the accusation against the accused and may contain factual allegations establishing reasonable cause. *Id.*; MCL 764.1d.

An arrest warrant is the order by the court to arrest a defendant and bring him or her before the court to answer the charge alleged in the complaint. MCL 764.1b. Under certain circumstances, a person may be arrested without an arrest warrant. See MCL 764.15; MCL 764.15a; MCL 764.15b; MCL 764.15e; MCL 764.15f; MCL 764.16. See Section 3.2(B) and Section 3.15 for a discussion of warrantless arrests.

For a summary of the arrest warrant process, see the Michigan Judicial Institute's checklist describing the process for issuing an arrest warrant and the checklist describing the process for electronically issuing an arrest warrant.

[4] For information on motions to suppress evidence based on an illegal seizure, see Chapter 11.

B. Probable Cause for Warrantless Arrest

"'A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that individual committed the felony.'" *People v Tierney*, 266 Mich App 687, 705 (2005), quoting *People v Kelly*, 231 Mich App 627, 631 (1998). "The existence of probable cause is determined by the totality of the circumstances." *People v Nguyen*, 305 Mich App 740, 752 (2014) (citations omitted). "The constitutional validity of an arrest depends upon whether, at the moment the arrest was made, the officers had probable cause to make it–whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense." *People v Trapp*, 335 Mich App 141, 166-167 (2020) (cleaned up). "'The prosecution has the burden of establishing that an arrest without a warrant is supported by probable cause.'" *Tierney*, 266 Mich App at 705, quoting *People v Davenport*, 99 Mich App 687, 691 (1980).

"Because distinctly different probable-cause standards distinguish . . . arrest and bind-over decisions," a district court's conclusion that it lacked probable cause to bind a defendant over for trial on the charge for which he was arrested did not necessarily render the arrest itself invalid. *People v Cohen*, 294 Mich App 70, 72, 76-77 (2011) (circuit court erroneously concluded that in the absence of probable cause to bind the defendant over for trial on charge of possession of cocaine, police lacked probable cause to arrest for that offense, and that evidence of additional crime obtained following arrest therefore must be suppressed; police had probable cause to arrest based on the defendant's joint constructive possession of cocaine paraphernalia, which was observed in plain view and within the defendant's reach in car occupied by only driver and the defendant, and evidence discovered after the constitutionally valid arrest was admissible in prosecution for additional offense).

See Section 3.15 for statutory provisions that provide for warrantless arrests.

C. Delay Between Crime and Arrest

The Speedy Trial Clause of the Sixth Amendment does not protect the defendant against lengthy prearrest delay, only from pretrial delay following an arrest. *United States v Lovasco*, 431 US 783, 788 (1977).[5] Generally, a defendant is protected against unreasonable prearrest delay by the applicable statute of limitations. *People v Bisard*, 114 Mich App 784, 788-789 (1982). A delay between an

offense and the arrest of the defendant may violate the defendant's federal and state due process rights. *People v Cain*, 238 Mich App 95, 109 (1999). The due process inquiry must consider the reasons for the delay as well as the prejudice to the defendant. *Lovasco*, 431 US at 790. A delay in bringing charges against a defendant may deny the due process right to a fair trial if the prosecutor delays to gain a tactical advantage or to deprive the defendant of an opportunity to defend against the charges. *Id*. at 797 n 19.

"A prearrest delay that causes substantial prejudice to a defendant's right to a fair trial and that was used to gain tactical advantages violates the constitutional right to due process" *People v Woolfolk*, 304 Mich App 450, 454 (2014), aff'd on other grounds 497 Mich 23 (2014). "Michigan applies a balancing test to determine if a prearrest delay requires reversing a defendant's conviction because the state may have an interest in delaying a prosecution that conflicts with a defendant's interest in prompt adjudication of the case." *Cain*, 238 Mich App at 108. Under this balancing test, the defendant bears the burden of "initially demonstrat[ing] 'actual and substantial' prejudice to his right to a fair trial." *People v Adams*, 232 Mich App 128, 134 (1998).

An "oppressive" delay between the alleged crime and the defendant's arrest may implicate a defendant's due process rights and lead to a motion to dismiss. *People v Tanner*, 255 Mich App 369, 414 (2003), rev'd on other grounds 469 Mich 437 (2003),[6] overruled on other grounds *People v Kennedy*, 502 Mich 206 (2018). In deciding the motion, the court must balance the actual prejudice to the defendant with the prosecutor's reasons for the delay. *Cain*, 238 Mich App at 108-109; *Bisard*, 114 Mich App at 790-791.

The defendant must produce evidence that he or she sustained "actual and substantial" prejudice because of the delay. *Cain*, 238 Mich App at 108; *Bisard*, 114 Mich App at 791. "Actual and substantial" prejudice means that the defendant's ability to defend against the charges was "meaningfully impaired" by the delay. *Cain*, 238 Mich App at 110; *Bisard*, 114 Mich App at 788. "[P]roof of 'actual and substantial' prejudice requires more than generalized allegations[.]" *Adams*, 232 Mich App at 135. "Defendant must present evidence of actual and substantial prejudice, not mere speculation." *Woolfolk*, 304 Mich App at 454. "A defendant cannot

[5] Additionally, the Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]" and therefore does not "apply to the sentencing phase of a criminal prosecution." *Betterman v Montana*, 578 US 437, 439-441 (2016) (holding "that the Clause does not apply to delayed sentencing").

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

merely speculate generally that delay resulted in lost memories, witnesses, and evidence[.]" *Id*.

The following cases discuss actual and substantial prejudice:

- *People v Adams*, 232 Mich App 128 (1998)

  The death of a witness or the loss of physical evidence alone are insufficient to establish actual prejudice. *Id*. at 136-138. "[A] defendant does not show actual prejudice based on the death of a potential witness if he has not given an indication of what the witness's testimony would have been and whether the substance of the testimony was otherwise available." *Id*. at 136 (quotation marks and citation omitted).

  Additionally, a 12-year delay did not violate the defendants' due process rights where physical evidence was lost, but its potentially exculpatory value was unsubstantiated. *Id*. at 132-139.

- *People v Cain*, 238 Mich App 95 (1999)

  Defendant was unable to establish unfair prejudice during 16-month delay where witnesses had slight memory failure and evidence that was unrelated to the case was thrown away. *Id*. at 107-111.

- *People v Patton*, 285 Mich App 229 (2009)

  Defendant was unable to establish actual and substantial prejudice because he did not identify any specific prejudice; rather, he made general allegations that the prearrest delay prevented him from contacting witnesses but gave no details on the substance of a defense to the charge, or details regarding how the witnesses would have supported a defense. *Id*. at 236-237.

- *People v Scott*, 324 Mich App 459 (2018)

  "[S]peculations regarding a possible alibi and the potential for adverse sentencing consequences do not constitute actual and substantial prejudice to defendant's right to a fair trial[.]" *Id*. at 463. An assertion by a defendant that delay in bringing charges resulted in prejudice regarding sentencing due to an earlier plea agreement regarding separate charges was insufficient to establish prejudice. *Id*. at 463, 464. "When considering whether a defendant was prejudiced by a delay in

> pursuing charges, '[w]hat must be kept in mind is that the prejudice to the defendant must impair his right to a fair trial, not merely that it has an adverse impact upon the sentence imposed upon the defendant.'" *Id*. at 465, citing *People v Ervin*, 163 Mich App 518, 520 (1987) (alteration in original).

Once the defendant has made a showing of prejudice, the prosecution has the burden of persuading the court that the reasons for the delay justified any prejudice that resulted. *Cain*, 238 Mich App at 109; *Bisard*, 114 Mich App at 791. In evaluating the reason for the delay, the court may consider the explanation for the delay, whether the delay was deliberate, and whether undue prejudice attached to the defendant. *Bisard*, 114 Mich App at 786-787, 791.

"When a delay is deliberately undertaken to prejudice a defendant, little actual prejudice need be shown to establish a due process claim. Where, however, there is a justifiable reason for the delay, the defendant must show more—that the prejudice resulting from the delay outweighs any reason provided by the state." *Bisard*, 114 Mich App at 790.

"It is appropriate for a prosecuting attorney to wait for the collection of sufficient evidence before charging a suspect, even when that wait is extended by the disappearance of a key witness." *Woolfolk*, 304 Mich App at 452-456 (a nearly five-year delay in arresting the defendant for a murder "was reasonable and justified under the circumstances" where the principal witness originally told the police that he did not know who shot the victim, then disappeared for several years and was convicted of an unrelated crime out-of-state before making a statement implicating the defendant; the officer in charge of the murder case, who "had [no] reason to believe that [the witness] was not being truthful" in his original interview, "was not aware that [the witness] was about to disappear," and "the prosecution lacked access to and jurisdiction over" the witness during the time he was being prosecuted out-of-state).

D. Delay Between Warrantless Arrest and Arraignment

Persons arrested without a warrant must be promptly brought before a neutral magistrate for a probable cause determination. *People v Cipriano*, 431 Mich 315, 319 (1988); MCL 764.13; MCL 764.26; MCR 6.104(A).

"[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of [a warrantless] arrest will, as a general matter, [be found to] comply with the promptness requirement" of

the federal constitution's Fourth Amendment. *Riverside Co v McLaughlin*, 500 US 44, 56 (1991). However, a probable cause determination is not automatically proper simply because it is made within 48 hours. *Id.* at 56. A delay of less than 48 hours may still be unconstitutional if it is an unreasonable delay. *Id.*

Police authorities may only hold an arrestee for more than 48 hours before arraignment if they can "'demonstrate the existence of a bona fide emergency or other extraordinary circumstance'" that would justify the delay. *People v Whitehead*, 238 Mich App 1, 2 (1999), quoting *Riverside Co v McLaughlin*, 500 US 44, 57 (1991).

See also *People v Cain (Cain I)*, 299 Mich App 27, 49-50 (2012), vacated in part on other grounds by *People v Cain (Cain II)*, 495 Mich 874 (2013)[7] (the defendant was not deprived of due process despite not being arraigned until three days after his arrest where "no evidence was obtained as a direct result of the 'undue delay,' which would have begun . . . 48 hours after [the] defendant's arrest;" because the evidence against the defendant, including his statement to police and his identification from a photo lineup, was obtained within 48 hours after his arrest, "there was no evidence to suppress").

E. Standard of Review

A trial court's decision on a motion to dismiss on the basis of prearrest delay is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389 (2001). To the extent that a claim of prearrest delay implicates constitutional due process rights, it is reviewed de novo. *People v Cain*, 238 Mich App 95, 108 (1999). The trial court's related factual findings are reviewed for clear error. *People v Tanner*, 255 Mich App at 412, rev'd on other grounds 469 Mich 437 (2003),[8] overruled on other grounds *People v Kennedy*, 502 Mich 206 (2018).

3.3 Summons Required Instead of Arrest Warrant

MCR 6.102(C) requires a court to issue a summons rather than a warrant unless:

> "(1) the complaint is for an assaultive crime or an offense involving domestic violence, as defined in MCL 764.1a.

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

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

(2) there is reason to believe from the complaint that the person against whom the complaint is made will not appear upon a summons.

(3) the issuance of a summons poses a risk to public safety.

(4) the prosecutor has requested an arrest warrant." MCR 6.102(D). See also MCL 764.1a(2).

See the Michigan Judicial Institute's *Issuing Summons Flowchart*.

3.4 District Court Magistrate's Authority to Issue Arrest Warrants and Summonses

See the Michigan Judicial Institute's *District Court Magistrate Manual*, Chapter 2, for more information on the district court magistrate's authority to issue arrest warrants and summonses.

3.5 The Complaint and Warrant or Summons

A defendant has a constitutional right to be informed of the nature of the charges pending against him or her. Const 1963, art 1, § 20; *People v Higuera*, 244 Mich App 429, 442-443 (2001). "A complaint is a written accusation that a named or described person has committed a specified criminal offense," and it "must include the substance of the accusation against the accused and the name and statutory citation of the offense." MCR 6.101(A); see also MCL 764.1d. A criminal complaint must "adequately inform of the substance of the accusations," and its "factual allegations [must] provide the basis from which commission of the legal elements of the charge can be inferred." *Higuera*, 244 Mich App at 447. At the time of filing, specified case information must be provided in the form and manner established by SCAO and other applicable rules. MCR 1.109(D)(2); MCR 6.101(A). "At a minimum, specified case information shall include the name, an address for service, an e-mail address, and a telephone number of every party[.]" MCR 1.109(D)(2). A complaint may also contain "factual allegations establishing reasonable cause." MCL 764.1d. "A summons must contain the same information as an arrest warrant, except that it should summon the accused to appear before a designated court at a stated time and place." MCR 6.102(C)(1).

A complaint serves a dual purpose: "[i]t both initiates the judicial phase of the prosecution and provides a basis for the issuance of an arrest warrant." *People v Burrill*, 391 Mich 124, 128 (1974). "'The primary function of a complaint is to move the magistrate to determine whether a warrant shall issue.'" *Higuera*, 244 Mich App at 443, quoting *Wayne Co Prosecutor v Recorder's Court Judge*, 119 Mich App 159, 162 (1982).

"The complaint must be signed and verified under MCR 1.109(D)(3). Any requirement of law that a complaint filed with the court must be sworn is met by this verification." MCR 6.101(B). "A complaint may not be filed without a prosecutor's written approval endorsed on the complaint or attached to it, or unless security for costs is filed with the court." MCR 6.101(C).

"A court must issue an arrest warrant or a summons[9]. . . if presented with a proper complaint and if the court finds probable cause to believe that the accused committed the alleged offense." MCR 6.102(A).The probable cause determination "may be based on hearsay evidence and rely on factual allegations in the complaint, affidavits from the complainant or others, the testimony of a sworn witness adequately preserved to permit review, or any combination of these sources." MCR 6.102(B).

The complaint is filed with the court and a file is established. The process of establishing a file varies among courts. At a minimum, the file must be assigned a case number and contain the complaint and warrant. For a summary of the arrest warrant process, see the Michigan Judicial Institute's checklist describing the process for issuing an arrest warrant and the checklist describing the process for electronically issuing an arrest warrant. The procedures for arraignment on the warrant or complaint are governed by MCR 6.104.[10] A person in custody "must be taken without unnecessary delay before a court . . . or must be arraigned without unnecessary delay by use of two-way interactive video technology[.]" MCR 6.104(A). A defendant is also entitled to the assistance of counsel at the arraignment unless he or she waives counsel or the court issues a personal bond and will not accept a plea of guilty or no contest at the arraignment. *Id*. At a defendant's arraignment, the court must address issues of pretrial release, possible appointment of counsel, and scheduling the defendant's preliminary examination. MCR 6.104.

Informations. "Criminal prosecutions may be initiated in the court having jurisdiction over the charge upon the filing of an information." *People v Glass*, 464 Mich 266, 277 (2001); MCL 767.1 *et seq*. The basis of an information is a signed warrant and complaint. *Glass*, 464 Mich at 277. The complaint must state the substance of the alleged crime and reasonable cause to believe that the person named in the complaint is the person who committed the crime. *Id*., citing MCL 764.1d. Before an information is filed, the person accused has a right to a preliminary examination to determine whether a crime has been committed and whether there is probable cause to believe that the person accused

[9]The court may issue a summons instead of an arrest warrant if requested by the prosecutor. MCR 6.102(D)(4).

[10] For more information on arraignments, see Chapter 5.

committed it. MCL 767.42; *Glass*, 464 Mich at 277-278. If the case is bound over to circuit court after arraignment in district court, an information must be filed on or before the date set for arraignment in circuit court. See MCL 767.1 and MCL 767.40. See also MCR 6.112(B) and MCR 6.112(C).

"Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense." MCR 6.112(G). "MCR 6.112(G) places the burden on [the] defendant to demonstrate prejudice and . . . establish that the error was not harmless." *People v Waclawski*, 286 Mich App 634, 707 (2009). In *Waclawski*, 286 Mich App at 705, an original felony information was not filed by the prosecutor. However, the defendant was unable to establish prejudice where the record revealed that the defendant was aware of the charges against him and participated in his own defense. *Id*. at 707.

3.6 Persons Who May File a Complaint

A. Prosecuting Attorney

"A complaint may not be filed without a prosecutor's written approval endorsed on the complaint or attached to it, or unless security for costs is filed with the court." MCR 6.101(C). See also MCL 764.1(1).

B. Other Authorized Official

An agent of the state transportation department, a county road commission, or the public service commission may make a complaint for a minor offense that constitutes a violation of the motor carrier act or the motor carrier safety act if that person has been delegated to enforce the act. See MCL 764.1(2)(a).

Similarly, a complaint alleging a minor offense that constitutes a violation of a law that provides for the protection of wild game or fish may be made by "[t]he director of the department of natural resources, or a special assistant or conservation officer appointed by the director . . . and declared by statute to be a peace officer[.]" See MCL 764.1(2)(b).

C. Private Citizen

Both statute, MCL 764.1(1)-(2), and court rule, MCR 6.101(C), allow a private citizen to file a complaint when security for costs is filed with the court. See also *People v Herrick*, 216 Mich App 594, 597 n 1 (1996). However, the statute and the court rule are silent regarding the procedure a court should use when a citizen seeks to file security for costs.

3.7 Drafting and Typing a Complaint

Preferably, a complaint should be typed on the following State Court Administrative Office forms:

SCAO Form MC 200, *Felony Set*, *Complaint*[11]

SCAO Form DC 225, *Complaint*, *Misdemeanor*

However, MCL 764.1(3) provides:

> "A complaint for an arrest warrant or summons may be made and an arrest warrant or summons may be issued by any electronic or electromagnetic means of communication from any location in this state, if all of the following occur:
>
> > (a) The prosecuting attorney authorizes the issuance of the warrant or summons. Authorization may consist of an electronically or electromagnetically transmitted facsimile of the signed authorization.
> >
> > (b) The judge or district court magistrate orally administers the oath or affirmation, in person or by any electronic or electromagnetic means of communication, to an applicant for an arrest warrant or summons who submits a complaint under this subsection.
> >
> > (c) The applicant signs the complaint. Proof that the applicant has signed the complaint may consist of an electronically or electromagnetically transmitted facsimile of the signed complaint."

A. Required Signatures on a Complaint

At least one attorney of record must sign every document on behalf of their client. MCR 1.109(E)(2). The party must sign if he or she is not represented by an attorney. *Id*. "If a document is not signed, it

[11] This *Felony Set* contains several forms in addition to the Complaint.

shall be stricken unless it is signed promptly after the omission is called to the attention of the party." MCR 1.109(E)(3). Electronic signatures are acceptable if they are made in accordance with MCR 1.109(E). See MCR 1.109(E)(4).

1. Signature and Written Authorization of Prosecuting Attorney

When written authorization by the prosecutor is required for issuance of a warrant, it must be signed by the prosecuting attorney. MCL 764.1(1). See also MCR 6.101(C), which requires a complaint, in felony cases, to contain a prosecutor's signature unless security for costs is filed with the court.

2. Signature and Oath of Complaining Witness

MCL 764.1a(1) requires a complaint to be "sworn to before a magistrate or clerk." See also MCR 1.109(E)(2) (requiring all filed documents to be signed by at least one attorney of record or the party if not represented by an attorney); MCR 6.101(B) (requiring complaint to be "signed and verified under MCR 1.109(D)(3)"; verification under MCR 1.109(D)(3) satisfies any requirement of law that a complaint filed with the court must be sworn). When a warrant or summons is sought by electronic means, a facsimile of the applicant's signature may be transmitted electronically to the court. MCL 764.1(3)(c).

The complaining witness swearing to the complaint need not necessarily be the victim. See, e.g., *People v Graham*, 173 Mich App 473, 475 (1988) (complainant was the victim's mother). See also MCL 764.1a(5), which provides:

> "The magistrate may require sworn testimony of the complainant or other individuals. Supplemental affidavits may be sworn to before an individual authorized by law to administer oaths. The factual allegations contained in the complaint, testimony, or affidavits may be based upon personal knowledge, information and belief, or both."

Under MCL 764.1a(6), a magistrate must accept a complaint if the complaint is signed upon information and belief by an individual other than the victim if:

- the complainant alleges a violation of MCL 750.81 (assault and battery, including domestic assault and battery) or MCL 750.81a (aggravated assault and

battery, including domestic aggravated assault and battery);[12] and

- the person against whom the complaint is filed is a spouse or former spouse of the victim, has a child in common with the victim, has or has had a dating relationship with the victim, or resides or has resided in the same house as the victim.

Under MCL 764.1a(7), a magistrate must "accept a complaint alleging that a crime was committed in which the victim is a vulnerable adult on the grounds that the complaint is signed upon information and belief by an individual other than the victim."

B. Substantive Requirements of a Complaint

"A party filing a case initiating document . . . shall provide specified case information in the form and manner established by the State Court Administrative Office and as specified in other applicable rules." MCR 1.109(D)(2). See also MCR 6.101(A). "At a minimum, specified case information shall include the name, an address for service, an e-mail address, and a telephone number of every party[.]" MCR 1.109(D)(2).

For a summary of the arrest warrant/summons process, including the substantive requirements of the complaint, see the Michigan Judicial Institute's checklist describing the process for issuing an arrest warrant or summons and the checklist describing the process for electronically issuing an arrest warrant or summons.

1. Nature of the Offense

A complaint must recite the substance of the accusation against the accused and may contain factual allegations establishing reasonable cause to arrest. MCL 764.1d. See also MCR 6.101(A) (requiring a complaint to "include the substance of the accusation against the accused and the name and statutory citation of the offense").

Committee Tip:

Although not required under MCL 764.1a, it is recommended that the name and statutory

[12] This requirement also applies to local ordinances substantially complying with MCL 750.81. MCL 764.1a(4).

citation of the offense be included in the complaint even on misdemeanor offenses to avoid arguments about the sufficiency of a complaint and to assist the court in identifying the charge.

"In charging the offense, a detailed recital of the evidence by which it will be established is not required. Such facts must be averred that, if admitted, would constitute the offense and establish the guilt of the accused. The elements of the offense must be so stated that [the accused] can know what he [or she] is to meet and can prepare for his [or her] defense." *People v Quider*, 172 Mich 280, 285-286 (1912). See also *People v Higuera*, 244 Mich App 429, 447-448 (2001) (where "the factual allegations provide the basis from which commission of the legal elements of the charge can be inferred[, a]ny deficiencies in the allegations of the actual charge . . . can be cured by amendment").

a. Statutory Violations

A complaint based on a violation of a statutory provision must include "the name and statutory citation of the offense." MCR 6.101(A). If the facts in a complaint sufficiently set out an offense under a particular section of a statute, it is immaterial that the complaint erroneously states the wrong section. *People v Wolfe*, 338 Mich 525, 536-537 (1953). Further, the facts contained in the complaint, not the conclusion of the person drafting it, control the particular section of law on which the charge should be predicated. *Id*. at 537.

b. Local Ordinance Violations

A complaint based on a violation of a local ordinance must substantially conform to the complaint requirements "as provided by law in misdemeanor cases in the district court." MCL 90.5(1); MCL 66.7. The complaint does not need to set out the ordinance or its provisions; rather, "[i]t is a sufficient statement of the cause of action in the [complaint] to set forth substantially, and with reasonable certainty as to time and place, the act or offense complained of and to allege it to be in violation of an ordinance of the city, referring to the ordinance by its title and the date of its passage or approval." MCL 90.10(1).[13] See also MCL 66.9(2), which contains substantially similar language.

2. Date and Place of Offense

Generally, a complaint is not invalidated merely because the complainant is unable to ascertain the exact date of the alleged violation. *Hamilton v People*, 46 Mich 186, 188-189 (1881). However, the complaint should establish that the offense was committed within the period of limitations. *People v Gregory*, 30 Mich 371, 372-373 (1874). Also, when time is an element of the offense charged, it should be set out in the complaint as part of the substance of the offense. See *People v Quider*, 172 Mich 280, 285-286 (1912).

The complaint should state the place where the offense is alleged to have been committed. A court may take judicial notice of a municipality within its jurisdiction; thus, it is sufficient if the complaint names the municipality where the crime occurred without naming the county. *People v Telford*, 56 Mich 541, 543 (1885). However, in *Gregory*, 30 Mich at 372-373, the complaint was fatally defective where it "named no county . . . except the county of 'Michigan.'" The Supreme Court reversed the defendant's conviction because the erroneous statement naming the county of Michigan "was no better than a blank," and thus the court lacked jurisdictional authority to proceed with the prosecution. *Id*.

For a violation of a local ordinance, the time and place should be stated on the complaint or warrant with "reasonable certainty." MCL 66.9(2); MCL 90.10(1).

3. Requirements Under the Crime Victim's Rights Act

Under the juvenile and serious misdemeanor articles of the Crime Victim's Rights Act (CVRA), if a complaint, petition, appearance ticket, traffic citation, or other charging instrument cites any one of several enumerated offenses, or a violation of a local ordinance substantially corresponding to any one of the enumerated offenses, the prosecuting attorney or law enforcement officer must include a statement on the charging instrument "that the offense resulted in damage to another individual's property or physical injury or death to another individual." MCL 780.783a (juvenile article); MCL 780.811a (serious misdemeanor article).

Along with the charging instrument, the investigating law enforcement agency must file a separate list of the name, address, and telephone number of each victim for any offense

[13] MCL 90.10(1) "does not apply to an ordinance violation that constitutes a civil infraction." MCL 90.10(1).

falling under the juvenile or serious misdemeanor articles of the CVRA. MCL 780.784 (juvenile article) and MCL 780.812 (serious misdemeanor article).[14]

a. Juvenile Article Enumerated Offenses

MCL 780.783a states that an enumerated offense under the juvenile article of the CVRA is one of the "juvenile offense[s] described in [MCL 780.781(1)(g)(*iii*)-(*v*)[15]], or a local ordinance substantially corresponding to [one of those] juvenile offense[s]." MCL 780.781(1)(g)(*iii*)-(*v*) include the following offenses:

- "[a] violation of [MCL 257.601b(2)[16]] (injuring a worker in a work zone)[;]"
- leaving the scene of a personal-injury accident, MCL 257.617a;
- "[a] violation of . . . [MCL 257.625[17]] (operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with unlawful blood alcohol content) . . . if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual[;]"
- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual; and
- "[a] violation of . . . [MCL 324.80176(1) or MCL 324.80176(3)[18]] (operating a motorboat while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content) . . . if the violation involves an accident resulting in

[14]For a discussion of charging instrument requirements under the CVRA, or a discussion of the CVRA generally, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

[15] MCL 780.783a states that the enumerated offenses appear in MCL 780.781(1)(d)(*iii*)-(*v*). However, MCL 780.781 has been revised numerous times, and the offenses now appear in MCL 780.781(1)(g)(*iii*)-(*v*). MCL 780.783a has not been amended to reflect this change.

[16] Note that MCL 257.601b has been subsequently amended to make it a misdemeanor to commit a moving violation that causes injury to another person in a work zone *or* school bus zone. See 2008 PA 296; 2011 PA 60. In deciding how MCL 780.781(1)(g)(*iii*) applies, the court should apply the rules of statutory interpretation.

[17] Note that MCL 257.625 has been amended numerous times and now contemplates additional offenses such as offenses involving other intoxicating substances. In deciding how MCL 780.781(1)(g)(*iii*) applies, the court should apply the rules of statutory interpretation.

damage to another individual's property or physical injury or death to any individual."

b. Serious Misdemeanor Enumerated Offenses

MCL 780.811a states that an enumerated offense under the serious misdemeanor article of the CVRA is one of the "serious misdemeanor[s] described in [MCL 780.811(1)(a)(*xix*)-(*xxi*)], or a local ordinance substantially corresponding to [one of those] serious misdemeanor[s]." MCL 780.811(1)(a)(*xix*)-(*xxi*) include the following offenses:

- operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, MCL 257.625, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual;

- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual;

- "[a] violation of . . . [MCL 324.80176(1) or MCL 324.80176(3)[19]] (operating a motorboat while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content) . . . if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual."

[18] Effective March 31, 2015, 2014 PA 402 amended MCL 324.80176(1) and MCL 324.80176(3) to, among other things, replace the term *vessel* with *motorboat*; replace the term intoxicating liquor with alcoholic liquor; and add MCL 324.80176(1)(c) to prohibit a person from operating a motorboat with the presence of any amount of certain controlled substances in the body. In deciding how MCL 780.781(1)(g)(*v*) applies, the court should apply the rules of statutory interpretation.

[19] Effective March 31, 2015, 2014 PA 402 amended MCL 324.80176(1) and MCL 324.80176(3) to, among other things, replace the term *vessel* with *motorboat*; replace the term *intoxicating liquor* with alcoholic liquor; and add MCL 324.80176(1)(c) to prohibit a person from operating a motorboat with the presence of any amount of certain controlled substances in the body. In deciding how MCL 780.781(1)(g)(*v*) applies, the court should apply the rules of statutory interpretation.

3.8 Persons Who May Issue Arrest Warrants or Summonses

A judge or district court magistrate may issue arrest warrants or summonses for the apprehension of persons charged with felony, misdemeanor, or ordinance violations. MCL 764.1. See also MCL 600.8511(e), which grants a district court magistrate jurisdiction "[t]o issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney[.]"[20] No provision of MCL 761.1 allows a probate judge to issue an arrest warrant.

Although district court "magistrates perform limited judicial functions," they are not judges for purposes of Const 1963, art 6, § 19 (requiring "judges of courts" to be licensed attorneys); however, a nonattorney magistrate may issue an arrest warrant. *People v Ferrigan*, 103 Mich App 214, 219 (1981). Additionally, it does not violate the Fourth Amendment for a nonattorney magistrate to issue a warrant. US Const, Am IV.; *Shadwick v City of Tampa*, 407 US 345, 350-353 (1972). In *Shadwick*, the United States Supreme Court established two necessary prerequisites that a magistrate must possess: (1) he or she must be neutral and detached,[21] and (2) he or she must be capable of determining whether probable cause exists for the requested arrest. The Court concluded that there is no reason that a nonattorney could not meet these prerequisites. *Id*. at 352-353.

A district court magistrate, like a judge, is also authorized to issue an arrest warrant or summons "by any electronic or electromagnetic means of communication from any location in this state," if certain conditions are met. MCL 764.1(3); see also MCL 764.1(4)-(5).

3.9 Finding Probable Cause to Issue Arrest Warrant or Summons[22]

In addition to the presentation of a proper complaint, issuance of an arrest warrant or summons requires the court to make a finding of probable cause[23] to believe that the individual accused in the complaint committed that offense. MCL 764.1a(1); MCR 6.102(A). The court must make an independent determination of the existence of probable cause

[20] MCL 600.8511(e) provides an exception to the requirement of written authorization when the defendant committed a traffic violation in the magistrate's jurisdiction, was issued a citation under MCL 257.728, and subsequently failed to appear.

[21] A *neutral and detached magistrate* is one that is "independent of the police and prosecution." *People v Payne*, 424 Mich 475, 481 (1985) (magistrate who was also a deputy sheriff was not neutral and detached, and therefore the search warrant he issued was invalid).

[22] See the Michigan Judicial Institute's Arrest Warrants, Search Warrants, and Summonses Quick Reference Materials web page for resources concerning the issuance of arrest warrants.

and may "not serve merely as a rubber stamp for the police." *United States v Leon*, 468 US 897, 914 (1984) (internal citation and quotation marks omitted). See also *People v Crawl*, 401 Mich 1, 26 n 15 (1977).[24] If a complaint is later found to have been issued without a finding of probable cause, an arrest warrant based on it is invalid. *People v Burrill*, 391 Mich 124, 132 (1974). However, such a complaint may nonetheless serve as a basis for starting judicial proceedings, and thus the court is not divested of jurisdiction when the complaint has insufficient factual support. *Id*. See also *Frisbie v Collins*, 342 US 519, 522 (1952) ("due process of law is satisfied when one present in court is convicted of [a] crime after having been fairly appri[s]ed of the charges against him [or her]"); *People v Muhammad*, 326 Mich App 40, 72 (2018) ("irrespective of whether there were errors associated with the warrant, defendant is not entitled to relief"). Moreover, even without a valid warrant, an arrest may be legal if circumstances allowing arrest without a warrant exist. For a summary of the arrest warrant and summons process, including the probable cause requirement, see the Michigan Judicial Institute's checklist describing the process for issuing an arrest warrant, the checklist describing the process for electronically issuing an arrest warrant, and the flowchart for issuing a summons.

A. Probable Cause Defined

> "'[A]rticulating precisely what . . . "probable cause" means is not possible. [It is a] commonsense, nontechnical conception[] that deals with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" [and] as such the standards are "not readily, or even usefully, reduced to a neat set of legal rules." . . . We have cautioned that [this] legal principle[] [is] not [a] "finely-tuned standard []" comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. [It is] instead [a] fluid concept[] that takes [its] substantive content from the particular contexts in which the standards are being assessed.'" *Matthews v BCBSM*, 456 Mich 365, 387 n 33 (1998), quoting and editing *Ornelas v United States*, 517 US 690 (1996).

A finding of probable cause on a complaint is proper where the complaint and testimony are sufficient to enable the judge or district

[23] MCL 764.1a states that the warrant may be issued upon a finding of *reasonable cause*, which is a term interchangeable with *probable cause*. See 1989 Staff Comment to MCR 6.102: "[MCR 6.102](A) states the requirements for issuance of a warrant set forth in MCL 764.1a except that it substitutes 'probable cause' for 'reasonable cause.' These terms are viewed as equivalent, with 'probable cause' being preferable because it is a familiar and recognized standard." This section will use the term "probable cause" as opposed to "reasonable cause."

[24] Both *Crawl* and *Leon* involve search warrants; however, the "independent determination" requirement for issuing a search warrant also governs the issuance of arrest warrants. See *People v Burrill*, 391 Mich 124, 132 (1974); *Giordenello v United States*, 357 US 480, 485-486 (1958).

court magistrate[25] "'to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play further steps of the criminal process.'" *People v Hill*, 44 Mich App 308, 312 (1973), overruled on other grounds *People v Mayberry*, 52 Mich App 450 (1974), quoting *Jaben v United States*, 381 US 214, 224-225 (1965).[26]

B. Evidentiary Support for a Finding of Probable Cause

"The finding of [probable] cause by the magistrate may be based upon 1 or more of the following:

> (a) Factual allegations of the complainant contained in the complaint.
>
> (b) The complainant's sworn testimony.
>
> (c) The complainant's affidavit.
>
> (d) Any supplemental sworn testimony or affidavits of other individuals presented by the complainant or required by the magistrate." MCL 764.1a(4).

See also MCR 6.102(B) (applicable only to offenses not cognizable by the district court, MCR 6.001(A)-(B)), which states:

> "A finding of probable cause may be based on hearsay evidence and rely on factual allegations in the complaint, affidavits from the complainant or others, the testimony of a sworn witness adequately preserved to permit review, or any combination of these sources."

"The factual allegations contained in the complaint, testimony, or affidavits may be based upon personal knowledge, information and belief, or both." MCL 764.1a(5). Thus, the factual basis is supplied by the operative facts relied on by the complaining witness and not merely by his or her conclusions. *People v Burrill*, 391 Mich 124, 132 (1974). It must appear that an affiant spoke with personal knowledge, or else the sources for the witness's belief must be disclosed. *People v Hill*, 44 Mich App 308, 311 (1973).[27] When the

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[25]For more information on the authority of district court magistrates to issue arrest warrants, see MCL 600.8511(e) and the Michigan Judicial Institute's *District Court Magistrate Manual*.

[26]The probable cause standard for arrests is different and distinct from the probable cause standard required to bind over a defendant after a preliminary examination. *People v Cohen*, 294 Mich App 70, 74 (2011). "'[T]he arrest standard looks only to the probability that the person committed the crime as established at the time of the arrest, while the preliminary [examination] looks both to that probability at the time of the preliminary [examination] *and* to the probability that the government will be able to establish guilt at trial.'" *Id*. at 76, quoting LaFave & Israel, Criminal Procedure (2d ed, 1992), § 14.3, pp 668-669.

belief is based on information from other persons, other than an eyewitness, some basis of informant credibility must be shown. *Id*. at 311-312. This does not necessarily require the affiant to reveal the identity of the informant. *McCray v Illinois*, 386 US 300, 307-308 (1967). The information required to support informant credibility depends on its context, including the nature of the alleged crime and the source of the information. *Jaben v United States*, 381 US 214, 224 (1965). See also *Adams v Williams*, 407 US 143, 147 (1972) ("Informants' tips, like all other clues and evidence . . . may vary greatly in their value and reliability.").

C. Record of Testimony and Affidavits

"The magistrate may require sworn testimony of the complainant or other individuals. Supplemental affidavits may be sworn to before an individual authorized by law to administer oaths." MCL 764.1a(5).

Any sworn testimony relied on in making the probable cause determination in a felony case must be "adequately preserved to permit review[.]" MCR 6.102(B).[28]

Although affidavits are not required to support a probable cause determination under MCL 764.1a(4) and MCR 6.102(B), if affidavits are used, they "must be verified by oath or affirmation." MCR 1.109(D)(1)(f). An affidavit must be verified by "oath or affirmation of the party or of someone having knowledge of the facts stated[.]"[29] MCR 1.109(D)(3)(a).

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[27]Because the due process protections for both search warrants and arrest warrants derive from the same source, the Fourth Amendment, "probable cause" in either context requires the same precautions. *Giordenello v United States*, 357 US 480, 485-486 (1958). Unlike MCL 764.1a(3), however, the statute controlling the probable cause supporting a search warrant, MCL 780.653, expressly specifies that an affidavit must contain allegations that a named informant spoke with personal knowledge or that an unnamed informant spoke with personal knowledge and either that the unnamed person is credible or that the information is reliable.

[28] The 1989 Staff Comment to MCR 6.102 states that "[a]n objective of [MCR 6.102(B)] is to ensure that there is a reviewable record in the event that the probable cause determination is subsequently challenged. Accordingly, if any oral testimony is relied on, it must be preserved adequately in some fashion to permit a review of its sufficiency to support the probable cause determination. An electronically recorded or verbatim written record obviously satisfies this requirement. A written or recorded oral summary of the testimony sufficiently contemporaneous to be reliable, and certified as accurate by the judicial officer, may also satisfy this requirement."

[29]Even though MCR 1.109 is a rule governing civil procedure, the rule may also be applied to matters of criminal procedure. See MCR 6.001(D), which states, in pertinent part: "The provisions of the rules of civil procedure apply to cases governed by this chapter [(Criminal Procedure)], except

(1) as otherwise provided by rule or statute,

(2) when it clearly appears that they apply to civil actions only,

(3) when a statute or court rule provides a like or different procedure, or

(4) with regard to limited appearances and notices of limited appearance."

Committee Tip:

The arraignment, plea, or sentence may be conducted days, weeks, months, or years after the warrant was issued or may be conducted by someone other than the individual who signed the warrant. If an affidavit is used to establish probable cause and is in the court file, the court can easily refer to the affidavit when setting bond or taking a plea or sentencing to remind the court of the allegations.

3.10 Issuing an Arrest Warrant

An arrest warrant is an order by a court to arrest a person and bring him or her before the court to answer to the charge alleged in the complaint and to be further dealt with according to law. MCL 764.1b. For a summary of the arrest warrant process, see the Michigan Judicial Institute's checklist describing the process for issuing an arrest warrant and the checklist describing the process for electronically issuing an arrest warrant.

"If an accused is arrested without a warrant, a complaint complying with MCR 6.101 must be filed at or before the time of arraignment." MCR 6.104(D). "On receiving the complaint and on finding probable cause, the court must either issue a warrant or endorse the complaint as provided in MCL 764.1c." MCR 6.104(D). "Arraignment of the accused may then proceed in accordance with [MCR 6.104(E)]." MCR 6.104(D). Stated another way, the court must either sign/issue the warrant *or* endorse the complaint before proceeding to arraignment. MCR 6.104(D).

A complaint may also serve as a warrant if the officer makes a warrantless arrest of a person, he or she is in custody, and the court endorses the complaint with a finding of probable cause. MCL 764.1c(2); MCR 6.104(D).

The proper sanction to be imposed for arresting an individual based on an invalid arrest warrant is the suppression of evidence obtained from the person following his or her illegal arrest, not divestiture of the court's jurisdiction. *People v Burrill*, 391 Mich 124, 133 (1974). Thus, even if the complaint or warrant is later determined to be invalid, the court retains jurisdiction. *Id*. See also *Whiteley v Warden, Wyoming State Penitentiary*, 401 US 560, 565 (1971) (where no probable cause supported either the warrant or a warrantless arrest, evidence secured as a result of the illegal

arrest should have been suppressed); *People v Muhammad*, 326 Mich App 40, 72 (2018) ("irrespective of whether there were errors associated with the warrant, defendant is not entitled to relief").

A. Requirement to Determine Parolee Status

Before an arrest warrant is issued, the law enforcement agency seeking the warrant must use the Law Enforcement Information Network (LEIN) to determine whether the individual for whom the warrant is sought is a parolee under the jurisdiction of the Michigan Department of Corrections (MDOC). MCL 764.1g(1). If the person is determined to be a parolee under the MDOC's jurisdiction, and an arrest warrant is issued, MCL 764.1g(1) requires that the MDOC be notified and provided with the following information, by telephone or other electronic means:[30]

> "(a) The identity of the person named in the warrant.
>
> (b) The fact that information in databases managed by the [MDOC] and accessible by the [LEIN] provides reason to believe the person named in the warrant is a parolee under the jurisdiction of the [MDOC].
>
> (c) The charge or charges stated in the warrant."

The MDOC must also be notified if there is a delay in the process:

> "If the court has assumed the responsibility for entering arrest warrants into the [LEIN] and delays issuance or entry of a warrant pending a court appearance by the person named in the warrant, the law enforcement agency submitting the sworn complaint to the court shall promptly give to the [MDOC], by telephonic or electronic means, notice of the following:
>
> > (a) The identity of the person named in the sworn complaint.
> >
> > (b) The fact that a prosecuting attorney has authorized issuance of a warrant.
> >
> > (c) The fact that information in databases managed by the [MDOC] and accessible by the [LEIN] provides reason to believe the person named in the

[30] MCL 764.1g(1) requires the information to be provided by either the investigating law enforcement agency, or the court if the court is entering arrest warrants and learns of the person's parolee status from the law enforcement agency.

> sworn complaint is a parolee under the jurisdiction of the [MDOC].
>
> (d) The charge or charges stated in the sworn complaint.
>
> (e) Whether, pending a court appearance by the person named in the sworn complaint, the court has either issued the arrest warrant but delayed entry of the warrant into the [LEIN] or has delayed issuance of the warrant." MCL 764.1g(2).

Transmitting notice to any of the following satisfies the notice requirements of MCL 764.1g:

> "(a) To the [MDOC] by a central toll-free telephone number that is designated by the [MDOC] for that purpose and that is in operation 24 hours a day and is posted in the [MDOC's] database of information concerning the status of parolees.
>
> (b) To a parole agent serving the county where the warrant is issued or is being sought.
>
> (c) To the supervisor of the parole office serving the county where the warrant is issued or is being sought." MCL 764.1g(3).

B. Substantive Requirements of Arrest Warrants

An arrest warrant must:

- "recite the substance of the accusation contained in the complaint[,]" MCL 764.1b;
- be directed at a peace officer, MCL 764.1b;
- "command the peace officer immediately to arrest the person accused and to take that person, without unnecessary delay, before a magistrate of the judicial district in which the offense is charged to have been committed, to be dealt with according to law[,]" MCL 764.1b;
- "direct that the warrant, with a proper return noted on the warrant, be delivered to the magistrate before whom the arrested person is to be taken." MCL 764.1b.

See also MCR 6.102(E), which requires an warrant to:

> "(1) contain the accused's name, if known, or an identifying name or description;
>
> (2) describe the offense charged in the complaint;
>
> (3) command a peace officer or other person authorized by law to arrest and bring the accused before a judicial officer of the judicial district in which the offense allegedly was committed or some other designated court; and
>
> (4) be signed by the court."

For a summary of the arrest warrant process, see the Michigan Judicial Institute's checklist describing the process for issuing an arrest warrant and the checklist describing the process for electronically issuing an arrest warrant.

In addition, MCR 6.102(F) allows the court, when permitted by law, to specify on the warrant an amount of interim bail the accused may post to obtain release before arraignment on the warrant.[31]

C. Sanctions for Arrest Based on Invalid Arrest Warrant

The proper sanction to be imposed for arresting an individual based on an invalid arrest warrant is the suppression of evidence obtained from the person following his or her illegal arrest, not divestiture of the court's jurisdiction. *People v Burrill*, 391 Mich 124, 133 (1974). Thus, even if the complaint or warrant is later determined to be invalid, the court retains jurisdiction. *Id*. See also *Whiteley v Warden*, *Wyoming State Penitentiary*, 401 US 560, 565 (1971) (where no probable cause supported either the warrant or a warrantless arrest, evidence secured as a result of the illegal arrest should have been suppressed); *People v Muhammad*, 326 Mich App 40, 72 (2018) ("irrespective of whether there were errors associated with the warrant, defendant is not entitled to relief").

[31]Interim bond may be set for a person arrested for a misdemeanor or ordinance violation, with or without a warrant. See MCL 780.581; MCL 780.582; MCR 6.102(F). There is no statutory provision that provides for interim bond on felony violations as there is for misdemeanor and ordinance violations. However, MCR 6.102(F) is applicable to both felony and misdemeanor cases. See MCR 6.001(A)-(B). In addition, that provision "sets forth a . . . procedure . . . [that] authorizes in felony cases the specification on the warrant of interim bail similar to the procedure . . . authorized by statute in misdemeanor cases. See MCL 780.582 and MCL 780.585." 1989 Staff Comment to MCR 6.102 (note, however, that staff comments are not authoritative constructions by the Michigan Supreme Court).

3.11 Arrest Warrants and Complaints for Juveniles Charged with Specified Juvenile Violations

If a prosecuting attorney has reason to believe that a juvenile at least 14 years old and less than 18 years old has committed a specified juvenile violation, the prosecutor may authorize the filing of a complaint and warrant on the charge in the district court instead of filing a petition in the family division of circuit court. MCL 764.1f. This is called an automatic waiver, and further discussion is beyond the scope of this benchbook. See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information.

3.12 Execution of Arrest Warrants

For a summary of the arrest warrant process, including execution, see the Michigan Judicial Institute's checklist describing the process for issuing an arrest warrant and the checklist describing the process for electronically issuing an arrest warrant.

A. Executing an Arrest Warrant

Unless the accused is already in custody after a warrantless arrest, MCL 764.1b directs that an arrest warrant "command the peace officer immediately to arrest the person accused and to take that person, without unnecessary delay[32], before a magistrate of the judicial district in which the offense is charged to have been committed . . . ." MCR 6.102(G) clarifies that "[o]nly a peace officer or other person authorized by law may execute an arrest warrant." It is not necessary for the arresting officer to personally possess the arrest warrant. MCL 764.18. Rather, it is sufficient for the officer to inform the arrestee of an outstanding warrant for his or her arrest. *Id*. However, the officer must show the arrest warrant to the arrestee as soon as practicable after the arrest. *Id*.

B. Return on an Arrest Warrant

The return on an arrest warrant is a certification by the executing officer that states the manner in which the warrant was executed. The warrant itself should direct the executing officer to note "a proper return" and to deliver the warrant "to the magistrate before whom the arrested person is to be taken." MCL 764.1b. MCR 6.102(G) (applicable only to offenses not cognizable by the district court, MCR 6.001(A)-(B)) similarly provides that "[o]n execution or

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

attempted execution of the warrant, the officer must make a return on the warrant and deliver it to the court before which the arrested person is to be taken."

The warrant, along with the proper return noted on it, should be delivered to the magistrate before whom the arrested person is taken. MCL 764.1b.

When an officer makes a warrantless arrest, "[t]he return of the officer making the arrest, endorsed upon the warrant upon which the accused shall be subsequently held, affirming compliance with the provisions herein, shall be prima facie evidence of the fact in the trial of any criminal cause." MCL 764.19.

C. Execution of Warrant by Electronic Device

"The person or department receiving an electronically or electromagnetically issued arrest warrant . . . must receive proof that the issuing judge or district court magistrate has signed the warrant . . . before the warrant . . . is executed. Proof that the issuing judge or district court magistrate has signed the warrant . . . may consist of an electronically or electromagnetically transmitted facsimile of the signed warrant[.]" MCL 764.1(4).

3.13 Collection of Biometric Data

A. Biometric Data Collection Requirements

MCL 28.243 requires law enforcement agencies to collect an individual's biometric data[33] upon arrest for a felony or other qualifying offense and to forward the biometric data to the Department of State Police.

MCL 28.243(1)-(2) provides, in part:

> "(1) Except as provided in [MCL 28.243(3)], upon the arrest of a person for a felony or for a misdemeanor violation of state law for which the maximum possible penalty exceeds 92 days' imprisonment or a fine of $1,000.00, or both, or a misdemeanor authorized for DNA collection under . . . [MCL 28.176(1)(b)],[34] or for

[33] Effective December 14, 2012, 2012 PA 374 amended MCL 28.243(8) and several related provisions governing the collection of fingerprints and other criminal history and juvenile history record information by law enforcement agencies to refer to *biometric data* rather than *fingerprints*. *Biometric data* includes fingerprint and palm print images, "[d]igital images recorded during the arrest or booking process," and "descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b).

> criminal contempt under . . . MCL 600.2950 [or MCL] 600.2950a, or criminal contempt for a violation of a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i, or for a juvenile offense,[35] other than a juvenile offense for which the maximum possible penalty does not exceed 92 days' imprisonment or a fine of $1,000.00, or both, or for a juvenile offense that is a misdemeanor authorized for DNA collection under . . . [MCL 28.176(1)(b)], the arresting law enforcement agency in this state shall collect the person's biometric data and forward the biometric data to the [Department of State Police ("department")] within 72 hours after the arrest. The biometric data must be sent to the department on forms furnished by or in a manner prescribed by the department, and the department shall forward the biometric data to the director of the Federal Bureau of Investigation on forms furnished by or in a manner prescribed by the director.
>
> (2) A law enforcement agency shall collect a person's biometric data under [MCL 28.243(2)] if the person is arrested for a misdemeanor violation of state law for which the maximum penalty is 93 days or for criminal contempt under . . . MCL 600.2950 [or MCL] 600.2950a, or criminal contempt for a violation of a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i, if the biometric data have not previously been collected and forwarded to the department under [MCL 28.243(1)]. A law enforcement agency shall collect a person's biometric data under [MCL 28.243(2)] if the person is arrested for a violation of a local ordinance for which the maximum possible penalty is 93 days' imprisonment and that substantially corresponds to a violation of state law that is a misdemeanor for which the maximum possible term of imprisonment is 93 days. If the person is convicted of any violation, the law enforcement agency shall collect the person's biometric data before sentencing if not previously collected. The court shall forward to the law enforcement agency a copy of the disposition of

[34] MCL 28.176(1) requires the Department of State Police to permanently retain a DNA identification profile obtained from a sample in the manner prescribed under the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, from offenders convicted or found responsible of the certain enumerated offenses.

[35] For discussion of biometric data collection requirements with respect to juvenile offenders, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 21.

> conviction, and the law enforcement agency shall forward the person's biometric data and the copy of the disposition of conviction to the department within 72 hours after receiving the disposition of conviction in the same manner as provided in [MCL 28.243(1)]. If the person is convicted of violating a local ordinance, the law enforcement agency shall indicate on the form sent to the department the statutory citation for the state law to which the local ordinance substantially corresponds."

A person's biometric data need not be collected solely because he or she has been arrested for violating MCL 257.904(3)(a) (individual's first conviction of driving or allowing someone else to drive the individual's motor vehicle with a suspended or revoked license or without a license) or a corresponding local ordinance. MCL 28.243(3).

B. District Court's Obligation to Ensure Fingerprinting

When a defendant is arraigned on a felony charge or a misdemeanor charge punishable by more than one year of imprisonment, the district court must examine the court file to determine whether the defendant's fingerprints have been taken as required by MCL 28.243.[36] MCL 764.29(1). If the defendant has not had the required fingerprints taken before arraignment, the magistrate must order him or her to submit to the arresting agency or order him or her committed to the custody of the sheriff so that fingerprints may be taken. MCL 764.29(2)(a)-(b).

C. Forwarding Biometric Data to the Department of State Police

If a court orders the collection of a person's biometric data, the law enforcement agency that collects the biometric data must forward the biometric data and arrest card to the Department of State Police. MCL 28.243(6).

D. Destruction of Biometric Data and Arrest Card

1. Release Without Charge or Finding of Not Guilty

If a person whose biometric data were collected is released without being charged, or if criminal contempt proceedings are not brought, the official taking or holding the person's biometric data and arrest card must immediately destroy the

[36] Note that MCL 28.243 requires the collection of *biometric data*, which includes fingerprints. However, MCL 764.29 has not been updated and still refers solely to the collection of fingerpints. See Section 5.12.

biometric data and arrest card. MCL 28.243(7). If the arrest card was forwarded to the Department of State Police ("department"), the law enforcement agency must notify the department in a manner prescribed by the department that a charge was not made or that a criminal contempt proceeding was not brought against the person. *Id.*

With the exception of certain offenses listed in MCL 28.243(14),[37] if the accused is found not guilty of an offense for which biometric data were collected, the biometric data and arrest card must be destroyed by the official holding those items. MCL 28.243(10). Additionally, "the clerk of the court entering the disposition shall notify the department of any finding of not guilty or nolle prosequi, if it appears that the biometric data of the accused were initially collected under [MCL 28.243.]" MCL 28.243(10).

"[The] defendant was [not] required to file an action for mandamus [against the Michigan State Police] rather than a motion in the district court seeking the destruction of his fingerprints and arrest card[]" because "courts of this state routinely recognize a defendant's ability to file a motion in a criminal case for the return or destruction of his or her biometric data and arrest card pursuant to MCL 28.243." *People v Guthrie*, 317 Mich App 381, 387, 387-388 n 6, 390 (2016) (additionally noting that "[t]his conclusion is consistent with the fact that the State Court Administrative Office (SCAO) has approved court forms[38] that specifically pertain to these motions[]").

2. Individual's Charge(s) Is Dismissed Before Trial

MCL 764.26a states:

> "(1) If an individual is arrested for any crime and the charge or charges are dismissed before trial, both of the following apply:
>
> > (a) The arrest record shall be removed from the internet criminal history access tool (ICHAT).
> >
> > (b) If the prosecutor of the case agrees at any time after the case is dismissed, or if the

[37] See Section 3.13(D) for discussion of offenses listed in MCL 28.243(14).

[38] See SCAO Form MC 235, *Motion for Destruction of Fingerprints and Arrest Card*; SCAO Form MC 392, *Order Regarding Destruction of Fingerprints and Arrest Card*; SCAO Form MC 263, *Motion/Order of Nolle Prosequi*.

prosecutor of the case or the judge of the court in which the case was filed does not object within 60 days from the date an order of dismissal was entered for cases in which the order of dismissal is entered after [June 12, 2018], all of the following apply:

(*i*) The arrest record, all biometric data, and fingerprints shall be expunged or destroyed, or both, as appropriate.

(*ii*) Any entry concerning the charge shall be removed from LEIN.

(*iii*) Unless a DNA sample or profile, or both, is allowed or required to be retained by the department of state police under . . . MCL 28.176, the DNA sample or profile, or both, obtained from the individual shall be expunged or destroyed.

(2) The department of state police shall comply with the requirements listed in subsection (1) upon receipt of an appropriate order of the district court or the circuit court." See also MCL 28.243(8)-(9).

3. Charges For Which Destruction of Biometric Data and Arrest Card Is Not Permitted

MCL 28.243(14) provides:

"Except as provided in [MCL 28.243(8)], the provisions of [MCL 28.243(10)] that require the destruction of the biometric data and the arrest card do not apply to a person who was arraigned for any of the following:

(a) The commission or attempted commission of a crime with or against a child under 16 years of age.

(b) Rape.

(c) Criminal sexual conduct in any degree.

(d) Sodomy.

(e) Gross indecency.

(f) Indecent liberties.

> (g) Child abusive commercial activities.
>
> (h) A person who has a prior conviction, other than a misdemeanor traffic offense, unless a judge of a court of record, except the probate court, by express order on the record, orders the destruction or return of the biometric data and arrest card.
>
> (i) A person arrested who is a juvenile charged with an offense that would constitute the commission or attempted commission of any of the crimes in [MCL 28.243(12] if committed by an adult."

"[A]n arraignment in either district court or circuit court is sufficient for [MCL 28.243(14)[39]] to apply[;]" therefore, under [MCL 28.243(14)(c)], a defendant who was arraigned in district court for second-degree criminal sexual conduct was not entitled to destruction of his biometric data and arrest card under [MCL 28.243(10)[40]] following entry of an order of nolle prosequi. *People v Guthrie*, 317 Mich App 381, 393-394 (2016) (concluding that the Legislature's "deletion of the phrase 'in circuit court or the family division of circuit court' [by a 2012 amendment to [former] MCL 28.243(12)] reflects the Legislature's intent to change the statute's scope[]"). Additionally, "given the clear and unambiguous language of the statute," a trial court lacks "discretion to order the destruction or return of [a] defendant's biometric data and arrest card in the interest of justice." *Guthrie*, 317 Mich App at 394.

In *People v Cooper (After Remand)*, 220 Mich App 368, 369-370 (1996), the Court of Appeals rejected the defendant's Equal Protection challenge with respect to former MCL 28.243(9)(a), which, similarly to current MCL 28.243(14),[41] provided that individuals who were charged with certain offenses, including criminal sexual conduct, were not entitled to the return of their fingerprints and arrest cards following acquittal.[42] The *Cooper* Court, noting the particular difficulty in detecting, investigating, and prosecuting criminal sexual conduct offenses, held that a rational basis existed for prohibiting the

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[39] At the time *Guthrie* was decided, the provision discussed was MCL 28.243(12). It was renumbered by 2018 PA 67, effective 6/12/18.

[40] At the time *Guthrie* was decided, the provision discussed was MCL 28.243(8). It was renumbered by 2018 PA 67, effective 6/12/18.

[41] At the time *Cooper* was decided, the provision discussed was MCL 28.243(12). It was renumbered by 2018 PA 67, effective 6/12/18.

return of fingerprints and arrest cards to persons acquitted of such charges while permitting return of those documents to persons acquitted of other serious crimes. *Cooper*, 220 Mich App at 371-375. See also *People v Pigula*, 202 Mich App 87, 91 (1993) (former MCL 28.243(9) did not violate the defendant's right of privacy because "there is no right of privacy with regard to arrest records where the arrest was made properly[]") (internal citations omitted).

3.14 Information or Indictment

A. Content

The required content of an information is mandated by statute. MCL 767.45(1) requires that an information contain: (1) the nature of the offense, stated in language that will fairly apprise the accused and the court of the offense charged; (2) the time of the offense as near as possible; and (3) the location of the offense. MCR 6.112(D).

Except where time is of the essence of the offense, an error in the time stated is not fatal to the information. MCL 767.45(1)(b). Additionally, "'an imprecise time allegation [in a felony information may] be acceptable for sexual offenses involving children, given their difficulty in recalling precise dates.'" *People v Bailey*, 310 Mich App 703, 717 (2015), quoting *People v Naugle*, 152 Mich App 227, 234 n 1 (1986) (internal citation omitted). A felony information "alleg[ing] sexual misconduct [against children] over a period of eight years" gave adequate notice where two of the victims "were 13 years old or younger at the time of the alleged offenses, and each testified that [the] defendant abused them numerous times over multiple years, such that specific dates would not stick out in their minds." *Bailey*, 310 Mich App at 717 (quoting *Naugle*, 152 Mich App at 235, and noting that "because [the] defendant was living with his victims over an extended period of time and the victims alleged that [the] defendant abused them at times when no one else was around, 'it appears that creating a valid alibi defense was not a realistic option'").

MCL 767.55 permits allegations in the alternative when an offense "is constituted of 1 or more of several acts, or which may be

[42] Under the version of MCL 28.243 in effect at the time that *Cooper*, 220 Mich App 368, was decided, MCL 28.243(5) provided that an acquitted defendant was entitled to the "return" of his or her fingerprints and arrest card; however, MCL 28.243(9)(a) provided that return of the fingerprints and arrest card was not required if "[t]he person arrested was charged with the commission or attempted commission . . . of a crime with or against a child under 16 years of age or the crime of criminal sexual conduct in any degree, rape, sodomy, gross indecency, indecent liberties, or child abusive commercial activities."

committed by 1 or more of several means, or with 1 or more of several intents, or which may produce 1 or more of several results . . . ."

B. Amendments

Unless a proposed amendment would unfairly surprise or prejudice the defendant, an amendment to the information is permitted either before, during, or after trial. MCR 6.112(H). "A defendant may establish unfair surprise by articulating how additional time to prepare would have benefited the defense." *People v Perry*, 317 Mich App 589, 594 (2016), citing *People v McGee*, 258 Mich App 683, 693 (2003).

Where the prosecution seeks to amend the information to add a criminal charge based on facts or evidence disclosed at the defendant's preliminary examination, a defendant is not unfairly surprised or prejudiced. *People v Fortson*, 202 Mich App 13, 16 (1993).

When a defendant is bound over on any charge cognizable in circuit court following a preliminary examination, the circuit court obtains jurisdiction over the defendant and may permit amendment of the information "to correct a variance between the information and the proofs" as long as the amendment does not unduly prejudice the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Unger*, 278 Mich App 210, 221-222 (2008) (amendment of the information to reinstate a previous charge did not unfairly surprise the defendant or deprive him of sufficient notice or opportunity to defend against the charge at trial). See also *People v Russell*, 266 Mich App 307, 316-317 (2005) (the defendant was not unfairly surprised or deprived of adequate time to prepare a defense against a charge when the charge added to the amended information was a charge presented at the defendant's preliminary examination that had been struck from the information in an earlier amendment).

Defendant failed to show that the trial court's decision to grant the prosecutor's request to amend the information to remove a codefendant amounted to unfair surprise or prejudice because the "removal of the codefendant did not alter the defense that defendant advanced at trial." *People v Muhammad*, 326 Mich App 40, 70 (2018). Additionally, when "the initial information put defendant on notice that the prosecution intended to seek a fourth-offense habitual offender enhancement," later amendments to the information notifying defendant that the "enhancement would result in a mandatory minimum 25-year sentence," and "add[ing] a fourth previous conviction . . . did not amount to unfair surprise in

that the trial court could have inferred that defendant was aware of his own criminal record." *Id*.

Where "[the] defendant knew of the prosecution's intent to amend the charges [to add an additional charge] . . . before trial started, he [did] not demonstrate[] that the amendment during the trial itself denied him the opportunity to cross-examine the witnesses on the new charge." *Perry*, 317 Mich App at 595. Additionally, the timing of the prosecutor's decision to request the addition of the new charge was "not evidence of presumptive vindictiveness[]" where the record was devoid of any indication that "the prosecution deliberately penalized [the] defendant for exercising his right to a trial." *Id*. at 596, citing *People v Jones*, 252 Mich App 1, 8 (2002).

The trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion. *Perry*, 317 Mich App at 594; *McGee*, 258 Mich App at 686-687. Any error in amending an information is waived by a party's failure to object to the amendment. *People v Bettistea*, 173 Mich App 106, 120 (1988).

C. Joinder of Counts

1. Single Defendant

MCR 6.120 governs joinder and severance for a single defendant. The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. MCR 6.120(A). Additionally, two or more informations or indictments against a single defendant may be consolidated for a single trial. *Id*.

When appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense, the court may—on its own initiative, the motion of a party, or the stipulation of all parties—join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant. MCR 6.120(B).

Joinder is appropriate if the offenses are related, i.e., they are based on the same conduct or transaction; a series of connected acts; or a series of acts constituting parts of a single scheme or plan. MCR 6.120(B)(1). See *People v Williams*, 483 Mich 226, 233 n 5 (2009).[43] In *Williams*, 483 Mich at 228-229, the defendant was convicted of two drug charges, stemming from two

[43]*Williams (Carletus)*, 483 Mich at 238, overruled *People v Tobey*, 401 Mich 141 (1977), because *Tobey* construed MCR 6.120 too narrowly.

separate arrests. The Court determined that "the offenses charged were related because the evidence indicated that [the] defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution," and therefore joinder was appropriate. *Id*. at 235. See also *People v Campbell*, 316 Mich App 279, 294 (2016), overruled on other grounds by *People v Arnold*, 502 Mich 438 (2018)[44] (holding that the trial court did not abuse its discretion or deny the defendant his due process right to a fair trial when it refused to bifurcate the proceedings or hold separate trials as to whether he both committed indecent exposure and was a sexually delinquent person; "[g]iven the substantial overlap in the evidence and that the trial court could adequately protect [the defendant's] rights with a limiting instruction concerning the evidence that was admissible only to prove that [he] was a sexually delinquent person, . . . the trial court's decision to hold a single trial was within the range of reasonable and principled outcomes"); *People v Gaines*, 306 Mich App 289, 305 (2014) (cases involving three different victims were "related" for purposes of MCR 6.120(B)(1) and were properly joined for trial where "[the] defendant engaged in ongoing acts related to his scheme of preying upon young, teenage girls from his high school[;] . . . used text messages to communicate with [them] and encouraged them to keep their communications secret[;] . . . requested naked photographs from [at least two of them] and, if they refused, threatened to cut off ties with them[; and] . . . used his parents' basement to isolate two of the young girls and sexually penetrate them").

Other relevant factors to consider include: the timeliness of the motion; the drain on the parties' resources; the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence; the potential for harassment; the convenience of witnesses; and the parties' readiness for trial. MCR 6.120(B)(2).

On a defendant's motion, unrelated charges against that defendant must be severed for separate trials. MCR 6.120(C).

2. Multiple Defendants

MCR 6.121 governs joinder and severance with regard to multiple defendants. An information or indictment may charge two or more defendants with the same offense. MCR 6.121(A). An information or indictment may charge two or

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

more defendants with two or more offenses when each defendant is charged with accountability for each offense or when the offenses are related as set out in MCR 6.120(B). MCR 6.121(A). When more than one offense is alleged, each offense must be stated in a separate count. *Id*. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment. *Id*.

On the defendant's motion, the court must sever offenses that are not related as set out in MCR 6.120(B). MCR 6.121(B).

On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to the substantial rights of a defendant. MCR 6.121(C). "The decision to try two defendants jointly or separately lies within the discretion of the trial court, and that decision will not be overturned absent an abuse of that discretion." *People v Furline*, 505 Mich 16, 20 (2020).

"Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 346 (1994). "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Id*. at 346-347.

"The affidavit or offer of proof must state 'facts on which the court might determine whether . . . a joint trial might result in prejudice.'" *Furline*, 505 Mich at 20, quoting *Hana*, 447 Mich at 339 (cleaned up). "[S]everance may be warranted when defendants' mutually exclusive or antagonistic defenses create a serious risk of prejudice." *Furline*, 505 Mich at 21 (quotation marks and citation omitted). "[T]he defenses must be irreconcilable and create such great tension that a jury would have to believe one defendant at the expense of the other." *Id*. (quotation marks and citation omitted). "Defenses are mutually exclusive . . . if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant"; "[p]rejudice requiring reversal occurs only when the competing defenses are so antagonistic at their cores that both cannot be believed." *Id*. (quotation marks and citations omitted).

The trial court did not err in denying defendant's motion for severance where defendant's affidavit consisted of "contextual" statements that were "not relevant to the severance analysis," or related to prejudice that was "obviated by the prosecutor's agreement not to offer [the complained of] evidence." *Furline*, 505 Mich at 23 (thus, defendant's affidavit lacked concrete facts that fully supported his claim that the lack of severance resulted in prejudice; the Court further found that no prejudice actually occurred during defendant's trial).

On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. MCR 6.121(D). Relevant factors include the timeliness of the motion; the drain on the parties' resources; the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence; the convenience of the witnesses; and the parties' readiness for trial. *Id*. "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Hana*, 447 Mich at 349. "'[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.'" *Id.* at 349, quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). "The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Hana*, 447 Mich at 349, quoting *Yefsky*, 994 F2d at 897.

3. Standard of Review

"To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." *People v Williams*, 483 Mich 226, 231 (2009). Therefore, a trial court's decision regarding joinder "is subject to both a clear error and a de novo standard of review." *Id*.

D. Reinstatement

A trial court properly amends an information under MCR 6.112(H) "when a prosecutor decides to reinstate a charge that was dismissed without prejudice pursuant to an order of *nolle prosequi*." *People v Warner*, 339 Mich App 125, 135 (2021). The *Warner* Court concluded "that the language of MCL 767.29 and MCR 6.112(H) do not conflict"; "MCL 767.29 merely requires that before a *nolle prosequi* is authorized, a prosecutor must state his or her 'reasons for the discontinuance or abandonment' of an indictment on the record and

obtain permission for the dismissal from the court that has jurisdiction to try the offenses charged." *Warner*, 339 Mich App at 136 ("the statute does not speak to the procedure that is required when a prosecutor wishes to reinstate a charge that was voluntarily dismissed without prejudice"). In *Warner*, the trial court entered the prosecutor's proposed *nolle prosequi* order of dismissal of a CSC-I charge that remained pending following defendant's jury conviction for CSC-II. On appeal, defendant's CSC-II conviction was reversed and remanded for a new trial, following which "the prosecutor moved the trial court to amend the information to include the charge of CSC-I pursuant to MCR 6.112(H)." *Warner*, 339 Mich App at 133. Under these circumstances, the *Warner* Court was not persuaded by defendant's argument that pursuant to MCL 767.29, "after a *nolle prosequi* is sought and entered, the dismissed charge can only be reinstated through a new indictment in district court, not by amendment." *Warner*, 339 Mich App at 134. "Because the amendment did not result in unfair surprise or prejudice to defendant, . . . the trial court properly amended the information under MCR 6.112(H) to reinstate the CSC-I charge." *Warner*, 339 Mich App at 141 (cautioning that its "conclusion that the trial court properly amended the information under MCR 6.112(H) [was] based on [a] very specific set of facts" and no authority was presented or found "that would permit amendment of an information under MCR 6.112(H) after all charges have been dismissed and the trial court is divested of jurisdiction").

E. Standard of Review

"A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *People v McGee*, 258 Mich App 683, 686-687 (2003).

F. Notice of Intent to Seek Enhanced Sentence[45]

MCR 6.112(F) provides:

> "Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must contain, if applicable, any mandatory minimum sentence required by law as a result of the sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information

[45] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 4, for additional discussion of sentence enhancement based on habitual offender status.

> charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E),[46] within 21 days after the filing of the information charging the underlying offense."

Before, during, or after trial, the court may permit the prosecutor to amend the notice of intent to seek an enhanced sentence "unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H).

Where "the prosecutor failed to file a proof of service of the notice of intent to enhance defendant's sentence" under MCL 769.13 and MCR 6.112(F), "the error [was] harmless because defendant had actual notice of the prosecutor's intent to seek an enhanced sentence and defendant was not prejudiced in his ability to respond to the habitual offender notification"; specifically, "defendant had access to the charging documents, he had notice of the charges against him, including the habitual offender enhancement, and he also was informed of the habitual offender enhancement at the preliminary examination." *People v Head*, 323 Mich App 526, 544-545 (2018) (holding that the prosecutor's error did not require resentencing). See also *People v Burkett*, 337 Mich App 631, 646-647 (2021) (the prosecutor's failure to file the proof of service was harmless error where the "defendant had actual notice" of the intent to seek an enhanced sentence evidenced by defense counsel's acknowledgment of receiving the notice of intent at the arraignment, and the defendant's "ability to respond to the notice was not prejudiced by the prosecution's failure to file a proof of service," because he "pleaded guilty at sentencing to being a fourth-offense habitual offender"). A violation of the notice requirement in MCL 769.13(1) does not divest a court of subject-matter jurisdiction to apply a habitual offender sentencing enhancement. *People v Adams*, ___ Mich ___, ___ (2022).

3.15 Circumstances Allowing Warrantless Arrests

A peace officer may make a warrantless arrest if a felony, misdemeanor, or ordinance violation is committed in the officer's presence. MCL 764.15(1)(a). Under MCL 764.15, a peace officer may also make a warrantless arrest for certain offenses *not* committed in his or her presence when:

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[46] "A circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information and any notice of intent to seek an enhanced sentence[pursuant to MCL 769.13], as provided in MCR 6.112(F)." MCR 6.113(E). See SCAO Model Local Administrative Order 26—Elimination of Circuit Court Arraignments.

- A person has committed a felony outside the presence of the officer, MCL 764.15(1)(b).

- A felony in fact has been committed and the officer has reasonable cause[47] to believe the person committed it, MCL 764.15(1)(c).

- The officer has reasonable cause to believe that a misdemeanor punishable by more than 92 days' imprisonment or a felony has been committed, and reasonable cause to believe the person committed it, MCL 764.15(1)(d).

- The officer receives positive information from a written, telegraphic, teletypic, telephonic, radio, electronic, or other authoritative source that another officer or a court holds a warrant for the person's arrest, MCL 764.15(1)(e).

- The officer receives positive information broadcast from a recognized police or other governmental radio station or teletype, that affords the officer reasonable cause to believe that a misdemeanor punishable by more than 92 days' imprisonment or a felony has been committed and that the person committed it, MCL 764.15(1)(f).

- The officer has reasonable cause to believe that the person is an escaped convict, has violated a condition of parole from a prison, has violated a condition of a pardon, or has violated one or more conditions of a conditional release order or probation order by any court of any state, Indian tribe, or United States territory, MCL 764.15(1)(g).

- The officer has reasonable cause to believe the person was involved in an accident in Michigan while operating a vehicle and (1) while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance, or any combination thereof, (2) with an unlawful bodily alcohol content, (3) while visibly impaired, (4) with any bodily alcohol content if the person is under 21, or (5) while violating certain provisions in MCL 257.625 and having occupants under age 16 in the vehicle. MCL 764.15(1)(h). Warrantless arrest authority also extends to violations of substantially corresponding local ordinances. *Id*.

- The officer has reasonable cause to believe the person was involved in an accident in Michigan while operating a

[47] The 1989 Staff Comment to MCR 6.102 states that *reasonable cause* and *probable cause* are equivalent. However, according to the Staff Comment, the preferred term is *probable cause*.

commercial vehicle and with an unlawful bodily alcohol content under MCL 257.625m, or violating a substantially corresponding local ordinance. MCL 764.15(1)(h).

- The person is found in the driver's seat of a stopped or parked vehicle on a highway or street that in any way intrudes into a roadway, and the officer reasonably believes the person was operating the vehicle (1) while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance, or any combination thereof, (2) with an unlawful bodily alcohol content, (3) while visibly impaired, (4) with any bodily alcohol content if the person is under 21, or (5) while violating certain provisions in MCL 257.625 and having occupants under age 16 in the vehicle. MCL 764.15(1)(*i*). Warrantless arrest authority also extends to violations of substantially corresponding local ordinances. *Id*.

- The person is found in the driver's seat of a stopped or parked commercial vehicle on a highway or street that in any way intrudes into a roadway, and the officer reasonably believes the person was operating the vehicle and with an unlawful bodily alcohol content under MCL 257.625m, or violating a substantially corresponding local ordinance. MCL 764.15(1)(i).

- The officer has reasonable cause to believe the person was involved in an accident in Michigan while operating a snowmobile, off-road vehicle (ORV), or vessel (1) while under the influence of intoxicating liquor or a controlled substance, or both (2) with an unlawful bodily alcohol content, or (3) while visibly impaired. MCL 764.15(1)(j)-(l). Warrantless arrest authority also extends to violations of substantially corresponding local ordinances. *Id*.

- The officer has reasonable cause to believe retail fraud has occurred, and the person committed the retail fraud, whether or not committed in the officer's presence, MCL 764.15(1)(m).

- The officer has reasonable cause to believe that a misdemeanor has occurred or is occurring on school property, and the person committed or is committing the misdemeanor, whether or not committed in the officer's presence, MCL 764.15(1)(n).

Other statutes also allow a peace officer to make a warrantless arrest when a criminal offense or violation of a court order allegedly occurred:

- MCL 764.15a authorizes a peace officer to make a warrantless arrest in a case involving domestic assault and aggravated domestic assault.[48] The officer may arrest a person regardless of whether the violation takes place in his or her presence, as

long as the arresting officer has or receives positive information that another officer has reasonable cause to believe both of the following:

(1) the violation occurred or is occurring; and

(2) the individual arrested has had a child in common with the victim, resides or has resided in the same household as the victim, is or has had a dating relationship with the victim, or is a spouse or former spouse of the victim.

- MCL 764.15b authorizes a peace officer to make a warrantless arrest for the violation of a personal protection order (PPO) or a valid foreign protection order (FPO) if the officer has or receives positive information that another officer has reasonable cause to believe all of the following:

  - a PPO has been issued under either the domestic or nondomestic PPO statute, or is a valid FPO;

  - the individual named in the PPO is violating or has violated the order (the act must be specifically prohibited in the order); and

  - the PPO states on its face that a violation of its terms subjects the individual to immediate arrest and either of the following:

    - if the individual is 18 years of age or older, to criminal contempt sanctions of imprisonment for not more than 93 days and to a fine of not more than $500; or

    - if the individual is less than 18 years of age, to the dispositional alternatives in MCL 712A.18 of the Juvenile Code.

- MCL 764.15e allows a peace officer to make a warrantless arrest of a person if the officer has or receives positive information that another officer has reasonable cause to believe that the person is violating or has violated a condition of release imposed under MCL 765.6b or MCL 780.582a (governing pretrial conditional release). See also MCL 764.15(1)(g) (allowing warrantless arrest of person violating postconviction conditional release).

[48] For a complete discussion of this topic, see the Michigan Judicial Institute's *Domestic Violence Benchbook*.

- MCL 764.15f allows a peace officer to make a warrantless arrest of a person if the officer has reasonable cause to believe all of the following:

  - the Family Division issued an order under MCL 712A.13a(4) (requiring certain adults to leave the home pending the outcome of child protective proceedings), and the order specifically stated the time period for which the order was valid;

  - a true copy of the order and proof of service have been filed with the law enforcement agency having jurisdiction of the area where the person who has custody of the child resides;

  - the person named in the order received notice of the order;

  - the person named in the order violated the order;

  - the order specifically states that a violation will subject the person to criminal contempt sanctions, including up to 90 days' imprisonment and a $500 fine.

"Warrantless arrests that take place in public upon probable cause do not violate the Fourth Amendment." *People v Hammerlund*, 504 Mich 442, 452 (2019). "[T]his standard applies when probable cause exists for a misdemeanor." *Id*. at 452 (where the officer "personally observed damage to [a] guardrail and cement barrier near defendant's abandoned vehicle," and "defendant admitted to him that she was driving the car that caused the damage and that she did not report the accident to law enforcement," the "information was more than adequate to provide the officer with probable cause to believe that the misdemeanor had been committed").

In *Hammerlund*, "a police officer entered [defendant's] home to complete her arrest for a [90-day] misdemeanor offense," after "she reached out her doorway to retrieve her identification[.]" *Hammerlund*, 504 Mich at 446. Before entering the home, the officer "stood on [defendant's] porch while she remained inside, approximately 15 to 20 feet away from the front door," and defendant "passed [her identification] to [the officer] through a third party in the home." *Id*. at 447, 448. Defendant did not "expose[] herself to public arrest by approaching the door and reaching out to retrieve her identification" because "there is a fundamental difference between the reasonable expectation of privacy of a person who voluntarily stands in an open doorway and the reasonable expectation of privacy of a person who remains inside the confines of her home, approaching the doorway only briefly and momentarily breaking the plane of the doorway with some portion of her arm or hand." *Id*. at 458-459. "[D]efendant did not surrender her expectation of privacy because she did not expose herself to public view, speech, hearing, and touch *as if she had been standing completely outside*." *Id*. at 459.

"The exigent circumstances exception to the warrant requirement contemplates the existence of an actual emergency." *People v Trapp*, 335 Mich App 141, 167 (2020). In *Trapp*, officers responded to a call from a trailer park manager reporting a man with a gun on the premises. *Id*. at 144. After being informed by the manager that the man with the gun was inside a nearby trailer with a group of kids nearby, "[t]he police ordered the males in the trailer to come outside with their hands visible. Defendant . . . complied, and within minutes, he was spun around and handcuffed." *Id*. at 144-145. Defendant resisted and was charged with a felony. *Id*. at 145. "When the police arrived at the trailer park, there were no signs of children or unrest. It was after 10:30 p.m. and the park appeared dark and quiet. If any children had been in danger when the manager called the police, the danger was over. The crime–a minor misdemeanor–was also complete." *Id*. at 168. "The mere fact that children lived in the trailer park was not enough to have supported a search warrant for the trailer or an arrest warrant for its occupants. The police were investigating a misdemeanor involving the possession of a firearm. That a firearm might have been located within the trailer, standing alone, did not give rise to an emergency." *Id*.at 168-169 (reversing defendant's resisting and obstructing conviction and remanding for further proceedings consistent with the Court's opinion).

A private person may make a warrantless arrest of another individual under the following circumstances:

- For a felony regardless of whether the felony is committed in his or her presence. MCL 764.16(a)–MCL 764.16(b).
- If summoned by a peace officer to assist the officer in making an arrest. MCL 764.16(c).
- If the private person is a merchant, agent of a merchant, employee of a merchant, or an independent contractor providing security for a merchant of a store and has reasonable cause to believe the other individual has committed retail fraud, regardless of whether the retail fraud occurred in his or her presence. MCL 764.16(d).

3.16 Complaint Serving as the Warrant

If a defendant is in custody following a warrantless arrest, the complaint can serve as both the complaint and warrant when reasonable cause is found. MCL 764.1c(2). The magistrate must direct the officer to bring the accused before the magistrate or judge for arraignment in the district where the offense allegedly was committed. MCL 764.1c(1)(b). See also MCR 6.104(D).

If the complaint will be used in lieu of a warrant, the finding of reasonable cause must be endorsed on the complaint. MCL 764.1c(1)(b).

3.17 Alternatives to a Formal Complaint and Arrest Warrant

A. Appearance Tickets for Misdemeanor Non-Traffic Violations

1. Statutory Authority

In lieu of filing a complaint as required by MCL 764.13, a police officer may issue an appearance ticket to a person who is arrested without a warrant "for a misdemeanor or ordinance violation[.]" MCL 764.9c(1). "The appearance ticket . . . , or other documentation as requested, must be forwarded to the court, appropriate prosecuting authority, or both, for review without delay." *Id*.

"Except as provided in [MCL 764.9c(5)], a police officer shall issue to and serve upon a person an appearance ticket . . . and release the person from custody if the person has been arrested for a misdemeanor or ordinance violation that has a maximum permissible penalty that does not exceed 1 year in jail or a fine, or both, and is not a serious misdemeanor, assaultive crime, domestic violence violation of . . . MCL 750.81 [or MCL] 750.81a, a local ordinance substantially corresponding to a domestic violence violation of . . . MCL 750.81 [or MCL] 750.81a, an offense involving domestic violence . . ., or an operating while intoxicated offense." MCL 764.9c(4).

MCL 764.9c "does not create a right to the issuance of an appearance ticket in lieu of arrest. An arrested person may appeal the legality of his or her arrest as provided by law. However, an arrested person does not have a claim for damages against a police officer or law enforcement agency because he or she was arrested rather than issued an appearance ticket." MCL 764.9c(8).

2. Appearance Ticket Requirements

Appearance tickets "must be numbered consecutively, provide a space for the defendant's cellular telephone number and electronic mail address, if applicable, [and] be in a form required by the attorney general, the state court administrator, and the director of the department of state police[.]" MCL 764.9f(1).The original appearance ticket serves as the complaint

or notice to appear and must be filed with the court. MCL 764.9f(1)(a). The first copy is the abstract of court record; the second copy must be retained by the local enforcement agency; the third copy must be delivered to the alleged violator. MCL 764.9f(1)(b)-(d).

3. Restrictions on the Issuance of Appearance Tickets

MCL 764.9c(3) prohibits the issuance of appearance tickets to:

- A person arrested for a domestic violence violation of assault and battery, MCL 750.81; aggravated assault and battery, MCL 750.81a; a substantially corresponding local ordinance; or an offense involving domestic violence. MCL 764.9c(3)(a).
- "A person subject to detainment for violating a personal protection order." MCL 764.9c(3)(b).
- "A person subject to a mandatory period of confinement, condition of bond, or other condition of release until he or she has served that period of confinement or meets that requirement of bond or other condition of release." MCL 764.9c(3)(c).
- "A person arrested for a serious misdemeanor." MCL 764.9c(3)(d).
- "A person arrested for any other assaultive crime." MCL 764.9c(3)(e).

4. Failure to Appear

"If after the service of an appearance ticket and the filing of a complaint for the offense designated on the appearance ticket the defendant does not appear in the designated local criminal court within the time the appearance ticket is returnable, the court may issue a summons or a warrant as provided in this [MCL 764.9e]." MCL 764.9e(1). "Notwithstanding any provision of law to the contrary, in the event that a defendant fails to appear for a court hearing within the time the appearance ticket is returnable there is a rebuttable presumption that the court must issue an order to show cause why the defendant failed to appear instead of issuing a warrant." MCL 764.9e(2). "The court may overcome the presumption and issue a warrant if it has a specific articulable reason to suspect that any of the following apply:

(a) The defendant committed a new crime.

> (b) The defendant's failure to appear is the result of a willful intent to avoid or delay the adjudication of the case.
>
> (c) Another person or property will be endangered if a warrant is not issued." MCL 764.9e(3).

"If the court overcomes the presumption under [MCL 764.9e(2)] and issues a warrant, the court must state on the record its reasons for doing so." MCL 764.9e(4).

5. Arrest in Lieu of Appearance Ticket

A police officer may take an "arrested person before a magistrate and promptly file a complaint as provided in [MCL 764.13] instead of issuing an appearance ticket as required under [MCL 764.9c(4)] if 1 of the following circumstances is present:

> (a) The arrested person refuses to follow the police officer's reasonable instructions.
>
> (b) The arrested person will not offer satisfactory evidence of identification.
>
> (c) There is a reasonable likelihood that the offense would continue or resume, or that another person or property would be endangered if the arrested person is released from custody.
>
> (d) The arrested person presents an immediate danger to himself or herself or requires immediate medical examination or medical care.
>
> (e) The arrested person requests to be taken immediately before a magistrate.
>
> (f) Any other reason that the police officer may deem reasonable to arrest the person which must be articulated in the arrest report." MCL 764.9c(5).

If acting under MCL 764.9c(5), a police officer "takes an arrested person before a magistrate and promptly files a complaint as provided in [MCL 764.13] instead of issuing an appearance ticket, the police officer must specify the reason for not issuing a citation in the arrest report or other documentation, as applicable, and must forward the arrest report or other documentation, as requested, to the appropriate prosecuting authority for review without delay." MCL 764.9c(6). A person arrested under MCL 764.9c(6) "must

be charged by the appropriate prosecuting authority or released from custody not later than 3 p.m. the immediately following day during which arraignments may be performed." MCL 764.9c(7).

B. Citations to Appear[49] for Traffic Misdemeanors or Traffic Civil Infractions

1. Statutory Authority

Under the Michigan Vehicle Code (MVC), a police officer *must* issue a citation to a person who is arrested without a warrant for "a violation of [the MVC] punishable as a misdemeanor, or an ordinance substantially corresponding to a provision of [the MVC] and punishable as a misdemeanor, under conditions not referred to in [MCL 257.617, MCL 257.619, or MCL 257.727.]" MCL 257.728(1). However, where no arrest occurs, "[a] police officer *may* issue a citation to a person who is an operator of a motor vehicle involved in an accident if, based upon personal investigation, the officer has reasonable cause to believe that the person has committed a misdemeanor under [the MVC] in connection with the accident." MCL 257.728(8) (emphasis added). See also MCL 257.742(3) (containing substantially similar language with respect to civil infractions). Additionally, an officer may issue a citation to a person he or she witnesses committing a civil infraction or who he or she has reason to believe is committing a civil infraction by violating certain load, weight, height, length, or width requirements. MCL 257.742(1)-(2).

Subject to the exceptions in MCL 764.9c, the citation must be filed in the district court in which the appearance is to be made. MCL 257.727c(1)(a); MCR 4.101(A) (civil infractions); MCR 6.615(A)(1)(a) (misdemeanors). There is no prohibition against filing a single citation that lists both a misdemeanor and a civil infraction. See MCL 257.727c(3).

A person arrested under the MVC without a warrant for a misdemeanor or civil infraction may, in lieu of being issued a citation to appear, demand to be brought to a judge or district court magistrate or to the family division of the circuit court for arraignment. MCL 257.728(1). If a nonresident demands an immediate arraignment, and a judge or district court

[49]The terms *complaint*, appearance ticket, and *citation to appear* are used interchangeably to discuss the Uniform Law Citation (UC-01a and UC-01b) and refer to "a written notice to appear given to a misdemeanor defendant (by an officer or other official) in lieu of a more immediate presentation of the defendant to a magistrate." *McIntosh*, 291 Mich App at 154 n 1.

magistrate is not available to conduct the arraignment or if an immediate trial cannot be held, the nonresident may deposit with the officer a guaranteed appearance certificate or a sum of money not to exceed $100 and be issued a written citation. MCL 257.728(5). However, a nonresident may not be issued a written citation if he or she was arrested for a violation of any offense listed in MCL 257.727(a)-(d). MCL 257.728(5).

2. Citation Requirements

The citation may serve as a sworn complaint and summons to command the initial appearance of the accused and, misdemeanor traffic cases, to command the accused's response regarding his or her guilt of or responsibility for the violation alleged in misdemeanor cases. MCR 4.101(A)(3)(a)-(b) (civil infractions); MCR 6.615(A)(2)(a)-(b) (misdemeanors). The citation must contain "the name and address of the person, the violation charged, and the time and place when and where the person shall appear in court." MCL 257.728(1) (warrantless arrest for alleged misdemeanor violation). See also MCL 257.743 (requiring substantially similar information and additional information for alleged civil infraction); MCL 257.728(8) (requiring substantially similar information for traffic accidents allegedly involving a misdemeanor where no arrest is made). The officer must complete an original and three copies of the citation. MCL 257.728(1); MCL 257.728(8). The original must be filed with the court in which the appearance is to be made, the first copy is retained by the local traffic enforcement agency, the second copy is delivered to the violator if the violation is a misdemeanor, and the third copy is delivered to the violator if the violation is a civil infraction. MCL 257.727c(1).[50] See also MCL 257.743, which requires additional information pertaining to an accused's right to admit or deny responsibility for a civil infraction citation.

"If the citation is issued to a person who is operating a commercial motor vehicle, the citation shall contain the vehicle group designation and indorsement description of the vehicle operated by the person at the time of the alleged violation." MCL 257.728(9) (misdemeanors). See also MCL 257.743(5) (requiring substantially similar information be provided for alleged traffic civil infraction involving commercial motor vehicle).

[50] With the approval of certain specified officials, the content or number of copies required by MCL 257.727c(1) may be modified "to accommodate law enforcement and local court and procedures and practices." MCL 257.727c(2).

3. Restrictions on the Issuance of Citations

MCL 257.728(1) prohibits the issuance of citations for the following offenses[51]:

- Leaving the scene of an accident resulting in serious impairment of a body function or death. MCL 257.617.

- Failing to give the proper information and aid after an accident. MCL 257.619.

- Committing a moving violation causing death or serious impairment of a body function to another person under MCL 257.601d. MCL 257.727(a).

- Operating a vehicle while intoxicated, visibly impaired, with any bodily alcohol content if under age 21, or while having a controlled substance in his or her body under MCL 257.625(1), MCL 257.625(3), MCL 257.625(6), or MCL 257.625(8), or a substantially corresponding ordinance. MCL 257.727(b).

- Causing death or serious impairment of a body function by operating a vehicle while intoxicated or visibly impaired, or while having a controlled substance in his or her body, MCL 257.625(4)-257.625(5). MCL 257.727(b).

- Operating a vehicle while intoxicated or visibly impaired, with any bodily alcohol content if under age 21, or while having a controlled substance in his or her body, and having occupants under age 16 in the vehicle, MCL 257.625(7). MCL 257.727(b).

- Reckless driving, MCL 257.626, or a substantially corresponding ordinance, unless the officer deems that issuing a citation and releasing the person will not constitute a public menace. MCL 257.727(c).

- Not having in his or her immediate possession at the time of arrest a valid operator's or chauffeur's license, MCL 257.311, or a receipt for an already surrendered license, MCL 257.311a. However, if the officer can satisfactorily determine the identity of the person and whether the person can be apprehended if he or she fails to appear before the designated magistrate, the officer may issue a citation. MCL 257.727(d).

[51]Some of the listed offenses are felonies, not punishable as misdemeanors, or may be punishable as felonies if the person has prior convictions.

C. Summons to Appear

A court must issue a summons[52] "if presented with a proper complaint and if the court finds probable cause to believe that the accused committed the alleged offense." MCR 6.102(A). See also MCL 764.1a(1). However, a court may issue an arrest warrant, rather than a summons, if:

> "(1) the complaint is for an assaultive crime or an offense involving domestic violence, as defined in MCL 764.1a.
>
> (2) there is reason to believe from the complaint that the person against whom the complaint is made will not appear upon a summons.
>
> (3) the issuance of a summons poses a risk to public safety.
>
> (4) the prosecutor has requested an arrest warrant." MCR 6.102(D). See also MCL 764.1a(2).

"A summons must contain the same information as an arrest warrant, except that it should summon the accused to appear before a designated court at a stated time and place." MCR 6.102(C)(1).

"A summons may be served by the court or prosecuting attorney by

> (a) delivering a copy to the named individual; or
>
> (b) leaving a copy with a person of suitable age and discretion at the individual's home or usual place of abode; or
>
> (c) mailing a copy to the individual's last known address.

Service should be made promptly to give the accused adequate notice of the appearance date. Unless service is made by the court, the person serving the summons must make a return to the court before the person is summoned to appear." MCR 6.102(C)(2). See also MCL 764.1a(3). "If the accused fails to appear in response to a summons, the court may issue a bench warrant pursuant to MCR 6.103." MCR 6.102(C)(3).[53] See also MCL 764.1a(3).

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[52]See SCAO Form DC 225s, *Misdemeanor Summons* or SCAO Form MC 200s, *Felony Summons*. MCR 6.103 is specifically applicable to misdemeanor cases. MCR 6.001(B).

Generally, "if a defendant fails to appear in court, the court must wait 48 hours, excluding weekends and holidays if the court is closed to the public, before issuing a bench warrant to allow the defendant an opportunity to voluntarily appear before the court." MCR 6.103(A). "If the defendant does not appear within 48 hours, the court must issue a bench warrant unless the court believes there is good reason to instead schedule the case for further hearing." MCR 6.103(A)(3). "The court must not revoke a defendant's release order or forfeit bond during the 48-hour period of delay before a warrant is issued." MCR 6.103(C). However, MCR 6.103(A) "does not apply if the case is for an assaultive crime or domestic violence offense, as defined in MCL 764.3, or if the defendant previously failed to appear in the case." MCR 6.103(A)(1).

MCR 6.103(A)(2) permits a court to "immediately issue a bench warrant only if the court has a specific articulable reason, stated on the record, to suspect any of the following apply:

> (a) the defendant has committed a new crime.
>
> (b) a person or property will be endangered if a bench warrant is not issued.
>
> (c) prosecution witnesses have been summoned and are present for the proceeding.
>
> (d) the proceeding is to impose a sentence for the crime.
>
> (e) there are other compelling circumstances that require the immediate issuance of a bench warrant.

MCR 6.103 "does not abridge a court's authority to issue an order to show cause, instead of a bench warrant, if a defendant fails to appear in court." MCR 6.103(B).

3.18 Plan for Judicial Availability

"In each county, the court with trial jurisdiction over felony cases must adopt and file with the state court administrator a plan for judicial availability." MCR 6.104(G). The plan must "make a judicial officer available for arraignments each day of the year, or . . . make a judicial

[53]Although corporations are not subject to arrest, they can be charged and held liable for criminal acts of their agents. *People v Lanzo Constr Co*, 272 Mich App 470, 472 (2006). Thus, the procedure set out in MCR 6.102 can be applied to a corporate defendant as well as an individual defendant.

officer available for setting bail for every person arrested for commission of a felony each day of the year[.]" MCR 6.104(G)(1)-(2). The setting of bail is conditioned upon the judicial officer being presented with a proper complaint and finding probable cause and the officer having available information to set bail. MCR 6.104(G)(2)(a)-(b).

The plan must also require that the judicial officer "order the arresting officials to arrange prompt transportation of any accused unable to post bond to the judicial district of the offense for arraignment not later than the next regular business day." MCR 6.104(G). See also MCR 6.104(A).

3.19 Interim Bail

In general, a person accused of a criminal offense is entitled to post interim bail to obtain release before arraignment. MCL 765.4; MCL 765.6. Const 1963, art 1, § 15 identifies offenses for which bail may be precluded "when the proof is evident or the presumption great[.]. See also MCR 6.106. However, "denial of bail on this condition is discretionary with the trial court upon a finding by the trial court that the proof of the defendant's guilt is evident or the presumption of the defendant's guilt is great." *People v Davis*, 337 Mich App 67, 77 (2021) (concluding that language in MCL 765.5 expressly prohibiting bail to a person charged with treason or murder conflicts with Const 1963, art 1, § 15 and MCR 6.106(B)(1), because it curtails "the discretion granted the trial court in the constitutional provision and the court rule, and also curtail[s] the defendant's right to pretrial release permitted by Const 1963, art 1, § 15"). The applicable procedures for bail depend on the nature of the offense and whether a magistrate is available to set the amount of bail.[54] See Section 8.3(D) for additional information on interim bail.

Part C: Search Warrants[55]

3.20 Purpose and Function of a Search Warrant

A search warrant gives the police authority to search a specified place, person, or thing as well as the authority to seize specified property. See, e.g., *People v Davis*, 442 Mich 1, 9-10 (1993). "Searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment, 'subject only to a few specifically established and well-delineated exceptions.'"

[54]In large part, the procedures for interim bail are the same as those for post-arraignment, pretrial bail. For a complete discussion of pretrial release and interim bail, see Chapter 8.

[55]See Section 11.5 for information on the scope of a search warrant.

Id., quoting *Horton v California*, 496 US 128, 133, n 4 (1990) (additional quotation marks omitted).[56]

For a summary of the search warrant process, see the Michigan Judicial Institute's checklist describing the process for issuing a search warrant and the checklist describing the process for electronically issuing a search warrant.

3.21 Authority to Issue Search Warrants

A. District or Circuit Court Judges

There is general authority for district and circuit court judges to issue search warrants. MCL 780.651(2)(a) and MCL 780.651(3) specify that "a judge or district court magistrate" may issue a search warrant. MCL 780.651(1) provides:

> "When an affidavit is made on oath to a judge or district court magistrate authorized to issue warrants in criminal cases, and the affidavit establishes grounds for issuing a warrant under this act, the judge or district court magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant to search the house, building, or other location or place where the person, property, or thing to be searched for and seized is situated."

MCL 780.651(3) authorizes "[a] judge or district court magistrate [to] issue a written search warrant in person or by any electronic or electromagnetic means of communication, including by facsimile or over a computer network." Furthermore, "[a] judge or district court magistrate may sign an electronically issued search warrant when he or she is at any location in this state." MCL 780.651(4).

In the event a district court judge knows that he or she may be temporarily unavailable to issue a search warrant, the chief judge of that district can request the chief judge of an adjoining district to direct a district judge within that adjoining district to serve temporarily as a district judge and to review the search warrant. MCL 600.8212. See also *People v Fiorillo*, 195 Mich App 701, 704 (1992) (a district court may issue a warrant for a search outside its jurisdictional boundaries).[57]

[56]For a detailed discussion of the exceptions to the warrant requirement, see Chapter 11.

[57]Whether a magistrate has statewide authority has not been decided.

B. District Court Magistrates

"Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division." MCR 4.401(B). Accordingly, a district court magistrate has the jurisdiction and duty "[t]o issue search warrants, if [so] authorized[.]" MCL 600.8511(g). See also MCL 780.651(1); MCL 780.651(3). The term *search warrant* includes administrative search warrants issued outside the criminal context. *Richter v Dep't of Natural Resources*, 172 Mich App 658, 664-665 (1988).

The chief judge of the district court may grant "blanket authorization" to magistrates to issue search warrants; the authorization need not be on a case-by-case basis. *People v Paul*, 444 Mich 949 (1994).

Although MCL 600.8511 does not require that the authorization to issue search warrants be in writing, effective January 1, 2010, AO 2009-6 requires the district court to submit a local administrative order (LAO) specifying each magistrate's authorized duties. See LAO 3a and 3b.[58]

MCL 780.651(3) authorizes "[a] . . . district court magistrate [to] issue a written search warrant in person or by any electronic or electromagnetic means of communication, including by facsimile or over a computer network." Furthermore, "[a] . . . district court magistrate may sign an electronically issued search warrant when he or she is at any location in this state." MCL 780.651(4).

District court magistrates may also issue search warrants in an adjoining district or in other districts within a county if there is a multiple district plan in place. MCL 600.8320.

A search warrant may be executed outside the district, but within the State of Michigan, in which the magistrate is appointed to serve. *People v Fiorillo*, 195 Mich App 701, 704 (1992) ("No constitutional or statutory limits exist which prevent the district court from issuing search warrants to be executed outside the county of issuance. Since there is only one district court within the state, there is no need for explicit statutory authorization allowing the district court to issue statewide search warrants.")[59]

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[58]LAO 3a and 3b, which are model administrative orders, can be downloaded from the Michigan One Court of Justice website.

[59]This case does not address whether a magistrate or judge has the authority to issue a search warrant for an underlying case which will be heard in another district court.

3.22 Initiating the Search Warrant Process[60]

The first step to the issuance of a search warrant is the preparation and filing of an affidavit. The affidavit is the document that sets forth the grounds for issuing the search warrant, as well as the factual averments from which a finding of probable cause may be made by the court. See MCL 780.651(1). For detailed discussion of the affidavit, see Section 3.27. Following the filing of an affidavit, a neutral and detached magistrate must examine the affidavit and determine whether there is probable cause to support the issuance of the search warrant. See *id.*; *People v Payne*, 424 Mich 475, 482-483 (1985).

The principal statutes concerning search warrants are MCL 780.651–MCL 780.658, and are discussed in more detail below. For a summary of the search warrant process, see the Michigan Judicial Institute's checklist describing the process for issuing a search warrant and the checklist describing the process for electronically issuing a search warrant.

A. Drafting and Typing the Documents

The affidavit and search warrant can be drafted by either: (1) the prosecuting official, which may include assistant attorneys general, assistant prosecuting attorneys, or attorneys for the city, village, or township; or (2) the applicable law enforcement agency. Preferably, the affidavit and warrant should be typed on SCAO Form MC 231, *Affidavit for Search Warrant*, which contains instructions on its reverse side.

B. Signature of Prosecuting Official

The signature of a prosecuting official is not legally necessary to issue a search warrant based on an affidavit. MCL 600.8511(g); *People v Brooks*, 75 Mich App 448, 450 (1977).[61]

[60] See the Michigan Judicial Institute's Warrants Quick Reference Materials for resources concerning the issuance of search warrants. For information regarding a motion to suppress evidence based on an illegal search or seizure, see Chapter 11.

[61] This is in contrast to the issuance of an arrest warrant, which generally requires the signature of a prosecuting official. See MCL 764.1(2) ("A judge or district court magistrate shall not issue a warrant for a minor offense unless an authorization in writing allowing the issuance of the warrant is filed with the judge or district court magistrate and signed by the prosecuting attorney") and MCL 600.8511(e) (a magistrate has the authority "[t]o issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney . . . .").

Committee Tip:

The signature of the prosecutor is not required, but if there are issues regarding the warrant or affidavit, the judge or district court magistrate should tell the police officer that it should be reviewed by the prosecutor.

Although a prosecuting official's signature is not legally necessary to issue a search warrant, SCAO Form MC 231, *Affidavit and Search Warrant*, contains a rectangular box in the lower left corner for the signature of a reviewing prosecuting official to accommodate local practice.

C. Probable Cause

Probable cause to issue a search warrant exists where there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place. *People v Kazmierczak*, 461 Mich 411, 417-418 (2000). See also *United States v Grubbs*, 547 US 90 (2006). Probable cause is discussed in detail in Section 3.25.

D. Neutral and Detached Magistrate

A magistrate who issues a search warrant must be "neutral and detached," a requirement rooted in both the United States and Michigan Constitutions. *Shadwick v City of Tampa*, 407 US 345, 350 (1972); *People v Payne*, 424 Mich 475, 482-483 (1985); Const 1963, art 3, § 2.

Committee Tip:

It is important to maintain neutrality. For example, if either the affidavit or search warrant is defective, the magistrate/judge can tell the police officer that there is a problem with it and can state what the problem is (e.g., insufficient factual basis to establish probable cause). Some judges are of the opinion that they should not tell the police officer how to fix the defect, while other judges are of the opinion that they may indicate what would be required in order for them to sign it. One approach is to refer the

police officer to the prosecutor for review of the affidavit/search warrant.

"The probable cause determination must be made by a person whose loyalty is to the judiciary alone, unfettered by professional commitment, and therefore loyalty, to the law enforcement arm of the executive branch." *Payne*, 424 Mich at 483 (magistrate who was also a court officer and a sworn member of the sheriff's department could not issue search warrants). See also *People v Lowenstein*, 118 Mich App 475, 486 (1982) (magistrate who previously had prosecuted and had been sued by the defendant was not neutral and detached). But see *People v Tejeda (On Remand)*, 192 Mich App 635, 638 (1992) (police officers waiting in magistrate's chambers for a phone call to provide them with additional information to complete the affidavit does not necessarily mean magistrate has injected himself or herself into the investigatory process).

A magistrate must disqualify himself or herself from authorizing warrants in the following situations:

> "'[A magistrate] associated in any way with the prosecution of alleged offenders, because of his [or her] allegiance to law enforcement, cannot be allowed to be placed in a position requiring the impartial judgment necessary to shield the citizen from unwarranted intrusions into his [or her] privacy.' . . . In other words, an otherwise duly appointed magistrate who just happens to be connected with law enforcement may not constitutionally issue warrants. . . . Next, the magistrate (or judge) must disqualify himself [or herself] if he [or she] had a pecuniary interest in the outcome. . . . A judge must also disqualify himself [or herself] when one of the parties happens to be his [or her] client. . . . He [or she] must also disqualify himself [or herself] where a party happens to be a relative. . . ." *Lowenstein*, 118 Mich App at 483-484 (citations omitted).

E. Review of Decision to Issue Search Warrant

In reviewing the issuance of a search warrant, the reviewing court must determine whether a reasonably cautious person could have concluded that there was a substantial basis for finding probable cause. *People v Russo*, 439 Mich 584, 603 (1992). The reviewing court must afford deference to the magistrate's decision and "insure that there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id*. at 604, quoting *Illinois v Gates*, 462

US 213, 238 (1983). See also *People v Kazmierczak*, 461 Mich 411, 417-418 (2000) ("[p]robable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place") and *United States v Ventresca*, 380 US 102, 108 (1965), where the United States Supreme Court stated:

> "[A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

F. SCAO-Approved Forms

The following SCAO-approved forms address the issuance of a search warrant:

- SCAO Form MC 231, *Affidavit and Search Warrant*
- SCAO Form MC 231a, *Affidavit for Search Warrant (continuation)*

3.23 Contents of the Search Warrant

For a summary of the search warrant process, see the Michigan Judicial Institute's checklist describing the process for issuing a search warrant and the checklist describing the process for electronically issuing a search warrant.

A. Description of Premises to be Searched

The United States and Michigan Constitutions require that a search warrant particularly describe the place to be searched. See US Const, Am IV ("no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched . . . .") and Const 1963, art I, § 11 ("No warrant to search any place . . . shall issue without describing [it] . . . ."). See also MCL 780.654(1) ("[e]ach warrant shall designate and describe the house or building or other location or place to be searched . . . .").

The place to be searched must be described with sufficient precision so as to exclude any and all other places. "[W]here a multi-unit dwelling is involved . . . the warrant must specify the particular sub-unit to be searched, unless the multi-unit character of the dwelling is not apparent and the police officers did not know and did not have reason to know of its multi-unit character." *People v Toodle*, 155 Mich App 539, 545 (1986).

Although specific addresses should be used when available, an incorrect address will not always invalidate a search warrant. See *People v Westra*, 445 Mich 284, 285-286 (1994) (warrant not invalid even though the apartment street address and unit number were incorrect, because the police made a reasonable inquiry into the address before executing the search).

A warrant may be issued for a specific building or place to be searched for violations of the Michigan Penal Code pertaining to animals. MCL 750.54. Articles or instruments found to be designed for torturing or harming animals or causing animals to fight are required to be seized by the executing officer, if found. *Id*.

B. Description of the Person to be Searched, Searched For, and/or Seized

"A warrant may be issued to search for and seize a person who is the subject of either of the following:

> (a) An arrest warrant for the apprehension of a person charged with a crime.
>
> (b) A bench warrant issued in a criminal case." MCL 780.652(2).

In order to issue a search warrant for a person, the affidavit must establish particularized probable cause to search the location "where the person . . . to be searched for and seized is situated." MCL 780.651(1). Once issued, "[a] search warrant shall be directed to the sheriff or any peace officer, commanding the sheriff or peace officer to search the house, building, or other location or place, where the person . . . for which the sheriff or peace officer is required to search is believed to be concealed. Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized." MCL 780.654(1).

Committee Tip:

MCL 780.654 requires particularized probable cause for the place and property to be searched. When the police are seeking a warrant to search for multiple objects, the magistrate/judge should verify that there is particularized probable cause for each place and property to be searched.

Although search warrants give authority to search the described premises and any specifically identified persons on the premises, it is sometimes unclear whether the warrant authorizes a search of persons who are present on the premises but who were not specifically identified in the search warrant.

MCL 780.654 requires particularized probable cause for the *place* and *property* to be searched, but it does not expressly provide legal requirements for a *person* to be searched. However, the United States Supreme Court has held that when a search warrant describes persons to be searched, it "must be supported by probable cause particularized with respect to that person." *Ybarra v Illinois*, 444 US 85, 91 (1979) (warrant to search public bar and bartender did not extend to a *Terry*[62] pat-down search of bar patrons present on the premises because the patrons were not described or named in the warrant as persons known to purchase drugs at that location, and because there was no reasonable belief that patrons were armed or dangerous). But see *People v Jackson*, 188 Mich App 117, 121 (1990), where the Court of Appeals distinguished *Ybarra* and upheld a *Terry* pat-down search of a defendant who arrived at an alleged drug-house during the execution of a search warrant ("[*Ybarra*] involved an unjustified cursory search of patrons in a public bar, whereas this case deals with the search of an individual at a residence targeted for drug sales, which was conducted in light of various threats made against the searching officers").

"The places and persons authorized to be searched by a warrant must be described sufficiently to identify them with reasonable certainty so that the object of the search is not left in the officer's discretion." *People v Kaslowski*, 239 Mich App 320, 323 (2000).

"[U]nless a search of a particularly described person is expressly authorized by a warrant, a full search of a person present on the premises subject to a warrant may not be based upon the warrant."

[62] *Terry v Ohio*, 392 US 1 (1968).

People v Stewart, 166 Mich App 263, 268 (1988). However, when a search of private premises pursuant to a warrant reveals controlled substances, police have probable cause to arrest and search incident to arrest occupants of the premises who were not named in the warrant. *People v Arterberry*, 431 Mich 381, 383-385 (1988). See also *Michigan v Summers*, 452 US 692, 705 (1981)[63] (a warrant to search a residence for contraband implicitly carries with it the limited authority to detain, but not search, occupants of the premises while a proper search of the home is conducted; once evidence to establish probable cause to arrest an occupant is found, that person's arrest and search incident thereto is constitutionally permissible).

A person on the premises at the time of the execution of the warrant may be searched without a warrant if probable cause exists independently of the search warrant to search that particular person. *People v Cook*, 153 Mich App 89, 91-92 (1986). A search may also be made of a person, even though the search warrant does not specifically authorize the search of a person, if the affidavit in support of the search warrant establishes probable cause to support the search. *People v Jones*, 162 Mich App 675, 677-678 (1987).

A "search warrant [which] merely described '[t]he person, place or thing to be searched' as the 'Cheboygan County Jail'" and "provided no guidance about whose blood should be drawn," was "plainly invalid" because "[t]he warrant did not identify defendant and ostensibly authorized a blood draw from any inmate at the Cheboygan County Jail." *People v Brcic*, ___ Mich App ___, ___ (2022). "The fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity." *Id*. at ___ (cleaned up). Although "a facially invalid search warrant *may* be saved by incorporated documents, . . . appropriate words of incorporation must direct the officers executing a search warrant to refer to an affidavit for guidance and not merely state an affidavit was used to establish probable cause." *Id*. at ___ (quotation marks and citation omitted). "[A] warrant does not incorporate a supporting affidavit when it merely states that the affidavit establishes probable cause." *Id*. at ___ (quotation marks and citation omitted). "'[A]ppropriate words of incorporation' are limited to phrases that reflect the magistrate's explicit intention to incorporate an affidavit or other supporting document for the purpose of providing particularity in describing the place to be searched and the items to be seized under the authority of a search warrant." *Id*. at ___. The *Brcic* Court noted that "the search warrant at issue [did] not direct the executing officer to refer to the affidavit" and "made no

[63]The rule in *Summers* is limited to a detention in the immediate vicinity of the premises to be searched; it does not apply to a detention at any appreciable distance away from the premises to be searched. *Bailey v United States*, 568 US 186, 201 (2013).

affirmative or explicit references to the affidavit." *Id*. at ___. Accordingly, the Court held that "the information provided in the affidavit [could not] be used to save the plainly invalid search warrant from its lack of particularity as to the place to be searched and the items to be seized." *Id*. at ___.

C. Description of Property to be Seized

General searches are prohibited under the Fourth Amendment of the United States Constitution, which requires warrants to "particularly describ[e] the . . . things to be seized[,]" and Const 1963, art 1, § 11, which provides that "[n]o warrant to . . . seize any . . . things shall issue without describing them[.]" See also MCL 780.654 ("[e]ach warrant shall designate and describe the . . . property or thing to be seized"), and *People v Collins*, 438 Mich 8, 37-38 (1991) ("the warrant must set forth, with particularity, the items to be seized").

"Under both federal law and Michigan law, the purpose of the particularization requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure." *People v Fetterley*, 229 Mich App 511, 543 (1998).

"The degree of specificity required depends upon the circumstances and types of items involved." *People v Zuccarini*, 172 Mich App 11, 15 (1988).

1. Descriptions Sufficient

- Descriptions in a warrant of "all money and property acquired through the trafficking of narcotics," and "ledgers, records or paperwork showing trafficking in narcotics," were sufficiently particular because the executing officers' discretion in determining what was subject to seizure was limited to items relating to drug trafficking. *People v Zuccarini*, 172 Mich App 11, 15-16 (1988).

- Descriptions in warrants of "equipment or written documentation used in the reproduction or storage of the activities and day-to-day operations of the [search location]" "further qualified by [a] reference to the drug trafficking and prostitution activities that were thought to take place there" described with sufficient particularity the items to be seized because they provided reasonable guidance to the officers

performing the search. *People v Martin*, 271 Mich App 280, 304-305 (2006).

- A search warrant authorizing the seizure of "any evidence of homicide" met the particularity requirement because the executing officers were limited to searching only for "items that might reasonably be considered 'evidence of homicide[,]'" and because "[a] general description, such as 'evidence of homicide,' is not overly broad if probable cause exists to allow such breadth." *People v Unger*, 278 Mich App 210, 245-246 (2008).

2. Descriptions Insufficient

- A warrant referring to stolen property of a certain type is insufficient if that property is common, particularly if additional details are available. *Wheeler v City of Lansing*, 660 F3d 931, 941-943 (CA 6, 2011).[64] In *Wheeler*, police officers were issued a warrant to search the plaintiff's apartment for personal property pursuant to an investigation of a series of home invasions. *Id*. at 934-935. The property to be seized was identified in the warrant as including "shotguns, long guns, computer and stereo equipment, cameras, DVD players, video game systems, big screen televisions, necklaces, rings, other jewelry, coin collections, music equipment, and car stereo equipment." *Id*. at 935. The United States Court of Appeals for the Sixth Circuit found that this description "provid[ed] no basis to distinguish the stolen items from [the plaintiff's] own personal property." *Id*. at 941. Although the police reports of the break-ins identified "the brand and dimensions of the televisions, the brand of the camera and Playstation and the exact amount of cash reported as stolen," two of the three cameras seized were not of the same brand as those identified as stolen. *Id*. The Court emphasized that the Fourth Amendment does not require "every single fact known" to be stated, but the affidavit supporting the warrant should provide "additional details, if they are available, to help distinguish between contraband and legally possessed property." *Id*. at 942.

[64] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

3.24 Property Subject to Seizure

In addition to the constitutional "particularity" requirement, Michigan statutory law limits the types of items for which a search warrant may be issued. Under MCL 780.652, a warrant may be issued to search for and seize any property or thing that is one or more of the following:

> "(a) Stolen or embezzled in violation of a law of this state.
>
> (b) Designed and intended for use, or that is or has been used, as the means of committing a crime.
>
> (c) Possessed, controlled, or used wholly or partially in violation of a law of this state.
>
> (d) Evidence of crime or criminal conduct.
>
> (e) Contraband.
>
> (f) The body or person of a human being or of an animal that may be the victim of a crime.
>
> (g) The object of a search warrant under another law of this state providing for the search warrant. If there is a conflict between this act and another search warrant law, this act controls."

Additionally, other Michigan statutes authorize the issuance of search warrants for any of the following property or things:

- alcoholic liquor and containers, MCL 436.1235.
- Body cavity searches, MCL 764.25b.
- Chop shop materials, MCL 750.535a.
- Controlled substances, MCL 333.7502.
- Gaming implements, MCL 750.308.
- Hair, tissue, blood, or other bodily fluids obtained in criminal sexual conduct crimes (related by blood or affinity), MCL 780.652a.
- Large carnivores, MCL 287.1117.
- Pistols, weapons, and devices unlawfully possessed or carried, MCL 750.238 (penal code); MCL 28.433 (firearms code).
- Sources of ionizing radiation, MCL 333.13517.

- Tortured animals and instruments of torture, MCL 750.54.
- Wild birds, wild animals, and fish, MCL 324.1602.
- Wolf-dogs, MCL 287.1017.

3.25 Probable Cause

A magistrate may only issue a search warrant when there is probable cause to support it. *People v Keller*, 479 Mich 467, 475 (2007); *People v Ulman*, 244 Mich App 500, 509 (2001).

For a summary of the search warrant process, including the probable cause requirement, see the Michigan Judicial Institute's checklist describing the process for issuing a search warrant and the checklist describing the process for electronically issuing a search warrant.

A. Probable Cause Defined

"Probable cause sufficient to support issuing a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched." *People v Brannon*, 194 Mich App 121, 132 (1992).

Regarding the degree of probability required for "probable cause," the Michigan Supreme Court has held that to issue a search warrant a magistrate need not require that the items be "more likely than not" in the place to be searched; rather, a magistrate need only reasonably conclude that there is a "fair probability" that the evidence be in the place indicated in the search warrant. *People v Russo*, 439 Mich 584, 614-615 (1992).

B. Staleness

"A search warrant must be supported on probable cause existing at the time the warrant is issued." *People v Osborn*, 122 Mich App 63, 66 (1982). "Nevertheless, a lapse of time between the occurrence of the underlying facts and the issuance of the warrant does not automatically render the warrant stale." *Id*. "[T]he measure of a search warrant's staleness rests not on whether there is recent information to confirm that a crime is being committed, but whether probable cause is sufficiently fresh to presume that the sought items remain on the premises." *People v Gillam*, 93 Mich App 548, 553 (1980). "Such probable cause is more likely to be 'sufficiently fresh' when a history of criminal activity is involved." *Osborn*, 122 Mich App at 66, quoting *Gillam*, 93 Mich App at 553.

Staleness "is not a separate doctrine in probable cause to search analysis"; instead "[i]t is merely an aspect of the Fourth Amendment inquiry." *Russo*, 439 Mich at 605. "Time as a factor in the determination of probable cause to search is to be weighed and balanced in light of other variables in the equation, such as whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense." *Id*. at 605-606.

Stale information cannot be used in making a probable cause determination. *United States v Frechette*, 583 F3d 374, 377 (CA 6, 2009).[65] In determining whether information is stale, the court should consider the following factors: (1) the character of the crime (is it a chance encounter or recurring conduct?); (2) the criminal (is he or she "nomadic or entrenched?"); (3) the thing to be seized (is it "perishable and easily transferrable or of enduring utility to its holder?"); and (4) the place to be searched (is it a "mere criminal forum of convenience or [a] secure operational base?"). *Id*. at 378. In *Frechette*, the court applied the above-listed factors to conclude that 16-month-old evidence that the defendant subscribed to a child pornography website was not stale, because the crime of child pornography is not fleeting; the defendant lived in the same house for the time period at issue; child pornography images can have an infinite life span; and the place to be searched was the defendant's home. *Id*. at 378-379.

There is no bright-line rule regarding how much time may intervene between obtaining the facts and presenting the affidavit; however, the time should not be too remote. *People v Mushlock*, 226 Mich 600, 602 (1924). "[T]he test of remoteness is a flexible and reasonable one depending on the facts and circumstances of the particular case in question." *People v Smyers*, 47 Mich App 61, 73 (1973).

1. Evidence Stale

- Affidavit alleging that defendant illegally sold liquor four days earlier, absent evidence of continuing illegal activity. *People v Siemieniec*, 368 Mich 405, 407 (1962).

- Affidavit alleging a single controlled drug buy made three days before warrant issued, because there was no evidence to suggest that defendant would still

[65] Though persuasive, Michigan state courts "are not . . . bound by the decisions of the lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

possess the marijuana at the time the warrant was executed. *People v David*, 119 Mich App 289, 296 (1982).

- Affidavit alleging liquor sales and gambling conducted on premises six days earlier, absent evidence of continuing illegal activity. *People v Wright*, 367 Mich 611, 614 (1962).

- Affidavit alleging drug sales to undercover police officer made more than one month before warrant issued. *People v Broilo*, 58 Mich App 547, 550-552 (1975).

2. Evidence Not Stale

- Six day delay between issuance of warrant and affiant's visit to defendant's home and observation of stolen dress. *People v Smyers*, 47 Mich App 61, 72-73 (1973).

- Affidavit alleging that a typewriter used to prepare forged checks had been seen in defendant's apartment several months earlier, because information indicated a continuing criminal enterprise. *People v Berry*, 84 Mich App 604, 608-609 (1978).

Committee Tip:

In operating while intoxicated cases, although M Crim JI 15.5(6) states that the jury "may infer that the defendant's bodily alcohol content at the time of the test was the same as [his / her] bodily alcohol content at the time [he / she] operated the motor vehicle[,]" the affidavit should indicate the time of the stop. It is common for the police officer to fail to indicate the time of the stop in the affidavit.

3.26 Anticipatory Search Warrant

"'An anticipatory search warrant is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.'" *People v*

Kaslowski, 239 Mich App 320, 324 (2000), quoting *People v Brake*, 208 Mich App 233, 244 (1994) (Wahls, J., concurring in part and dissenting in part).

In *Kaslowski*, 239 Mich App at 325-329, an anticipatory search warrant permitting police officers to deliver a parcel containing drugs and an electronic monitoring device that would activate when the parcel was opened was deemed valid because the warrant and affidavit established narrow circumstances under which the police were authorized to execute the warrant, the search was subject to the successful delivery of drugs by an undercover police officer, and the affidavit clearly indicated that the execution of the warrant was contingent on the successful delivery of the drugs.

Anticipatory search warrants do not violate the Fourth Amendment's warrant clause. *United States v Grubbs*, 547 US 90, 94-95 (2006). Further, the condition or event that "triggers" execution of an anticipatory search warrant need not be included in the search warrant itself. *Id*. at 99.

3.27 Affidavit

The affidavit is the beginning of the search warrant process and must set forth grounds and establish probable cause to support the issuance of the warrant. See *People v Waclawski*, 286 Mich App 634, 698 (2009). In addition, the Michigan search warrant statute provides that "[t]he magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit" before him or her. MCL 780.653.

For a summary of the search warrant process, see the Michigan Judicial Institute's checklist describing the process for issuing a search warrant and the checklist describing the process for electronically issuing a search warrant.

A. Requirements

"'The affidavit must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or belief. An affidavit made on information and belief is not sufficient. The affidavit should clearly set forth the facts and circumstances within the knowledge of the person making it, which constitute the grounds of the application. The facts should be stated by distinct averments, and must be such as in law would make out a cause of complaint. It is not for the affiant to draw his own inferences. He must state matters which justify the drawing of them.'" *People v Rosborough*, 387 Mich 183, 199 (1972), quoting 2 Gillespie, Michigan Crim Law & Proc (2d ed), Search and Seizure, § 868, p 1129.

B. Validity

"In Michigan, there is a presumption that an affidavit supporting a search warrant is valid." *People v Mullen*, 282 Mich App 14, 23 (2008).

"A defendant is entitled to a hearing to challenge the validity of a search warrant if he [or she] 'makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause . . . .'" *People v Martin*, 271 Mich App 280, 311 (2006), quoting *Franks v Delaware*, 438 US 154, 155-156 (1978). "In order to warrant a hearing, the challenge 'must be more than conclusory and must be supported by more than a mere desire to cross-examine.'" *Martin*, 271 Mich App at 311, quoting *Franks*, 438 US at 171. "*Franks* controls the circumstances under which 'the Fourth Amendment *requires* that a hearing be held at the defendant's request,' but *Franks* does not bar a trial court from exercising its discretion to grant evidentiary hearings concerning the veracity of search warrant affidavits under other circumstances." *People v Franklin*, 500 Mich 92, 95 (2017) (holding that the Court of Appeals erred in "interpret[ing] *Franks* as barring a trial court from granting a defendant an evidentiary hearing to challenge the veracity of a search warrant affidavit following the warrant's execution '*unless* the defendant makes "[the] substantial preliminary showing"' as set forth in *Franks*") (citations omitted; second alteration in original). "Given the absence of any identified prohibition, and given the latitude Michigan trial courts enjoy regarding motion practice and evidentiary hearings generally, . . . trial courts possess the authority to grant discretionary evidentiary hearings on the veracity of search warrant affidavits and a trial court's decision to hold a veracity hearing is subject to review only for an abuse of discretion." *Franklin*, Mich at 110-111 (concluding that the trial court did not abuse its discretion in granting an evidentiary hearing on the defendant's motion to quash the search warrant on the ground "that the affiant had failed to supply sufficient information to demonstrate that the [confidential informant mentioned in the affidavit] was credible").

"In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause." *People v Stumpf*, 196 Mich App 218, 224 (1992). This rule also applies to material omissions from affidavits. *Id*. See

Mullen, 282 Mich App at 22-27, where the Court of Appeals held that probable cause existed to issue a search warrant despite a police officer's intentional or reckless omission of material information from the affidavit and his intentional or reckless inclusion of false information in the affidavit. In *Mullen*, the defendant was stopped and arrested for operating a motor vehicle while intoxicated. *Id*. at 20. The arresting police officer filed an affidavit seeking a search warrant to test the defendant's blood alcohol content. *Id.* at 19. The trial court determined that the officer both included false information in and omitted material information from the affidavit. *Id*. at 23. For example, although the officer failed to properly conduct a few of the field sobriety tests, the officer indicated that the defendant performed poorly on the tests. *Id.* at 20. In addition, the officer failed to indicate that the defendant had a piece of paper in his mouth a few minutes before taking a preliminary breath test (PBT). *Id.* The Michigan Court of Appeals agreed with the trial court's factual determinations, but disagreed with its decision to suppress the evidence because:

> "the evidence presented . . . did not establish that the 0.15 PBT test result was significantly unreliable as to preclude the reasonable belief by a police officer or a magistrate that defendant's blood might contain evidence of intoxication. Given the absence of any basis to significantly call into question the 0.15 PBT result, and given the other circumstantial evidence that defendant was intoxicated, we find that the circuit court erred by determining that a reasonable magistrate would not have found probable cause to issue a search warrant." *Mullen*, 282 Mich App at 28.

"Where the defendant challenges the truth of facts alleged in the affidavit, our courts have struck only the challenged portions of the warrant or its affidavit. In those cases, if enough substance remains to support a finding of probable cause the warrant is valid." *People v Kolniak*, 175 Mich App 16, 22 (1989).

C. Affidavits Based upon Hearsay Information

An affidavit may be based on hearsay information supplied to the affiant by a named or unnamed person, subject to the following requirements:

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

(b) If the person is unnamed, affirmative allegations from which the judge or district court magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." MCL 780.653.

1. Informant Must Speak with Personal Knowledge

"In general, the requirement that the informant have personal knowledge seeks to eliminate the use of rumors or reputations to form the basis for the circumstances requiring a search." *People v Stumpf*, 196 Mich App 218, 223 (1992). "The personal knowledge element should be derived from the information provided or material facts, not merely a recitation of the informant's having personal knowledge." *Id*. "If personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge." *Id*. See also *People v Martin*, 271 Mich App 280, 302 (2006) ("[p]ersonal knowledge can be inferred from the stated facts").

2. Informant Must Be Credible or Information Must Be Reliable

"MCL 780.653(b) derives from the defunct 'two-pronged test' enunciated by the United States Supreme Court in *Aguilar v Texas*, 378 US 108[](1964), and *Spinelli v United States*, 393 US 410[](1969), for determining whether an anonymous informant's tip established probable cause for issuance of a search warrant." *People v Hawkins*, 468 Mich 488, 501 (2003). "Under the *Aguilar-Spinelli* formulation as it was generally understood, a search warrant affidavit based on information supplied by an anonymous informant was required to contain both (1) some of the underlying circumstances evidencing the informant's basis of knowledge and (2) facts establishing either the veracity or the reliability of the information." *Hawkins*, 468 Mich at 501-502.

In *Illinois v Gates*, 462 US 213 (1983), "the United States Supreme Court abandoned the *Aguilar-Spinelli* two-pronged test in favor of a 'totality of the circumstances' approach." *Hawkins*, 468 Mich at 502 n 11. "Accordingly, in determining whether a search warrant affidavit that is based on hearsay information passes Fourth Amendment muster, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her], . . . there is a fair probability

that contraband or evidence of a crime will be found in a particular place.'" *Id.*, quoting *Gates*, 462 US at 238.

A statement in the affidavit that the informant is a "credible person" does not satisfy the statutory requirement set out in MCL 780.653(b). *People v Sherbine*, 421 Mich 502, 511 n 16 (1984), overruled on other grounds by *People v Hawkins*, 468 Mich 488 (2003).

Examples of factual information that is probative of "informant credibility" include:

- A course of past performance in which the informant has supplied reliable information;
- Admissions against the informant's penal interest; and
- Corroboration of non-innocuous details of the informant's story by reliable, independent sources or police investigation. *Sherbine*, 421 Mich at 510 n 13.

The statutory alternative of "informational reliability" must also be established by factual averments in the affidavit. In most cases, once "informant credibility" is established, it logically follows that the information is reliable, and vice versa. However, a subtle distinction may be drawn in situations where the method of procuring the information is unknown. In *Spinelli*, 393 US at 416, the United States Supreme Court explained:

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he [or she] is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Thus, by describing the criminal activity in detail, the reliability of the information can be proven independent of informant credibility.

When, in addition to information obtained from an anonymous informant, an affidavit in support of a search warrant is based on other information sufficient in itself to justify the judge or district court magistrate's finding of probable cause, it is not necessary for purposes of MCL 780.653

to determine whether the informant was credible or whether the information provided was reliable. *People v Keller*, 479 Mich 467, 477 (2007). In *Keller*, marijuana discovered in the defendants' trash was itself sufficient to support the conclusion that there was a fair probability that evidence of illegal activity would be found in the defendants' home. *Id*. at 477. Even though an anonymous tip prompted the initial investigation into the defendants' possible illegal activity, the marijuana alone supported the probable cause necessary to issue a search warrant and "the statutory requirement that an anonymous tip bear indicia of reliability d[id] not come into play." *Id*. at 483.

3.28 Invalidity of Search Warrant and Suppression of Evidence

The invalidity of a portion of a search warrant does not require suppression of all seized evidence. Instead, trial courts are to sever any tainted portions of the warrant—e.g., those portions that lack probable cause or do not sufficiently describe the place, property, or person—from the valid portions. Severance has been explained as follows:

> "Severance does not ratify the invalid portions of the warrant, but recognizes that we need not completely invalidate a warrant on the basis of issues that are not related to the evidence validly seized. Where items are validly seized, a defect in a severable portion of the warrant should not be used to suppress the validly seized evidence." *People v Kolniak*, 175 Mich App 16, 22-23 (1989).

See also *People v Melotik*, 221 Mich App 190, 202-203 (1997), where the case was remanded to the district court to "consider whether the facts contained in the second affidavit, after redaction of the facts arising solely from defendant's inadmissible statement, established probable cause to issue the second warrant."

Even where a search warrant issued from an affidavit is later found insufficient in light of the requirements of MCL 780.653, the evidence obtained in execution of the faulty warrant may still be admissible against a defendant. In *People v Hawkins*, 468 Mich 488, 501 (2003), the defendant moved to suppress evidence obtained pursuant to a search warrant based on an affidavit that failed to satisfy the requirements of MCL 780.653(b) for an affiant's reliance on unnamed sources. The Court held that "[n]othing in the plain language of [MCL 780.653] provides us with a sound basis for concluding that the Legislature intended that noncompliance with its affidavit requirements, standing alone, justifies application of the exclusionary rule to evidence obtained by police in reliance on a search warrant." *Hawkins*, 468 Mich at 510. The Court

concluded that suppression of the evidence was not required as a remedy for the violation of MCL 780.653(b). *Hawkins*, 468 Mich at 512.

3.29 Verifying and Executing the Affidavit

For a summary of the search warrant process, see the Michigan Judicial Institute's checklist describing the process for issuing a search warrant and the checklist describing the process for electronically issuing a search warrant.

"An affidavit must be verified by oath or affirmation." MCR 1.109(D)(1)(f). The affiant should have knowledge of the facts stated. See MCR 1.109(D)(3)(a). "When an affidavit is made on oath to a judge or district court magistrate authorized to issue warrants in criminal cases, and the affidavit establishes grounds for issuing a warrant under this act, the judge or district court magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant to search the house, building, or other location or place where the property or thing to be searched for and seized is situated." MCL 780.651(1).

Once the judge or district court magistrate is satisfied that the warrant is in proper form and that the affidavit establishes probable cause to believe the items to be seized may be found in the place to be searched, it must swear the affiant and ask him or her to state that the averments in the affidavit are true to the best of his or her information and belief. See MCL 780.651(2).

After the affiant has signed the affidavit, the judge or district court magistrate should sign and date it. This indicates the affidavit was signed and subscribed in the presence of the court on that date. Following this, the court should sign and date the search warrant, thereby "issuing" the warrant. See MCL 780.651(4)-(5).

Committee Tip:

The judge or district court magistrate may want to indicate the time of signature, especially if staleness may be an issue.

The court must retain the original affidavit and warrant for its own records. See SCAO Form MC 231, *Affidavit and Search Warrant*.[66]

[66] For additional information on records management, and for links to records retention and disposal schedules, see the State Court Administrative Office's Records Management website.

A. Affiant's Signature Requirement

"The affidavit should be signed by the affiant. A warrant based upon an unsigned affidavit is presumed to be invalid, but the prosecutor may rebut the presumption by showing that the affidavit was made on oath to a magistrate." *People v Waclawski*, 286 Mich App 634, 698 (2009). See also MCL 780.651(2)(a).

B. Judge's or District Court Magistrate's Signature Requirement

"[T]he fact that a search warrant has not been signed by a magistrate or judge presents a presumption that the warrant is invalid. However, this presumption may be rebutted with evidence that, in fact, the magistrate or judge did make a determination that the search was warranted and did intend to issue the warrant before the search." *People v Barkley*, 225 Mich App 539, 545 (1997).

C. Information in Affidavit and Supplementation with Oral Statements

There are "dangers inherent in allowing a magistrate to base his [or her] determinations of probable cause on oral statements not embodied in the affidavit." *People v Sloan*, 450 Mich 160, 176 (1995), rev'd on other grounds by *People v Hawkins*, 468 Mich 488 (2003). "[A]ny additional facts relied on to find probable cause must be incorporated into an affidavit." *Id*. at 177. "What is critical is that the additional information be presented under oath and simultaneously made a permanent part of the record.[67]" *Id*. at 178.

Committee Tip:

It is important to refrain from discussing the facts of the case with the police officer, so that all the facts relied on are contained in the affidavit. This avoids the issue of facts not contained in the affidavit, which occurs when the police officer verbally augments the facts set out in the affidavit.

If the affiant wants to modify or supplement the affidavit, the affiant may insert additional or corrected information in the affidavit and initial

[67] "The recording may take various forms, including handwritten notes, video or audio tapes, or formal or informal transcripts of testimony." *Sloan*, 450 Mich at 177.

it. The judge or district court magistrate should also initial the changes.

3.30 Submission of Affidavit and Issuance of Search Warrant by Electronic Device

"Under MCL 780.651(2), an affidavit may be made to a judge or district court magistrate via electronic or electromagnetic means of communication if the judge or district court magistrate orally administers the oath or affirmation and the affiant signs the affidavit." *People v Paul*, 203 Mich App 55, 61 (1993), rev'd on other grounds 444 Mich 949 (1994).[68] See also MCR 1.109(E)(4) (authorizing the use of electronic signatures that are in accordance with MCR 1.119(E)). Specifically, MCL 780.651(2) provides:

> "An affidavit for a search warrant may be made by any electronic or electromagnetic means of communication, including by facsimile or over a computer network, if both of the following occur:
>
> > (a) The judge or district court magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits an affidavit under this subsection.
> >
> > (b) The affiant signs the affidavit. Proof that the affiant has signed the affidavit may consist of an electronically or electromagnetically transmitted facsimile of the signed affidavit or an electronic signature on an affidavit transmitted over a computer network."

"A judge or district court magistrate may issue a written search warrant in person or by any electronic or electromagnetic means of communication, including by facsimile or over a computer network." MCL 780.651(3). Furthermore, "[a] judge or district court magistrate may sign an electronically issued search warrant when he or she is at any location in this state." MCL 780.651(4).

"The peace officer or department receiving an electronically or electromagnetically issued search warrant shall receive proof that the issuing judge or district court magistrate has signed the warrant before the warrant is executed." MCL 780.651(5). "Proof that the issuing judge

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

or district court magistrate has signed the warrant may consist of an electronically or electromagnetically transmitted facsimile of the signed warrant or an electronic signature on a warrant transmitted over a computer network." *Id*.

"If an oath or affirmation is orally administered by electronic or electromagnetic means of communication under [MCL 780.651], the oath or affirmation is considered to be administered before the judge or district court magistrate." MCL 780.651(6).

"If an affidavit for a search warrant is submitted by electronic or electromagnetic means of communication, or a search warrant is issued by electronic or electromagnetic means of communication, the transmitted copies of the affidavit or search warrant are duplicate originals of the affidavit or search warrant and are not required to contain an impression made by an impression seal." MCL 780.651(7).

See also the Michigan Judicial Institute's checklist describing the process for electronically issuing a search warrant.

3.31 Administrative Inspection Warrants

The Public Health Code (PHC), MCL 333.1101 *et seq.*, specifically authorizes the issuance of administrative inspection warrants, MCL 333.7504, which can be presented to inspect controlled premises, MCL 333.7507.

Specifically, MCL 333.7504 provides:

> "(1) Administrative inspection warrants shall be issued and executed as prescribed in [Part 75 of the PHC].
>
> (2) A magistrate within the magistrate's jurisdiction, upon proper oath or affirmation showing probable cause, may issue a warrant for the purpose of conducting an administrative inspection authorized by [Article 7 of the PHC] or the rules promulgated under [Article 7 of the PHC] and seizures of property appropriate to the inspection. Probable cause exists upon showing a valid public interest in the effective enforcement of [Article 7 of the PHC] or the rules promulgated under [Article 7 of the PHC] sufficient to justify administrative inspection of the area, premises, building, or conveyance in the circumstances specified in the application for the warrant.
>
> (3) A warrant shall issue only upon an affidavit of a designated officer or employee having knowledge of the facts alleged, sworn to before the magistrate and establishing

> the grounds for issuing the warrant. The magistrate, if satisfied that the grounds for the application exist or that there is probable cause to believe they exist, shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected."

MCL 333.7507 specifically addresses administrative inspections of controlled premises. "When authorized by an administrative inspection warrant, an officer or employee designated by the department of commerce, upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an administrative inspection." MCL 333.7507(2). For detailed discussion of an inspection under an administrative inspection warrant, see MCL 333.7507.

Further, administrative inspection warrants may be sought by agencies even where a particular act does not expressly provide for an administrative inspection warrant. *Richter v Dep't of Natural Resources*, 172 Mich App 658, 662-663 (1988) (holding that the district court magistrate's issuance of an administrative inspection warrant to the DNR was proper where the DNR compiled information and evidence that led them to believe that water pollution existed at or near the petitioner's oil well sites despite the fact that the relevant acts provided for a hearing and not an administrative inspection warrant).

3.32 Issuance of Search Warrant in Operating While Intoxicated/Operating While Visibly Impaired Cases

"[P]ersons who operate vehicles on public highways are 'considered to have given consent to chemical tests of his or her blood,' rather than requiring the state to first obtain actual consent or a search warrant." *People v Campbell*, 236 Mich App 490, 498 (1999), quoting MCL 257.625c(1). Specifically, Michigan's implied consent statute, MCL 257.625c, provides:

> "A person who operates a vehicle upon a public highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol or presence of a controlled substance or other intoxicating substance, or any combination of them, in his or her blood or urine or the amount of alcohol in his or her breath [if the person is arrested for certain specified offenses]." MCL 257.625c(1).

The offenses specified in MCL 257.625c(1) are:

- Operating while intoxicated, MCL 257.625(1), or a substantially corresponding local ordinance;
- Operating while visibly impaired, MCL 257.625(3), or a substantially corresponding local ordinance;
- Operating while intoxicated/while visibly impaired/with any amount of controlled substance in body causing death, MCL 257.625(4);
- Operating while intoxicated/while visibly impaired/with any amount of controlled substance in body causing serious impairment of a body function, MCL 257.625(5);
- Operating with any bodily alcohol content, if the driver is less than 21 years of age, MCL 257.625(6), or a substantially corresponding local ordinance;
- Operating in violation of MCL 257.625(1), MCL 257.625(3)-(5), or MCL 257.625(8), if committed with a passenger under 16 years of age, MCL 257.625(7);
- Operating with any amount of a controlled substance, MCL 257.625(8), or a substantially corresponding local ordinance;
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis,[69] MCL 257.625a(5), or a substantially corresponding local ordinance;
- Operating a commercial vehicle with a prohibited alcohol content, MCL 257.625m, or a substantially corresponding local ordinance;
- Committing a moving violation causing death, MCL 257.601d;
- Reckless driving causing serious impairment of a body function, MCL 257.626(3);
- Reckless driving causing death, MCL 257.626(4);
- Manslaughter resulting from the operation of a motor vehicle, MCL 257.625c(1)(b); or
- Murder resulting from the operation of a motor vehicle, MCL 257.625c(1)(b).

[69] See MCL 257.43a.

MCL 257.625a(6)(b)(*iv*) provides that a person arrested for any of the offenses specified in MCL 257.625c(1) must be advised, among other things, that "[i]f he or she refuses the request of a peace officer to take a [chemical test of his or her blood, urine, or breath], a test shall not be given without a court order, but the peace officer may seek to obtain a court order." "[A] blood test conducted under the direction of police falls within the ambit of the Fourth Amendment." *People v Perlos*, 436 Mich 305, 313 (1990). "When a blood sample is taken pursuant to a search warrant, the issue of consent is removed, and the implied consent statute is not applicable." *Manko v Root*, 190 Mich App 702, 704 (1991).

Validity of Search Warrant. A search warrant to perform chemical testing should not be invalidated unless "material misstatements or omissions *necessary to the finding of probable cause* have been made." *People v Czuprynski*, 325 Mich App 449, 471 (2018) (citation omitted). A search warrant remains valid even if it contains some incorrect information, or fails to include exculpatory information, if the incorrect or omitted information does not negate a finding of probable cause. *Id*. at 470.

"Reliance on a warrant is reasonable even if the warrant is later invalidated for lack of probable cause, except under three circumstances: (1) if the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his or her reckless disregard of the truth; (2) if the issuing judge or magistrate wholly abandons his or her judicial role; or (3) if an officer relies on a warrant based on a 'bare bones' affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Czuprynski*, 325 Mich App at 472, citing *United States v Leon*, 468 US 897, 923 (1984); *People v Goldston*, 470 Mich 523, 531 (2004).

Constitutionality of Warrantless Breath and Blood Testing. "[T]he Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving[,]" and a state may criminally prosecute a driver for refusing a warrantless breath test;[70] "[t]he impact of breath tests on privacy is slight, and the need for [blood alcohol concentration (BAC)] testing is great." *Birchfield v North Dakota*, 579 US ___, ___ (2016). However, "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, . . . a blood test[] may [not] be administered as a search incident to a lawful arrest for drunk driving[,]" and "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id*. at ___ (concluding that one of the three petitioners in the case "was threatened with an unlawful search" under a state law making it a

[70] Note that Michigan does not currently criminalize an individual's refusal to submit to a preliminary chemical breath analysis (PBT); refusal to submit is a civil infraction. See MCL 257.625a(2)(d).

crime to refuse a warrantless blood draw, and that "the search he refused [could not] be justified as a search incident to his arrest or on the basis of implied consent") (emphasis added).

"[T]he natural metabolization of alcohol in the bloodstream [does not] present[] a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *Missouri v McNeely*, 569 US 141, 145 (2013). "[C]onsistent with general Fourth Amendment principles . . . exigency in this context must be determined case by case based on the totality of the circumstances." *Id*. See also *Birchfield*, 579 US at ___ (citing *McNeely*, 569 US at 145, and noting that "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not"). See MCL 257.625d(1).

In a plurality opinion[71], the United States Supreme Court held that "in a narrow . . . category of cases . . . in which the driver is unconscious and therefore cannot be given a breath test, . . . the exigent circumstances rule almost always permits a blood test without a warrant." *Mitchell v Wisconsin*, 588 US ___, ___ (2019). "[E]xigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious[.]" *Id*. at ___.

"[B]lood [that] has been lawfully collected for analysis may be analyzed without infringing additional privacy interests or raising separate Fourth Amendment concerns." *People v Woodard*, 321 Mich App 377, 390-391 (2017). "[O]nce police procured a sample of [the] defendant's blood pursuant to her consent, she had no reasonable expectation of privacy in the blood alcohol content of that sample and it could be examined for that purpose without her consent"; "the subsequent analysis of the blood did not constitute a separate search, and [the] defendant simply had no Fourth Amendment basis on which to object to the analysis of the blood for the purpose for which it was drawn." *Id*. at 396. "[W]ithdrawal of consent after the search has been completed does not entitle a defendant to the return of evidence seized during the course of a consent search because those items are lawfully in the possession of the police; and, by the same token, a defendant who consents to the search in which evidence is seized cannot, by revoking consent, prevent the police from examining the lawfully obtained evidence." *Id*. at 394-395.

[71] "A plurality opinion of the United States Supreme Court . . . is not binding precedent. *Texas v Brown*, 460 US 730, 737 (1983)." *People v Beasley*, 239 Mich App 548, 559 (2000).

3.33 Issuance of Search Warrants for Monitoring Electronic Communications

No Michigan statute explicitly governs the issuance of search warrants to monitor private conversations. The federal Electronic Communications Privacy Act, 18 USC § 2510 *et seq.*, consists of three parts. 18 USC 2510–18 USC 2522 is entitled "Wire and Electronic Communications Interception and Interception of Oral Communications," and prohibits the unauthorized interception of wire, oral, or electronic communications. 18 USC 2701– 18 USC 2712 is entitled "Stored Wire and Electronic Communications and Transactional Records Access," and is known as the "Stored Communications Act (SCA)," and concerns stored electronic communications. Finally, 18 USC 3121–18 USC 3127 is entitled "Pen Registers and Trap and Trace Devices," and sets out the procedure for government installation and use of pen registers and trap and trace devices.

The United States Supreme Court has held that third-party monitoring (wiretaps) of private conversations, without the consent of either party, are subject to the warrant requirements of the Fourth Amendment. *Katz v United States*, 389 US 347 (1967). "[T]he very fact that information is being passed through a communications network is a paramount Fourth Amendment consideration." *United States v Warshak*, 631 F3d 266, 285 (CA 6, 2010).[72] "[T]he Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish." *Id*. To that end, "email requires strong protection under the Fourth Amendment." *Id*. at 286. "[A]gents of the government cannot compel a commercial ISP [(Internet Service Provider)] to turn over the contents of an email without triggering the Fourth Amendment." *Id*. "[I]f government agents compel an ISP to surrender the contents of a subscriber's emails, those agents have thereby conducted a Fourth Amendment search, which necessitates compliance with the warrant requirement absent some exception." *Id*. In *Warshak*, the United States Court of Appeals for the Sixth Circuit stated that "[t]he government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause." *Id*. at 288 (holding that the government violated the Fourth Amendment when it obtained the contents of the defendant's e-mails without a warrant). Further, the Court held that "to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional." *Id*.

[72] Though persuasive, Michigan state courts "are not . . . bound by the decisions of the lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

Committee Tip:

Requests for electronic communications are becoming increasingly prevalent. To stay in line with impending changes in the law, the best practice is to have law enforcement seek a search warrant, instead of signing a subpoena.

3.34 Executing the Search Warrant

A. Knock-and-Announce

Michigan's "knock-and-announce" statute is set out in MCL 780.656:

> "The officer to whom a warrant is directed, or any person assisting him [or her], may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his [or her] authority and purpose, he [or she] is refused admittance, or when necessary to liberate himself [or herself] or any person assisting him [or her] in execution of the warrant."

"The knock-and-announce statute requires that police executing a search warrant give notice of their authority and purpose and be refused entry before forcing their way in." *People v Fetterley*, 229 Mich App 511, 521 (1998). Although it is known as the "knock-and-announce" rule, "[n]either case law nor statute requires that the police physically knock on the door; rather, they need only give proper notice to the occupants of their authority and purpose." *Id*. at 524. "Police must allow a reasonable time for the occupants to answer the door following the announcement." *Id*. at 521.

The exclusionary rule does not apply to violations of the knock-and-announce statute because violation of MCL 780.656 is unrelated to the seizure of a person's property pursuant to a valid search warrant. *Hudson v Michigan*, 547 US 586, 594, 599-600 (2006).

B. Required Actions Upon Seizure of Property

MCL 780.655(1) sets out the procedures to be followed after property is seized during the execution of a search warrant:

> "When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things that were seized. The officer taking property or other things under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. The officer is not required to give a copy of the affidavit to that person or to leave a copy of the affidavit at the place from which the property or thing was taken."

"[A] copy of the affidavit becomes part of the 'copy of the warrant' that must be provided or left pursuant to MCL 780.655[.]" *People v Garvin*, 235 Mich App 90, 99 (1999). "However, a failure by law enforcement officers to comply with the statutory requirement to attach a copy of the affidavit to the copy of the warrant provided or left does not require suppression of evidence seized pursuant to the warrant." *Id*. See also MCL 780.654(3), which permits a magistrate to order the suppression of an affidavit in circumstances necessitating the protection of an investigation or the privacy or safety of a victim or witness:

> "Upon a showing that it is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness, the magistrate may order that the affidavit be suppressed and not be given to the person whose property was seized or whose premises were searched until that person is charged with a crime or named as a claimant in a civil forfeiture proceeding involving evidence seized as a result of the search."

Additionally, the officer must promptly file the tabulation with the judge or district court magistrate. MCL 780.655(2) provides:

> "The officer shall file the tabulation promptly with the judge or district court magistrate. The tabulation may be suppressed by order of the judge or district court magistrate until the final disposition of the case unless otherwise ordered. The property and things that were seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence in any trial."

After the execution of the warrant, seized property must be returned and disposed of in accordance with MCL 780.655(3):

> "As soon as practicable, stolen or embezzled property shall be restored to the owner of the property. Other things seized under the warrant shall be disposed of under direction of the judge or district court magistrate, except that money and other useful property shall be turned over to the state, county or municipality, the officers of which seized the property under the warrant. Money turned over to the state, county, or municipality shall be credited to the general fund of the state, county, or municipality."

A failure to strictly comply with the requirements of MCL 780.655 does not by itself require suppression of seized evidence. In *People v Sobczak-Obetts*, 463 Mich 687, 712-713 (2001), the Supreme Court held that the trial court and Court of Appeals erred by applying the exclusionary rule to conduct that amounted to a technical violation of MCL 780.655, i.e., an officer's failure to provide a copy of the affidavit in support of the warrant to the defendant at the time of the search, because there was no discernible legislative intent that a violation of MCL 780.655 requires suppression, and because there was no police misconduct to necessitate application of the exclusionary rule, which is predicated on deterring such conduct.

3.35 Public Access to Search Warrant Affidavits

MCL 780.651(8) provides that, "[e]xcept as provided in [MCL 780.651(9)], an affidavit for a search warrant contained in any court file or court record retention system is nonpublic information." MCL 780.651(9) provides:

> "On the fifty-sixth day following the issuance of a search warrant, the search warrant affidavit contained in any court file or court record retention system is public information unless, before the fifty-sixth day after the search warrant is issued, a peace officer or prosecuting attorney obtains a suppression order from a judge or district court magistrate upon a showing under oath that suppression of the affidavit is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness. The suppression order may be obtained ex parte in the same manner that the search warrant was issued. An initial suppression order issued under [MCL 780.651(9)] expires on the fifty-sixth day after the order is issued. A second or subsequent suppression order may be obtained in the same manner as the initial suppression order and shall expire on a date specified in the

order. [MCL 780.651(9)] and [MCL 780.651(8)] do not affect a person's right to obtain a copy of a search warrant affidavit from the prosecuting attorney or law enforcement agency under the [Freedom of Information Act, MCL 15.231–MCL 15.246]."

Part D: Grand Jury

3.36 Grand Jury

Criminal prosecutions may be initiated when the prosecuting attorney files a complaint and an information, or by grand jury indictment. MCL 767.1 *et seq.*; *People v Glass*, 464 Mich 266, 276 (2001). There is no state constitutional right to indictment by a grand jury. *Glass*, 464 Mich at 278. An information shall not be filed until the defendant has had or has waived a preliminary examination. MCL 767.42(1). However, indictees do not have the right to a preliminary examination. *Glass*, 464 Mich at 283, overruling *People v Duncan*, 388 Mich 489 (1972) (which had granted indictees the right to a preliminary examination). The grand jury indictment is a procedural alternative to the preliminary examination. *Glass*, 464 Mich at 278. See also *People v Baugh*, 249 Mich App 125, 129-130 (2002) (where the defendant was indicted by grand jury, the information issued after the defendant's preliminary examination was null and void following the Court's decision in *Glass*).

Grand juries are creatures of statute. Generally, the statutes provide for a one person grand jury, MCL 767.3 and MCL 767.4, a citizen grand jury comprised of 13 to 17 grand jurors, MCL 767.11, and a multi-county grand jury, MCL 767.7c, MCL 767.7d, MCL 767.7e, MCL 767.7f, and MCL 767.7g.

A. One-Person Grand Jury

"Enacted in 1917, MCL 767.3 and MCL 767.4 are part of a statutory scheme that quickly became known as the 'one man grand jury' law." *People v Peeler*, *509* Mich 381, 389 (2022). "A 'one person' grand jury may . . . be convened to investigate whether probable cause exists to suspect a crime has been committed." *People v Farquharson*, 274 Mich App 268, 274 (2007). Whether the judge orders an inquiry "into the matters relating to [the alleged crime]" is discretionary. MCL 767.3. The one person grand jury statute does not violate a defendant's right to due process. *In re Colacasides*, 379 Mich 69, 75 (1967).

While "MCL 767.3 and MCL 767.4 authorize a judge to investigate, subpoena witnesses, and issue arrest warrants[,]" "they do not authorize the judge to issue indictments." *Peeler*, *509* Mich 381, 400 (2022).[73] "And if a criminal process begins with a one-man grand jury, the accused is entitled to a preliminary examination before being brought to trial." *Id*. at 400. "Probable cause to *arrest* (which MCL 767.4 requires and authorizes the judge to order) is different from probable cause to *bindover* (which must be found at a preliminary examination to bind the defendant over on felony charges)." *Id*. at 394, overruling *People v Green*, 322 Mich App 676 (2018).

B. Citizen Grand Jury

Citizen grand juries are drawn and summoned as directed by the court. MCL 767.7. A grand juror's term of service is six months. MCL 767.7a. Not more than 17 persons and not less than 13 shall be sworn on any grand jury. MCL 767.11. A foreperson is appointed by the court. MCL 767.11; MCL 767.12. Witnesses appearing before the grand jury have the right to counsel. MCL 767.19e and MCR 6.005(I). An indictment requires the concurrence of at least nine of the grand jurors. MCL 767.23. The foreperson shall present the indictment to the court in the presence of the grand jury. MCL 767.25(1). The judge presiding over the grand jury proceedings shall then return the indictment to the court having jurisdiction. MCL 767.25(3). An arrest warrant may be issued by the court. MCL 767.30. The statute contemplates that a defendant will be arraigned in the court having jurisdiction over the matter because the statute indicates that the court may properly receive the indictee's plea of guilty if offered. MCL 767.37.

A grand jury is not required to "reflect the precise racial composition of a community." *People v Glass*, 464 Mich 266, 284 (2001). The *Glass* Court indicated that the three-step analysis set out in *Castaneda v Partida*, 430 US 482, 494 (1977), should be used to resolve a defendant's claim of racial discrimination in the selection of a grand jury. *Glass*, 464 Mich at 285. "[I]n addition to showing discriminatory purpose, [the] defendant must show that the grand jury selection procedure resulted in a 'substantial underrepresentation of his [or her] race.'" *Id*., quoting *Castaneda*, 430 US at 494. In *Glass*, 464 Mich at 285, the Court applied the three steps set out in *Castaneda*, 430 US at 494:

[73] *Peeler* applies retroactively. *People v Kennedy*, ___ Mich App ___, ___ (2023).

(1) The defendant must show that he or she belongs to a recognizable and distinct class singled out for different treatment by the law as written or as applied.

(2) The defendant must show that significant underrepresentation of that distinct class existed over a significant period of time.

(3) The defendant must show that the selection procedure was susceptible to abuse or was not racially neutral.

C. Multicounty Grand Jury

The Court of Appeals may convene a multicounty grand jury if the petition establishes: (1) probable cause to believe that a crime, or a portion of a crime, has been committed in two or more of the counties named in the petition, and (2) reason to believe that a grand jury with jurisdiction over two or more of the counties named in the petition could more effectively address the criminal activity referenced in the petition than could a grand jury with jurisdiction over one of those counties. MCL 767.7d. The term of a multicounty grand jury must not exceed six months. MCL 767.7f.

Committee Tip:

In considering a challenge to the creation or scope of a multicounty grand jury, consider reviewing a copy of the petition, order of the Court of Appeals, presiding judge's order, and any order continuing the term of the grand jury. In addition, seek information regarding the number and source of the grand jurors along with the number concurring in any indictment being challenged.

D. Oath for the Grand Jury

The following oath should be used when a grand jury is sworn:

"'You as grand jurors of this inquest do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge; your own counsel and the counsel of the people, and of your fellows, you shall keep secret; you shall present no person for envy, hatred or malice,

> neither shall you leave any person unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God.'" MCL 767.9.

E. Right to Counsel

"A witness called before a grand jury or a grand juror is entitled to have a lawyer present in the hearing room while the witness gives testimony. A witness may not refuse to appear for reasons of unavailability of the lawyer for that witness. Except as otherwise provided by law, the lawyer may not participate in the proceedings other than to advise the witness." MCR 6.005(I)(1). See also MCL 767.19e, containing substantially similar language. If the witness is financially unable to retain a lawyer, upon request, the chief judge in the circuit court in which the grand jury is convened will refer the witness to the local indigent criminal defense system for appointment of an attorney at public expense. MCR 6.005(I)(2).

F. Rules of Evidence

With the exception of those rules regarding privilege, the rules of evidence do not apply to grand jury proceedings. MRE 1101(b)(2).

Testimony given before the grand jury may be admissible at trial, subject to the rules of evidence. *People v Chavies*, 234 Mich App 274, 281-284 (1999), overruled on other grounds by *People v Williams*, 475 Mich 245 (2006).[74]

G. Discovery

A defendant is entitled to a transcript of his or her grand jury testimony and other parts of the grand jury record—including other witnesses' testimony—that touch on the issue of the defendant's guilt or innocence. *People v Bellanca*, 386 Mich 708, 715 (1972). This entitlement applies whether the defendant is charged by information or indictment. *People v Fagan (On Remand)*, 213 Mich App 67, 68-70 (1995) (definition of indictment includes information, see, e.g., MCL 750.10, MCL 761.1(g); MCL 767.2.

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

H. Investigative Subpoenas

In general, MCL 767A.2 permits a prosecuting attorney to petition the court to issue one or more investigative subpoenas to investigate the commission of a felony. MCL 767A.3 authorizes the judge to issue the investigative subpoena. "A court may 'authorize the prosecutor to issue an investigative subpoena if the judge determines that there is reasonable cause to believe a felony has been committed and that there is reasonable cause to believe that the person who is the subject of the investigative subpoena may have knowledge concerning the commission of a felony or the items sought are relevant to investigate the commission of a felony.'" *People v Farquharson*, 274 Mich App 268, 273 (2007), quoting *In re Subpoenas to News Media Petitioners*, 240 Mich App 369, 375 (2000), citing MCL 767A.3(1).

"Investigative subpoenas must include a statement that a person may have legal counsel present at all times during questioning, MCL 767A.4(g), and a witness must be advised of his or her constitutional rights against compulsory self-incrimination, MCL 767A.5(5); *People v Stevens*, 461 Mich 655, 659 n 1 (2000). A person served with an investigative subpoena must appear before the prosecuting attorney and answer questions concerning the felony being investigated. MCL 767A.5(1). The prosecuting attorney is authorized to administer oaths, MCL 767A.5(2), and if a witness testifies falsely under oath during an investigative proceeding under oath, perjury penalties apply, MCL 767A.9." *Farquharson*, 274 Mich App at 273.

"If a criminal charge is filed by the prosecuting attorney based upon information obtained pursuant to this chapter, upon the defendant's motion made not later than 21 days after the defendant is arraigned on the charge, the trial judge shall direct the prosecuting attorney to furnish to the defendant the testimony the defendant gave regarding the crime with which he or she is charged and may direct the prosecuting attorney to furnish to the defendant the testimony any witness who will testify at the trial gave the prosecuting attorney pursuant to this chapter regarding that crime except those portions that are irrelevant or immaterial, or that are excluded for other good cause shown." MCL 767A.5(6).

"If the defendant requests the testimony of a witness pursuant to [MCL 767A.5] and the trial judge directs the prosecuting attorney to furnish to the defendant a copy of that witness's testimony, the prosecuting attorney shall furnish a copy of the testimony not later than 14 days before trial. If the prosecuting attorney fails or refuses to furnish a copy of the testimony to the defendant pursuant to this

subsection, the prosecuting attorney may be barred from calling that witness to testify at the defendant's trial." MCL 767A.5(6).

"If a person files an objection to, or fails or refuses to answer any question or to produce any record, document, or physical evidence set forth in an investigative subpoena, the prosecuting attorney may file a motion with the judge who authorized the prosecuting attorney to issue the subpoena for an order compelling the person to comply with that subpoena." MCL 767A.6(1). In *People v Seals*, 285 Mich App 1, 8-9 (2009), the defendant argued that the testimony he gave pursuant to an investigative subpoena was involuntary; however, the Court held that "[t]he fact that [the] defendant did not take advantage of his opportunity [under MCL 767A.6(1)] to have the trial court determine whether he was required to respond to the investigative subpoena d[id] not make his testimony forced." Therefore, admission of his testimony at trial did not violate his right against compulsory self-incrimination. *Seals*, 285 Mich App at 9-10.

Disclosure in a civil action of transcripts of testimony obtained pursuant to the investigative subpoena process, during an investigation of alleged criminal conduct, is not authorized by the statutes governing the disclosure of such information, MCL 767A.1 *et seq*. *Truel v City of Dearborn*, 291 Mich App 125, 131-135 (2010). According to the *Truel* Court, MCL 767A.8 "makes several delineated items related to an investigation confidential, including (1) petitions for immunity, (2) orders granting immunity, (3) 'transcripts of testimony delivered to witnesses pursuant to grants of immunity,' and (4) 'records, documents, and physical evidence obtained by the prosecuting attorney pursuant to an investigation under [the investigative subpoena statutes].'" *Truel*, 291 Mich App at 133. However, "[items delineated] in [MCL 767A.8] were meant to address those matters not already covered elsewhere in the [investigative subpoena statutes]." *Truel*, 291 Mich App at 134. Because MCL 767A.5(6) specifically "provides for the limited disclosure of testimony to a defendant who has been charged based upon information obtained pursuant to the investigative subpoena statutes[,]" its disclosure under other circumstances is not expressly or impliedly authorized under other provisions of the investigative subpoena statutes. *Truel*, 291 Mich App at 134-135. The plain language of MCL 767A.5(6) states that "transcripts of witness testimony are only available to a criminal defendant when the charges result from information obtained through investigative subpoenas and (a) the testimony is that of the defendant or (b) the testimony is that of witnesses who will testify at trial[.]" *Truel*, 291 Mich App at 135. In *Truel*, the trial court improperly ruled that transcripts of witness testimony obtained under the investigative subpoena statutes, during an investigation into alleged criminal

activity, should be disclosed to the defendants named in the plaintiff's civil action. *Id*. at 131-135.

The Michigan Supreme Court has held that the exclusionary rule does not apply to statutory violations of MCL 767A.1 *et seq*. *People v Earls,* 477 Mich 1119 (2007).

Chapter 4: Right to Counsel, Waiver of Counsel, and Forfeiture of Counsel

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4.1 Introduction

This chapter discusses the general concepts of a defendant's right to counsel, waiver of counsel, and forfeiture of counsel, and is intended to be an overview of these rights. For information on these rights as they pertain to specific criminal proceedings, see the appropriate chapter in this book that discusses that particular type of proceeding.

See the Michigan Judicial Institute's checklist for attorney waiver or appointment of counsel.

Part A: Right to Counsel

4.2 Constitutional Rights to Counsel

A criminal defendant has a constitutional right to counsel. *Coleman v Alabama*, 399 US 1, 7 (1970). In Michigan, a criminal defendant's right to counsel has two sources: (1) the Sixth Amendment to the United States Constitution, US Const, Am VI, applicable to the states through the Fourteenth Amendment, US Const, Am XIV, and its Michigan corollary in Const 1963, art 1, § 20, and (2) a prophylactic right found in the Supreme Court's jurisprudence relating to the Fifth Amendment right against compelled self-incrimination and to due process, US Const, Am V, and its Michigan corollary in Const 1963, art 1, § 17. *People v Williams*, 244 Mich App 533, 538 (2001). "The Fifth Amendment right to counsel is distinct and not necessarily coextensive with the right to counsel afforded criminal defendants under the Sixth Amendment," because "the Fifth Amendment right to counsel during a custodial interrogation serves an entirely different purpose than the Sixth Amendment right to counsel at trial." *Id*. at 538-539. This section focuses on a defendant's Sixth Amendment right to counsel. For more information on suppressing a defendant's statement for violation of his or her Fifth Amendment right to counsel, see the Michigan Judicial Institute's *Evidence Benchbook*.

"The Sixth Amendment right, which is offense-specific and cannot be invoked once for all future prosecutions, attaches only at or after adversarial judicial proceedings have been initiated[,]" *People v Smielewski*, 214 Mich App 55, 60 (1995), i.e., at the first appearance before a judicial officer at which the defendant is told of the formal accusation against him or her, and restrictions are imposed on his or her liberty (e.g., formal charge, preliminary hearing, indictment, information, or arraignment). *Rothgery v Gillespie Co, Texas*, 554 US 191, 198 (2008). See also *Montejo v Louisiana*, 556 US 778, 797 (2009) (critical stage includes interrogation after a defendant has asserted his or her right to counsel at

an arraignment or similar proceeding); *People v Perkins* , 314 Mich App 140, 151-152 (2016) (holding that where an investigating officer "knew that [the defendant] was in jail on an unrelated offense and was represented by counsel and nevertheless questioned [him] without his attorney[,]" the defendant's confession was properly admitted into evidence; "[b]ecause the Sixth Amendment right to counsel is offense specific and because adversarial judicial proceedings had not been initiated for the offenses [to which the defendant confessed], [his] right to counsel under the Sixth Amendment had not yet attached"); *People v Collins*, 298 Mich App 458, 470 (2012) (bond revocation hearing that has no effect on determination of defendant's guilt or innocence is not a critical stage in the proceeding; therefore, counsel's presence is not constitutionally required). The Sixth Amendment right to counsel attaches without regard to whether a public prosecutor is aware of the initial proceeding or is involved in its conduct. *Rothgery*, 554 US at 194-195.

A. Actual Imprisonment

No person may receive an actual or suspended sentence for any offense—petty, misdemeanor, or felony—unless he or she was represented by counsel at trial or knowingly and intelligently waived representation. *Alabama v Shelton*, 535 US 654, 657-659, 662 (2002) (an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel may not be given a probated or suspended sentence of imprisonment). An indigent defendant's right to counsel applies to the states through the Fourteenth Amendment. *Gideon v Wainwright*, 372 US 335, 340, 344-345 (1963).

No real distinction exists between "actual imprisonment" and probated or "threatened" imprisonment for purposes of an indigent defendant's right to counsel). *Shelton*, 535 US at 659.

B. Counsel of Choice

A criminal defendant has a constitutional right to retain an attorney of his or her choice. *People v Arquette*, 202 Mich App 227, 231 (1993). However, the constitutional right to counsel of choice is not absolute; it only applies to criminal defendants who retain counsel, not to indigent defendants for whom counsel is appointed. *United States v Gonzalez-Lopez*, 548 US 140, 144, 151 (2006).

Where a defendant is wrongly denied his or her Sixth Amendment right to counsel of choice, the constitutional violation is complete and the defendant's conviction must be reversed; the defendant need not show that he or she was denied a fair trial or that his or her actual counsel was ineffective. *Gonzalez-Lopez*, 548 US at 148; *People v Aceval*,

282 Mich App 379, 386 (2009). "However, this right to choice of counsel is limited and may not extend to a defendant under certain circumstances." *Aceval*, 282 Mich App at 386. For example, a defendant may not insist on retaining counsel who is not a member of the bar, or counsel for whom representation of the defendant would constitute a conflict of interest. *Gonzalez-Lopez*, 548 US at 152. Nor may a defendant insist on retaining a specific attorney as a tactic to delay or postpone trial. *People v Akins*, 259 Mich App 545, 557-558 (2003). "'[A] balancing of the accused's right to counsel of his [or her] choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated.'" *Aceval*, 282 Mich App at 387, quoting *People v Krysztopaniec*, 170 Mich App 588, 598 (1988).

C. Access to Interpreter During Meetings with Counsel

"[T]here are both state and federal constitutional implications–based on a defendant's right to counsel during critical stages of the proceedings–when a defendant who is entitled to an interpreter is prevented from communicating with his attorney because he has been denied an interpreter." *People v Hoang*, 328 Mich App 45, 59 (2019). "Depriving a defendant of the ability to communicate with his or her attorney during pretrial preparations—a critical stage of the proceedings—prevents the attorney from fulfilling the attorney's duty to investigate and prepare possible defenses." *Id*. at 60. However, in *Hoang*, "there was no Sixth Amendment violation" where although the defendant did not "have an interpreter physically present during [his] pretrial meetings with his attorney," he "was granted the appointment of an interpreter" who "participated via speakerphone while [defendant] and his attorney prepared the case and discussed the prosecution's plea offer." *Id*. at 62-63.

D. Polygraph Examination

A defendant has the right to have counsel present during a polygraph examination if the examination occurs after the Sixth Amendment right to counsel has attached. *People v Leonard*, 125 Mich App 756, 759 (1983).[1] However, a defendant may waive the right to have counsel present at a polygraph examination. See *Wyrick v Fields*, 459 US 42 (1982); *McElhaney*, 215 Mich App at 274-277.

[1] Although a defendant's attorney is not allowed in the examination room, the defendant has the right to stop the examination at any time to consult with the attorney. See *People v McElhaney*, 215 Mich App 269, 274 (1996).

E. Standard of Review

Violation of a defendant's Sixth Amendment right to counsel of choice is a structural error and is not subject to harmless error analysis. *Gonzalez-Lopez*, 548 US at 150. However, "deprivation of counsel at a preliminary examination is subject to harmless-error review." *People v Lewis (Gary)*, 501 Mich 1, 9 (2017).

Whether to permit the substitution of appointed counsel with retained counsel is reviewed for an abuse of discretion. *Akins*, 259 Mich App at 556; *Arquette*, 202 Mich App at 231. "[A] defendant must be afforded a reasonable time to select his [or her] own retained counsel." *Id.* at 231.

4.3 Multiple Representation of Defendants

MCR 6.005(F) distinguishes between appointed and retained counsel. Joint representation is allowed when counsel is retained, after inquiry by the court. Joint representation is not allowed when counsel is appointed.

"[T]he court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless: (1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests; (2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and (3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding." MCR 6.005(F). The distinction between court-appointed counsel and retained counsel in MCR 6.005(F) was upheld in *People v Portillo*, 241 Mich App 540, 542-543 (2000).

See also MRPC 1.7(b), which provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

MCR 6.005(G) requires the attorney to inform the court if an unanticipated conflict of interest arises at any time in a case of joint representation. "If the court agrees that a conflict has arisen, it must afford one or more of the defendants the opportunity to retain separate

lawyers." *Id*. In addition, "[t]he court should on its own initiative inquire into any potential conflict that becomes apparent, and take such action as the interests of justice require." *Id*.

4.4 Right to Appointed Counsel Under the Michigan Indigent Defense Commission Act

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., creating the Michigan Indigent Defense Commission (MIDC) within the Department of Licensing and Regulatory Affairs (LARA),[2] establishes a system for the appointment of defense counsel for indigent defendants.[3]

Under the MIDCA, the MIDC is required to "develop[] and oversee[] the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults[4] in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and [the MIDCA]." MCL 780.989(1)(a). Although the MIDC is within the executive branch (and not the judicial branch), the MIDCA does not violate Const 1963, art 3 § 2, Const 1963 art 6 § 4, or Const 1963 art 6 § 5 because "any sharing or overlapping of functions required by the [MIDCA] is sufficiently specific and limited that it does not encroach on the constitutional authority of the judiciary." *Oakland Co v State of Michigan*, 325 Mich App 247, 262 (2018). The MIDCA "does not directly regulate trial courts or attorneys." *Id*. Instead, it "regulates 'indigent criminal defense system[s],' statutorily defined as funding units, rather than trial courts themselves." *Id*. at 262-263. In addition, it "repeatedly recognizes the Michigan Supreme Court's constitutional authority to regulate practice and procedure and to exercise general superintending control of Michigan courts." *Id*. at 263. Further, "the [MIDCA] contains no provision authorizing the MIDC to force the judiciary to comply with the minimum standards, nor does the [MIDCA] purport to control what happens in court." *Id*. at 264. Accordingly, the MIDCA is not facially unconstitutional. *Id*. at 265.

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[2] See MCL 780.985(1); MCL 780.983(c).

[3] More information on the Michigan Indigent Defense Commission is available at https://michiganidc.gov/.

[4] The MIDCA applies to "individual[s] 18 years of age or older" and to juveniles who are charged with felony offenses in traditional waiver, designated, and automatic waiver proceedings. MCL 780.983(a) (defining *adult* for purposes of the MIDCA). See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Ch 17, for discussion of the MIDCA as it applies to these juveniles.

Similarly, a challenge to the MIDC's minimum standard requirements[5] that they "violate the separation of powers doctrine and are otherwise not authorized by law . . . lack[ed] merit." *Oakland Co*, 325 Mich App at 265-266. Also, rules and procedures established by the MIDC do not violate the Administrative Procedures Act[6] because they "are merely explanatory and do not contain compulsory provisions." *Id*. at 272.

"Approval of a minimum standard proposed by the MIDC is considered a final department action subject to judicial review under [Const 1963, art VI, § 28] to determine whether the approved minimum standard is authorized by law. MCL 780.985(5). "Jurisdiction and venue for judicial review are vested in the court of claims." *Id*. "An indigent criminal defense system may file a petition for review in the court of claims within 60 days after the date of mailing notice of [LARA's] final decision on the recommended minimum standard. The filing of a petition for review does not stay enforcement of an approved minimum standard, but the department may grant, or the court of claims may order, a stay upon appropriate terms." *Id*.

"No later than 180 days after a standard is approved by [LARA], each indigent criminal defense system shall submit a plan to the MIDC for the provision of indigent criminal defense services in a manner as determined by the MIDC and shall submit an annual plan for the following state fiscal year on or before October 1 of each year." MCL 780.993(3). The plan "must include a cost analysis for meeting [the] minimum standards." *Id*. The MIDC must approve or disapprove all or any portion of a system's plan and/or cost analysis within 90 days. MCL 780.993(4).[7]

Within 180 days[8] after receiving grant funding from the MIDC,[9] "an indigent criminal defense system shall comply with the terms of the grant in bringing its system into compliance with the minimum standards established by the MIDC for effective assistance of counsel." MCL 780.993(11); see also MCL 780.997.

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[5]See MIDC Minimum Standards.

[6]MCL 24.201 *et seq*.

[7] See MCL 780.993 for additional requirements for the submission and approval of plans for the provision of indigent criminal defense services. See MCL 780.993(7)-(17) for requirements concerning the funding of indigent criminal defense systems. See MCL 780.995 for requirements concerning the resolution of a dispute between the MIDC and an indigent criminal defense system, including the requirement that the parties engage in mediation.

[8] The 180-day time period may be extended. See MCL 780.993(11).

[9] "An indigent criminal defense system must not be required to provide funds in excess of its local share[as defined by MCL 780.983(i)]." MCL 780.993(8). "The MIDC shall provide grants to indigent criminal defense systems to assist in bringing the systems into compliance with minimum standards established by the MIDC." *Id*. See MCL 780.993(7)-(17) for additional requirements concerning the funding of indigent criminal defense systems.

The standards, rules, and procedures established by the MIDC must address the MIDCA requirements discussed in the following subsections.

A. Advice of the Right to Counsel

The trial court must "assure that each criminal defendant is advised of his or her right to counsel." MCL 780.991(1)(c). See also MCR 6.005(A), which provides:

> "At the arraignment on the warrant or complaint, the court must advise the defendant
>
> > (1) of entitlement to a lawyer's assistance at all court proceedings, and
> >
> > (2) that the defendant is entitled to a lawyer at public expense if the defendant wants one and is financially unable to retain one."

"Court rules providing for advising a defendant concerning his right to counsel at subsequent court proceedings . . . do not conflict with the language of [MIDC] Standard 4 providing for representation at the arraignment." *Oakland Co v State of Michigan*, 325 Mich App 247, 270-271 (2018) (additionally holding that although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited, and through the MIDCA, the Michigan Legislature has enacted a protection greater than that secured by the United States Constitution).

B. Screening for Eligibility for Appointed Counsel

"All adults,[10] except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under [the MIDCA], and counsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c). See also MIDC Standard 4.

1. Preliminary Inquiry

"A preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination whether a defendant is partially indigent, for purposes of [the MIDCA]

[10] The MIDCA applies to "individual[s] 18 years of age or older" and to juveniles who are charged with felony offenses in traditional waiver, designated, and automatic waiver proceedings. MCL 780.983(a) (defining *adult* for purposes of the MIDCA). See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Ch 17, for discussion of the MIDCA as it applies to these juveniles.

must be made as determined by the indigent criminal defense system not later than at the defendant's first appearance in court.[11] The determination may be reviewed by the indigent criminal defense system at any other stage of the proceedings." MCL 780.991(3)(a). See also MIDC Standard 4 ("The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge.").

See also MCR 6.005(A), requiring the court, at arrai gnment, to "ask the defendant whether the defendant wants a lawyer and, if so, whether [he or she] is financially unable to retain one." "Court rules providing for advising a defendant concerning his right to counsel at subsequent court proceedings and providing for the prompt appointment of a lawyer . . . do not conflict with the language of [MIDC] Standard 4 providing for representation at the arraignment." *Oakland Co v State of Michigan*, 325 Mich App 247, 270-271 (2018) (additionally holding that although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited, and through the MIDCA, the Michigan Legislature has enacted a protection greater than that secured by the United States Constitution).

2. Relevant Factors in Determining Eligibility for Appointment of Counsel

"In determining whether a defendant is entitled to the appointment of counsel, the indigent criminal defense system shall consider whether the defendant is indigent and the extent of his or her ability to pay." MCL 780.991(3)(a). See also MIDC Standard 4; Standard for Determining Indigency and Contribution, Indigency Determination. A defendant may be either fully or partially indigent.[12] See MCL 780.991(3)(a); MCL 780.991(3)(d)-(e). See Section 4.4(B)(3) for more information on finding a defendant partially indigent.

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[11]Note also that the MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribu te to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a). See also Section 4.4(B)(3) for more information on determining partial indigency.

[12] The MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e).

Trial courts may play a role in determining whether a defendant is entitled to the appointment of counsel. *Id.*[13] Nothing in the MIDCA prevents a *court* from making a determination of indigency for any purpose consistent with Const 1963, art VI, § 4. MCL 780.991(3)(a). See also Standard for Determining Indigency and Contribution, Indigency Determination (a) ("[a] plan that leaves screening decisions to the court can be acceptable").

"A defendant is considered to be indigent if he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation on his or her own." MCL 780.991(3)(b). See also MCL 780.983(e). Substantial financial hardship is rebuttably presumed under certain circumstances. MCL 780.991(3)(b). See Section 4.4(B)(3); Standard for Determining Indigency and Contribution, Indigency Determination (b).

In determining eligibility for appointed counsel under the MIDCA, MCL 780.991(3)(a) sets out factors the court may consider, which "include, but are not limited to":

- income or funds from employment or any other source (including personal public assistance) to which the defendant is entitled
- property owned by the defendant or in which he or she has an economic interest
- outstanding obligations
- the number and ages of the defendant's dependents
- employment and job training history
- the defendant's level of education.[14]

See also Standard for Determining Indigency and Contribution, Indigency Determination; MCR 6.005(B), providing that a

[13] This statute recognizes "the authority of the judicial branch with respect to indigency determinations," and "it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area." *Oakland Co*, 325 Mich App at 265.

[14] See also MCR 6.005(B)(1)-(6), setting out similar factors relevant to determining indigency. Because "[a]ctual indigency determinations may still be made at the arraignment in conformance with the court rule," "[t]he language of MCR 6.005(B) . . . does not expressly conflict with the language of Standard 4, requiring the assignment of counsel as soon as the defendant is deemed eligible for [indigent criminal defense] services, that the indigency determination be made and counsel appointed as soon as the defendant's liberty is subject to restriction, and that representation includes but is not limited to arraignment." *Oakland Co v State of Michigan*, 325 Mich App 247, 270 (2018). It is possible that an on-duty arraignment attorney represent a defendant at arraignment but different counsel be appointed for future proceedings. *Id.*

defendant's "ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer."

3. Determination of Partial Indigence[15]

"A determination that a defendant is partially indigent may only be made if the indigent criminal defense system determines that a defendant is not fully indigent." MCL 780.991(3)(d). The more rigorous screening process set forth in MCL 780.991(3)(c) must be utilized if the indigent criminal defense system determines that a defendant may be partially indigent. MCL 780.991(3)(d). The screening process applies to defendants who do not fall below the presumptive thresholds described in MCL 780.991(3)(b).[16] See also Standard for Determining Indigency and Contribution, Indigency Determination (b).

"If an indigent criminal defense system determines that a defendant is partially indigent, the indigent criminal defense system shall determine the amount of money the defendant must contribute to his or her defense. An indigent criminal defense system's determination regarding the amount of money a partially indigent defendant must contribute to his or her defense is subject to judicial review." MCL 780.991(3)(a). See Section 4.4(G) for more information on collecting contributions and reimbursements from individuals determined to be partially indigent.

4. Rebuttable Presumption of Substantial Financial Hardship

MCL 780.991(3)(b) provides that substantial financial hardship is rebuttably presumed if any of the following apply to the defendant:

- receives personal public assistance (including under the food assistance program, temporary assistance for needy families, Medicaid, or disability insurance)
- resides in public housing
- earns an income less than 140% of the federal poverty guideline[17]

[15] The MIDC must "promulgate objective standards for indigent criminal defense systems to determine the amount a partially indigent defendant must contribute to his or her defense. The standards must include availability of prompt judicial review, under the direction and supervision of the Supreme Court[.]" MCL 780.991(f).

[16] See Section 4.4(B)(3) for more information regarding a rebuttable presumption of substantial financial hardship and the screening process required in certain circumstances.

- is currently serving a sentence in a correctional institution
- is receiving residential treatment in a mental health or substance abuse facility.

"A defendant not falling below the presumptive thresholds described in [MCL 780.991(3)(b)] must be subjected to a more rigorous screening process to determine if his or her particular circumstances, including the seriousness of the charges being faced, his or her monthly expenses, and local private counsel rates would result in a substantial hardship if he or she were required to retain private counsel." MCL 780.991(3)(c).

See also Standard for Determining Indigency and Contribution, Indigency Determination (b).

5. Burden of Proof

"A defendant is responsible for applying for indigent defense counsel[18] and for establishing his or her indigency and eligibility for appointed counsel under [the MIDCA]. Any oral or written statements made by the defendant in or for use in the criminal proceeding and material to the issue of his or her indigency must be made under oath or an equivalent affirmation." MCL 780.991(3)(g).

C. Appointment of Counsel

"[C]ounsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c). See also MCR 6.005(D) (requiring the court to "promptly refer the defendant to the local indigent criminal defense system's appointing authority for appointment of a lawyer" following a determination of indigency).[19]

"The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's

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[17] See http://aspe.hhs.gov/poverty-guidelines for the federal poverty guidelines.

[18] Note, however, that MCL 780.991(1)(c) requires the screening of "*[a]ll* adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, . . . for eligibility under [the MIDCA]" (emphasis supplied).

[19] "Court rules providing . . . for the prompt appointment of a lawyer . . . do not conflict with the language of [MIDC] Standard 4 providing for representation at the arraignment." *Oakland Co v State of Michigan*, 325 Mich App 247, 270-271 (2018) (additionally holding that although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited, and through the MIDCA, the Michigan Legislature has enacted a protection greater than that secured by the United States Constitution).

liberty is subject to restriction by a magistrate or judge." MIDC Standard 4.[20] "Representation includes but is not limited to the arraignment on the complaint and warrant." *Id*. "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court." *Id*. However, the defendant is not prohibited "from making an informed waiver of counsel." *Id*.

"The selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary. Similarly, the selection and approval of, and payment for, other expenses necessary for providing effective assistance of defense counsel shall not be made by the judiciary or employees reporting to the judiciary." MIDC Standard 5(A).[21] "The court's role shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; if deemed eligible for counsel, referring the defendant to the appropriate agency (absent a valid waiver). Judges are permitted and encouraged to contribute information and advice concerning the delivery of indigent criminal defense services, including their opinions regarding the competence and performance of attorneys providing such services." MIDC Standard 5(B) "Only in rare cases may a judge encourage a specific attorney be assigned to represent a specific defendant because of unique skills and abilities that attorney possesses. In these cases, the judge's input may be received and the system may take this input into account when making an appointment, however the system may not make the appointment solely because of a recommendation from the judge." MIDC Standard 5, (staff comment).

In some actions, an appointing authority independent of the judiciary will appoint an attorney to represent a party for the entirety of the action, in which case the attorney must file an appearance with the court. MCR 2.117(B)(3). The appointing authority may appoint an attorney for a single hearing such as an arraignment, in which case the attorney does not need to file an appearance, but should orally inform the court of the limited appointment at the time of the hearing. *Id*.

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[20]The requirement that counsel be appointed for arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co v State of Michigan*, 325 Mich App 247 (2018). "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*. at 269, quoting *People v Harris*, 499 Mich 332, 338 (2016).

[21]See the MIDC's *Frequently Asked Questions About Standard 5* for more information. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

The MIDC's minimum standards, rules, and procedures must generally ensure that "[t]he same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case." MCL 780.991(2)(d).

D. Bond and Right to Counsel

"Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment." MIDC Standard 4.[22]

E. Review of Determination of Eligibility

The indigent criminal defense system's preliminary determination of indigency, including partial indigency, "may be reviewed by the indigent criminal defense system at any other stage of the proceedings." MCL 780.991(3)(a). See also Standard for Determining Indigency and Contribution, Judicial Review, for more information on a defendant's right of review and related procedures.

F. Effective Assistance of Counsel

"The MIDC shall implement minimum standards, rules, and procedures to guarantee the right of indigent defendants to the [effective] assistance of counsel as provided under" the state and federal constitutions. MCL 780.991(2). In establishing these standards, rules, and procedures, the MIDC must adhere to the following principles:

> "(a) Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.
>
> (b) Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation must be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.

[22]The requirement that counsel be appointed for arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co*, 325 Mich App 247 (2018). "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*. at 269, quoting *People v Harris*, 499 Mich 332, 338 (2016).

(c) Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.

(d) The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.

(e) indigent criminal defense systems employ only defense counsel who have attended continuing legal education relevant to counsels' indigent defense clients.

(f) indigent criminal defense systems systematically review defense counsel at the local level for efficiency and for effective representation according to MIDC standards." MCL 780.991(2).

1. No Expansion of Federal or State Constitutional Law

"Nothing in [the MIDCA] shall be construed to overrule, expand, or extend, either directly or by analogy, any decisions reached by the United States [S]upreme [C]ourt or the [Michigan Supreme Court] regarding the effective assistance of counsel." MCL 780.1003(1).

2. Prohibition of Civil Remedy

"Except as otherwise provided in [the MIDCA], the failure of an indigent criminal defense system to comply with statutory duties imposed under [the MIDCA] does not create a cause of action against the government or a system." MCL 780.1003(3).

"Statutory duties imposed that create a higher standard than that imposed by the United States constitution or the state constitution of 1963 do not create a cause of action against a local unit of government, an indigent criminal defense system, or this state." MCL 780.1003(4).

3. Prohibition of Remedy in Criminal Cases

"Violations of MIDC rules that do not constitute ineffective assistance of counsel under the United States constitution or the state constitution of 1963 do not constitute grounds for a conviction to be reversed or a judgment to be modified for ineffective assistance of counsel." MCL 780.1003(5).

G. Collection of Contribution or Reimbursement from Partially Indigent Individuals

"The court shall collect contribution or reimbursement from individuals determined to be partially indigent[.]" MCL 780.993(17). Reimbursement under MCL 780.993(17) is subject to MCL 775.22, which governs the allocation of funds received by an individual in a criminal case. MCL 780.993(17). One hundred percent of the funds collected by the court must be remitted to the indigent criminal defense system in which the court is sitting. *Id*. See also Standard for Determining Indigency and Contribution, Determination of Reimbursement.

H. Standard of Review

A trial court's determination of a defendant's indigence is reviewed for an abuse of discretion. *People v Gillespie*, 42 Mich App 679, 681-682 (1972).

4.5 Scope of Counsel's Responsibilities

A. Responsibilities at Trial

"The responsibilities of the trial lawyer who represents the defendant include

> (a) representing the defendant in all trial court proceedings through initial sentencing,
>
> (b) filing of interlocutory appeals the lawyer deems appropriate,
>
> (c) responding to any preconviction appeals by the prosecutor. Unless an appellate lawyer has been appointed or retained, the defendant's trial lawyer must either:
>
> > (*i*) file a response to any application for leave to appeal, appellant's brief, or substantive motion; or
> >
> > (*ii*) notify the Court of Appeals in writing that the defendant has knowingly elected not to file a response." MCR 6.005(H)(1).

B. Responsibilities on Appeal

"Unless an appellate lawyer has been appointed or retained, or if retained trial counsel withdraws, the trial lawyer who represents the

defendant is responsible for filing postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing." MCR 6.005(H)(2).

"When an appellate lawyer has been appointed or retained, the trial lawyer is responsible for promptly making the defendant's file, including all discovery material obtained and exhibits in the trial lawyer's possession, reasonably available upon request of the appellate lawyer. The trial lawyer must retain the materials in the defendant's file for at least five years after the case is disposed in the trial court. MCR 6.005(H)(3).

C. Responsibilities at Grand Jury Proceedings

"A witness called before a grand jury or a grand juror is entitled to have a lawyer present in the hearing room while the witness gives testimony. A witness may not refuse to appear for reasons of unavailability of the lawyer for that witness. Except as otherwise provided by law, the lawyer may not participate in the proceedings other than to advise the witness." MCR 6.005(I)(1).

"The prosecutor assisting the grand jury is responsible for ensuring that a witness is informed of the right to a lawyer's assistance during examination by written notice accompanying the subpoena to the witness and by personal advice immediately before the examination. The notice must include language informing the witness that if the witness is financially unable to retain a lawyer, the chief judge in the circuit court in which the grand jury is convened will on request refer the witness to the local indigent criminal defense system for appointment of an attorney at public expense." MCR 6.005(I)(2).

4.6 Substitution or Withdrawal of Counsel

An attorney who has entered an appearance in a criminal case "may withdraw from the action or be substituted for only on order of the court." MCR 2.117(C)(2).[23] "In appointed cases, substituted counsel shall file an appearance with the court after receiving the assignment from the appointing authority." MCR 2.117(C)(3).

"[A] trial court may only sua sponte remove and substitute appointed counsel for gross incompetence, physical incapacity, or contumacious conduct." *People v Bailey*, 330 Mich App 41, 54 (2019) (quotation marks

[23] MCR 2.117(C)(4) allows an attorney who has filed a notice of limited appearance in a civil action, as permitted under MCR 2.117(B)(2)(c) and MRPC 1.2(b), to withdraw without a court order under certain circumstances.

and citations omitted) (questioning this rule in the context of cases involving appointed counsel, not retained counsel, but indicating that because "this distinction is neither recognized nor addressed" in the cases that have made this holding, the rule of stare decisis bound the Court of Appeals to their holdings).

MRPC 1.16 outlines situations when an attorney *must* or *may* move to withdraw as counsel. However, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." MRPC 1.16(c).

"'A defendant is only entitled to a substitution of appointed counsel when discharge of the first attorney is for "good cause" and does not disrupt the judicial process.' *People v O'Brien*, 89 Mich App 704, 708 (1979) (quotation marks and citation omitted). The circumstances that would justify good cause rest on the individual facts in each case." *People v Buie (On Remand) (Buie IV)*, 298 Mich App 50, 67 (2012).

While an indigent defendant is entitled to have counsel appointed at public expense, he or she is not entitled to choose the lawyer. *People v Ginther*, 390 Mich 436, 441 (1973). "When a defendant asserts that his assigned lawyer is not adequate or diligent or asserts[] . . . that [the] lawyer is disinterested, the judge should hear [the defendant's] claim and, if there is a factual dispute, take testimony and state [its] findings and conclusion." *Id*.

"The replacement of court-appointed counsel might violate a defendant's Sixth Amendment right to adequate representation or his Fourteenth Amendment right to due process if the replacement prejudices the defendant–e.g., if a court replaced a defendant's lawyer hours before trial or arbitrarily removed a skilled lawyer and replaced him with an unskilled one." *Bailey*, 330 Mich App at 57 (quotation marks and citation omitted) ("the trial court erroneously substituted [appointed] counsel" where "no evidence was presented to the trial court supporting the notion that defense counsel erroneously urged [the defendant] to plead guilty or that any actual conflict existed," therefore, "appointed counsel's conduct did not rise to the level of gross incompetence"; however, the defendant was not entitled to relief because he "was never without representation," and "the trial court's substitution of counsel did not amount to plain error affecting [the defendant's] substantial rights").

A defendant does not have an absolute right to be represented at sentencing by the same attorney who represented him or her at trial. *People v Evans*, 156 Mich App 68, 70 (1986). But see MCL 780.991(2)(d), requiring representation by "[t]he same [appointed] defense counsel . . . at every court appearance throughout the pendency of the case," with the permissible exception of "ministerial, nonsubstantive tasks, and hearings."[24]

A. Good Cause

What constitutes good cause for substitution of counsel depends on the facts and circumstances of each case. *Buie IV*, 298 Mich App at 67.

Case finding good cause:

- *People v Jones (Edward)*, 168 Mich App 191, 194 (1988), superseded by statute on other grounds (a valid and reasonable disagreement between counsel and the defendant regarding a fundamental trial tactic (such as whether to call alibi witnesses) satisfies the good cause requirement), citing *People v Williams (Charles)*, 386 Mich 565, 578 (1972).

Cases finding *no* good cause:

- *Buie IV*, 298 Mich App at 66-70 (although the defendant and defense counsel did not have a "completely amicable relationship," the trial court did not abuse its discretion "when it did not either appoint substitute counsel or hold an evidentiary hearing when [the] defendant sought substitute counsel" because "the record [did] not show that [defense counsel] was in fact inattentive to [the defendant's] responsibilities, inadequate, or disinterested" (internal quotations and citations omitted)).

- *People v Strickland*, 293 Mich App 393, 397-399 (2011) ("[a] mere allegation that a defendant lacks confidence in his or her attorney, unsupported by a substantial reason," or "a defendant's general unhappiness with counsel's representation is insufficient" to establish good cause, and the defendant did not establish good cause where counsel's testimony refuted the defendant's "lack-of-contact claim" and where the defendant's "remaining complaints lacked specificity and did not involve a difference of opinion with regard to a fundamental trial tactic[]").

- *People v Traylor*, 245 Mich App 460, 463 (2001) (good cause was not established where the defendant claimed (1) no contact by the attorney but refused to take advantage of alternative arrangements to make contact easier, (2) the attorney did not file certain pretrial motions that were ultimately deemed frivolous, and (3) that filing a grievance automatically created good cause

[24] See Section 4.4 for additional discussion of MCL 780.991 and other provisions of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*.

for substitution of counsel without providing legal authority to support the claim).

B. Procedure

A trial court is obligated to take testimony and make findings of fact when a factual dispute exists with regard to a defendant's assertion that his or her assigned attorney "is not adequate or diligent or . . . is disinterested[.]" *Ginther*, 390 Mich at 441-442. However, "[a] judge's failure to explore a defendant's claim that his [or her] assigned lawyer should be replaced does not necessarily require that a conviction following such error be set aside." *Id*. at 442 (holding that such failure did not require the setting aside of the defendant's conviction where "the record [did] not show that the lawyer assigned to represent [the defendant] was in fact inattentive to his responsibilities[]"). Although "the trial court must elicit testimony from the attorney and the defendant in order to assess any issues of fact[,]" a full adversarial proceeding is not required. *People v Ceteways*, 156 Mich App 108, 119 (1986).

C. Standard of Review

The trial court's decision on a request for substitution of counsel is reviewed for an abuse of discretion. *Traylor*, 245 Mich App at 462.

The trial court's decision on a motion for a continuance to retain new counsel is reviewed for an abuse of discretion. *Akins*, 259 Mich App at 556.

4.7 Removal of Counsel

"A court may remove a defendant's attorney on the basis of gross incompetence, physical incapacity, or contumacious conduct." *People v Durfee*, 215 Mich App 677, 681 (1996) (court had no authority to remove the defendant's court-appointed counsel for "conduct allegedly committed in other cases or outside the courtroom[]").

4.8 Withdrawal of Assigned Appellate Counsel

"A court-appointed appellate attorney for an indigent appellant may file a motion to withdraw [in the Court of Appeals] if the attorney determines, after a conscientious and thorough review of the trial court record, that the appeal is wholly frivolous." MCR 7.211(C)(5). See also *Anders v California*, 386 US 738, 744-745 (1967). Motions to withdraw on this basis are permitted in both appeals as of right and appeals by leave. See MCR 7.211(C)(5)(b).

Part B: Waiver of Counsel

4.9 Valid Waiver of Right to Counsel

A. Right of Self-Representation

"The right of self-representation is secured by both the Michigan Constitution, Const 1963, art 1, § 13, and by statute, MCL 763.1. The right of self-representation is also implicitly guaranteed by the Sixth Amendment of the United States Constitution. Although the right to counsel and the right of self-representation are both fundamental constitutional rights, representation by counsel, as a guarantor of a fair trial, is the standard, not the exception, in the absence of a proper waiver." *People v Spears (On Remand)*, ___ Mich App ___, ___ (2023) (cleaned up). A defendant necessarily waives the correlative Sixth Amendment right to counsel in exercising the right of self-representation. *People v Dennany*, 445 Mich 412, 427 (1994). "Consequently, a knowing and intelligent waiver of the right to counsel [is] an essential prerequisite to the right to proceed pro se[.]" *Id*. at 427-428.See Section 4.9(C) for more information on a valid waiver of counsel.

There is no *federal* constitutional right to self-representation on direct appeal from a criminal conviction. *Martinez v California*, 528 US 152, 163 (2000). The United States Supreme Court clearly stated, however, that nothing in its *Martinez* holding prevented any state from recognizing a right to self-representation in appellate proceedings under the state's constitution. *Id.* at 163.

A juvenile defendant may waive the right to assistance of counsel according to the requirements of MCR 6.905(C). These requirements mandate that the court appoint standby counsel to assist the juvenile at trial and sentencing. MCR 6.905(C)(5).[25]

A defendant is not required to personally assert his or her constitutional right to self-representation for the request to be valid; the request may be made through counsel. *People v Hill*, 485 Mich 912 (2009).

B. Scope of Right

"While a defendant's right to self-representation encompasses certain specific core rights, including the right to be heard, to control the organization and content of his [or her] own defense, to make

[25]See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 16, for more information.

motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at times, the right to self-representation is not unfettered." *People v Arthur*, 495 Mich 861, 862 (2013). "The trial court did not unconstitutionally 'nullify' the defendant's right to self-representation by declining to remove the defendant's leg shackles. That the defendant elected to relinquish his right of self-representation rather than exercise that right while seated behind the defense table does not amount to a denial of the defendant's right of self-representation." *Id*. "[T]he trial court did not violate the defendant's due process rights by ordering the defendant to wear leg shackles in the first place because the court was justified in imposing those limited restraints to avoid the risk of flight and to ensure the safety of those present" in light of the defendant's reported escape attempt and history of physical violence. *Id*.

Under MRE 611(a), "'a trial court, in certain circumstances, may prohibit a defendant who is exercising his right to self-representation from personally questioning the victim.'" *People v Daniels*, 311 Mich App 257, 268 (2015) (citation omitted). "MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault[; t]he court must balance the criminal defendant's right to self-representation with 'the State's important interest in protecting child sexual abuse victims from further trauma.'" *Daniels*, 311 Mich App at 269 (citation omitted). "[T]he trial court wisely and properly prevented [the] defendant from personally cross-examining [his children regarding their testimony that he sexually abused them], to stop the children from suffering 'harassment or undue embarrassment,'" following "a motion hearing at which [the court] heard considerable evidence that [the] defendant's personal cross-examination would cause [the children] significant trauma and emotional stress." *Id*. at 270-271, quoting MRE 611(a) (additional citations omitted). The defendant's right to self-representation was not violated under these circumstances where the defendant was instructed "to formulate questions for his [children], which his advisory attorney then used to cross examine them." *Daniels*, 311 Mich App at 270.

C. Requirements for Valid Waiver

"Absent a defendant's valid waiver of their right to counsel, deprivation of counsel during critical stages of the criminal proceedings is a structural error subject to automatic reversal, even when a defendant formally requests to represent themself." *People v King*, ___ Mich ___, ___ (2023). The right to counsel "is a fundamental right that cannot be forfeited and is preserved absent a personal waiver." *Id*. at ___ (quotation marks and citation omitted). "Accordingly, a defendant need not affirmatively invoke their right to

counsel in order to preserve that right—the right is preserved absent a personal and informed waiver, and it is not forfeitable. Therefore, without a valid waiver, a defendant *remains entitled* to the right to counsel for every critical stage of criminal proceedings." *Id*. at ___. "Because defendant's waiver of his right to counsel was invalid," the *King* Court held that "he was deprived of counsel during significant portions of the critical stages in the proceedings, including trial, and the error [was] subject to automatic reversal." *Id*. at ___.

"[A] trial judge must recognize that the first ground on appeal is probably going to be that the defendant was allowed to represent himself without having intelligently and voluntarily made that decision. . . . Therefore, pragmatically, and defensively, in addition to the legal necessity of establishing that a defendant voluntarily and intelligently reached this decision, the trial court should also protect itself — and the record." *People v Dennany*, 445 Mich 412, 437-438 (1994) (quotation marks and citation omited). "[T]he most effective way for a trial court to safeguard against the opening of an appellate parachute is to comply with the court rules and [*People v Anderson*, 398 Mich 361 (1976)]). *Dennany*, 445 Mich at 438.

Under MCR 6.005(D), "[t]he court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer."

MCR 6.005(E) provides:

> "If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
>
> > (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
> >
> > (2) if the defendant requests a lawyer and is financially unable to retain one, the court must refer the defendant to the local indigent criminal

> defense system's appointing authority for the appointment of one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.
>
> The court may refuse to adjourn a proceeding for the appointment of counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel."

Additionally, pursuant to *Anderson*, 398 Mich 361 (1976), upon the defendant's initial request to represent himself, the court must determine whether (1) the request was unequivocal, (2) the choice to proceed without counsel is knowing, intelligent, and voluntary, and (3) defendant acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business. *People v Spears (On Remand)*, ___ Mich App ___, ___ (2023). In *Spears*, "defendant never unequivocally requested to represent himself" because "defendant actually was requesting substitute counsel, as clarified by his oral motion for new counsel at a . . . pretrial hearing." *Id.* at ___. Accordingly, "the trial court did not abuse its discretion by 'failing' to address this request or by otherwise 'denying' self-representation." *Id.* at ___.

"[T]rial courts must substantially comply with the aforementioned substantive requirements set forth in both *Anderson* and MCR 6.005(D). Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Adkins*, 452 Mich at 726-727. There is no specific list of questions that must be used; rather, the inquiry should be tailored to the particular case and stage of the proceedings. *Iowa v Tovar*, 541 US 77, 88-92 (2004). "If a judge is uncertain regarding whether any of the waiver procedures are met, he [or she] should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record." *People v Ratliff*, 424 Mich 874 (1986). See also *People v Russell*, 471 Mich 182, 188 (2004) ("[I]t is a long-held principle that courts are to make every reasonable presumption *against* the waiver of a fundamental constitutional right, including the waiver of the right to the assistance of counsel."). "The defendant should then continue to be represented by retained or appointed counsel, unless the judge determines substitute counsel is appropriate." *Adkins*, 452 Mich at 727.

The trial court substantially complied with the requirements of MCR 6.005(D) and *Anderson*, 398 Mich 361, where "[b]oth the prosecutor and the trial court asked [defendant] a series of questions to ascertain whether he fully understood the dangers of self-representation;" "the trial court could properly consider the prosecutor's questions and [defendant's] responses as part of its 'short colloquy' to determine whether [defendant] fully understood the import of his waiver." *People v Campbell*, 316 Mich App 279, 286, 288 (2016), overruled on other grounds by *People v Arnold*, 502 Mich 438 (2018).[26] Furthermore, although the trial court failed to specifically list the charges against the defendant and "never explicitly found that his waiver request was unequivocal, knowing, and voluntary," these errors were harmless; "there [was] record support that [defendant] was fully aware of the charges against him" and that the trial court "endeavored to make the requisite determinations and . . . actually found that [the] waiver was unequivocal, knowing, and voluntary." *Campbell*, 316 Mich App at 287-288.

"'[A] defendant may forfeit his self-representation right if he does not assert it "in a timely manner."'" *People v Richards*, 315 Mich App 564, 576 (2016), rev'd in part on other grounds 501 Mich 921 (2017)[27] (citations omitted). Although "'*Faretta*[, 422 US 806,] did not establish a bright-line rule for timeliness,'" the timeliness of a motion for self-representation "is established, at least in part, by the date of trial relative to the date of the request." *Richards*, 315 Mich App at 579 (citations omitted). Accordingly, "the trial court's decision denying defendant's request for self-representation [as untimely] was well within the range of reasonable and principled outcomes and was not an abuse of discretion" where "[i]t was not until after the jury had been sworn that defendant, through counsel, made the request to proceed in proper personia [sic]." *Id.* at 580, 581 (noting that "defendant never made a [pretrial] request for self-representation" and that he filed multiple motions for new counsel) (citations omitted). Additionally, case law does not require "that a trial court *must* conduct a *Faretta* inquiry prior to denying a request as untimely;" nor must the court "engage[] in an inquiry pursuant to MCR 6.005(D)" regarding waiver of counsel. *Richards*, 315 Mich App at 578 (citations omitted). "[B]ecause the underlying rationale for a trial court to conduct an inquiry pursuant to MCR 6.005(D) 'is to inform the defendant of the hazards of self-representation, not to determine whether a request is timely,'" it is "unnecessary for the trial court to engage in an inquiry pursuant to MCR 6.005(D)" when the dispositive issue is "whether defendant asserted his right to self-

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

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

representation in a timely manner." *Richards*, 315 Mich App at 578 (citations omitted).

Cases discussing waiver of counsel:

- *People v Russell*, 471 Mich 182, 184 (2004).

  A defendant's refusal to cooperate with his or her appointed counsel and his or her unequivocal request to be provided with a different defense attorney at trial does not constitute a waiver of counsel or operate as an implicit request to proceed in *propria persona* (in pro per or pro se) where the record shows that "[the] defendant clearly and unequivocally declined self-representation."

  In *Russell*, 471 Mich at 184, the defendant informed the trial court at the beginning of trial that he wanted the trial court to appoint a substitute for the defendant's *second* court-appointed attorney. The court refused to appoint different counsel unless the defendant offered "some valid reason" other than "personality difficulties" to justify the appointment of a third defense attorney. *Id.* at 184. The defendant failed to provide any such explanation, and the court explained to the defendant his options: (1) the defendant could retain the counsel of his choice; (2) the defendant could continue with the present attorney's representation; (3) the defendant could represent himself without any legal assistance; or (4) the defendant could represent himself with the assistance of his present attorney. *Id.* at 184-185. The defendant continued to express his dissatisfaction with his present attorney's defense at the same time that he clearly indicated that he did not wish to conduct his own defense, and that he "need[ed]" to be provided with "competent counsel." *Id.* at 185-186. However, at trial he "expressly rejected self-representation[.]" *Id.* at 192. Accordingly, the Court of Appeals erred in determining "that [the] defendant implicitly 'made his unequivocal choice' to proceed in propria persona 'by his own conduct' when he continued to reject appointed counsel's representation." *Id.* at 186-187.

- *People v Kammeraad*, 307 Mich App 98, 129-130 (2014).

  While "the circuit court attempted to obtain a formal waiver of counsel by [the] defendant, along with the attendant invocation of the right to self-representation, carefully imparting the information encompassed by MCR 6.005(D) and then directly querying [the]

> defendant with respect to whether he wished to represent himself[,] [he] . . . vigorously voiced a refusal to represent himself, and he refused to expressly acknowledge, let alone accept, the right-to-counsel and waiver-related information conveyed to him by the court." Because "[t]he circuit court was unable to make an express finding that [the] defendant fully understood, recognized, and agreed to abide by the waiver of counsel procedures[,] . . . the required waiver procedures were not met, ostensibly dictating that appointed counsel continue to represent [the] defendant." However, the Court concluded that the defendant had *forfeited* his right to counsel.

- *People v Williams*, 470 Mich 634, 647 (2004).

  Even where the defendant "appeared to condition his initial waiver of counsel on the trial court's agreement to allow him to recall and cross-examine two excused witnesses," the defendant "subsequently made an intelligent, knowing, and voluntary waiver of this right to counsel after the trial court rejected [the] defendant's request to recall and cross-examine the witnesses."

D. Standard of Review

A trial court's factual determination whether a waiver was knowing and intelligent is reviewed for clear error, while the meaning of "knowing and intelligent" is a question of law reviewed de novo on appeal. *Williams*, 470 Mich at 640.

4.10 Advice at Subsequent Proceedings

Once a defendant has waived the assistance of a lawyer, a record must be made at each subsequent proceeding showing that the court advised the defendant of the continuing right to a lawyer (at public expense if the defendant is indigent) and that the defendant has waived the right. MCR 6.005(E). At the beginning of any proceeding following the defendant's initial waiver of counsel, the record should reflect whether the defendant's wishes to proceed with or without the assistance of counsel. *Id*. If the defendant requests an attorney and can afford to retain one, arrangements must be made to permit the defendant to do so. MCR 6.005(E)(3). If the defendant requests an attorney and is indigent, the court must refer the defendant to the local indigent criminal defense system's appointing authority for the appointment of an attorney to represent the defendant. MCR 6.005(E)(2). If the prosecution would be significantly prejudiced by an adjournment and a defendant has not been

reasonably diligent in seeking counsel, the court may refuse to grant an adjournment for the appointment of counsel or to permit the defendant to retain counsel. MCR 6.005(E).

"Unlike the rules relating to an initial waiver of counsel, the procedure outlined in MCR 6.005(E) does not stem from any constitutional requirement," and "a trial court's failure to strictly comply with these requirements can be harmless error." *People v Campbell*, 316 Mich App 279, 289 (2016), overruled on other grounds by *People v Arnold*, 502 Mich 438 (2018)[28] (citing *People v Lane*, 453 Mich 132, 139-142 (1996), and concluding that "[a]lthough the trial court did not explicitly remind" the defendant, at several hearings following his initial waiver and at trial, "that he had the continued right to the assistance of counsel, it [was] evident [from the record] that the court operated on that assumption and that [the defendant] was aware of that right and continued to assert his right to represent himself").

4.11 Standby Counsel

A plurality[29] of the Michigan Supreme Court has held that "a request to proceed pro se with standby counsel—be it to help with either procedural or trial issues—can never be deemed to be an unequivocal assertion of the defendant's rights." *Dennany*, 445 Mich at 446.

In contrast, the Court of Appeals has held that a defendant's request for standby counsel does not make that same defendant's request for self-representation invalid as a matter of law, and that a defendant's request for self-representation can be accompanied by a request for standby counsel without affecting the unequivocal nature of the defendant's request to proceed in *propria persona*. *People v Hicks (Rodney)*, 259 Mich App 518, 526-528 (2003). According to the *Hicks (Rodney)* Court, the trial court should evaluate the defendant's credibility to determine the vacillation or unequivocal nature of a defendant's request. *Id.* at 528-529.

Part C: Forfeiture of Counsel

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

[29] "Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on this Court under the doctrine of stare decisis." *Negri v Slotkin*, 397 Mich 105, 109 (1976).

4.12 Doctrine of Forfeiture of Counsel

The doctrine of forfeiture of counsel provides that "[w]hile the right to counsel is constitutionally protected, this constitutional right can be relinquished by waiver *or* forfeiture." *People v Kammeraad*, 307 Mich App 98, 130 (2014) (formally "recogniz[ing], adopt[ing], and employ[ing] the principle or doctrine of forfeiture of counsel").

In *Kammeraad*, 307 Mich App at 126, the defendant "indisputably and defiantly refused to participate in the trial and other judicial proceedings, indisputably and defiantly refused to accept the services of appointed counsel or to communicate with counsel, regardless of counsel's identity, indisputably and defiantly refused to engage in self-representation, indisputably and defiantly refused to promise not to be disruptive during trial, and indisputably and defiantly refused to remain in the courtroom for his jury trial." The trial court "attempted to obtain a formal waiver of counsel by [the] defendant, along with the attendant invocation of the right to self-representation, carefully imparting the information encompassed by MCR 6.005(D) and then directly querying [the] defendant with respect to whether he wished to represent himself[; the d]efendant, however, vigorously voiced a refusal to represent himself, and he refused to expressly acknowledge, let alone accept, the right-to-counsel and waiver-related information conveyed to him by the court." *Kammeraad*, 307 Mich App at 129. Accordingly, because the trial court "was unable to make an express finding that [the] defendant fully understood, recognized, and agreed to abide by the waiver of counsel procedures[,]" there was no effective waiver of counsel. *Id*. at 129-130.

The *Kammeraad* Court held that, "[d]espite[] . . . the ineffective *waiver* of counsel," the defendant, "being competent, [had] forfeited his constitutional rights to counsel, self-representation, and to be present in the courtroom during his trial, given the severity of his misconduct and his absolute refusal to participate in any manner in the proceedings[,]" and "there was no constitutional obligation to impose a court-appointed attorney upon the unwilling defendant." *Kammeraad*, 307 Mich App at 100, 127, 130. The Court explained:

> "[The] defendant lost his right to counsel on the basis of his conduct and statements.
>
> Honoring a defendant's wishes within reason with respect to declining counsel is a principle that was accepted in *Faretta v California*, 422 US 806, 817 (1975), wherein the Supreme Court acknowledged the 'nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.' . . .

* * *

> [The d]efendant had the free choice to refuse the services of appointed counsel, but, as opposed to the circumstances in *Faretta*, he also refused self-representation. Nevertheless, we conclude that [the] defendant had the free choice to refuse both appointed counsel and self-representation, forfeiting these constitutional rights." *Kammeraad*, 307 Mich App at 134-135.

The Court emphasized, however, that "a finding of forfeiture of [counsel] . . . should only be made in the rarest of circumstances and as necessary to address exceptionally egregious conduct." *Kammeraad*, 307 Mich App at 136-137 (additionally noting that "[the] defendant was competent for purposes of finding forfeiture[]" and that *Indiana v Edwards*, 554 US 164, 177-178 (2008), "might suggest that if [the] defendant were not competent because of severe mental illness, forfeiture of the constitutional rights at issue cannot be recognized and imposing or forcing counsel upon [the] defendant . . . [might have been] constitutionally permissible or even necessary[]").

Notwithstanding the *Kammeraad* case, which has not been overruled, the Michigan Supreme Court has held that the right to counsel "is a fundamental right that cannot be forfeited and is preserved absent a personal waiver." *People v King*, ___ Mich ___, ___ (2023) (quotation marks and citation omitted). "Accordingly, a defendant need not affirmatively invoke their right to counsel in order to preserve that right—the right is preserved absent a personal and informed waiver, and it is not forfeitable. Therefore, without a valid waiver, a defendant *remains entitled* to the right to counsel for every critical stage of criminal proceedings." *Id*. at ___.

The *King* Court considered "the applicable standard of review when a defendant request[ed] to represent themself but fail[ed] to object to an invalid waiver of their right to counsel." *Id*. at ___. "[F]orfeiture is the failure to make the timely assertion of a right, and the right to counsel is the standard and does not require an affirmative invocation." *Id*. at ___ (quotation marks and citation omitted). "[W]hen there is an invalid waiver of a defendant's right to counsel, the defendant remains entitled to full representation at each critical stage of the criminal proceedings." *Id*. at ___. Consequently, the *King* Court held that "[d]efendant was not required to affirmatively invoke his Sixth Amendment right to counsel in order to preserve that right," "was not required to object to the invalid waiver of the right to counsel," and that "the *Carines*[30] forfeiture doctrine [did] not apply." *Id*. at ___.

4.13 Forfeiture of Right to Counsel and Presumption of Prejudice

"[In *United States v Cronic*, 466 US 648, 659 (1984), the United States Supreme Court] identified certain 'rare situations in which the attorney's performance is so deficient that prejudice is presumed.'" *People v Kammeraad*, 307 Mich App 98, 125 (2014), quoting *People v Frazier (Corey)*, 478 Mich 231, 243 (2007). One such example is when "'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing[.]'" *Kammeraad*, 307 Mich App at 125, quoting *Cronic*, 466 US at 659.

However, even "assum[ing] that defense counsel failed entirely to subject the prosecution's case to any meaningful adversarial testing[,]" this assumption is "irrelevant[,]" and "*Cronic*[, 466 US at 659], "is not implicated[,]" where the defendant has forfeited his or her right to counsel. *Kammeraad*, 307 Mich App at 125-127, 136 (noting that "[b]y appointed counsel's assumed complete failure to subject the prosecution's case to meaningful adversarial testing, [the] defendant received exactly what he desired, and . . . [the] defendant [could not be rewarded] with a new trial on the basis of an alleged constitutional deficiency that was of [his] own making[]").

[30] I*Carines* sets forth a standard of review for unpreserved constitutional errors requiring defendant to "establish: (1) the error had occurred, (2) the error was plain, (3) the error affected personal rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of defendant's innocence." *King*, ___ Mich at ___, citing *People v Carines*, 460 Mich 750, 763-764 (1999).

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5.1 Introduction

The district court conducts initial arraignments for all misdemeanors and felonies. See MCL 600.8311(c); MCR 6.610(D); MCR 6.610(I). This chapter discusses the procedures for conducting initial arraignments in all criminal cases. Additionally, the district court may conduct circuit court (post-bindover) arraignments in felony cases and misdemeanor cases not cognizable in the district court. MCL 600.8311(f); MCR 6.111(A). See Chapter 7 for discussion of post-bindover arraignments.

The procedures for conducting initial arraignments vary depending on whether the crime charged is cognizable in district court or in circuit court. Procedures also vary depending on whether the defendant is arrested with or without a warrant and on whether the arrest takes place in or outside the county in which the offense allegedly occurred. These procedures are discussed in detail in this chapter.

Part A of this chapter contains discussion of procedures and law applicable to arraignment proceedings for offenses cognizable in both district court and circuit court. Part B discusses additional procedures specifically applicable to misdemeanor offenses cognizable in the district court. Part C discusses additional procedures specifically applicable to felony, misdemeanor, and juvenile offenses cognizable in the circuit court.

See the following Michigan Judicial Institute Pretrial/Trial Quick Reference Materials: a table including information on the jurisdiction of district court judges and magistrates over preliminary matters in criminal proceedings; a flowchart for conducting misdemeanor arraignments; and separate checklists specifically applicable to misdemeanor, felony, and juvenile arraignments in district court.

Part A: Generally-Applicable Arraignment Principles and Procedures

5.2 Right to a Prompt Arraignment

A. Arraignment "Without Unnecessary Delay"

Michigan law mandates that an arrestee be arraigned "without unnecessary delay." See MCL 764.1b; MCL 764.13; MCL 764.26; *People v Cipriano*, 431 Mich 315, 319 (1988); see also MCR 6.104(A). "[T]he state constitutional guarantee of due process of law requires an arrestee's prompt arraignment." *People v Mallory*, 421 Mich 229, 239 (1984), citing Const 1963, art 1, § 17.

"[I]n all but the most extraordinary situations," an individual arrested without a warrant may not be detained for more than 48 hours without a judicial determination of probable cause. *People v Whitehead*, 238 Mich App 1, 4 (1999). A delay of more than 48 hours between a defendant's warrantless arrest and the probable cause hearing is presumptively unreasonable and shifts the burden to the government to show the delay was caused by extraordinary circumstances. *Riverside Co v McLaughlin*, 500 US 44, 56-57 (1991). Moreover, a delay of *less* than 48 hours may be unreasonable under certain circumstances. *Id*. at 56.

> "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities." *Id*. at 56-57.

"Both the constitutional and statutory [arraignment] requirements are designed to advise the arrestee of his constitutional rights and the nature of the charges against him by an impartial judicial magistrate, to insure that the arrestee's rights are not violated, and to afford the arrestee an opportunity to make a statement or explain

his conduct in open court if he so desires." *Mallory*, 421 Mich at 239 (citations omitted). "Finally, prompt arraignment affords the arrestee an opportunity to have his right to liberty on bail determined." *Id*.

Express statutory authority for felony arraignments is contained in MCL 764.26:

> "Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his [or her] rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer."

General statutory authority for arraignments following a *warrantless* arrest for an offense of unspecified severity is contained in MCL 764.13:

> "A peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is charged to have been committed, and shall present to the magistrate a complaint stating the charge against the person arrested."

Videoconferencing technology is the preferred mode for conducting arraignments for in-custody defendants. MCR 6.006(C)(1). Arraignments are "scheduled to be conducted remotely subject to a request under MCR 2.407(B)(4) to appear in person by any participant, including a victim. . . , or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5)." MCR 6.006(C)(1). "The use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by [SCAO], and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D). See also MCR 4.401(E) ("[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006"). For additional information, including a complete list of authorized uses for videoconferencing, see the SCAO's *Michigan Trial Court Standards for Courtroom Technology*.

MCR 6.104(A), which applies to both felonies and misdemeanors,[1] provides, in relevant part:

> "**Arraignment Without Unnecessary Delay.** Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of [MCR 6.104], or must be arraigned without unnecessary delay by use of two-way interactive video technology[2] in accordance with MCR 6.006(A)."
>
> **Note: Circuit Court Plan for Judicial Availability.** In each county, the court with trial jurisdiction over *felony* cases must submit a plan for making a judicial officer available to conduct felony arraignments on each day of the year, or a plan to make a judicial officer available every day of the year to set bail for felony offenses. MCR 6.104(G)(1)-(2).[3] If a court adopts the latter plan of availability and makes an officer available to set bail each day of the year, the court's plan must provide for the prompt transport of any defendant who is unable to post bond to the judicial district where the offense occurred. MCR 6.104(G)(2). "Prompt transportation" requires that the defendant be arraigned "not later than the next regular business day." *Id*.

B. Consequences of a Lengthy Delay

"'[A]n improper delay in arraignment . . . does not entitle a defendant to dismissal of the prosecution.'" *People v Cain (Cain I)*, 299 Mich App 27, 49 (2012), vacated in part on other grounds 495 Mich 874 (2013),[4] quoting *People v Harrison*, 163 Mich App 409, 421 (1987). However, failure to conduct a district court arraignment without unnecessary delay *may* jeopardize the admissibility of a confession or physical evidence in subsequent court proceedings against the defendant. *Cain I*, 299 Mich App at 49 (citations omitted).

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[1] See MCR 6.001(A); MCR 6.001(B).

[2] See Section 5.3(A) for discussion of interactive video technology.

[3] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." "Notwithstanding any other provision in [MCR 6.006], until further order of the Court, AO No. 2012-7 is suspended." MCR 6.006(E).

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

> "The Fourth Amendment prohibits unreasonable searches and seizures of persons and property. Thus, it is this amendment that prohibits unreasonable delays between an arrest and a finding of probable cause. The Fifth Amendment prohibits involuntary self-incrimination. It is therefore this amendment that prevents a prosecutor from introducing a confession that was not made voluntarily. When a confession is made during an unreasonable seizure, these two protections intersect." *People v Manning*, 243 Mich App 615, 627 (2000) (citations omitted).

Evidence must be excluded when it was obtained during an unlawful detention *designed* to allow law enforcement personnel additional time to gather evidence. *People v Mallory*, 421 Mich 229, 240-241 (1984). The exclusionary rule similarly bars the admission of any evidence that would not have been obtained but for the procurement of evidence first obtained by unlawful detention. *Id*. at 241. However, "[t]he exclusionary rule will not bar the admission at trial of evidence which has been acquired absent exploitation of a statutorily unlawful detention." *Id*.

Where there is no bona fide emergency to justify a lengthy detention and circumstances indicate that a detention was prolonged beyond 48 hours in an effort to obtain more evidence to support the accused's guilt, a person's constitutional right to be free of unreasonable seizure may be implicated. *People v Whitehead*, 238 Mich App 1, 13-14 (1999). Therefore, statements made by an accused during a period of unnecessary delay "may well be found inadmissible" against the accused at trial. *Id*. at 4. However, unnecessary prearraignment delay is only one factor to be considered when determining whether a defendant's confession was voluntary. *People v Cipriano*, 431 Mich 315, 319 (1988).

A delay of more than 48 hours between a defendant's warrantless arrest and the probable cause hearing is presumptively unreasonable and shifts the burden to the government to show the delay was caused by extraordinary circumstances. *Riverside Co v McLaughlin*, 500 US 44, 56-57 (1991). Based on *Riverside*, the Michigan Court of Appeals held that a delay in excess of 80 hours was a presumptive violation of the Fourth Amendment protection against unreasonable seizure. *Manning*, 243 Mich App at 631-632. However, in the absence of police misconduct, such a lengthy delay did not automatically make involuntary any statements the defendant made during the extended detention. *Id*. at 644-645. Notwithstanding the presumptive unreasonableness of the seizure, the *Manning* Court concluded that the ultimate admissibility of a defendant's statement required a traditional inquiry into the

statement's voluntariness. *Id.* at 645, citing *Cipriano*, 431 Mich 315. The Court noted, however, "that in some situations the length of the delay alone may be a sufficient ground to suppress a defendant's statement, particularly where the delay is so inexplicably long that it raises an inference of police misconduct." *Manning*, 243 Mich App at 645.

See also *Cain I*, 299 Mich App at 48-50 (the defendant was not deprived of due process despite not being arraigned until three days after his arrest where "no evidence was obtained as a direct result of the 'undue delay,' which would have begun . . . 48 hours after [the] defendant's arrest;" because the evidence against the defendant, including his statement to police and his identification from a photo lineup, was obtained within 48 hours after his arrest, "there was no evidence to suppress").

5.3 Location of Arraignment

Arraignment and bail procedures vary depending on whether an arrest is made by warrant or without a warrant, and whether an arrest is made in the county in which the offense occurred or in a different county.

A. Video and Audio Technology

Videoconferencing technology is the preferred mode for conducting arraignments for in-custody defendants. MCR 6.006(C)(1). Arraignments are "scheduled to be conducted remotely subject to a request under MCR 2.407(B)(4) to appear in person by any participant, including a victim. . . , or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5)." MCR 6.006(C)(1). "The use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by [SCAO], and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D). See also MCR 4.401(E) ("[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006"). For additional information, including a complete list of authorized uses for videoconferencing, see the SCAO's *Michigan Trial Court Standards for Courtroom Technology*.

Judges and district court magistrates are authorized by statute to conduct arraignments and set bail using interactive video technology. MCL 767.37a provides, in part:

> "(1) A judge or district court magistrate may conduct initial criminal arraignments and set bail by 2-way

> interactive video technology communication between a court facility and a prison, jail, or other place where a person is imprisoned or detained. A judge or district court magistrate may conduct initial criminal arraignments and set bail on weekends, holidays, or at any time as determined by the court.
>
> * * *
>
> (5) This act does not prohibit the use of 2-way interactive video technology for arraignments on the information, criminal pretrial hearings, criminal pleas, sentencing hearings for misdemeanor violations cognizable in the district court, show cause hearings, or other criminal proceedings, to the extent the Michigan supreme court has authorized that use."[5]

B. Arraignment on Arrest by Warrant

1. Arrest by Warrant in County in Which Alleged Offense Occurred

A warrant for an individual's arrest must direct the arresting officer to take the arrestee, without unnecessary delay, before a judge or district court magistrate of the judicial district in which the charged offense occurred. MCL 764.1b.

See also MCR 6.104(A), which provides that an arrested person, if not released beforehand or arraigned by interactive video technology, must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of MCR 6.104. MCR 6.104(B)[6] provides, in relevant part:

> "**Place of Arraignment.** An accused arrested pursuant to a warrant must be taken to a court specified in the warrant. . . . In the alternative, the provisions of this subrule may be satisfied by use

[5] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes."

[6] Although MCR 6.104(B) is not included in the list of court rules that are expressly applicable to misdemeanors under MCR 6.001(B), MCR 6.104(B) is presumably applicable to misdemeanors under MCR 6.104(A), which *is* expressly applicable to misdemeanors and provides that arraignment is to take place "in accordance with the provisions of [MCR 6.104.]"

> of two-way interactive video technology in accordance with MCR 6.006(A)."

See also MCR 4.401(E) ("[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006").

2. Arrest By Warrant Outside County in Which Charged Offense Occurred

MCR 6.104(B)[7] provides, in relevant part:

> "**Place of Arraignment.** An accused arrested pursuant to a warrant must be taken to a court specified in the warrant. . . . If the arrest occurs outside the county in which [this court is] located, the arresting agency must make arrangements with the authorities in the demanding county to have the accused promptly transported to the latter county for arraignment in accordance with the provisions of [MCR 6.104]. If prompt transportation cannot be arranged, the accused must be taken without unnecessary delay before the nearest available court for preliminary appearance in accordance with [MCR 6.104(C)]. In the alternative, the provisions of this subrule may be satisfied by use of two-way interactive video technology in accordance with MCR 6.006(A)."[8]

If an accused first appears before the court in a county other than the one in which the offense occurred or, if arrested by warrant, in a county not listed in the arrest warrant, and the accused is not represented by counsel, the court must advise the accused of certain rights and decide whether to release the accused before trial. MCR 6.104(C).[9] Specifically, the court is responsible for advising the accused that

> "(a) the accused has a right to remain silent,

[7] Although MCR 6.104(B) is not included in the list of court rules that are expressly applicable to misdemeanors under MCR 6.001(B), MCR 6.104(B) is presumably applicable to misdemeanors under MCR 6.104(A), which *is* expressly applicable to misdemeanors and provides that arraignment is to take place "in accordance with the provisions of [MCR 6.104.]"

[8] See also MCR 4.401(E) ("[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006").

[9] Although MCR 6.104(C) is not included in the list of court rules that are expressly applicable to misdemeanors under MCR 6.001(B), MCR 6.104(C) may be instructive when conducting an arraignment of a person arrested for a misdemeanor.

(b) anything the accused says orally or in writing can be used against the accused in court,

(c) the accused has a right to have a lawyer present during any questioning consented to, and

(d) if the accused does not have the money to hire a lawyer, the local indigent criminal defense system will appoint a lawyer for the accused[.]" MCR 6.104(E)(2); see MCR 6.104(C).

The court must also advise the accused of the right to a lawyer at all proceedings. MCR 6.104(E)(3). An accused's preliminary appearance may be "by way of two-way interactive video technology[.]" MCR 6.104(C).

MCL 764.4 governs arrests by warrant when the arrest and the charged offense do not occur in the same county *and* the offense is one for which bail may not be denied. In such a case, the arrestee has the right to request to be taken before a magistrate of the judicial district in which he or she was arrested. MCL 764.4. In those circumstances:

- The court may take from the person a recognizance with sufficient sureties for the accused's appearance within 10 days before a court in the district in which the charged offense occurred. MCL 764.5.

- The court must certify on the recognizance that the accused was permitted to post bail and must deliver the recognizance to the arresting officer. Without unnecessary delay, the arresting officer must see that the recognizance is delivered to the court in which the accused will be appearing. MCL 764.6.

- If the court refuses to permit the arrestee to post bail or if insufficient bail is offered, the official having charge of the arrestee must take him or her before a magistrate in the judicial district in which the charged offense was committed. MCL 764.7.

- The interim bond provisions in MCL 780.581 apply to misdemeanor arrests by warrant, unless the alleged offense is a violation of MCL 764.15a (warrantless arrest only) or a substantially corresponding local ordinance; a violation of MCL 750.81, if the arrestee is in a specified relationship with the victim, or a substantially corresponding local ordinance; or a violation of MCL 750.81a, if the arrestee is in a specified relationship with the victim. MCL 780.582; MCL 780.582a(1).[10]

MCL 765.6e governs detention on an arrest warrant that originated in another county. "Except in cases in which the person is alleged to have committed an assaultive crime or an offense involving domestic violence, a person who is detained on warrant of arrest in a county other than the county from which the warrant originated must be released from custody if the county from which the warrant originated does not make arrangements within 48 hours from the time the person was detained to pick the person up and does not in fact pick the person up within 72 hours after the time the person was detained." MCL 765.6e(1). "If a person is released from custody under [MCL 765.6e], the releasing facility must contact the originating court and obtain a court date for the defendant to appear." MCL 765.6e(1).

Each district court must "establish a communication protocol to enable the swift processing of individuals detained on a warrant of arrest that originated in another county," and also "establish a hearing protocol for individuals detained on a warrant that originated in another county," that includes "the use of 2-way interactive video technology, when appropriate." MCL 764.6f(1)-(2).

3. Interim Bail When Arrest is Made by Warrant

MCR 6.102(H), governing interim bail when arrest is made by warrant, states:

> **"Release on Interim Bail.** If an accused has been arrested pursuant to a warrant that includes an interim bail provision, the accused must either be arraigned promptly or released pursuant to the interim bail provision. The accused may obtain release by posting the bail on the warrant and by submitting a recognizance to appear before a specified court at a specified date and time, provided that
>
> > (1) the accused is arrested prior to the expiration date, if any, of the bail provision;
> >
> > (2) the accused is arrested in the county in which the warrant was issued, or in which the accused resides or is employed, and the accused is not wanted on another charge;

[10] See Chapter 8 for discussion of bail.

> (3) the accused is not under the influence of liquor or controlled substance; and
>
> (4) the condition of the accused or the circumstances at the time of arrest do not otherwise suggest a need for judicial review of the original specification of bail."

Provisions similar to those in MCR 6.102(H) are also found in MCL 780.581 (interim bail and warrantless arrests), which, subject to the conditions of MCL 780.582a, is made applicable to arrests on warrants by MCL 780.582.[11]

C. Arraignment on Arrest Without a Warrant

1. Warrantless Arrest in County in Which Charged Offense Occurred

MCL 764.15 sets out circumstances under which an officer may arrest a person without a warrant. For example, a police officer may arrest a person without a warrant for a felony, misdemeanor, or ordinance violation that is committed in the officer's presence, MCL 764.15(1)(a), or for a felony committed outside the officer's presence, MCL 764.15(1)(b); additionally, a police officer who has reasonable cause to believe a person committed a felony or a misdemeanor offense punishable by more than 92 days of imprisonment may arrest that person without a warrant and without having witnessed the criminal conduct, MCL 764.15(1)(c)-(d). Additional exceptions to the warrant requirement for misdemeanor arrests include arrests for offenses involving the operation of a vehicle, snowmobile, ORV, or vessel while intoxicated or visibly impaired, MCL 764.15(1)(h)-(l), and arrests for domestic assault, MCL 764.15a.

An accused arrested without a warrant must be taken to a court in the judicial district in which the offense allegedly occurred. MCR 6.104(B).[12] MCL 764.13 provides that a peace

[11] See Chapter 8 for additional discussion of bail.

[12] Although MCR 6.104(B) is not included in the list of court rules that are expressly applicable to misdemeanors under MCR 6.001(B), MCR 6.104(B) is presumably applicable to misdemeanors under MCR 6.104(A), which *is* expressly applicable to misdemeanors and provides that arraignment is to take place "in accordance with the provisions of [MCR 6.104.]" Effective May 22, 2017, the Department of Licensing and Regulatory Affairs approved proposed standards submitted pursuant to the Michigan Indigent Defense Commission Act (MIDCA) by the Michigan Indigent Defense Commission, including that "[w]here there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment." MIDC Standard 4(A). See Section 4.4 for discussion of the MIDCA.

officer who arrests an individual without a warrant must, without unnecessary delay, take the arrestee before a magistrate in the district in which the offense occurred and present the magistrate with a complaint stating the offense for which the individual was arrested. See also MCL 780.581(1), which provides:

> "If a person is arrested without a warrant for a misdemeanor or a violation of a city, village, or township ordinance, and the misdemeanor or violation is punishable by imprisonment for not more than 1 year, or by a fine, or both, the officer making the arrest shall take, without unnecessary delay, the person arrested before the most convenient magistrate of the county in which the offense was committed to answer to the complaint."

MCR 6.104(D)[13] provides:

> "Arrest Without Warrant. If an accused is arrested without a warrant, a complaint complying with MCR 6.101 must be filed at or before the time of arraignment. On receiving the complaint and on finding probable cause, the court must either issue a warrant or endorse the complaint as provided in MCL 764.1c. Arraignment of the accused may then proceed in accordance with [MCR 6.104(E)]."

MCR 6.101 contains the requirements of a criminal complaint.

> "A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense. At the time of filing, specified case initiation information[14] shall be provided in the form and manner approved by the State Court Administrative Office." MCR 6.101(A).

When an individual has been arrested without a warrant, the law requires also that a prompt determination of probable

[13] Although MCR 6.104(D) is not included in the list of court rules that are expressly applicable to misdemeanors under MCR 6.001(B), MCR 6.104(D) may be instructive when conducting an arraignment of a person arrested without a warrant for a misdemeanor.

[14] "At a minimum, specified case information shall include the name, an address for service, an e-mail address, and a telephone number of every party[.]" MCR 1.109(D)(2).

cause be made. See *People v Mallory*, 421 Mich 229, 239 n 4 (1984). Under MCL 764.1c(1), if an individual is in custody after a warrantless arrest, a magistrate must determine if there exists reasonable cause to believe the individual in custody committed the offense; if the court finds reasonable cause, it must either:

- issue a warrant for the accused's arrest according to MCL 764.1b, or
- endorse the complaint according to MCL 764.1c.

If the court endorses the complaint on a finding of reasonable cause, the complaint constitutes a warrant as well as a complaint. MCL 764.1c(2). A magistrate "endorses" the complaint by noting the finding of reasonable cause that a crime was committed and that the individual named in the complaint committed it, and directing that the individual accused of the crime be taken before the court in the district in which the crime allegedly occurred. MCL 764.1c(1)(b).

In addition, MCL 764.9c addresses warrantless arrests for misdemeanors or ordinance violations and provides, subject to certain exceptions, an alternative to formal arraignment. MCL 764.9c(1) provides, in relevant part:

> "Except as provided in [MCL 764.9c(3)], if a police officer has arrested a person without a warrant for a misdemeanor or ordinance violation, instead of taking the person before a magistrate and promptly filing a complaint . . . , the officer may issue to and serve upon the person an appearance ticket as defined in [MCL 764.9f] and release the person from custody. The appearance ticket . . . , or other documentation as requested, must be forwarded to the court, appropriate prosecuting authority, or both, for review without delay."[15]

2. Warrantless Arrest Outside County in Which Charged Offense Occurred

Because most warrantless arrests result from the accused's conduct as witnessed by a law enforcement officer or citizen, warrantless arrests most often are made in the county in which the offense occurred. Exceptions may arise, however, such as

[15] See Section 5.9(D) for additional discussion of MCL 764.9c and appearance tickets. See Section 3.17(A) for information on the issuance and restrictions of appearance tickets.

when an individual cannot be apprehended immediately but is later located and arrested in another county.

MCR 6.104(B)[16] provides, in relevant part:

> "**Place of Arraignment.** . . . An accused arrested without a warrant must be taken to a court in the judicial district in which the offense allegedly occurred. If the arrest occurs outside the county in which [this court is] located, the arresting agency must make arrangements with the authorities in the demanding county to have the accused promptly transported to the latter county for arraignment in accordance with the provisions of [MCR 6.104]. If prompt transportation cannot be arranged, the accused must be taken without unnecessary delay before the nearest available court for preliminary appearance in accordance with [MCR 6.104(C)]. In the alternative, the provisions of this subrule may be satisfied by use of two-way interactive video technology in accordance with MCR 6.006(A)."

If an accused first appears before the court in a county other than the one in which the offense occurred and the accused is not represented by counsel, the court must advise the accused of certain rights and decide whether to release the accused before trial. MCR 6.104(C).[17] Specifically, when an accused appears before a court outside the county in which the alleged offense occurred, the court is responsible for advising the accused that

> "(a) the accused has a right to remain silent,
>
> (b) anything the accused says orally or in writing can be used against the accused in court,
>
> (c) the accused has a right to have a lawyer present during any questioning consented to, and
>
> (d) if the accused does not have the money to hire a lawyer, the local indigent criminal defense system

[16] Although MCR 6.104(B) is not included in the list of court rules that are expressly applicable to misdemeanors under MCR 6.001(B), MCR 6.104(B) is presumably applicable to misdemeanors under MCR 6.104(A), which *is* expressly applicable to misdemeanors and provides that arraignment is to take place "in accordance with the provisions of [MCR 6.104.]"

[17] Although MCR 6.104(C) is not included in the list of court rules that are expressly applicable to misdemeanors under MCR 6.001(B), MCR 6.104(C) may be instructive when conducting an arraignment of a person arrested for a misdemeanor.

> will appoint a lawyer for the accused[.]" MCR 6.104(E)(2); see MCR 6.104(C).

The court must also advise the accused of the right to a lawyer at all proceedings. MCR 6.104(E)(3).An accused's preliminary appearance may be "by way of two-way interactive video technology[.]" MCR 6.104(C).

3. Interim Bail

Subject to the conditions of MCL 780.582a, "if a magistrate is not available or immediate trial cannot be had," an individual arrested without a warrant for a misdemeanor offense or ordinance violation punishable by imprisonment for not more than one year may be entitled to post an interim bond with the arresting officer or other authorized officer. MCL 780.581(2). The bond amount may not exceed the maximum possible fine for the offense, but may not be less than 20 percent of the minimum possible fine for the offense. *Id*.[18]

D. Special Procedures for Violations of Part 801 of the Natural Resources and Environmental Protection Act (NREPA)

1. Arrest Without Warrant – Residents of Michigan

If an individual is arrested without a warrant under conditions not referred to in MCL 324.80167,[19] immediate arraignment is not required, and the arresting officer must prepare in duplicate a written notice directing the offender to appear in court. MCL 324.80168(1). The notice must contain the name and address of the offender, the name of the offense charged, and the time and place the person must appear in court. *Id*. If the arrested person demands arraignment before a magistrate or district court judge, the arresting officer must take the actions outlined in MCL 324.80167[20] in lieu of issuing the offender a written notice to appear in court. MCL 324.80168(1).

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[18] Effective May 22, 2017, the Department of Licensing and Regulatory Affairs approved proposed standards submitted pursuant to the Michigan Indigent Defense Commission Act (MIDCA) by the Michigan Indigent Defense Commission, including that "[w]here there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment." MIDC Standard 4(A).

See Section 4.4 for discussion of the MIDCA. See Chapter 8 for additional discussion of bail.

[19] MCL 324.80167 requires specific arraignment procedures for specified offenses; however, these offenses are not within a district court magistrate's jurisdiction.

Timing of appearance required by written notice. Unless the arrestee demands an earlier hearing, the time listed in a written notice to appear must be within a reasonable time after the arrest. MCL 324.80168(2).

Place of appearance. The place specified in the notice to appear must be before a magistrate or district court judge with jurisdiction of the offense and within the township or county in which the charged offense allegedly occurred. MCL 324.80168(3).

Methods of appearance. The person to whom a written notice to appear is issued may make appearance in person, by representation, or by mail. When an individual appears by representation or by mail, the magistrate or district judge may accept a plea of guilty or not guilty for purposes of arraignment just as if the offender had personally appeared before the court. The magistrate or district judge may require a person's appearance before the court by giving the person five days' notice of the time and place of his or her required appearance. MCL 324.80168(4).

2. Arrest Without Warrant – Nonresidents of Michigan

If an individual who is not a resident of Michigan is arrested without a warrant under conditions not referred to in MCL 324.80167,[21] the arresting officer must, upon demand of the arrested person, immediately take the person for arraignment by a magistrate or district court judge in the vicinity to answer to the complaint made against him or her. MCL 324.80169(1). "If a magistrate or a district court judge is not available or an immediate trial cannot be had, the person arrested may recognize to the officer for his or her appearance by leaving with him or her not more than $200.00." *Id.* "The officer making the arrest shall give a receipt to the person arrested for the money deposited with him or her under [MCL 324.80169(1)], together with a written summons as provided in [MCL 324.80168]." MCL 324.80169(2).

Failure of the arrested person to appear will result in forfeiture of the deposit in addition to any other penalty permitted by Part 801 of the NREPA. MCL 324.80169(3).

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[20] MCL 324.80167 provides in pertinent part that "the arrested person shall, without unreasonable delay, be arraigned by a magistrate or judge who is within the county in which the offense charged is alleged to have been committed, who has jurisdiction of the offense, and who is nearest or most accessible with reference to the place where the arrest is made[.]"

[21] MCL 324.80167 requires specific arraignment procedures for specified offenses; however, these offenses are not within a district court magistrate's jurisdiction.

> "Not more than 48 hours after taking a deposit under [MCL 324.80169], the officer shall deposit the money with the magistrate or the district court judge named in the notice to appear, together with a report stating the facts relating to the arrest. Failure to make the report and deposit the money is embezzlement of public money." MCL 324.80169(4).

5.4 Voluntary Appearance

"If a defendant, wanted on a bench or arrest warrant, voluntarily presents himself or herself to the court that issued the warrant within one year of the warrant issuance, the court must either (1) arraign the defendant, if the court is available to do so within two hours of the defendant presenting himself or herself to the court; or (2) recall the warrant and schedule the case for a future appearance." MCR 6.105(A). See also MCL 762.10d(3). "It is presumed the defendant is not a flight risk when the court sets bond or other conditions of release at an arraignment under [MCR 6.105]." MCR 6.105(A). See also MCL 762.10d(2). However, MCR 6.105 "does not apply to assaultive crimes or domestic violence offenses, as defined in MCL 762.10d, or to defendants who have previously benefited from [MCR 6.105] on any pending criminal charge." MCR 6.105(B). See also MCL 762.10d(1).

5.5 Communication Protocol

Each district court must "establish a communication protocol to enable the swift processing of individuals detained on a warrant of arrest that originated in another county," and also "establish a hearing protocol for individuals detained on a warrant that originated in another county," that includes "the use of 2-way interactive video technology, when appropriate." MCL 764.6f(1)-(2).

5.6 Fingerprinting

At a defendant's arraignment for a felony or misdemeanor punishable by more than 92 days' imprisonment, the district court must ensure that the accused's fingerprints have been taken as required by law. MCL 764.29; see also MCR 6.104(E)(6).[22] MCL 764.29 provides:

> "(1) At the time of arraignment of a person on a complaint for a felony or a misdemeanor punishable by imprisonment for

[22] MCR 6.104(E)(6) is not included in the list of court rules that are expressly applicable to misdemeanors under MCR 6.001(B). In addition, MCR 6.104(E)(6) references the collection of biometric data rather than fingerprints.

more than 92 days, the magistrate shall examine the court file to determine if the person has had fingerprints taken as required by [MCL 28.243].

(2) If the person has not had his or her fingerprints taken prior to the time of arraignment for the felony or the misdemeanor punishable by imprisonment for more than 92 days, upon completion of the arraignment, the magistrate shall do either of the following:

(a) Order the person to submit himself or herself to the police agency that arrested or obtained the warrant for the arrest of the person so that the person's fingerprints can be taken.

(b) Order the person committed to the custody of the sheriff for the taking of the person's fingerprints."[23]

5.7 Waiver of Rights

A. Right to Arraignment

A defendant may waive the right to an arraignment. *People v Phillips*, 383 Mich 464, 469-470 (1970). With the court's permission, a defendant may stand mute or plead not guilty without a "formal" or "in-court" arraignment by filing a written statement signed by the defendant and any defense attorney of record. MCR 6.610(D)(4) provides:

> "The court may allow a defendant to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement signed by the defendant and any defense attorney of record, reciting the general nature of the charge, the maximum possible sentence, the rights of the defendant at arraignment, and the plea to be entered. The court may require that an appropriate bond be executed and filed and appropriate and reasonable sureties posted or continued as a condition precedent to allowing the defendant to be arraigned without personally appearing before the court."

Determining whether a defendant waived his or her right to an arraignment requires an examination of all the circumstances. *People v Thomason*, 173 Mich App 812, 815 (1988), citing *Phillips*, 383 Mich at 470. For a defendant's waiver to be valid, the record must establish

[23] See Section 3.13 for more information on fingerprinting and collection of biometric data.

that the defendant was entitled to an arraignment, that the defendant knew he or she was entitled to an arraignment, and that the defendant voluntarily elected not to exercise that entitlement. *Thomason*, 173 Mich App at 815-816, citing *Phillips*, 383 Mich at 470. A defendant does not have the burden of coming forward to request an arraignment, even when the defendant is aware that he or she was entitled to an arraignment and the arraignment did not occur. *Thomason*, 173 Mich App at 816 (citation omitted).

B. Right to Counsel

A court cannot accept a defendant's waiver of the right to be represented by an attorney unless the court first

- advises the defendant of the charge against him or her, the maximum possible prison sentence the defendant could face if convicted of the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
- offers the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed attorney. MCR 6.005(D)(1)-(2).[24]

Part B: Procedures Specific to Misdemeanor Arraignments[25]

5.8 Required Advice of Rights and Procedures at Misdemeanor Arraignment

When a defendant is arraigned in district court for a misdemeanor offense over which the district court has jurisdiction, the defendant must be given certain specific information. MCR 6.610(D)(1) states:

[24] MCR 6.005(D) is not specifically applicable to misdemeanor offenses under MCR 6.001(B). See Chapter 4 for more information on waiving the right to counsel.

[25] This Part discusses the procedures that are specifically applicable to arraignments for misdemeanor offenses over which the district court has trial jurisdiction. See Section 2.7 for discussion of district court jurisdiction. See Part C for discussion of procedures specifically applicable to arraignments for felony offenses and circuit court misdemeanors.

> "Whenever a defendant is arraigned on an offense over which the district court has jurisdiction,[26] the defendant must be informed of
>
> (a) the name of the offense;
>
> (b) the maximum sentence permitted by law; and
>
> (c) the defendant's right
>
> (*i*) to the assistance of an attorney at all court proceedings, including arraignment, and to a trial;
>
> (*ii*) (if [MCR 6.610(D)(2)] applies)[27] to an appointed attorney; and
>
> (*iii*) to a trial by jury, when required by law."

This information may be given to the defendant in a writing made part of the file or by the court on the record. MCR 6.610(D)(1). See SCAO Form DC 213, *Advice of Rights and Plea Information*.

At a defendant's arraignment for a misdemeanor punishable by more than 92 days' imprisonment, the district court must ensure that the accused's fingerprints have been taken as required by law.[28] MCL 764.29; see also MCR 6.104(E)(6).[29] See Section 5.6 for information on fingerprinting.

If an accused first appears before the court in a county other than the one in which the offense occurred or, if arrested by warrant, in a county not listed in the arrest warrant, and the accused is not represented by counsel, the court must advise the accused of certain rights and decide whether to release the accused before trial.[30] MCR 6.104(C).[31]

See the Michigan Judicial Institute's checklist for misdemeanor arraignments in district court.

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[26] See Section 2.7 for discussion of district court jurisdiction.

[27] MCR 6.610(D)(2) governs an indigent defendant's right to appointed counsel when a conviction could result in imprisonment.

[28] See Section 5.6. See also Section 3.13 for more information on fingerprinting and collection of biometric data.

[29] MCR 6.104(E)(6) is not included in the list of court rules that are expressly applicable to misdemeanors under MCR 6.001(B). In addition, MCR 6.104(E)(6) references the collection of biometric data rather than fingerprints.

[30] See Section 5.3(B)(2) and Section 5.3(C)(2) for discussion of applicable procedures when an arrest is made outside the county in which the offense allegedly occurred.

[31] Although MCR 6.104(C) is not included in the list of court rules that are expressly applicable to misdemeanors under MCR 6.001(B), MCR 6.104(C) may be instructive when conducting an arraignment of a person arrested for a misdemeanor.

A. Right To Counsel

A criminal defendant's right to the assistance of counsel is recognized in the federal and state constitutions and by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1; MCL 780.981 *et seq*. However, there is no federal or state constitutional right to appointed counsel when a defendant is charged with a misdemeanor and no sentence of imprisonment is imposed. *People v Richert (After Remand)*, 216 Mich App 186, 192-194 (1996). "The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge[; r]epresentation includes but is not limited to the arraignment on the complaint and warrant." MIDC Standard 4.[32]

"When a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed." MCL 775.16. See also MCR 6.005(A). "If the person states that he or she is unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the [Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981—MCL 780.1003[33]]." MCL 775.16. "The selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary. Similarly, the selection and approval of, and payment for, other expenses necessary for providing effective assistance of defense counsel shall not be made by the judiciary or employees reporting to the judiciary." MIDC Standard 5(A). "The court's role shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; if deemed eligible for counsel, referring the defendant to the appropriate agency (absent a valid waiver). Judges are permitted and encouraged to contribute

[32]The requirement that counsel be appointed for arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co v State of Michigan*, 325 Mich App 247 (2018) (although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited, and through the MIDCA, the Michigan Legislature has enacted a protection greater than that secured by the United States Constitution). "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*. at 269, quoting *People v Harris*, 499 Mich 332, 338 (2016).

[33] The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(f)(*i*) (defining *indigent criminal defense services* for purposes of the MIDCA). The MIDCA requires the trial court to "assure that each criminal defendant is advised of his or her right to counsel." MCL 780.991(1)(c). It requires the indigent criminal defense system to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . not later than at the defendant's first appearance in court." MCL 780.991(3)(a). See Chapter 4 for discussion of the MIDCA.

information and advice concerning the delivery of indigent criminal defense services, including their opinions regarding the competence and performance of attorneys providing such services." MIDC Standard 5(B) "Only in rare cases may a judge encourage a specific attorney be assigned to represent a specific defendant because of unique skills and abilities that attorney possesses. In these cases, the judge's input may be received and the system may take this input into account when making an appointment, however the system may not make the appointment solely because of a recommendation from the judge." MIDC Standard 5 (staff comment).[34] See also MCR 6.610(D)(1)(c), which requires the district court at a misdemeanor arraignment to advise a defendant of his or her right to the assistance of counsel and to appointed counsel under certain circumstances, and MCR 6.005(B),[35] which requires the court, under certain circumstances, to determine whether a defendant is indigent and details the process for determining indigency. "If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent unless the court's local funding unit has designated an appointing authority in its compliance plan with the Michigan Indigent Defense Commission," in which case, the court must refer the defendant to the appointing authority for indegency screening. MCR 6.005(B). If there is no appointing authority, or if the defendant seeks judicial review of the appointing authority's decision, the court may make a determination of indigency. MCR 6.005(B). "A defendant is considered to be indigent if he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation on his or her own. Substantial financial hardship is rebuttably presumed if the defendant receives personal public assistance, including under the food assistance program, temporary assistance for needy families, Medicaid, or disability insurance, resides in public housing, or earns an income less than 140% of the federal poverty guideline. A defendant is also rebuttably presumed to have a substantial financial hardship if he or she is currently serving a sentence in a correctional institution or is receiving residential treatment in a mental health or substance abuse facility." MCL 780.991(3)(b). If a defendant is not fully indigent, he or she may be considered partially indigent. See MCL 780.991(3)(d). See also MCR 6.005(B), which sets forth several factors that guide the determination of indigency:

[34]See the MIDC's *Frequently Asked Questions About Standard 5* for more information.The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[35] MCR 6.005(B) is applicable to both felony and misdemeanor cases. MCR 6.001(A)-(B). See Chapter 4 for additional discussion of the MIDCA.

> "(1) present employment, earning capacity and living expenses;
>
> (2) outstanding debts and liabilities, secured and unsecured;
>
> (3) whether the defendant has qualified for and is receiving any form of public assistance;
>
> (4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned;
>
> (5) the rebuttable presumptions of indigency listed in the MIDC's indigency standard; and
>
> (6) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel." MCR 6.005(B)(1)-(6).

Note also that the MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a).

Because "[a]ctual indigency determinations may still be made at the arraignment in conformance with the court rule," "[t]he language of MCR 6.005(B) . . . does not expressly conflict with the language of Standard 4, requiring the assignment of counsel as soon as the defendant is deemed eligible for [indigent criminal defense] services, that the indigency determination be made and counsel appointed as soon as the defendant's liberty is subject to restriction, and that representation includes but is not limited to arraignment." *Oakland Co v State of Michigan*, 325 Mich App 247, 270 (2018). It is possible that an on-duty arraignment attorney represent a defendant at arraignment but different counsel be appointed for future proceedings. *Id*.

The court may require the defendant to contribute to the cost of an attorney if the defendant is able to pay part of the cost. MCR 6.005(C).[36] The order of contribution permitted under MCR 6.005(C) is "an on-going obligation during the term of the appointment" to contribute to the cost of an attorney and is distinct from reimbursement for attorney fees, "which suggests an obligation arising after the term of appointment has ended[.]" *People v Jose*, 318 Mich App 290, 298 (2016). Although MCR 6.005(C) "'pertains to contribution . . . [it] does not preclude trial courts from ordering subsequent reimbursement of expenses paid for court-appointed counsel.'" *Jose*, 318 Mich App at 298, quoting *People v Nowicki*, 213 Mich App 383, 386-387, n 3 (1995).

See also SCAO Form MC 222, *Request for Court-Appointed Attorney and Order*.

When authorized by the chief judge of the district, a district court magistrate may "[a]pprove and grant petitions for the appointment of an attorney to represent an indigent defendant accused of any misdemeanor punishable by imprisonment for not more than 1 year[.]" MCL 600.8513(2)(a).

See Chapter 4 for more information on a defendant's right to counsel, including waiver of that right, determining indigency for purposes of appointing counsel, the MIDCA, and situations involving multiple defendants.

B. Entering a Plea at Arraignment[37]

At arraignment, a plea to the charge must be entered after the court has informed the defendant of the charge as it is stated in the warrant or complaint:

> "At the arraignment of an accused charged with a misdemeanor or an ordinance violation, the magistrate shall read to the accused the charge as stated in the warrant or complaint. The accused shall plead to the charge, and the plea shall be entered in the court's minutes. If the accused refuses to plead, the magistrate shall order that a plea of not guilty be entered on behalf of the accused." MCL 774.1a.

With the court's permission, a defendant may stand mute or plead not guilty without a "formal" or "in-court" arraignment by filing a

[36] MCR 6.005(C) is applicable to both felony and misdemeanor cases. MCR 6.001(A)-(B).

[37] See Chapter 6 for discussion of pleas.

written statement signed by the defendant and any defense attorney of record. MCR 6.610(D)(4) provides:

> "The court may allow a defendant to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement signed by the defendant and any defense attorney of record, reciting the general nature of the charge, the maximum possible sentence, the rights of the defendant at arraignment, and the plea to be entered. The court may require that an appropriate bond be executed and filed and appropriate and reasonable sureties posted or continued as a condition precedent to allowing the defendant to be arraigned without personally appearing before the court."[38]

C. Pretrial Release

Except as otherwise provided by law, an individual charged with a criminal offense is entitled to bail. MCL 765.6(1); Const 1963, art 1, § 15; MCR 6.106(A). Unless an order has already entered, the court must determine the conditions of a defendant's release at the defendant's arraignment on the complaint and/or warrant. MCR 6.106(A). A court may not deny pretrial release to a person charged with a misdemeanor. Const 1963, art 1, § 15; MCR 6.106(B). For persons charged with misdemeanors, the court must order the release of the defendant on personal recognizance or an unsecured appearance bond, or subject to a conditional release, with or without money bail (10 percent, cash, or surety). MCR 6.106(A)(2)-(3).

See SCAO Form MC 240, *Pretrial Release Order*. See Chapter 8 for more information on pretrial release.

5.9 Misdemeanor Cases[39]

A. Beginning a Misdemeanor Case

A misdemeanor case begins in one of three ways:

- when a law enforcement officer serves an individual with a written citation for a traffic violation and the citation is filed in district court, MCR 6.615(A)(1)(a)(subject to the exceptions in MCL 764.9c);[40]

[38] See SCAO Form DC 223, *Plea by Mail*.

[39] See the Michigan Judicial Institute's *Traffic Benchbook* for more information.

- when a sworn complaint is filed in district court and a summons or an arrest warrant is issued, MCR 6.615(A)(1)(b); or

- when other special procedures authorized by statute are taken,[41] MCR 6.615(A)(1)(c).

The written citation may serve as a sworn complaint and summons that commands the offender's initial appearance in court and, for misdemeanor traffic cases, to respond to the violation alleged by the citation. MCR 6.615(A)(2)(a)-(b).

B. Arraignment on a Misdemeanor Citation

A person arrested for a misdemeanor violation of MCL 257.625(1) (operating while intoxicated), MCL 257.625(3) (operating while visibly impaired), MCL 257.625(6) (zero tolerance/minor operation), MCL 257.625(7) (operating while intoxicated or visibly impaired with a minor in the vehicle), MCL 257.625(8) (operating with any amount of certain controlled substances in the body), or MCL 257.625m (operating a commercial motor vehicle with an unlawful blood alcohol content), or for a violation of a local ordinance substantially corresponding to MCL 257.625(1), MCL 257.625(3), MCL 257.625(6), MCL 257.625(8), or MCL 257.625m,[42] must be arraigned on the citation, complaint, or warrant within 14 days of the arrest or service of the warrant. MCL 257.625b(1).

A district court magistrate may conduct arraignments on misdemeanor violations if the magistrate is so authorized by statute and by the judges of the district. MCR 6.615(C).[43]

Failure to Appear or Respond. Generally, a court must issue an order to show cause if "a defendant fails to appear or otherwise respond to any matter pending relative to a misdemeanor citation issued under MCL 764.9c." MCR 6.615(B). However, a "court may immediately issue a bench warrant, rather than an order to show cause, if the court has a specific articulable reason to suspect that any of the following apply and states it on the record:

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[40] "The citation may be prepared electronically or on paper." MCR 6.615(A)(1)(a). The citation must be signed by the officer in accordance with MCR 1.109(E)(4); if a citation is prepared electronically and filed with a court as data, the name of the officer that is associated with issuance of the citation satisfies this requirement." MCR 6.615(A)(1)(a).

[41] Procedures for citing out-of-state motorists, for example. See the Michigan Judicial Institute's *Traffic Benchbook* for more information.

[42] See the Michigan Judicial Institute's *Traffic Benchbook* for detailed information on these offenses.

[43] See Section 2.9 for discussion of a district court magistrate's authority.

(a) the defendant has committed a new crime.

(b) the defendant's failure to appear is the result of a willful intent to avoid or delay the adjudication of the case.

(c) another person or property will be endangered if a warrant is not issued." MCR 6.615(B)(1).

"If a defendant fails to appear or otherwise respond to any matter pending relative to a misdemeanor traffic citation, the court must also initiate the procedures required by MCL 257.321a." MCR 6.615(2).[44] MCL 257.321a provides different procedures depending on the offense involved. For offenses for which license suspension is allowed under the Michigan Vehicle Code or a substantially corresponding local ordinance that are **not** offenses enumerated in MCL 257.321a(2), the following procedures apply:

- 28 days or more after an individual fails to answer a citation or notice to appear in court or fails to comply with an order or judgment, the court must give notice by mail at the individual's last-known address;

- the notice must indicate that if the individual fails to appear or comply within 14 days after the notice is issued, the individual's license will be suspended, see SCAO Form MC 216, *14-Day Notice*, *Traffic*;

- if the individual fails to appear or comply within the 14-day period, the court must inform the Michigan Secretary of State within 14 days;

- upon receiving notice, the Michigan Secretary of State must immediately suspend the license of the individual and notify the individual of the suspension by regular mail at that individual's last-known address. MCL 257.321a(1).

- For an individual who is charged with or convicted of an enumerated offense in MCL 257.321a(2), the following procedures apply:

- if an individual fails to answer a citation or notice to appear in court or fails to comply with an order or judgment, the court must immediately give notice by first-class mail sent to the individual's last-known address to appear within seven days after the notice is issued;

[44] MCL 257.321a provides for the suspension of an operator's license.

- the notice must indicate that if the individual fails to appear within seven days after the notice is issued, or fails to comply with the court's order/judgment within 14 days, the Michigan Secretary of State will suspend the individual's license, see SCAO Form 216a, *Notice of Noncompliance*;

- the court must immediately inform the Michigan Secretary of State if the individual fails to appear within the seven-day or 14-day period;

- upon receiving notice, the Michigan Secretary of State must immediately suspend the individual's license and notify the individual of the suspension by first-class mail sent to the individual's last-known address. MCL 257.321a(2).

"Notwithstanding any provision of law to the contrary and except in cases where the complaint is for an assaultive crime or an offense involving domestic violence, in the event that a defendant fails to appear for a court hearing and it is the defendant's first failure to appear in the case, there is a rebuttable presumption that the court must wait 48 hours before issuing a bench warrant to allow the defendant to voluntarily appear. If the defendant does not appear within 48 hours, the court shall issue a bench warrant unless the court believes there is good reason to instead schedule the case for further hearing." MCL 764.3(1). "The court may overcome the presumption under [MCL 764.3(1)] and issue an immediate bench warrant for the defendant's failure to appear if the court has a specific articulable reason to suspect that any of the following apply:

> (a) The defendant has committed a new crime.
>
> (b) A person or property will be endangered if a bench warrant is not issued.
>
> (c) Prosecution witnesses have been summoned and are present for the proceeding.
>
> (d) The proceeding is to impose a sentence for the crime.
>
> (e) There are other compelling circumstances that require the immediate issuance of a bench warrant." MCL 764.3(3).

The court must state its reasons for departing from the presumption under MCL 764.3(1) if it issues an immediate bench warrant. MCL 764.3(4). "When a court delays the issuance of a warrant, the court

shall not revoke the release order or declare bail money deposited or the surety bond, if any, forfeited. Upon the issuance of the arrest warrant, the court may then enter an order revoking the release order and declaring the bail money deposited, personal recognizance bond, surety bond, or 10% bond, if any, forfeited." MCL 764.3(2).

C. Conducting Hearings on Contested Cases

"A misdemeanor case must be conducted in compliance with the constitutional and statutory procedures and safeguards applicable to misdemeanors cognizable by the district court." MCR 6.615(D).

D. Appearance Tickets

When a police officer makes a warrantless arrest for a misdemeanor or ordinance violation, the officer may, instead of bringing the accused before a magistrate and promptly filing a complaint, issue and serve on the offender an appearance ticket, and release the person from custody. MCL 764.9c(1). See Section 3.17(A) for information regarding the issuance and restrictions of appearance tickets.

"If after the service of an appearance ticket and the filing of a complaint for the offense designated on the appearance ticket the defendant does not appear in the designated local criminal court within the time the appearance ticket is returnable, the court may issue a summons or a warrant as provided in this [MCL 764.9e]." MCL 764.9e(1). "Notwithstanding any provision of law to the contrary, in the event that a defendant fails to appear for a court hearing within the time the appearance ticket is returnable there is a rebuttable presumption that the court must issue an order to show cause why the defendant failed to appear instead of issuing a warrant." MCL 764.9e(2). "The court may overcome the presumption and issue a warrant if it has a specific articulable reason to suspect that any of the following apply:

> (a) The defendant committed a new crime.
>
> (b) The defendant's failure to appear is the result of a willful intent to avoid or delay the adjudication of the case.
>
> (c) Another person or property will be endangered if a warrant is not issued." MCL 764.9e(3).

"If the court overcomes the presumption under [MCL 764.9e(2)] and issues a warrant, the court must state on the record its reasons for doing so." MCL 764.9e(4).

No sworn complaint is necessary for the magistrate's acceptance of an accused's plea on an appearance ticket issued under MCL 764.9c. MCL 764.9g(1). If, however, the accused pleads not guilty to the offense charged in the appearance ticket, a sworn complaint must be filed with the magistrate to proceed with prosecuting the offender, *id.*, and no arrest warrant may issue for an offense listed on an appearance ticket until a sworn complaint is filed, *City of Plymouth v McIntosh*, 291 Mich App 152, 162 (2010). "[N]ot all appearance tickets or citations are considered sworn complaints under the Michigan Vehicle Code or the Code of Criminal Procedure, and not every appearance before the magistrate necessarily is preceded by the issuance of a complaint." *City of Plymouth*, 291 Mich App at 162. "This procedure[] . . . is designed to ensure that, following a plea of not guilty, until the magistrate has in front of him or her either a sworn complaint or a citation that takes the place of a sworn complaint, further proceedings do not occur." *Id*. Where an appearance ticket is issued for a misdemeanor violation and is in the form of a "Uniform Law Citation" containing the language, "'I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief[,]'" it constitutes a sworn complaint under MCL 257.727c, MCL 764.1e, and MCR 6.615. *City of Plymouth*, 291 Mich App at 153-154, 154 n 1, 163. A prosecutor is not required to file a second sworn complaint in order to proceed on a not guilty plea. *Id*. at 163.

Similarly, a peace officer may issue a written citation to a person arrested without a warrant for most misdemeanor traffic offenses. See MCL 257.728(1); MCR 6.615(A)(1)(a). If the officer issues a citation for a misdemeanor punishable by imprisonment for not more than 90 days, a magistrate may accept the accused's plea of guilty without the filing of a sworn complaint. MCL 257.728e. However, if the accused pleads not guilty, a sworn complaint must be filed with the magistrate. *Id*.

A district court magistrate may accept an accused's guilty plea without requiring that a sworn complaint be filed when the offense charged falls within the district court magistrate's authority under MCL 600.8511. MCL 764.9g(2).[45]

5.10 Violations of the Marine Safety Act[46]

Unless otherwise indicated, a violation of the Marine Safety Act (MSA), MCL 324.80101 *et seq.*, is a misdemeanor. MCL 324.80171. A peace officer who observes a marine law violation or the commission of a crime may

[45] See Section 2.9 for discussion of a district court magistrate's authority.

[46] See the Michigan Judicial Institute's *Recreational Vehicles Benchbook* for more information.

immediately arrest the violator without a warrant, or the officer may issue the person a written or verbal warning. MCL 324.80166(4). If an officer has reasonable cause to believe that an individual, at the time of his or her involvement in an accident, was operating a vessel in violation of MCL 324.80176(1), MCL 324.80176(3), MCL 324.80176(4), MCL 324.80176(5), MCL 324.80176(6), or MCL 324.80176(7) (offenses involving operation of a motorboat while under the influence of alcoholic liquor and/or a controlled substance, with an unlawful blood alcohol content, with any amount of certain controlled substances in the body, or while visibly impaired, or operation by a person less than 21 years of age with any bodily alcohol content), or a local ordinance corresponding to MCL 324.80176(1), MCL 324.80176(3), or MCL 324.80176(6), the officer may arrest that individual without a warrant. MCL 324.80180(1).

A. Arraignment After a Warrantless Arrest

If an officer arrests an individual without a warrant for certain MSA violations (listed below), the individual must be arraigned without unreasonable delay by a magistrate or judge who

- is within the county where the offense allegedly occurred,
- has jurisdiction of the offense, and
- is nearest or most accessible with reference to the place where the arrest was made. MCL 324.80167.

MCL 324.80167 provides that MSA offenses requiring immediate arraignment when the offender is arrested without a warrant are:

- negligent homicide;
- violations of MCL 324.80176(1), MCL 324.80176(3), MCL 324.80176(4), or MCL 324.80176(5) (offenses involving operation of a motorboat while under the influence of alcoholic liquor and/or a controlled substance, with an unlawful blood alcohol content, with any amount of certain controlled substances in the body, or while visibly impaired), or violations of local ordinances substantially corresponding to MCL 324.80176(1) or MCL 324.80176(3); or
- violations of MCL 324.80147 (reckless operation of a vessel) or violations of a local ordinance substantially corresponding to MCL 324.80147. The arresting officer may issue a written notice to appear in court for a violation of MCL 324.80147 if it does not appear that releasing the offender pending the issuance of a warrant would constitute a public menace. MCL 324.80167(c).

B. Written Notice To Appear After a Warrantless Arrest

If an individual is arrested without a warrant under conditions not referred to in MCL 324.80167, immediate arraignment is not required, and the arresting officer must prepare in duplicate a written notice directing the offender to appear in court. MCL 324.80168(1). The notice must contain the name and address of the offender, the name of the offense charged, and the time and place the person must appear in court. *Id*. If the arrested person demands arraignment before a magistrate or district court judge, the arresting officer must take the actions outlined in MCL 324.80167[47] in lieu of issuing the offender a written notice to appear in court. MCL 324.80168(1).

Timing of appearance required by written notice. Unless the arrestee demands an earlier hearing, the time listed in a written notice to appear must be within a reasonable time after the arrest. MCL 324.80168(2).

Place of appearance. The place specified in the notice to appear must be before a magistrate or district court judge with jurisdiction of the offense and within the township or county in which the charged offense allegedly occurred. MCL 324.80168(3).

Methods of appearance. The person to whom a written notice to appear is issued may make appearance in person, by representation, or by mail. When an individual appears by representation or by mail, the magistrate or district judge may accept a plea of guilty or not guilty for purposes of arraignment just as if the offender had personally appeared before the court. The magistrate or district judge may require a person's appearance before the court by giving the person five days' notice of the time and place of his or her required appearance. MCL 324.80168(4).

5.11 A Crime Victim's Rights Following Misdemeanor Arraignment

Article 3 of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., assigns certain rights and responsibilities to victims of serious misdemeanors.[48] Although many provisions of Article 3 of the CVRA deal with a law enforcement agency's or prosecuting attorney's

[47] See Section 5.10(A).

[48] Some of the enumerated serious misdemeanors in MCL 780.811(1)(a) are punishable by more than one year in prison and are therefore cognizable in the circuit court. See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for a detailed and comprehensive discussion of the Crime Victim's Rights Act.

obligations, the court may find it helpful to be cognizant of the following CVRA requirements and procedures as early as the arraignment:

- **Identifying information about a crime victim must be contained in a separate statement.** An officer investigating a serious misdemeanor involving a victim must file with the complaint, appearance ticket, or traffic citation a separate written statement containing the name, address, and telephone number of each victim. MCL 780.812. Victim information is not a matter of public record, and statutory law exempts it from disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. MCL 780.812; MCL 780.830.

- **Notice required when the defendant pleads guilty or no contest to a serious misdemeanor.** Within 48 hours of accepting a defendant's guilty or no contest plea to a serious misdemeanor, the court must notify the prosecuting attorney of the plea and the date scheduled for sentencing. MCL 780.816(1). The notice must include the name, address, and telephone number of the victim. *Id*. "The notice is not a public record and is exempt from disclosure under the freedom of information act, [MCL 15.231 to MCL 15.246]." MCL 780.816(1).

- **Notice required when no plea to a serious misdemeanor is accepted.** Even when no plea is accepted at the arraignment and further proceedings are expected, the court must notify the prosecuting attorney of that fact within 48 hours of the arraignment. MCL 780.816(1).

- **Notice requirements in cases involving deferred judgments or delayed sentences.** In all cases, the court, the Department of Corrections (DOC), the Department of Health and Human Services (DHHS), a county sheriff, or a prosecuting attorney must provide notice to a victim if the case against the defendant is resolved by assignment of the defendant to trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal. In performing this duty, the court, DOC, DHHS, county sheriff, or prosecuting attorney may furnish information or records to the victim that would otherwise be closed to public inspection, including information or records related to a defendant's youthful trainee status. MCL 780.752a; MCL 780.781a; MCL 780.811b.[49] Notice must be mailed to the address provided by the victim, except as otherwise provided in MCL 780.861. If the victim is a program participant of the

[49] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for discussion of deferment and delayed sentencing, including specialized treatment courts.

Address Confidentiality Program,[50] the victim may use the address designated by the department of the attorney general. MCL 780.811b(2).

- **Prosecutor's obligation to notify the crime victim.** Within 48 hours after receiving notice from the court that at arraignment, a defendant pleaded guilty or no contest to a serious misdemeanor, or that no plea was accepted, the prosecutor must give the crime victim written notice of the statutory rights specified in MCL 780.816(1)(a)-(f).

- **Victim impact statements (written).** The court may order the preparation of a presentence investigation report (PSIR) in any criminal misdemeanor case. MCL 771.14(1). If a crime victim requests, a written impact statement must be included in the PSIR if one is prepared. MCL 771.14(2)(b). In juvenile delinquency, designated, and serious misdemeanor cases, the victim also has the right to submit an oral or written impact statement if a disposition report or PSIR is prepared. MCL 780.792(1); MCL 780.792(3); MCL 780.824. If no PSIR is prepared in a serious misdemeanor or designated case involving a misdemeanor, the court must notify the prosecuting attorney of the date and time of sentencing at least 10 days before the disposition or sentencing, and the victim may submit a written impact statement to the prosecutor or court. MCL 780.792(2)-(3); MCL 780.825(1).

- **Victim impact statements (oral).** A crime victim has the right to appear and make an oral impact statement at the sentencing of the defendant irrespective of whether a presentence report is prepared. MCL 780.825(1). A crime victim also has the right to appear and make an oral impact statement at a juvenile's disposition or sentencing. MCL 780.793(1). The victim may elect to remotely provide the oral impact statement. MCL 780.793(1); MCL 780.825(1). The defendant or juvenile must be physically present in the courtroom at the time a victim makes an oral impact statement, unless the court has determined, in its discretion, that the defendant or juvenile is behaving in a disruptive manner or presents a threat to the safety of any individuals in the courtroom. MCL 780.793(3); MCL 780.825(2). The court may consider any relevant statement provided by the victim regarding the defendant being physically present during the victim's oral impact statement when making its determination. MCL 780.793(3); MCL 780.825(2).

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[50] MCL 780.851 *et seq.*

- **Restitution is required of any defendant convicted of a misdemeanor punishable by not more than one year.** Full restitution is not limited to serious misdemeanor convictions. At sentencing for a misdemeanor punishable by imprisonment for one year or less, the court must order the defendant to "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction[.]" MCL 780.826(2). See also MCR 6.610(G)(1)(d) (requiring the restitution order to indicate a dollar amount).

Part C: Procedures Specific to Felony Arraignments[51]

5.12 Procedure Required for Felony Arraignments in District Court

MCR 6.610(I) specifies the procedure to be employed by a district court when a defendant first appears in district court for arraignment on an offense over which the *circuit* court has trial jurisdiction. Arraignment procedure for felony offenses is also covered by MCR 6.104(E). See the Michigan Judicial Institute's checklist regarding felony arraignment in district court.

When a defendant is arraigned on a felony charge or a misdemeanor charge punishable by more than one year of imprisonment,[52] the court must:

- "inform the accused of the nature of the offense charged, and its maximum possible prison sentence and any mandatory minimum sentence required by law[,]" MCR 6.104(E)(1); see also MCR 6.610(I)(1);

[51] This Part discusses the procedures that are specifically applicable to arraignments for felony offenses and misdemeanor offenses over which the *circuit* court has trial jurisdiction. See Section 2.7 for discussion of district court jurisdiction. See Part B for discussion of procedures specifically applicable to misdemeanor arraignments. See Chapter 7 for discussion of post-bindover (circuit court) arraignments.

[52] The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., applies to an indigent defendant who "is being prosecuted or sentenced for a crime *for which an individual may be imprisoned upon conviction*, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(f)(*i*) (defining indigent criminal defense services for purposes of the MIDCA) (emphasis supplied). Therefore, the requirements of the MIDCA concerning advice of the right to counsel and appointment of counsel apply whenever imprisonment of *any* length of time is a potential penalty. See Chapter 4 for discussion of the MIDCA.

- if the accused is not represented by counsel, inform the accused of the right to be represented by an attorney, MCR 6.610(I)(2)(b);[53]

- if the accused is not represented by counsel, advise the accused that he or she has a right to remain silent, that anything said orally or in writing can be used against him or her in court, that he or she is entitled to have an attorney present during any questioning consented to, and that the local indigent criminal defense system will appoint an attorney to represent the accused if he or she cannot afford to hire one, MCL 775.16[54]; MCL 780.991(1)(c)[55]; MCR 6.104(E)(2)(a)-(d); MCR 6.610(I)(2)(c);

- advise the accused of his or her right to be represented by an attorney at all court proceedings, MCR 6.104(E)(3);

- inform the defendant of the right to a preliminary examination, MCR 6.610(I)(2)(a);

- set a date for a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, MCL 766.4(1); MCR 6.104(E)(4)[56];

- schedule a preliminary examination for a date not less than 5 days or more than 7 days[57] after the date of the probable cause conference, MCL 766.4(1); MCR 6.104(E)(4);

- if an unrepresented defendant waives the preliminary examination at arraignment, before accepting the waiver the court must determine that the waiver is given freely, understandingly, and voluntarily, MCR 6.610(I)[58];

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[53] See Section B. for more information on advising a defendant of the right to counsel at a felony arraignment.

[54] Although MCR 6.104(E)(2)(d) has been amended to clarify that the local indigent criminal defense system is responsible for appointing an attorney to represent the accused if he or she cannot afford counsel, MCL 775.16 still provides that "the magistrate shall appoint counsel" if a defendant is eligible under the Michigan Indigent Defense Commission Act (MIDCA).

[55] The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., applies to an indigent defendant who "is being prosecuted or sentenced for a crime *for which an individual may be imprisoned upon conviction*, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(f)(*i*) (defining indigent criminal defense services for purposes of the MIDCA) (emphasis supplied). Therefore, the requirements of the MIDCA concerning advice of the right to counsel and appointment of counsel apply whenever imprisonment of *any* length of time is a potential penalty. See Chapter 4 for discussion of the MIDCA.

[56] The prosecuting attorney and defense counsel may agree to waive the probable cause conference. MCL 766.4(2); see also MCR 6.110(A). See Chapter 7 for discussion of scheduling the probable cause conference and preliminary examination.

- inform the defendant of the right to consideration of pretrial release, MCR 6.610(I)(2)(d);

- determine whether pretrial release is appropriate and, if so, what form of pretrial release is proper, MCR 6.104(E)(5); and

- "ensure that the accused has had biometric data collected as required by law," MCR 6.104(E)(6); see also MCL 764.29.[59]

"A defendant neither demanding nor waiving preliminary examination in writing is deemed to have demanded preliminary examination and a defendant neither demanding nor waiving jury trial in writing is considered to have demanded a jury trial." MCL 600.8513.

If an accused first appears before the court in a county other than the one in which the offense occurred or, if arrested by warrant, in a county not listed in the arrest warrant, and the accused is not represented by counsel, the court must advise the accused of certain rights and decide whether to release the accused before trial.[60] MCR 6.104(C).

The court conducting an accused's arraignment on a circuit court offense "may not question the accused about the alleged offense or request that the accused enter a plea." MCR 6.104(E).

A. Pretrial Release

Except as otherwise provided by law, an individual charged with a criminal offense is entitled to bail. MCL 765.6(1); Const 1963, art 1, § 15; MCR 6.106(A). A defendant arraigned in district court for a felony or misdemeanor not cognizable by the district court must be informed of his or her right to consideration of pretrial release. MCR 6.610(I)(2)(d). In addition, when a defendant is arraigned before a court in the same county in which the offense allegedly occurred, or before the court specified in the complaint or warrant if the

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[57] "The parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the [probable cause] conference." MCL 766.4(4). Additionally, under certain circumstances, the prosecuting attorney may request that the preliminary examination "commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present." *Id.*; see also MCR 6.110(B)(2) (adding that "the defendant [must either be] present in the courtroom or [have] waived the right to be present[]"). See Chapter 7 for discussion of scheduling the probable cause conference and preliminary examination.

[58] "The defendant may waive the preliminary examination *with the consent of the prosecuting attorney*." MCL 766.7 (emphasis supplied); MCR 6.110(A); see also MCL 766.4(4).

[59] See Section 3.13 for more information on fingerprinting and collection of biometric data. Note that MCR 6.104(E)(6) contemplates the collection of biometric data while MCL 764.29 contemplates the taking of fingerprints.

[60] See Section 5.3(B)(2) and Section 5.3(C)(2) for discussion of applicable procedures when an arrest is made outside the county in which the offense allegedly occurred.

defendant was arrested by warrant, the district court must determine whether pretrial release is appropriate and, if so, the court must tailor any conditions of the defendant's pretrial release to the circumstances of the offense and the offender. MCR 6.104(C); MCR 6.104(E)(5); MCR 6.106(A).

MCR 6.104(B) provides:

> "(1) The court may deny pretrial release to
>
> (a) a defendant charged with
>
> (*i*) murder or treason, or
>
> (*ii*) committing a violent felony and
>
> [A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or
>
> [B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents, if the court finds that proof of the defendant's guilt is evident or the presumption great;
>
> (b) a defendant charged with criminal sexual conduct in the first degree, armed robbery, or kidnapping with the intent to extort money or other valuable thing thereby, if the court finds that proof of the defendant's guilt is evident or the presumption great, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person."

In general, where the defendant is preliminarily arraigned, "either in person or by way of two-way interactive video technology," before a court in a county other than the county in which the offense occurred, the court must obtain a recognizance from the accused indicating that he or she will appear within the next 14 days before a court specified in the warrant or, in the case of a warrantless arrest, before a court in the judicial district where the offense occurred, or before another designated court. MCR 6.104(C). After receiving the

accused's recognizance, the court must certify the recognizance and deliver it to the appropriate court "without delay[.]" *Id*. If the accused is not released, he or she must be promptly transported to the judicial district of the offense. *Id*. "In all cases, the arraignment is then to continue under [MCR 6.104](D), if applicable, and [MCR 6.104](E) either in the judicial district of the alleged offense or in such court as otherwise is designated." MCR 6.104(C).

See Chapter 8 for more information on pretrial release.

B. Advice of Right to Counsel at Felony Arraignments[61]

"[T]he right to counsel attaches at the initial appearance before a judicial officer[.]" *Rothgery v Gillespie Co*, 554 US 191, 199 (2008) (citations omitted). Whether the prosecutor was involved in or aware of the initial proceeding is irrelevant in determining when a defendant's right to counsel has attached. *Id*. at 198-199. In *Rothgery*, despite several requests, the defendant was denied the appointment of counsel for six months after his initial appearance. *Id*. at 195-197. The lower courts concluded that this delay did not interfere with the defendant's right to counsel because the prosecutor was neither aware of the arrest nor present at the initial hearing. *Id*. at 197-198. The United States Supreme Court disagreed and stated:

> "[A] criminal defendant's initial appearance before a judicial officer, where he [or she] learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Id*. at 213.

The Court declined to decide whether the six-month delay prejudiced the defendant's Sixth Amendment rights. The Court simply reaffirmed its longstanding position that attachment of the right to counsel begins at the first formal proceeding. *Rothgery*, 554 US at 213.

When an unrepresented defendant is arraigned in district court for an offense over which the district court does not have trial jurisdiction, the court must inform the defendant of his or her right to the assistance of counsel and to appointed counsel if he or she is indigent. MCR 6.610(I)(2)(b)-(c). "When a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed." MCL 775.16. "If the person states that he or she

[61] See Chapter 4 for more information on a defendant's right to counsel.

is unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the [Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981—MCL 780.1003[62]]." MCL 775.16.

In addition, two different court rules address the court's responsibility, at a defendant's arraignment on the warrant or complaint, to advise a defendant of his or her right to counsel. MCR 6.005(A); MCR 6.104(E).[63]

MCR 6.005(A)(1) requires the court, at a defendant's arraignment on the warrant or complaint, to advise the defendant of his or her right to the assistance of counsel at all court proceedings. In addition, at a defendant's arraignment on the warrant or complaint, the court must inform the defendant that he or she is entitled to a lawyer at public expense if he or she wants an attorney and cannot afford to retain one. MCR 6.005(A)(2). The court must ask the defendant whether they want a lawyer, and, if so, whether he or she is financially unable to retain one.[64] MCR 6.005(A).[65]

"Court rules providing for advising a defendant concerning his right to counsel at subsequent court proceedings . . . do not conflict with the language of [MIDC] Standard 4 providing for representation at the arraignment." *Oakland Co v State of Michigan*, 325 Mich App 247, 270-271 (2018) (additionally holding that although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited, and through the MIDCA, the Michigan Legislature has enacted a protection greater than that secured by the United States Constitution).

MCR 6.104(E)(2) requires a court to convey specific information to a defendant at arraignment "*if the accused is not represented by a lawyer at the arraignment*[.]" (Emphasis added.) If the defendant is not represented by counsel at arraignment, the court must advise the defendant that he or she is entitled to have an attorney present at all court proceedings and during any questioning to which the

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[62] The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(f)(*i*) (defining *indigent criminal defense services* for purposes of the MIDCA). The MIDCA requires the trial court to "assure that each criminal defendant is advised of his or her right to counsel." MCL 780.991(1)(c). It requires the indigent criminal defense system to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . not later than at the defendant's first appearance in court." MCL 780.991(3)(a). See Chapter 4 for discussion of the MIDCA.

[63] See Section 5.12 for more information on the court's responsibility at arraignment.

[64] See Chapter 4 for more information on right to counsel, waiver of that right, and determining indigency.

[65] See Chapter 4 for discussion of the MIDCA.

defendant has consented, and that the local indigent criminal defense system will appoint an attorney to represent the defendant if he or she is indigent.[66] MCR 6.104(E)(2)(c)-(d); MCR 6.104(E)(3). See also MCL 775.16 ("[w]hen a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed").[67]

MCR 6.104(E)(3) further requires the court to advise a defendant at arraignment (whether or not represented by an attorney at the time) that he or she has the right to be represented by an attorney at all subsequent proceedings; if appropriate, the court must appoint counsel for the defendant.[68] Additionally, because "the negotiation of a plea bargain . . . is almost always the critical point for a defendant, . . . criminal defendants require effective counsel during plea negotiations" even though they occur out of court and the prosecutor may have little or no notice of a deficiency in defense counsel's conduct. *Missouri v Frye*, 566 US 134, 138, 144 (2012).[69] In order to assist any later review of defense counsel's effectiveness, any party may choose to make any formal plea offers a matter of record at any plea proceeding or before a trial on the merits. *Frye*, 566 US at 142, 146.[70]

C. Scheduling the Probable Cause Conference and Preliminary Examination[71]

See Chapter 7 for information on probable cause conferences and preliminary examinations and Section 7.3 for information on scheduling these types of hearings.

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[66] See Chapter 4 for information on appointed counsel.

[67] The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(f)(*i*) (defining *indigent criminal defense services* for purposes of the MIDCA). The MIDCA requires the trial court to "assure that each criminal defendant is advised of his or her right to counsel." MCL 780.991(1)(c). It requires the indigent criminal defense system to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . not later than at the defendant's first appearance in court." MCL 780.991(3)(a). See Chapter 4 for discussion of the MIDCA. Although MCR 6.104(E)(2)(d) has been amended to clarify that the local indigent criminal defense system is responsible for appointing an attorney to represent the accused if he or she cannot afford counsel, MCL 775.16 still provides that "the magistrate shall appoint counsel" if a defendant is eligible under the Michigan Indigent Defense Commission Act (MIDCA).

[68] The MIDCA requires the trial court to "assure that each criminal defendant is advised of his or her right to counsel." MCL 780.991(1)(c). It further requires the indigent criminal defense system to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . not later than at the defendant's first appearance in court." MCL 780.991(3)(a). The trial court may play a role in the determination of indigency. *Id.*

5.13 Juvenile Proceedings in District Court

"The courts may use telephonic, voice, or videoconferencing technology under [Subchapter 6.900 of the Michigan Court Rules] as prescribed by MCR 6.006."[72] MCR 6.901(C).

A. Arraignments in Automatic Waiver Cases

Where a specified juvenile violation is alleged, the automatic waiver procedure provides the Criminal Division of the Circuit Court with jurisdiction to hear the case by allowing the prosecutor to file a complaint and warrant in district court rather than filing a petition in the Family Division of Circuit Court. See MCL 600.606(1); MCL 764.1f(1); MCL 712A.2(a)(1).[73]

Subchapter 6.900 of the Michigan Court Rules is dedicated to automatic waiver cases. See MCR 6.001(C). MCR 6.901(B) defines the scope of these rules:

> "The rules apply to criminal proceedings in the district court and the circuit court concerning a juvenile against whom the prosecuting attorney has authorized the filing of a criminal complaint charging a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court. The rules do not apply to a person charged solely with an offense in which the family division has waived jurisdiction pursuant to MCL 712A.4 ['traditional waiver' procedure]."

MCL 764.27 states that "[e]xcept as provided in [MCL 600.606]," a person under 18 years of age arrested with or without a warrant must be taken immediately before the Family Division of Circuit Court. The automatic waiver provision of MCL 600.606 operates as an exception to MCL 764.27's mandate that a juvenile first be taken before a Family Division court after his or her arrest. *People v Brooks*, 184 Mich App 793, 797-798 (1990). In *Brooks*, 184 Mich App at 794-795, the trial court suppressed a juvenile defendant's statement to

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[69] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US 134, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2). Note that, although persuasive, Michigan state courts "are not . . . bound by the decisions of lower federal courts[.]" *People v Gillam (Willie)*, 479 Mich 253, 261 (2007).

[70] See Chapter 6 for discussion of pleas.

[71] See Chapter 7 for discussion of probable cause conferences and preliminary examinations.

[72] MCR 6.006 addresses video and audio proceedings in criminal cases.

[73] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information.

police because the juvenile was not "taken immediately before the family division of the circuit court" as required by MCL 764.27. In reversing the trial court's decision, the Court of Appeals explained:

> "[T]he Legislature intended that those juveniles charged as adult offenders pursuant to [MCL 600.606] fall outside of the juvenile court's jurisdiction. Because [MCL 600.606] divests the juvenile court of jurisdiction and gives the circuit court original jurisdiction in the matter, the mandatory provisions set forth in [MCL 764.27] do not apply to those juveniles charged as adult offenders." *Brooks*, 184 Mich App at 798.

B. Procedure Required for Juvenile Arraignments in District Court

MCR 6.907 specifies the procedure for conducting juvenile arraignments in district court. Specific time limitations apply to juvenile arraignments when the prosecutor has decided to proceed against the juvenile by complaint and warrant for the juvenile's alleged commission of a specified juvenile violation. MCR 6.907(A) provides:

> **"Time.** When the prosecuting attorney authorizes the filing of a complaint and warrant charging a juvenile with a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court, the juvenile in custody must be taken to the magistrate for arraignment on the charge. The prosecuting attorney must make a good-faith effort to notify the parent of the juvenile of the arraignment. The juvenile must be released if arraignment has not commenced:
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> > (1) within 24 hours of the arrest of the juvenile; or
> >
> > (2) within 24 hours after the prosecuting attorney authorized the complaint and warrant during special adjournment pursuant to MCR 3.935(A)(3),[74] provided the juvenile is being detained in a juvenile facility."

At a juvenile's arraignment on the complaint and warrant charging him or her with a specified juvenile violation, the court must first

[74] MCR 3.935(A)(3) requires the Family Division of Circuit Court, upon the prosecuting attorney's request, to adjourn a preliminary hearing in a delinquency proceeding for up to five days to allow the prosecutor to decide whether to proceed under the automatic waiver statutes. See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information.

determine whether the juvenile is accompanied by a parent, guardian, or adult relative. MCR 6.907(C)(1). The court may conduct a juvenile's arraignment in the absence of the juvenile's parent, guardian, or adult relative, as long as the local funding unit's appointment authority has appointed an attorney to appear with the juvenile at arraignment or an attorney retained by the juvenile appears with him or her at arraignment. *Id*.[75]

> **Note:** The Michigan Indigent Defense Commission Act (MIDCA),[76] MCL 780.981 *et seq.*, requires the court to advise the juvenile of the right to counsel and requires that the juvenile be screened for eligibility for appointed counsel, MCL 780.991(1)(c), and requires that a determination of indigency be made by the indigent criminal defense system "not later than at the [juvenile's] first appearance in court[,]" MCL 780.991(3)(a).[77] See also MCL 775.16. See Chapter 17 of the Michigan Judicial Institute's *Juvenile Justice Benchbook* for discussion of the MIDCA as it applies to juveniles.

C. Juvenile Pretrial Release

MCR 6.909 governs the release or detention of juveniles pending trial and other court proceedings.[78]

Bail. Except when bail may be denied, the court must advise a juvenile defendant of the right to bail as it would for adults accused

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[75] MCL 766.4 previously provided that the preliminary examination was to be scheduled for a date "not exceeding 14 days after the arraignment." Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015, 2014 PA 123 amended MCL 766.4 to require the court, at arraignment for a felony charge, to schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1.

Under MCR 6.907(C)(2), a juvenile's preliminary examination must be scheduled within 14 days of the juvenile's arraignment, and under the special adjournment provision of MCR 3.935(A)(3), this 14-day period may be reduced by as many as three days for time given and used by the prosecutor. Furthermore, MCR 6.911(A) provides that a juvenile may waive his or her right to a preliminary examination if the juvenile is represented by an attorney and makes a written waiver of the right in open court. These court rules have not been amended to reflect the statutory changes adopted by 2014 PA 123.

[76] The MIDCA does not violate the separation of powers doctrine of the Michigan Constitution because "any sharing or overlapping of functions required by the [MIDCA] is sufficiently specific and limited that it does not encroach on the constitutional authority of the judiciary." *Oakland Co v State of Michigan*, 325 Mich App 247, 262 (2018). "[T]he [MIDCA] contains no provision authorizing the MIDC to force the judiciary to comply with the minimum standards, nor does the [MIDCA] purport to control what happens in court." *Id*. at 264.

[77] The MIDCA applies to "[a]n individual less than 18 years of age at the time of the commission of a felony" if "[t]he prosecuting attorney authorizes the filing of a complaint and warrant for a specified juvenile violation under . . . MCL 764.1f." MCL 780.983(a)(*ii*)(D).

of bailable criminal offenses. MCR 6.909(A)(1). The court may order a juvenile released to a parent or guardian and impose any lawful conditions on the juvenile's release, including the condition that bail be posted. *Id*.

Detention without bail. MCR 6.909(A)(2) specifies the circumstances in which a juvenile may be denied bail:

> "If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or the court may deny bail:
>
> (a) to a juvenile charged with first-degree murder, second-degree murder, or
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> (b) to a juvenile charged with first-degree criminal sexual conduct, or armed robbery,
>
> (*i*) who is likely to flee, or
>
> (*ii*) who clearly presents a danger to others."

Juvenile's place of confinement during detention without bail. Generally, a juvenile charged with a crime and not released while awaiting trial or sentencing must be placed in a juvenile facility. MCR 6.909(B)(1). However, on motion of the prosecuting attorney or the superintendent of the juvenile facility where a juvenile is detained, the court may order that the juvenile be lodged in a facility used to incarcerate adult prisoners if the juvenile's conduct is a menace to other juveniles or if "the juvenile may not otherwise be safely detained in a juvenile facility." MCR 6.909(B)(2)(a)-(b). Additionally, if no juvenile facility is reasonably available and it is apparent that the juvenile cannot otherwise be safely detained, the court may place the juvenile in an adult facility. See MCR 6.909(B)(1) and MCR 6.907(B).

A juvenile must not be placed in an institution operated by the family division of the circuit court unless the family division consents to the placement or the circuit court orders the placement. MCR 6.909(B)(3). A juvenile in custody or otherwise detained must be maintained separately from adult prisoners or defendants pursuant to MCL 764.27a. MCR 6.907(B); MCR 6.909(B)(4).

[78] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for detailed information.

5.14 A Crime Victim's Rights Following Felony Arraignment[79]

Article 1 of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, assigns certain rights and responsibilities to victims of felonies. In addition, some provisions in the Revised Judicature Act assign victim rights. Although most provisions of the CVRA deal with a law enforcement agency's obligations, the court may find it helpful to be cognizant of the following CVRA requirements and procedures as early as the arraignment.

- **Identifying information about and visual representations of a crime victim are protected.** MCL 780.758(2) provides that a victim's home and work addresses and telephone numbers must not be in the court file or "ordinary" court documents unless they are contained in a trial transcript or are used to identify the place of a crime. Under MCL 780.758(3), information and visual representations of a crime victim are subject to the following:

  > "(a) The home address, home telephone number, work address, and work telephone number of the victim are exempt from disclosure under the [Freedom of Information Act (FOIA), MCL 15.231 *et seq.*], unless the address is used to identify the place of the crime.
  >
  > (b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim, are exempt from disclosure under the [FOIA], and, if the picture, photograph, drawing, or other visual representation is from a court proceeding that is made available to the public through streaming on the internet or other means, the picture, photograph, drawing, or visual representation may be blurred.
  >
  > (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent to commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed is exempt from disclosure under the [FOIA]:
  >
  > (*i*) The victim's name and address.

[79] See Section 5.11 for discussion of application of the Crime Victim's Rights Act (CVRA) to *serious misdemeanors*, some of which are punishable by more than one year in prison and are therefore cognizable in the circuit court. See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for a detailed and comprehensive discussion of the Crime Victim's Rights Act.

(*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.

(*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused."

- **Notice required when the defendant is available for pretrial release.** Within 24 hours of a felony defendant's arraignment, the investigating law enforcement agency must notify the victim "of the availability of pretrial release for the defendant[.]" MCL 780.755(1). The notice must include the sheriff's or juvenile facility's telephone number and must inform the crime victim that he or she may contact the sheriff or juvenile facility to find out whether the defendant was released from police custody. *Id*. If a victim has requested notification of a defendant's arrest or release under MCL 780.753, the investigating law enforcement agency must promptly notify the victim of these events. MCL 780.755(1).

- **Notice requirements in cases involving deferred judgments or delayed sentences.** In all cases, the court, the Department of Corrections (DOC), the Department of Health and Human Services (DHHS), a county sheriff, or a prosecuting attorney must provide notice to a victim if the case against the defendant is resolved by assignment of the defendant to trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal. In performing this duty, the court, DOC, DHHS, county sheriff, or prosecuting attorney may furnish information or records to the victim that would otherwise be closed to public inspection, including information or records related to a defendant's youthful trainee status. MCL 780.752a; MCL 780.781a; MCL 780.811b.[80] Notice must be mailed to the address provided by the victim, except as otherwise provided in MCL 780.861. If the victim is a program participant of the Address Confidentiality Program,[81] the victim may use the address designated by the department of the attorney general. MCL 780.811b(2).

- **Notice requirements prior to the defendant's admission to drug treatment court.**[82] Circuit and district courts are

[80] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for discussion of deferment and delayed sentencing, including specialized treatment courts.

[81] MCL 780.851 *et seq*.

authorized to institute or adopt a drug treatment court.[83] MCL 600.1062(1). Family divisions are also authorized to institute or adopt a drug treatment court for juveniles. MCL 600.1062(2). If an offender is admitted to a drug treatment court, adjudication of his or her crime may be deferred. MCL 600.1070(1)(a)-(c). A crime victim and others must be permitted to submit a written statement to the court prior to an offender's admission to drug treatment court. MCL 600.1068(4) provides:

> "In addition to rights accorded a victim under the [CVRA], . . . MCL 780.751 to [MCL] 780.834, the drug treatment court must permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted, and members of the community in which either the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the drug treatment court."

Note: Subject to the agreement of the defendant, the defendant's attorney, the prosecutor, the judge of the transferring court, the judge of the receiving court, and the prosecutor of the receiving drug treatment court's funding unit, a drug treatment court may accept participants from any other jurisdiction based on the participant's residence or the unavailability of a drug treatment court in the jurisdiction where the participant is charged. MCL 600.1062(4).

- **Notice requirements prior to the defendant's admission to veterans treatment court.**[84] Circuit and district courts are authorized to adopt or institute a veterans treatment court.[85] MCL 600.1201(2). If an offender is admitted to a veterans treatment court, adjudication of his or her crime may be deferred. MCL 600.1206(1)(c). Crime victims and community members must be permitted to submit written statements to

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[82] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for discussion of drug treatment courts.

[83] A drug treatment court, or a circuit or district court seeking to adopt or institute a drug treatment court, must be certified by the State Court Administrative Office. MCL 600.1062(5). A case may be completely transferred from a court of original jurisdiction to a drug treatment court, prior to or after adjudication, if those courts—with the approval of the chief judge and assigned judge of each court, a prosecuting attorney from each court, and the defendant—have executed a memorandum of understanding as provided in MCL 600.1088(1)(a)-(e). See MCL 600.1088(1). Unless a memorandum of understanding provides otherwise, the original court of jurisdiction maintains jurisdiction over the participant until final disposition of the case, but not longer than the probation period established under MCL 771.2. MCL 600.1070(2).

[84] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for discussion of veterans treatment courts.

the veterans treatment court prior to an offender's admission to that court. MCL 600.1205(4) provides:

> "In addition to rights accorded a victim under the [CVRA], . . . MCL 780.751 to [MCL] 780.834, the veterans treatment court shall permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted, and members of the community in which the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the veterans treatment court."

A participant in veterans treatment court must "[p]ay all crime victims' rights assessments under . . . MCL 780.905." MCL 600.1208(1)(d).

> **Note:** Subject to the agreement of the defendant, the defendant's attorney, the prosecutor, the judge of the transferring court, the judge of the receiving veterans treatment court, and the prosecutor of the receiving veterans treatment court's funding unit, a veterans treatment court may accept participants from any other jurisdiction in the state based on either the participant's residence in the receiving jurisdiction or the unavailability of a veterans treatment court in the jurisdiction in which the participant is charged. MCL 600.1201(4).

- **Notice requirements prior to the defendant's admission to mental health court.**[86] Circuit and district courts are authorized to adopt or institute a mental health court. MCL 600.1091(1).[87] If an offender is admitted to a mental health court, he or she may be entitled to discharge and dismissal of the proceedings. MCL 600.1098(2)-(5). Crime victims must be permitted to submit written statements to the mental health

[85] A veterans treatment court, or a circuit or district court seeking to adopt or institute a veterans treatment court, must be certified by the State Court Administrative Office. MCL 600.1201(5). A case may be completely transferred from a court of original jurisdiction to a veterans treatment court, prior to or after adjudication, if those courts—with the approval of the chief judge and assigned judge of each court, a prosecuting attorney from each court, and the defendant—have executed a memorandum of understanding as provided in MCL 600.1088(1)(a)-(e). See MCL 600.1088(1). Unless a memorandum of understanding provides otherwise, the original court of jurisdiction maintains jurisdiction over the participant until final disposition of the case, but not longer than the probation period established under MCL 771.2. MCL 600.1206(2).

[86] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for discussion of mental health courts.

court prior to an offender's admission to that court. MCL 600.1094(4) provides:

> "In addition to rights accorded a victim under the [CVRA], . . . MCL 780.751 to [MCL] 780.834, the mental health court shall permit any victim of the offense or offenses of which the individual is charged as well as any victim of a prior offense of which that individual was convicted to submit a written statement to the court regarding the advisability of admitting the individual into the mental health court."
>
> > **Note:** The court may, but is not required to, "accept participants from any other jurisdiction in [the] state based upon the residence of the participant in the receiving jurisdiction, the nonavailability of a mental health court in the jurisdiction where the participant is charged, and the availability of financial resources for both operations of the mental health court program and treatment services." MCL 600.1091(2).

- **Notice requirements prior to the juvenile's admission to juvenile mental health court.**[88] The family division of a circuit court is authorized to adopt or institute a juvenile mental health court. MCL 600.1099c(1).[89] If a juvenile is admitted to a juvenile mental health court, he or she may be entitled to discharge and dismissal of the proceedings. MCL 600.1099k(2)-(3). Crime victims must be permitted to submit written statements to the juvenile mental health court prior to a juvenile's admission to that court. MCL 600.1099g provides:

> "In addition to rights accorded a victim under the [CVRA], . . . MCL 780.751 to [MCL] 780.834, the juvenile mental health court shall permit any victim of the offense or offenses for which the juvenile has been petitioned to submit a written statement to the court

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[87] A mental health court, or a circuit or district court seeking to adopt or institute a mental health court, must be certified by the State Court Administrative Office. MCL 600.1091(4). A case may be completely transferred from a court of original jurisdiction to a mental health court, prior to or after adjudication, if those courts—with the approval of the chief judge and assigned judge of each court, a prosecuting attorney from each court, and the defendant—have executed a memorandum of understanding as provided in MCL 600.1088(1)(a)-(e). See MCL 600.1088(1). Unless a memorandum of understanding provides otherwise, the original court of jurisdiction maintains jurisdiction over the participant until final disposition of the case, but not longer than the probation period established under MCL 771.2. MCL 600.1095(2).

[88] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for discussion of mental health courts.

regarding the advisability of admitting the juvenile into the juvenile mental health court."

Note: The court may, but is not required to, "accept participants from any other jurisdiction in [the] state based upon the residence of the participant in the receiving jurisdiction. MCL 600.1099c(2).

- **Victim impact statements (written).** The court must order the preparation of a presentence investigation report (PSIR) in any criminal felony case. MCL 771.14(1). If a crime victim requests, a written impact statement must be included in the PSIR if one is prepared. MCL 771.14(2)(b); MCL 780.764. In juvenile delinquency, designated, and serious misdemeanor cases, the victim also has the right to submit a written impact statement if a disposition report or PSIR is prepared. MCL 780.792(1); MCL 780.792(3). If no PSIR is prepared in a designated case involving a misdemeanor, the court must "notify the prosecuting attorney of the date and time of sentencing at least 10 days prior to the [disposition or] sentencing[,]" and the victim may submit a written impact statement to the prosecutor or court. MCL 780.792(2)-(3).

- **Victim impact statements (oral).** A crime victim has the right to appear and make an oral impact statement at the sentencing of the defendant or at the disposition or sentencing of the juvenile. MCL 780.765(1); MCL 780.793(1). The victim may elect to remotely provide the oral impact statement. MCL 780.765(1); MCL 780.793(1). The defendant or juvenile must be physically present in the courtroom at the time a victim makes an oral impact statement, unless the court has determined, in its discretion, that the defendant or juvenile is behaving in a disruptive manner or presents a threat to the safety of any individuals in the courtroom. MCL 780.765(2); MCL 780.793(3). The court may consider any relevant statement provided by the victim regarding the defendant being physically present

[89] A juvenile mental health court, or a family division of circuit court seeking to adopt or institute a juvenile mental health court, must be certified by the State Court Administrative Office. MCL 600.1099c(4). A case may be completely transferred from a court of original jurisdiction to a juvenile mental health court, prior to or after adjudication, if those courts—with the approval of the chief judge and assigned judge of each court, a prosecuting attorney from each court, and the juvenile—have executed a memorandum of understanding as provided in MCL 600.1088(1)(a)-(e). See MCL 600.1088(1). Unless a memorandum of understanding provides otherwise, the original court of jurisdiction maintains jurisdiction over the participant until final disposition of the case. MCL 600.1099h(b). The court may also "receive jurisdiction over the juvenile's parents or guardians under section 6 of chapter XIIA of the probate code of 1939, . . . MCL 712A.6, in order to assist in ensuring the juvenile's continued participation and successful completion of the juvenile mental health court and may issue and enforce any appropriate and necessary order regarding the parent or guardian." MCL 600.1099h(b).

during the victim's oral impact statement when making its determination. MCL 780.765(2); MCL 780.793(3).

Chapter 6: Pleas

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Introductory Note

Part A of this chapter contains discussion of procedures and law applicable to plea proceedings for offenses cognizable in both district court and circuit court. Part B discusses additional procedures specifically applicable to misdemeanor offenses cognizable in the district court. Part C discusses additional procedures specifically applicable to felony and misdemeanor offenses cognizable in the circuit court.

Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district or municipal court on or after January 1, 2015,[1] 2014 PA 123 and 2014 PA 124 amended several provisions in the Code of Criminal Procedure and the Revised Judicature Act related to preliminary examinations, probable cause conferences, and the jurisdiction and duties of district court judges and magistrates with respect to pretrial proceedings in felony cases. For a chart outlining the differences in procedures before and after January 1, 2015, as a result of statutory reforms concerning probable cause conferences, preliminary examinations, and felony pleas, see SCAO Memorandum, July 23, 2014. For additional information, see the SCAO's *Best Practices for Probable Cause Conferences and Preliminary Examinations*.

See Chapter 2 for discussion of jurisdiction, including the jurisdiction of district court judges and magistrates. See the Michigan Judicial Institute's Criminal Pretrial/Trial Quick Reference Materials web page for a table including information on the jurisdiction of district court judges and magistrates over preliminary matters in criminal proceedings, and checklists and flowcharts for proceedings involving misdemeanor and felony guilty and no contest pleas.

Part A: Generally-Applicable Principles and Procedures

[1] See 2014 PA 123, enacting section 1; 2014 PA 124, enacting section 2.

6.1 Introduction

A person accused of an offense cannot be convicted of the offense unless he or she is found guilty of the charge by a judge or jury, or unless he or she confesses guilt in open court or admits to the truth of the charge. MCL 763.2.

Subchapter 6.300 of the Michigan Court Rules contains detailed information about the kinds of pleas available to defendants charged with criminal offenses cognizable by circuit courts. See MCR 6.001(A). Subchapter 6.600, the section devoted to criminal procedure in district court, contains all the information *expressly* applicable to plea proceedings in district court for offenses over which the district court has trial jurisdiction. MCR 6.001(B) does not include subchapter 6.300 in its list of court rules applicable to misdemeanor plea proceedings in district court. However, provisions contained in subchapter 6.300 pertaining to plea proceedings involving offenses cognizable in circuit court may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

"A district judge has the authority to accept a felony plea[and] . . . shall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties." MCL 766.4(3).[2] A district court magistrate, however, may *not* accept a plea of guilty or nolo contendere to an offense or impose a sentence except as otherwise authorized by MCL 600.8511(a)-(c). MCL 766.1.[3]

6.2 Competency to Enter a Plea[4]

An incompetent defendant cannot tender a valid guilty plea. *Godinez v Moran*, 509 US 389, 400-402 (1993); see also *People v Kline*, 113 Mich App 733, 738 (1982). A defendant is presumed competent to stand trial. MCL 330.2020(1). When a defendant offers to enter a plea to the crime charged and significant record evidence suggests that the defendant is possibly incompetent, a trial court is obligated to make a separate finding with regard to competency before addressing the defendant's plea. *People v Whyte*, 165 Mich App 409, 414 (1988); *People v Matheson*, 70 Mich App 172, 179 (1976).

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[2] However, following bindover, "[t]he circuit court retains jurisdiction over any case in which a plea is entered or a verdict rendered to a charge that would normally be cognizable in the district court," MCR 6.008(C), and the circuit court must "sentence all defendants bound over to circuit court on a felony that either plead guilty to, or are found guilty of, a misdemeanor," MCR 6.008(D). Additionally, "[s]entencing for felony cases and misdemeanor cases not cognizable by the district court shall be conducted by a circuit judge." MCL 600.8311(f); see also MCL 766.4(3). See Section 2.5 for discussion of circuit court jurisdiction.

[3] See Chapter 2 for discussion of the jurisdiction of district court judges and magistrates.

[4] See Chapter 10 for more information on determining a defendant's competency.

See Chapter 10 for a detailed discussion of determining a defendant's competency.

6.3 Plea Bargain with Ambiguous Terms

General contract principles should be applied when construing plea bargains with ambiguous terms. See *People v Rydzewski*, 331 Mich App 126, 138 (2020). "When interpreting contractual terms, a court's primary purpose is to determine the parties' intent from the language of the contract. In general, contract language is interpreted according to its plain meaning. An unambiguous contract must be enforced according to its terms." *Id*. at 138 (quotation marks and citation omitted). "When the contract's terms are ambiguous, a court may look to extrinsic evidence to determine the parties' intent." *Id*. "A contractual term can be ambiguous either when it is equally susceptible to more than a single meaning or if two provisions of the same contract irreconcilably conflict with each other." *Id*. at 138-139 (quotation marks and citation omitted). A contractual ambiguity can be patent or latent in nature. *Id*. at 139. "A patent ambiguity arises from the face of the document," while "a latent ambiguity does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." *Id*. (quotation marks and citation omitted). Although "finding . . . ambiguity is a last resort in contract interpretation," it may be appropriate where "the language and context of [a] provision of the plea agreement [does] not provide [a court] with enough guidance to construe and give effect to the parties' intention from the plain language alone." *Id*. at 139 (quotation marks and citation omitted) (finding a latent ambiguity in a plea provision that indicated "no mental health court" because it was subject to multiple meanings).

See the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 9, for more information on contract principles.

6.4 Plea Negotiation and Sentence Bargaining

A. Plea Agreements and Sentence Recommendations

A defendant does not have a right to engage in plea negotiations with the prosecution. *People v Payne*, 285 Mich App 181, 191 (2009). Neither the United States Supreme Court nor the Michigan Supreme Court "'has recognized that the parties have a right to present a plea.'" *Id*. at 191, quoting *People v Grove*, 455 Mich 439, 469 n 36 (1997).[5]

[5] *Grove*, 455 Mich 439, "has been superseded by MCR 6.310(B)." *People v Franklin*, 491 Mich 916, 916 (2012).

1. Record Requirements

Where a defendant's sentence will result from a plea-based conviction, the trial court must determine whether the parties have made a plea agreement, "which may include an agreement to a sentence to a specific term or within a specific range[.]" MCR 6.302(C)(1).[6] Any agreement "must be stated on the record or reduced to writing and signed by the parties,"[7] and any written agreement must be made part of the case file. *Id*. See also MCR 6.610(F)(5), which specifically requires district courts to place plea agreements on the record:

> "The court shall make the plea agreement a part of the record and determine that the parties agree on all the terms of that agreement. The court shall accept, reject or indicate on what basis it accepts the plea."

Where all the terms of a plea agreement are not placed on the record, the trial court and the parties have not fully complied with the rule requirements, which are designed to safeguard the rights of the defendant and the prosecution if enforcement of the plea agreement becomes an issue. *People v Hannold*, 217 Mich App 382, 386-387 (1996), overruled in part on other grounds by *People v Smart*, 497 Mich 950 (2015).[8] In *Hannold*, 217 Mich App 385-386, details of the defendant's agreement to testify against another individual in exchange for a specific sentencing consideration were not included on the record made of the defendant's plea proceeding; instead, details of the agreement were contained in a sealed document on file with the court. When the defendant failed to provide the promised testimony, the court vacated his plea to a lesser charge, and he was convicted of the original, and more serious, controlled substance charge. *Id*. at 383-386. Although the Court of Appeals concluded that the parties' failure to comply with the rule requirements was harmless error, the Court was unequivocal in its disapproval of such conduct:

> "This was error. We take this opportunity to emphasize that we do not condone such agreements or procedure and in fact strongly

[6] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

[7] "The parties may memorialize their agreement on a form substantially approved by the SCAO." MCR 6.302(C)(1). See SCAO Form MC 414, *Plea Agreement*.

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

disapprove of plea agreements not fully and openly set forth on the record." *Id*. at 387.

2. Negotiating a Plea Agreement: *Cobbs* and *Killebrew*

A prosecutor and a defendant may reach a sentence agreement whereby the defendant agrees to plead guilty in exchange for a sentence to a specified term or within a specified range, or in exchange for a nonbinding prosecutorial sentence recommendation. See MCR 6.302(C).[9] However, if the offense to which the defendant is to enter a plea is subject to a mandatory minimum sentence, "the trial court is without authority to impose" a lesser sentence. *People v Kreiner*, 497 Mich 1024, 1024-1025 (2015) (where the terms of a plea offer called for the defendant to plead guilty of first-degree criminal sexual conduct in exchange for a ten-year minimum sentence, the trial court was "without authority to impose" the proposed sentence because "MCL 750.520b(2)(b) provides that the statutorily authorized punishment for the offense to which [the] defendant [was] to plead guilty under the proposed plea agreement is 'imprisonment for . . . not less than 25 years'").

The extent to which a trial court may involve itself in sentence negotiations has been set out by the Michigan Supreme Court in *People v Killebrew*, 416 Mich 189 (1982), effectively superseded in part by ADM File No. 2011-19,[10] and *People v Cobbs*, 443 Mich 276 (1993). In *Killebrew*, 416 Mich at 205, the Supreme Court held that a trial court may not initiate or participate in discussions regarding a plea agreement. In *Cobbs*, 443 Mich at 283, the Supreme Court modified *Killebrew* to allow the trial court, at the request of a party, to state on the record the length of the sentence that appeared to be appropriate, based on the information available to the trial court at the time. The *Cobbs* Court made clear that the trial court's preliminary evaluation did not bind the court's ultimate sentencing discretion, because additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources. *Cobbs*, 443 Mich at 283.

A "trial court did not create impermissible coercion as contemplated by *Killebrew*" when it "accurately acknowledged its authority to impose an upward departure after trial" and

[9] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

[10] Effective January 1, 2014. See 495 Mich lxxix (2013).

"never initiated or participated in any negotiations for the plea agreement itself." *People v Spears (On Remand)*, ___ Mich App ___, ___ (2023). In *Spears*, the Court of Appeals determined that "the prosecution's statement [was] consistent with its authority to engage in sentence negotiations, and particularly its authority to persuade a defendant to plead guilty in exchange for concessions regarding the charged offense and corresponding sentence." *Id*. at ___ (noting defendant did not argue that the prosecution's action was unconstitutionally vindictive). The Court of Appeals did not "fault the trial court for informing defendant that he legally may be subject to a sentence of more than 20 years in prison for second-degree murder if he elects to proceed to trial." *Id*. at ___ (holding "the trial court's isolated and accurate description of its sentencing authority did not violate *Killebrew*").

Nonbinding sentence recommendation under *Killebrew*. Under *Killebrew*, 416 Mich at 209, a trial court may accept a defendant's guilty plea without being bound by any agreement between the defendant and the prosecution. Where a trial court has decided not to adhere to the sentence recommendation accompanying the defendant's plea agreement, the court must explain to the defendant that the recommendation was not accepted and state the sentence that the court finds is the appropriate disposition. *Id*. at 209-210. However, "[a] judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea." MCR 6.302(C)(3).[11]

***Cobbs* plea.** *Cobbs* authorizes the trial court, at the request of a party, to state on the record the sentence that appears appropriate for the charged offense, on the basis of information available to the court at the time. *Cobbs*, 443 Mich at 283. Even when a defendant pleads guilty or nolo contendere to the charged offense in reliance on the court's preliminary determination regarding the defendant's likely sentence, the court retains discretion over the actual sentence imposed should additional information dictate the imposition of a longer sentence. *Id*. at 283. If the court determines it will exceed its previously stated sentence, the defendant has an absolute right to withdraw the plea. *Id*.[12]

"The decision in [*Cobbs*, 443 Mich 276] does not exempt trial courts from articulating the basis for guidelines departures[;]"

[11] See ADM File No. 2011-19, effective January 1, 2014, effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation. See 495 Mich lxxix (2013).

accordingly, where "the trial court failed to articulate any reason for imposing a minimum sentence that was below the applicable guidelines range," the case was remanded for the trial court to "'consult the applicable guidelines range and take it into account when imposing a sentence'" and to "'justify the sentence imposed in order to facilitate appellate review'" as required under *People v Lockridge*, 498 Mich 358, 392 (2015). *People v Williams*, 501 Mich 966 (2018).[13]

The defendant was not entitled to withdraw his guilty plea on the basis of his erroneous understanding of the trial court's statement at the preliminary sentence evaluation that his *maximum* sentence would be 20 years, where the trial court's statement when read as a whole, clearly indicated that a 20-year *minimum* sentence was appropriate and the defendant was sentenced to a minimum of 20 years' imprisonment consistent with the preliminary evaluation. *People v Pointer-Bey*, 321 Mich App 609, 617 (2017) (holding, however, that the defendant could withdraw his plea in its entirety on other grounds).

"[T]he fact that new information [comes] to light after [a] *Cobbs* plea [is] entered does not justify the circuit court in vacating [a] defendant's bargained-for plea." *People v Martinez*, 307 Mich App 641, 650-651, 653-654 (2014) (holding that where the defendant entered a guilty plea in exchange for the prosecutor's agreement not to bring any additional charges regarding contact with the complainant "'grow[ing] out of [the] same investigation that occurred during [a certain period of years,]'" the "fact that the complainant, after [the] defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact" permitting the court to vacate the defendant's plea under either MCR 6.310 or contract principles).

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[12] Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea[]'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin*, 491 Mich 916, 916 (2012). In *Franklin*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin* Court clarified that "*Grove* has been superseded by MCR 6.310(B)[.]" and cautioned that "in the future, such an error will be 'plain[.]'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin*, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Franklin*, 491 Mich at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

[13] For discussion of the sentencing guidelines, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*.

The Michigan Supreme Court has distinguished between a trial court's role in sentence negotiations occurring under *Killebrew* and those occurring under *Cobbs*. *People v Williams*, 464 Mich 174 (2001). According to the *Williams* Court, *Cobbs* modified *Killebrew* "to allow somewhat greater participation by the judge." *Williams*, 464 Mich at 177. However, the *Williams* Court ruled that the requirement of *Killebrew*—that a court must indicate the sentence it considers appropriate if the court decides against accepting the prosecutorial recommendation—does not apply to a *Cobbs* agreement later rejected by the court that made the preliminary evaluation. *Williams*, 464 Mich at 178-179. The Court explained the distinction between *Cobbs* and *Killebrew* as preserving the trial court's impartiality in sentence negotiations by minimizing the potential coercive effect of a court's participation in the process:

> "In cases involving sentence recommendations under *Killebrew*, the neutrality of the judge is maintained because the recommendation is entirely the product of an agreement between the prosecutor and the defendant. The judge's announcement that the recommendation will not be followed, and of the specific sentence that will be imposed if the defendant chooses to let the plea stand,[14] is the first involvement of the court, and does not constitute bargaining with the defendant, since the judge makes that announcement and determination of the sentence on the judge's own initiative after reviewing the presentence report.
>
> By contrast, the degree of the judge's participation in a *Cobbs* plea is considerably greater, with the judge having made the initial assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process.

[14] However, see ADM File No. 2011-19, effective January 1, 2014, amending MCR 6.302(C)(3) and MCR 6.310(B)(2) to eliminate a defendant's ability to withdraw a plea if the court rejects a plea agreement involving a prosecutorial sentence recommendation (effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation). See 495 Mich lxxix (2013).

> Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.
>
> Thus, we hold that in informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand." *Williams*, 464 Mich at 179-180.

MCR 6.310[15] incorporates the outcome in *Williams*. MCR 6.310(B)(2)(b) states:

> "[T]he defendant is entitled to withdraw the plea if
>
> * * *
>
> (b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose."[16]

Committee Tip:

To expedite the process, require the attorneys to provide the court with information regarding the reasons why a Cobbs *hearing is appropriate,*

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[15] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

[16] Failure to provide the defendant with an opportunity to withdraw a plea as required by MCR 6.310(B) constitutes plain error that may require reversal. *People v Franklin*, 491 Mich 916, 916 (2012). In *Franklin,* 491 Mich at 916, the Michigan Supreme Court concluded that failing to provide the defendant with the opportunity to withdraw his plea was *not* plain error in *Franklin* because of its previous holding in *People v Grove*, 455 Mich 439 (1997), which permitted "the trial court [to] reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[.]" However, the *Franklin* Court clarified that MCR 6.310(B) superseded *Grove,* 455 Mich 439, and stated that because of this "in the future, such an error will be 'plain[.]'" *Franklin*, 491 Mich at 916. The *Franklin* Court also found that even where plain error exists, an appellate court must still "'exercise its discretion in deciding whether to reverse.'" *Franklin,* 491 Mich at 916, quoting *People v Carines*, 460 Mich 750, 763 (1999).

and, if a hearing is held, why a particular plea is appropriate. If the defendant elects to withdraw his or her plea, the trial court may consider a new Cobbs *agreement, or proceed to trial.*

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3. Plea Agreements Involving Probation

A trial court may impose additional conditions on a defendant's sentence of probation, even when the sentence is part of the defendant's plea agreement and did not contain the additional conditions. *People v Johnson*, 210 Mich App 630, 633-635 (1995).

4. Plea Agreements Involving Mental Health Court

Notwithstanding the existence of a memorandum of understanding between a court and the prosecuting attorney that contains a provision that the prosecuting attorney must consent to a defendant's admission to mental health court, MCL 600.1091(1), the trial court retains "discretion to sentence defendant to participation in mental health court, despite the prosecution's objection and lack of consent," because such provisions are understood "to be a standard 'best practice' concerning admission" to mental health court, "not a 'rigid' rule from which a trial court cannot stray." *People v Rydzewski*, 331 Mich App 126, 135 (2020).

5. Plea Agreements Involving Bar-to-Office Conditions

The trial court properly ruled that a term in a plea agreement, which precluded defendant from running for public office while on probation, was unenforceable as against public policy.[17] *People v Smith*, 502 Mich 624, 628 (2018) (further holding that the trial court erred by refusing to allow the prosecutor to withdraw from the agreement once the term was removed from the plea agreement).[18] "[W]hen challenged as void against public policy, bar-to-office provisions in plea agreements should be analyzed under the balancing test in [*Town of Newton v Rumery*, 480 US 386 (1987)]." *Smith*, 502 Mich

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[17]The trial court also struck a condition that defendant resign from his current public office. However, the validity of a condition to resign a political office as part of a plea agreement was not addressed by the Michigan Supreme Court because defendant voluntarily resigned from office after the trial court struck the condition. *People v Smith (Virgil)*, 502 Mich 624, 632 (2018).

[18]See Section 6.4(C)(3) for additional information regarding violations of a plea or sentencing agreement by a court.

at 648. "[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 US at 392. After weighing the interests at stake, it is important to then inquire whether the government has a legitimate reason for requiring the bar-to-office term. *Smith*, 502 Mich at 643. The public policy considerations outweighed enforcement of the bar-to-office provision in *Smith* because it restricted the foundational right of voters to select their representatives and reflected only the prosecutor's own conclusion that defendant should not serve in public office. *Id*. at 642 Further, "no 'close nexus' existed between the charged offenses and defendant's conduct in office." *Id*. at 644.

B. Court's Refusal To Accept a Plea or Plea Agreement

MCR 6.301(A) permits a court to refuse a defendant's felony plea as long as the refusal is made pursuant to the court rules. MCR 6.301 applies to circuit court arraignments conducted in district court pursuant to MCR 6.111. MCR 6.111(C).[19] If the court refuses to accept the defendant's plea, the court must enter a plea of not guilty on the record. MCR 6.301(A). "A plea of not guilty places in issue every material allegation in the information and permits the defendant to raise any defense not otherwise waived." MCR 6.301(A).[20]

C. Violations of a Sentence Agreement or Recommendation

1. By Prosecutor

"As a general rule, '"fundamental fairness requires that promises made during plea-bargaining"'" be respected where the government agent was authorized to enter into the agreement and the defendant relied on the promise to his or her detriment. *People v Ryan*, 451 Mich 30, 41 (1996).

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[19] MCR 6.111(A), which allows a district judge to conduct the circuit court arraignment following bindover on a felony charge, further provides that "[a] district court judge shall take a felony plea as provided by court rule if a plea agreement is reached between the parties." With respect to ordinance violations and misdemeanors cognizable in the district court, MCR 6.610(F)(5) permits the district court to reject a plea agreement; however, because the court rule offers no guidance on the procedure or requirements for rejecting such a plea, MCR 6.301(A) is potentially instructive in cases involving offenses cognizable in district court.

[20] MCR 6.610(F)(5) permits a district court to reject a plea agreement. However, because the court rule offers no guidance on the procedure or requirements for rejecting a plea made in district court, MCR 6.301(A) is potentially instructive in cases involving offenses cognizable in district court, permits a court to refuse a defendant's plea as long as the refusal is made pursuant to the court rules.

Where a sentencing agreement negotiated between the defendant and the prosecution is subsequently breached by the prosecution, a reviewing court has discretion to choose between vacating the plea or ordering specific performance, with considerable weight given to the defendant's choice of remedy. *People v Nixten*, 183 Mich App 95, 97, 99 (1990) (where the defendant did not assert his innocence and "merely complain[ed] that the prosecution did not keep its part of the bargain," the Court of Appeals determined that specific performance was the appropriate remedy) (citation omitted).

However, where a defendant is aggrieved by the breach of an unauthorized non-plea agreement with the police (that the defendant not be prosecuted), he or she is not entitled to specific performance of that agreement. *People v Gallego*, 430 Mich 443, 445, 452 (1988). Instead, suppression or exclusion of the written agreement is an appropriate remedy. *Id.* at 446, 456-457.

2. By Defendant

"On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement." MCR 6.310(E).[21] However, where the prosecution's motion to vacate a plea is not based on the defendant's failure to comply with the terms of the plea agreement, and the record shows that the defendant fully complied with his or her part of the plea bargain, MCR 6.310(E) does not permit the trial court to vacate the plea on its own motion or that of the prosecutor. *People v Martinez*, 307 Mich App 641, 648-650 (2014).

"The plain language of MCR 6.310(E) sets no limits on when the prosecutor must file the motion to vacate a plea." *People v Caddell*, 332 Mich App 27, 63 (2020). "The rule does not delineate when the prosecutor's motion must be filed or granted. By contrast, other portions of MCR 6.310 specifically limit when a defendant may move to withdraw a plea and what is required at each timeframe." *Caddell*, 332 Mich App at 63 (finding that "[g]iven [defendant's] numerous inconsistencies, contradictions, and evasive testimony, the trial court did not clearly err by concluding that he failed to comply with the terms of his plea agreement at [co-defendant's] trial" and that "the prosecutor's motion, filed less than three weeks

[21] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

after [co-defendant's] first trial ended, and after [defendant] refused to cooperate with investigators, was not untimely").

"By submitting a sentence agreement to the trial court, the prosecutor and the defendant enter[] into a contractual bargain"; "[b]ecause the defendant and the prosecutor are equally entitled to benefit from the agreement, when the defendant's breach prevents the prosecutor from reaping the benefit of the contractual bargain, the prosecutor has a right to rescind the agreement."*People v Anderson*, 326 Mich App 747, 752 (2019) (the prosecution was entitled to rescind the sentence agreement where the defendant admitted to perjuring himself in violation of the agreement to provide truthful testimony in exchange for a lighter sentence).[22] See also *People v Abrams*, 204 Mich App 667, 672-673 (1994) (holding that where the defendant breached his plea agreement by engaging in criminal activity, the prosecution was allowed to pursue its case against the defendant); *People v Acosta*, 143 Mich App 95, 99 (1985) (holding that it was not error for the trial court to grant the prosecution's motion to void a plea agreement where the defendant absconded, failed to appear to enter his guilty plea, and was arrested eight months later).

Although "even unwise plea bargains are [generally] binding on the prosecutor," an agreement may not be binding if "'the prosecutor is misled by force of [the] defendant's connivance into a disadvantageous agreement or [if] facts not within the fair contemplation of agreement have come to light.'" *People v Cummings*, 84 Mich App 509, 511-513 (1978) (quoting *People v Reagan*, 395 Mich 306, 318 (1975), and holding that the trial court properly granted the prosecutor's motion to set aside a guilty plea where defense counsel, during the bargaining process, concealed material information regarding the defendant's extensive criminal record) (additional citation omitted).

Additionally, "[e]xcept as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct[23] after the plea is accepted but before sentencing." MCR 6.310(B)(3).

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[22] The defendant was convicted following a jury trial and entered into the sentence agreement with the prosecution while his appeal was pending. *Anderson*, 326 Mich App at 750.

[23] "For purposes of [MCR 6.310], misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing." MCR 6.310(B)(3).

The defendant "did not violate the terms of the plea agreement" by requesting that "the trial court follow the PSIR's recommendation that he be sentenced to mental health court" where during the colloquy "the trial court noted that the written plea agreement stated 'No mental health court,' and interpreted the phrase to mean that the prosecution was not 'up-front' consenting to defendant's admission to mental health court as part of the plea agreement," but "immediately qualified this interpretation by stating that the question of whether defendant would be admitted to mental health court depended on the recommendation contained within the PSIR." *People v Rydzewski*, 331 Mich App 126, 140 (2020). "[W]hile the phrase ['no mental health court'] on its own appears to be straightforward, a latent ambiguity arises when trying to give effect to the provision in the broader context of effecting the plea agreement." *Id*. at 139. "[T]he prosecution stated the trial court had accurately recited the plea agreement's terms on the record. In light of the interpretation stated by the trial court and accepted by the parties, . . . the plea agreement did not definitively state whether defendant 'would or would not be considered' for admission to mental health court." *Id*. at 140.

3. By the Court

Where the court accepts a plea bargain in which the prosecutor and the defendant agreed to the sentence to be imposed, the court may not then impose on the defendant a sentence lower than the one to which the prosecutor agreed. To allow such a departure offends the prosecutor's charging authority, and if the court deviates from the agreement between the defendant and the prosecutor, the prosecutor must be permitted to withdraw. *People v Siebert*, 450 Mich 500, 504 (1995).

> "Plea bargains . . . are more than contracts between two parties. As the judicial representative of the public interest, the trial judge is an impartial party whose duties and interests are separate from and independent of the interests of the prosecutor and [the] defendant. The court's interest is in seeing that justice is done. In the context of plea and sentence agreements, the court's interest in imposing a just sentence is protected by its right to reject any agreement, except that which invades the prosecutor's charging authority. A trial court may reject pleas to reduced charges, and it may protect its sentencing discretion by rejecting sentence agreements. In this sense, neither the

> prosecutor nor the defendant can dictate the sentence." *Id*. at 509-510.

"When [a trial court] rejects either the sentence or a plea term like a bar-to-office provision,[24] while keeping the rest of the agreement, the trial court essentially imposes a different plea bargain on the prosecutor than he or she agreed to." *People v Smith*, 502 Mich 624, 647 (2018) Imposing a different plea bargain on the prosecutor than he or she agreed to is an impermissible infringement on the prosecutor's charging discretion. *Id*. at 647. "If the trial court wishes to reject a bar-to-office provision, it must give the prosecutor the opportunity to withdraw from the agreement." *Id*. at 647 (the trial court erred by refusing to permit the prosecutor to withdraw from a plea agreement after the court struck a bar-to-office provision[25] of the agreement but otherwise sentenced defendant in accordance with the plea agreement).[26]

A defendant is entitled to withdraw his or her plea, after acceptance but before sentencing, when the court is unable to comply with an agreement for a sentence for a specified term or within a specified range, when the court is unable to sentence a defendant in accord with the court's initial statement regarding the sentence it would impose, or when the court imposes a consecutive sentence and the defendant was not advised at the time of his or her plea that the law permits or requires a consecutive sentence.[27] MCR 6.310(B)(2)(a)-(c).[28]

"[I]f the court chooses not to follow an agreement to a sentence for a specified term or within a specified range, [the court must explain to the defendant that] the defendant will be allowed to withdraw from the plea agreement." MCR 6.302(C)(3). However, "[a] judge's decision not to follow [a prosecutorial] sentence recommendation does not entitle the defendant to withdraw the defendant's plea." *Id*.[29]

"[T]he plea agreement did not definitively state whether defendant 'would or would not be considered' for admission

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[24] The plea agreement contained a term where the defendant agreed that he would not seek public office during his probationary term. *People v Smith (Virgil)*, 502 Mich 624, 627 (2018).

[25] The trial court also struck a condition that defendant resign from his current public office. However, the validity of a condition to resign a political office as part of a plea agreement was not addressed by the Michigan Supreme Court because defendant voluntarily resigned from office after the trial court struck the condition. *People v Smith*, 502 Mich 624, 632 (2018).

[26] See Section 6.4(A)(5) for additional information on bar-to-office plea conditions.

[27] However, "[e]xcept as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct after the plea is accepted but before sentencing." MCR 6.310(B)(3).

to mental health court" where "[d]uring the colloquy, the trial court noted that the written plea agreement stated 'No mental health court,' and interpreted the phrase to mean the prosecution was not 'up-front' consenting to defendant's admission to mental health court as part of the plea agreement," but "immediately qualified this interpretation by stating that the question of whether defendant would be admitted to mental health court depended on the recommendation contained within the PSIR." *People v Rydzewski*, 331 Mich App 126, 140 (2020) (the prosecution also stated that "the trial court had accurately recited the plea agreement's terms on the record"). Therefore, the trial court did not err in concluding that "in light of the terms of the agreement as stated upon the record, the agreement contained a sentence recommendation rather than a sentence agreement, . . . which the trial court [was] bound to follow." *Id*. at 140-141 (further concluding that *Smith* was not dispositive because the disregarded plea terms in *Smith* "were clear and imposed definite obligations on the defendant," while "the provision of defendant's plea agreement concerning mental health court [was] ambiguous at best").

4. Standard of Review

The trial court's finding that a plea agreement was breached is reviewed for clear error. See MCR 2.613(C); *People v Abrams*, 204 Mich App 667, 673 (1994).

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[28] Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea[]'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012). In *Franklin (Joseph)*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin (Joseph)* Court clarified that "*Grove* has been superseded by MCR 6.310(B)[,]" and cautioned that "in the future, such an error will be 'plain[.]'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin (Joseph)*, 491 Mich 916, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Franklin (Joseph)*, 491 Mich at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

[29] See ADM File No. 2011-19, effective January 1, 2014, effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation. See 495 Mich lxxix (2013).

D. Ineffective Assistance of Counsel During Plea Bargain Negotiation

"[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v Kentucky*, 559 US 356, 373 (2010),[30] citing *Hill v Lockhart*, 474 US 52, 57 (1985). See also *Missouri v Frye*, 566 US 134, 143 (2012) ("plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages[]").[31] "A defendant who has entered a plea does not waive his [or her] opportunity to attack the voluntary and intelligent character of the plea by arguing that his or her counsel provided assistance during the plea bargaining process." *People v Horton*, 500 Mich 1034 (2017), citing *Hill*, 474 US at 56-57, and overruling *People v Vonins (After Remand)*, 203 Mich App 173, 175-176 (1993), and *People v Bordash*, 208 Mich App 1 (1994), "to the extent that they are inconsistent with *Hill*[.]"

Absent unusual circumstances, where counsel has adequately apprised a defendant of the nature of the charges and the consequences of a plea, the defendant can make an informed and voluntary choice whether to plead guilty or go to trial without a specific recommendation from counsel. *People v Corteway*, 212 Mich App 442, 446 (1995) (citations omitted); see also *People v Armisted*, 295 Mich App 32, 49 (2011) (the defendant's affidavit, stating that trial counsel misinformed him about the minimum sentence that would likely be imposed if he were convicted of the charged offense, "was insufficient to contradict or overcome his previous sworn statements at the plea proceeding . . . that he understood the plea and sentencing agreement[]"); *People v White*, 307 Mich App 425, 429-430, 432 (2014) ("[the d]efendant's contradictory affidavit [was] insufficient to contradict his sworn testimony in open court[]" that his plea was entered knowingly and voluntarily, and "the trial court did not abuse its discretion when it denied [his] request for an evidentiary hearing[]" regarding the voluntariness of his plea and the effectiveness of trial counsel).

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[30] *Padilla*, 559 US 356, has prospective application only under both federal and state rules of retroactivity. See *Chaidez v United States*, 568 US 342, 344 (2013); *People v Gomez*, 295 Mich App 411, 413 (2012).

[31] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US 134, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2). Note that, although persuasive, Michigan state courts "are not . . . bound by the decisions of lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

For a thorough discussion of ineffective assistance of counsel in the context of pleas, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1.

6.5 Guilty Pleas and Nolo Contendere Pleas

A. Guilty Pleas

A guilty plea is a conclusive conviction equivalent to a jury's guilty verdict. *People v Ginther*, 390 Mich 436, 440 (1973) (citations omitted). A defendant's decision to plead guilty "is the most serious step a defendant can take in a criminal prosecution." *People v Thew*, 201 Mich App 78, 95 (1993). Precisely because a guilty plea is the most serious aspect of a defendant's criminal case, a guilty plea "'not only must be voluntary but must be [a] knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances and likely consequences.'" *Id.*, quoting *Brady v United States*, 397 US 742, 747-748 (1970).

MCR 6.302 describes a detailed process by which a circuit court is to determine whether a plea is understanding, voluntary, and accurate.[32] See MCR 6.302(B)-(D).[33]

B. Nolo Contendere (No Contest) Pleas

"A nolo contendere plea does not admit guilt, it merely communicates to the court that the criminal defendant does not

[32] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

[33] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *People v Cole*, 491 Mich 325, 330-332, 337-338 (2012) (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea." MCR 6.302(B)(2) was subsequently amended to require this advice by the court). "Because [the Sex Offenders Registration Act (SORA)] is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea" and "the registration requirement must be included in the judgment of sentence." *People v Nunez*, ___ Mich App ___, ___ (2022) (noting that "MCR 6.427(9) provides that for any offense the court must include in the judgment of sentence 'the conditions incident to the sentence'"). While MCR 6.429(A) permits "trial courts to sua sponte amend an invalid judgment of sentence . . . within six months of its entry, [t]he amendment in [*Nunez*] was attempted beyond the six-month limitations period." *Nunez*, ___ Mich App at ___ n 5. The *Nunez* Court concluded that "[it was] too late for the judge to amend or correct the judgment of sentence to add a registration requirement, and the prosecution [was] not empowered to do so by letter." *Id.* at ___. Accordingly, "the failure of the trial court to adhere to the statutory notice requirement and to include SORA registration in the judgment of sentence prevent[ed] any belated application of SORA to [the defendant]" under MCL 28.724(5). *Nunez*, ___ Mich App at ___.

wish to contest the state's accusations and will acquiesce in the imposition of punishment." *Lichon v American Universal Ins Co*, 435 Mich 408, 417 (1990). A nolo contendere plea may be offered for a variety of reasons such as: (1) the defendant's reluctance to relate the details of a particularly sordid crime, (2) the defendant's recollection of the facts may be unclear due to intoxication or because so many similar crimes were committed that defendant cannot differentiate one from another, and (3) the defendant wishes to minimize other repercussions, e.g., civil litigation. *In re Guilty Plea Cases*, 395 Mich 96, 134 (1975). The list is not exhaustive. *Id.*

A no contest plea prevents the court from eliciting a defendant's admission of guilt, but the result of the defendant's plea not to contest the charges against him or her is the same as if the defendant had admitted guilt. If a defendant pleads no contest to a charged offense, with the exception of questioning the defendant about his or her role in the charged offense, the court must proceed in the same manner as if the defendant had pleaded guilty. MCL 767.37; see also MCR 6.302(D)(2); MCR 6.610(F)(1)(b). A plea of no contest to a felony offense requires the court's consent. MCR 6.301(B).

MCR 6.302 describes a detailed process by which a circuit court is to determine whether a guilty plea or nolo contendere plea is understanding, voluntary, and accurate.[34] See MCR 6.302(B)-(D).[35]

A defendant's no contest plea to criminal charges does not estop that defendant from denying responsibility in a later civil action arising from the same conduct. *Lichon*, 435 Mich at 417.

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[34] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

[35] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *People v Cole*, 491 Mich 325, 330-332, 337-338 (2012) (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea." MCR 6.302(B)(2) was subsequently amended to require this advice by the court). "Because [the Sex Offenders Registration Act (SORA)] is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea" and "the registration requirement must be included in the judgment of sentence." *People v Nunez*, ___ Mich App ___, ___ (2022) (noting that "MCR 6.427(9) provides that for any offense the court must include in the judgment of sentence 'the conditions incident to the sentence'"). While MCR 6.429(A) permits "trial courts to sua sponte amend an invalid judgment of sentence . . . within six months of its entry, [t]he amendment in [*Nunez*] was attempted beyond the six-month limitations period." *Nunez*, ___ Mich App at ___ n 5. The *Nunez* Court concluded that "[it was] too late for the judge to amend or correct the judgment of sentence to add a registration requirement, and the prosecution [was] not empowered to do so by letter." *Id.* at ___. Accordingly, "the failure of the trial court to adhere to the statutory notice requirement and to include SORA registration in the judgment of sentence prevent[ed] any belated application of SORA to [the defendant]" under MCL 28.724(5). *Nunez*, ___ Mich App at ___.

If a defendant's no contest plea is accepted, MCR 6.302 (not expressly applicable to procedural matters involving offenses cognizable in district court) requires that the court "state why a plea of nolo contendere is appropriate." MCR 6.302(D)(2)(a).

> **Note:** The court rules governing criminal procedure in cases involving offenses over which the district court has trial jurisdiction contain no requirement similar to MCR 6.302(D)(2). Though not required, a district court's articulation for the record of its reasons for finding a defendant's nolo contendere plea appropriate would almost certainly assist any appellate review of the case. Both MCR 6.302(D) and MCR 6.610(F) do require that the court determine that the defendant's plea is supported by facts indicating the defendant's participation in the crime charged.

See the Michigan Judicial Institute's Criminal Pretrial/Trial Quick Reference Materials web page for reference guides concerning no contest pleas.

C. Unconditional Pleas

Generally, guilty and nolo contendere pleas waive all nonjurisdictional defects in the proceedings and waive the right to challenge issues involving the defendant's factual guilt. *People v New*, 427 Mich 482, 488, 491 (1986); see also *People v Eaton*, 184 Mich App 649, 653-654 (1990). However, an unconditional guilty or no contest plea does not necessarily waive a defendant's right to challenge the state's *jurisdictional* authority to bring the defendant to trial. *New*, 427 Mich at 495-496; *Eaton*, 184 Mich App at 658.[36] See also *People v Cook*, 323 Mich App 435, 447 n 3 (2018) (noting that "*New's* construct is still controlling").

Pretrial evidentiary issues. By pleading guilty or nolo contendere, a defendant waives the right to raise issues on appeal regarding a pretrial denial of his or her motion to suppress evidence or quash the information, because those issues involve the defendant's factual guilt. *New*, 427 Mich at 485, 496.

[36] Jurisdictional defects have been found where a defendant raises issues such as "improper personal jurisdiction, improper subject matter jurisdiction, double jeopardy, imprisonment when the trial court had no authority to sentence [the] defendant to the institution in question, and the conviction of a defendant for no crime whatsoever." *People v Carpentier*, 446 Mich 19, 47-48 (1994) (Riley, J., concurring) (citations omitted). Nonjurisdictional defects include violations of the Interstate Agreement on Detainers (IAD), *People v Wanty*, 189 Mich App 291, 293 (1991); noncompliance with the 180-day rule, *People v Eaton*, 184 Mich App 649, 657-658 (1990); and claims of unlawful search and seizure, *People v West*, 159 Mich App 424, 426 (1987).

Statutes of limitations. The statute of limitations in a criminal case is an affirmative, waivable, nonjurisdictional defense. *People v Bulger*, 462 Mich 495, 517 n 7 (2000), effectively overruled in part on other grounds by *Halbert v Michigan*, 545 US 605, 619-624 (2005); *People v Burns*, 250 Mich App 436, 440, 444-445 (2002). A defendant's unconditional plea of guilty or no contest waives the defendant's right to challenge his or her conviction on the ground that the applicable limitations period had expired. *People v Allen*, 192 Mich App 592, 600 (1992).

D. Conditional Pleas

"A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only." MCR 6.301(C)(2).[37]

Conditional guilty pleas may be appropriate when a defendant has "a legitimate legal defense notwithstanding his factual guilt." *People v Reid*, 420 Mich 326, 334 (1984). A conditional guilty plea anticipates that the prosecution may be precluded from proving its case against a defendant because of claims or defenses to which the defendant believes he or she is entitled. *Id*. at 334-335.

"A conditional plea requires the agreement of the defendant, the prosecutor, and the judge." *People v Andrews*, 192 Mich App 706, 707 (1992) (citation omitted).

E. Plea to Lesser Offense

MCR 6.301(D) prohibits a court from accepting a defendant's plea to an offense lesser than the one charged unless the prosecutor consents.[38] See *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 121-122 (1974) (holding that the prosecutor has discretion to charge a greater, rather than a lesser-included, offense); *Genesee*

[37] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court. MCR 6.610 does not discuss conditional pleas and their availability to misdemeanor cases. However, the Michigan Court of Appeals has noted instances of conditional guilty pleas in district court without any negative comment on the process. See, e.g., *City of Owosso v Pouillon*, 254 Mich App 210, 212-213 (2002) (noting a district court took a conditional plea); *People v Lyon*, 227 Mich App 599, 603 (1998) (noting the same).

Prosecutor v Genesee Circuit Judge, 386 Mich 672, 683-684 (1972) (holding that the choice of the statute under which to prosecute the accused is an executive function properly exercised by the prosecutor, not the court).

6.6 General Accurate, Understanding, and Voluntary Plea Requirements

"A no-contest or a guilty plea constitutes a waiver of several constitutional rights, including the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers." *People v Cole*, 491 Mich 325, 332 (2012). However, "[f]or a plea to constitute an effective waiver of these rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing." *Id.* at 332-333. In Michigan, portions of MCR 6.302(A)[39] are "premised on the requirements of constitutional due process[.]" *Cole*, 491 Mich at 332.

It is the duty of the judge to be satisfied that a plea is made freely, with full knowledge of the nature of the accusation, and without undue influence. MCL 768.35. The court may not accept a guilty or nolo contendere (no contest) plea unless it is convinced that the plea is understanding, voluntary, and accurate. MCR 6.302(A); MCR 6.610(F)(1). See also *People v Brinkey*, 327 Mich App 94, 100 (2019) ("although strict compliance with MCR 6.302 is not essential, a defendant's plea must always be understanding, knowing, voluntary, and accurate"). In other words, a defendant must be afforded due process. See *Cole*, 491 Mich at 332. If the court doubts the veracity of a guilty or no contest plea, the judge is obligated to vacate the plea, direct entry of a not guilty plea, and order the case to trial. MCL 768.35.

"A defendant who has entered a plea does not waive his [or her] opportunity to attack the voluntary and intelligent character of the plea by arguing that his or her counsel provided assistance during the plea bargaining process." *People v Horton*, 500 Mich 1034 (2017), citing *Hill v Lockhart*, 474 US 52, 56-57 (1985), and overruling *People v Vonins (After Remand)*, 203 Mich App 173, 175-176 (1993), and *People v Bordash*, 208 Mich App 1 (1994), "to the extent that they are inconsistent with *Hill*[.]"

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[38] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

[39] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

Before accepting a guilty or nolo contendere plea in a felony case, the court must place the defendant under oath and personally carry out MCR 6.302(B)-(E). MCR 6.302(A). However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *Cole*, 491 Mich at 330-332, 337-338 (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea[;]" however, MCR 6.302(B)(2) was subsequently amended to require this advice by the court).

A trial court's acceptance of a defendant's guilty or no contest plea is implicit proof of the court's determination that the plea was freely, understandingly, and voluntarily made. *In re Guilty Plea Cases*, 395 Mich 96, 126 (1975).

"[T]he court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." MCR 6.302(D)(1)[40]; see also MCR 6.610(F)(1)(a). A guilty plea should not be accepted by a trial court until facts sufficient to establish the defendant's guilt have been placed on the record. *People v Haack*, 396 Mich 367, 375 (1976). "Courts in Michigan are required to evaluate a defendant's *actual* guilt before accepting a plea, not just the mere expression of willingness by the prosecutor and defendant to strike a bargain." *People v White*, 331 Mich App 144, 152 (2020) (quotation marks and citation omitted).

For an accurate nolo contendere plea, the court may not question the defendant about participation in the crime, but must state why a plea of nolo contendere is appropriate, and hold a hearing (unless there has

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[40] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *Cole*, 491 Mich at 330-332, 337-338 (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea." MCR 6.302(B)(2) was subsequently amended to require this advice by the court). "Because [the Sex Offenders Registration Act (SORA)] is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea" and "the registration requirement must be included in the judgment of sentence." *People v Nunez*, ___ Mich App ___, ___ (2022) (noting that "MCR 6.427(9) provides that for any offense the court must include in the judgment of sentence 'the conditions incident to the sentence'"). While MCR 6.429(A) permits "trial courts to sua sponte amend an invalid judgment of sentence . . . within six months of its entry, [t]he amendment in [*Nunez*] was attempted beyond the six-month limitations period." *Nunez*, ___ Mich App at ___ n 5. The *Nunez* Court concluded that "[it was] too late for the judge to amend or correct the judgment of sentence to add a registration requirement, and the prosecution [was] not empowered to do so by letter." *Id*. at ___. Accordingly, "the failure of the trial court to adhere to the statutory notice requirement and to include SORA registration in the judgment of sentence prevent[ed] any belated application of SORA to [the defendant]" under MCL 28.724(5). *Nunez*, ___ Mich App at ___.

already been one) that establishes support for finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading. MCR 6.302(D)(2); see also MCR 6.610(F)(1)(b). It is appropriate for a trial court to rely on a preliminary examination transcript to furnish the factual basis for a nolo contendere plea. *People v Chilton*, 394 Mich 34, 38-39 (1975).

"In assessing voluntariness, . . . a defendant entering a plea must be 'fully aware of the direct consequences' of the plea." *Cole*, 491 Mich at 333, quoting *Brady v United States*, 397 US 742, 755 (1970). To ensure that a plea is voluntary, the court must determine whether the parties have made a plea agreement, "which may include an agreement to a sentence to a specific term or within a specific range[.]" MCR 6.302(C)(1). Any agreement "must be stated on the record or reduced to writing and signed by the parties,"[41] and "[t]he written agreement shall be made part of the case file." *Id*. "A defendant's ignorance of the collateral consequences of a guilty plea does not render the plea involuntary." *People v White*, 337 Mich App 558, 574, 576 (2021) (determining "that the trial court was required to advise defendant of the mandatory consecutive sentencing at the plea hearing under MCR 6.302(A) and due-process principles, [but that did] not mean that defendant [was] automatically entitled to postappeal relief under MCR 6.500 *et seq*.").

A promise of leniency to a relative or a third party in exchange for the defendant's plea may render the defendant's plea involuntary in fact if the defendant can show that the prosecutor did not have probable cause to prosecute the third party or relative at the time the defendant entered his or her plea. *People v Samuels*, 339 Mich App 664, 673, 679 (2021). However, if the prosecution had probable cause to prosecute the third party or relative, the defendant cannot show that his or her plea was coerced by the prosecution's good-faith offer of leniency. *Id*. at 679.

"For a valid plea agreement, . . . there must be an actual agreement on the essential features of the plea." *Brinkey*, 327 Mich App at 95. "When there are multiple proposed plea agreements and hearings, . . . reference to a 'prior plea' will likely be ambiguous and require some clarification on the record[.]" *Id*. at 95 (the trial court abused its discretion in denying defendant's motion to withdraw his plea where the record showed "a lack of clarity with respect to essential features of the plea agreement, specifically the sentencing parameters"). Although strict compliance with MCR 6.302 is not essential, "the trial court's noncompliance [was] serious in nature" because "the trial court made no [apparent] effort to ensure that defendant actually knew and understood" the conditions he was pleading guilty under. *Brinkey*, 327 Mich App at 103.

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[41] "The parties may memorialize their agreement on a form substantially approved by the SCAO." MCR 6.302(C)(1). See SCAO Form MC 414, *Plea Agreement*.

The adequacy of the factual basis for a guilty plea is reviewed by examining "whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Brownfield (After Remand)*, 216 Mich App 429, 431 (1996), citing *People v Booth*, 414 Mich 343, 360 (1982).

When a plea is taken and all of the required elements are not satisfied, the case should be remanded to allow the prosecution to establish the missing elements. *People v Mitchell*, 431 Mich 744, 749-750 (1988). If the prosecution is able to do so and there is no contrary evidence, the defendant's conviction should stand. *Id*. at 750. However, if the prosecution is unable to establish that the defendant committed the offense, the trial court must set aside the defendant's conviction. *Id*. If contrary evidence is produced, the matter should be treated as a motion to withdraw the guilty plea, and the trial court must exercise its discretion to decide the matter. *Id*. If the motion is granted, the trial court must set aside the conviction. *Id*.

6.7 Specific Required Advice of Rights at Plea Proceedings

A. Advice About the Right To Counsel[42]

The right to counsel attaches at all critical stages of the proceedings, and "[t]he entry of a plea is a critical stage of the proceedings because it results in the defendant's conviction." *People v Pubrat*, 451 Mich 589, 593-594 (1996), citing *Gideon v Wainwright*, 372 US 335 (1963). When an indigent defendant may be sentenced to jail pursuant to a plea obtained in the absence of counsel, the record must show that the defendant was offered counsel and made an intelligent and understanding waiver of counsel. See *People v Bailey*, 7 Mich App 157, 159-160 (1967); MCR 6.610(F)(2).

A defendant's Sixth Amendment right to counsel attaches at the defendant's initial proceeding, regardless of the prosecution's involvement in, or awareness of, the proceeding. *Rothgery v Gillespie Co*, 554 US 191 (2008). "[T]he negotiation of a plea bargain . . . is almost always the critical point for a defendant," and thus "criminal defendants require effective counsel during plea negotiations" even though they occur out of court and the prosecutor may have little or no notice of a deficiency in defense counsel's conduct. *Missouri v Frye*, 566 US 134, 144 (2012).[43] "The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been

[42] See Chapter 3 for more information about a defendant's right to counsel.

accepted or after a trial leading to conviction with resulting harsh consequences." *Id*. at 146. For example, a party may make any formal offers part of the record at any plea proceeding or before a trial on the merits. *Id*.

If the defendant previously waived the assistance of counsel, MCR 6.005(E) (applicable to matters of procedure involving felony offenses but not expressly applicable to procedural matters involving offenses cognizable in district court) mandates that the court advise the defendant of his or her continuing right to an attorney's assistance and obtain the defendant's continued waiver of that right before beginning any court proceeding following the defendant's initial waiver. Substantial compliance with the mandates contained in MCR 6.005(E)(1)-(3) is required. *People v Russell*, 471 Mich 182, 191-192 (2004).

See Chapter 4 for additional discussion of the right to counsel during criminal proceedings.

B. Advice About Mandatory Minimum Jail Sentence, Maximum Jail Sentence, and Maximum Possible Penalty

Before accepting a plea of guilty or nolo contendere, the court must advise the defendant of the mandatory minimum and maximum jail sentence, if any, and the maximum possible penalty for the offense. MCR 6.302(B)(2); MCR 6.601(F)(3)(a). "[M]andatory consecutive sentencing relat[ing] to a *past* offense for which defendant was on parole and resurrection of the original sentence for that offense, which must be completed before defendant starts serving the sentences on crimes to which he pleaded guilty . . . do not fall squarely within the particular parameters of MCR 6.302(B)(2)," which "focuses on the minimum and maximum sentences with respect to the offense or offenses to which a defendant pleads guilty." *People v White*, 337 Mich App 558, 572 (2021). Notwithstanding, the *White* Court determined that "the trial court was required to advise defendant of the mandatory consecutive sentencing at the plea hearing under MCR 6.302(A) and due-process principles[.]" *White*, 337 Mich App at 576. The trial court in *White* "did not advise defendant of the mandatory consecutive sentencing relative to [a] parole violation and completion of [a prior] murder sentence" at the plea hearing; "the mandatory consecutive sentencing that resulted was a direct consequence of defendant's

[43] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US 134, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2). Note that, although persuasive, Michigan state courts "are not . . . bound by the decisions of lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

pleading guilty" and "[t]he result constituted a definite, immediate, and automatic effect on the range of defendant's punishment." *Id*. at 563, 575.

A plea is not "understanding or knowingly entered into when it was, in significant part, induced on the basis of an inaccurate understanding of the minimum and maximum possible prison sentence[.]" *People v Guyton*, ___ Mich ___, ___ (2023) (remanding to allow the defendant to elect to allow her plea to stand or to withdraw her plea where "defendant was led to believe that her guilty plea would result in the dismissal of a third-offense habitual offender sentence enhancement—a likely consequence and relevant circumstance of her plea—when she was subject only to a second-offense habitual offender enhancement").

C. Advice About the Right to Trial

Before the court accepts a defendant's guilty or nolo contendere plea, the court must advise the defendant of the rights the defendant will waive as a result of pleading guilty, including the right to trial. MCR 6.302(B)(3)(a); MCR 6.610(F)(3)(b).

A defendant may waive his or her right to a jury trial. MCL 763.3(1) provides, in part:

> "(1) In all criminal cases arising in the courts of this state the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury."

See also MCR 6.401.[44] A defendant's election to be tried by the bench requires the prosecutor's consent and the court's approval. *Id*.

MCL 763.3(1) requires, except in cases of minor offenses, that a defendant wishing to waive the right to a jury trial make and sign a written statement of waiver similar in substance to the example contained in the statute.[45] In addition to the written waiver, in cases involving crimes other than minor offenses, "the waiver of trial by jury shall be made in open court after the defendant has been arraigned and has had opportunity to consult with legal counsel." MCL 763.3(2).

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[44] Although MCR 6.401 is not specifically applicable to district court proceedings, see MCR 6.001(B), this rule may be instructive because no similar provision is found in the court rules specifically applicable to proceedings involving offenses cognizable in district court.

[45] See SCAO Form MC 260, *Waiver of Trial by Jury and Election to be Tried Without Jury*.

With the exception of requiring the written waiver, MCR 6.402 (a rule not specifically made applicable to criminal procedure involving offenses cognizable in district court, but which may be instructive where no other rule applies) mirrors the other legislative requirements of a defendant's waiver of the right to be tried by a jury. MCR 6.402 states:

> "**(A) Time of Waiver.** The court may not accept a waiver of trial by jury until after the defendant has been arraigned or has waived an arraignment on the information, or, in a court where arraignment on the information has been eliminated under MCR 6.113(E), after the defendant has otherwise been provided with a copy of the information, and has been offered an opportunity to consult with a lawyer.
>
> **(B) Waiver and Record Requirements.** Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding."

D. *Jaworski* Rights

A guilty plea cannot be "understandingly" made unless the defendant has knowledge of the consequences of his or plea. Automatic reversal is mandated where the record does not affirmatively show that before pleading guilty, a defendant was advised that his or her guilty plea waived a trio of constitutional trial rights known as "*Jaworski* rights." See *People v Jaworski*, 387 Mich 21, 27, 30 (1972) (citations omitted); see also *Boykin v Alabama*, 395 US 238, 242-244 (1969). The three constitutional rights waived by a defendant's guilty plea are:

- the privilege against self-incrimination,
- the right to a trial by jury, and
- the right to confront one's accusers. *Boykin*, 395 US at 243 (citations omitted); *Jaworski*, 387 Mich at 30 (citation omitted).

MCR 6.302(B)(3) (governing felony pleas) and MCR 6.610(F)(3)(b) (governing pleas to offenses cognizable in district court) require the court to advise the defendant of these and other trial rights that the defendant waives by entering a plea of guilty or nolo

contendere.The Michigan Supreme Court has specifically approved of a trial court's "grouping" of a defendant's rights in the court's recital of rights to a defendant. *In re Guilty Plea Cases*, 395 Mich 96, 114-115 (1975). Provided that the record at a plea proceeding reflects that none of the three *Jaworski* rights was omitted, reversal is not necessarily required where each right is not explained separately or is imprecisely recited. *In re Guilty Plea Cases*, 395 Mich at 122. In other words, "explicit questioning on each *Jaworski* right is not always necessary." *People v Spears (On Remand)*, ___ Mich App ___, ___ (2023) (holding the trial court substantially complied with MCR 6.302(B) when it "only explicitly questioned defendant on the record regarding one *Jaworski* right in confirming that defendant understood that he would forgo his right to a jury trial by pleading guilty").

However, a defendant "is automatically entitled to set aside his or her plea when reference to those rights, either by their express enumeration or by reference to [a] written document, is omitted from the in-court plea proceedings." *People v Al-Shara*, 311 Mich App 560, 577 (2015), citing *People v Saffold*, 465 Mich 268, 273, 281 (2001); *Jaworski*, 387 Mich at 31. In *Al-Shara*, the Court of Appeals "set aside the defendant's no-contest plea because the trial court failed to mention two of the three *Jaworski* rights on the record, and because there was no mention in the record of the signed form purportedly confirming the defendant's understanding waiver of these rights." *Spears*, ___ Mich App at ___.

E. Method of Recital

The advice of trial rights may be made orally on the record or in a writing. See MCR 6.302(B)[46]; MCR 6.610(F)(4).[47] If a writing is used (other than in cases where a plea is made in writing without the personal appearance of defendant pursuant to MCR 6.610(F)(7)[48]), the court must address the defendant and obtain from the defendant, orally and on the record, a statement that the defendant has read and understands the rights, and that he or she is waiving those rights; however, "[t]he waiver may be obtained without repeating the individual rights." MCR 6.302(B); MCR 6.610(F)(4).

The trial court must assume the principal burden of advising the defendant of the required information before accepting a plea. The

[46] For a felony plea, the writing "may be . . . on a form approved by the State Court Administrative Office." MCR 6.302(B). See SCAO Form CC 291, *Advice of Rights (Circuit Court Plea)*.

[47] See SCAO Form DC 213, *Advice of Rights and Plea Information*, for pleas to offenses cognizable in the district court.

[48] See Section 6.15(C) for more information on written pleas.

purpose of requiring the trial court to personally address the defendant is to enable the court to "observe [the defendant's] demeanor and responses" to the information as he or she receives it, but the information conveyed to the defendant may come from sources other than the court. *In re Guilty Plea Cases*, 395 Mich at 114. According to the Michigan Supreme Court:

> "A guilty plea conviction will not be reversed if the judge engages in the required colloquy but fails to mention an item which the record shows was established through, for example, an opening statement of or interjection by the prosecutor or defense counsel in the hearing of the judge and [the] defendant." *Id*. at 114-115.

In *People v Harris*, 191 Mich App 422, 423-425 (1991), the Court of Appeals affirmed a defendant's conviction of operating under the influence of intoxicating liquor, third offense (OUIL-3rd), concluding that the defendant had failed to establish that his earlier plea-based conviction (his second OUIL conviction, which served as the basis for his OUIL-3rd) was invalid because the trial court had not informed the defendant of his right to a trial by jury. The Court noted that the defendant had been provided with written information about the rights to which he was entitled, and that MCR 6.610(F)(4)(b)[49] allows a defendant to be informed of his or her trial rights in writing. *Harris*, 191 Mich App at 425.

However, "a written advice of rights alone—signed by a defendant off the record and outside of the court's presence, and unreferenced by the court or anyone else during the plea hearing—cannot satisfy, substantially or otherwise, a trial court's obligation under [MCR 6.610(F)(4)[50]] to ensure that the defendant's plea is understandingly and voluntarily made with knowledge of his or her *Jaworski* rights." *People v Al-Shara*, 311 Mich App 560, 576 (2015). In *Al-Shara*, 311 Mich App at 563, the defendant "signed a written 'Pre-Trial Conference Summary' form detailing the terms of [his nolo contendere] plea agreement" and waiving his trial rights, including his *Jaworski* rights. However, "[a]t the plea hearing, the district court . . . referenced [only the] defendant's right to a jury trial [and] wholly failed to inform [him] of his right to remain silent and his right to confront his accusers" as required under MCR 6.610(F)(3)(b)[51]; additionally, the district court "failed to make any reference to defendant's execution of a written advice-of-rights form

[49]Formerly MCR 6.610(E)(4)(b). See ADM File No. 2018-23, effective May 1, 2020. Substantially similar provisions pertaining to advice of rights for felony pleas are found in MCR 6.302(B).

[50]Formerly MCR 6.610(E)(4).

[51]Formerly MCR 6.610(E)(3)(b).

or to verify that [he] actually read and understood the rights communicated on the form he signed[as required under MCR 6.610(F)(4)[52]]." *Al-Shara*, 311 Mich App at 573. The Court of Appeals affirmed the circuit court's order vacating the defendant's plea and remanding for a trial, rejecting the prosecutor's contention that the defendant's signature on the written waiver form constituted "substantial compliance" with MCR 6.610(F)(4)[53]:

> "[E]ven when a written advice-of-rights form has been signed by a defendant, there cannot be a total omission of any reference during the in-court proceedings to either the enumerated rights in question or to the form itself signed by defendant off the record[, and] . . . when the rights implicated by the plea-taking procedure include a defendant's *Jaworski* rights, the defendant is *automatically entitled* to set aside his or her plea when reference to those rights, either by their express enumeration or by reference to a written document, is omitted from the in-court plea proceedings." *Al-Shara*, 311 Mich App at 576-577 (emphasis added; citations omitted).

In contrast to *Al-Shara*, the trial court in *Spears* "did discuss defendant's written acknowledgment of rights on the record when confirming not only that defendant signed the plea acceptance form that referenced all of the rights allegedly omitted by the trial court, but also discussed its contents with his attorney[.]" *People v Spears (On Remand)*, ___ Mich App ___, ___ (2023) (noting that "this colloquy is a proper method for accepting defendant's guilty plea in substantial compliance with MCR 6.302 and *Jaworski*").

Committee Tip:

The Editorial Advisory Committee emphasizes the importance of obtaining an oral statement and waiver from a defendant who was advised of his or her trial rights in writing. Because some defendants are functionally illiterate, it is imperative that the court determine that a defendant has indeed read and understood rights provided to him or her in writing. In addition to the English language, SCAO Form DC 213, *Advice of Rights and Plea Information, and* SCAO Form CC 291, *Advice of Rights (Circuit*

[52]Formerly MCR 6.610(E)(4).

[53]Formerly MCR 6.610(E)(4).

Court Plea), are available in Spanish, Arabic, Chinese, Hmong, Korean, and Russian versions.

F. Substantial Compliance with Rule Requirements

"When considering whether a trial court complied with the court rules governing plea proceedings and whether any deviation entitles a defendant to reversal of his or her plea, [the appellate court] review[s] under the doctrine of substantial compliance whether the trial court observed the court rules detailing the plea-taking procedure." *People v Al-Shara*, 311 Mich App 560, 571-572 (2015), citing *People v Saffold*, 465 Mich 268, 273 (2001). "Under [the substantial compliance] doctrine, literal or 'talismanic' compliance with the court rules is not required." *Al-Shara*, 311 Mich App at 572, citing *Saffold*, 465 Mich at 280; *In re Guilty Plea Cases*, 395 Mich at 124.[54]

In *Saffold*, 465 Mich at 273-276, 281, the Michigan Supreme Court concluded that automatic reversal is not required when a trial court fails to advise a defendant of a trial right other than one of the three *Jaworski* rights. At the defendant's plea proceeding, the trial court did not advise him that by tendering a guilty plea, he waived the presumption of innocence; however, earlier on the same day, the defendant was present when the judge instructed the jury (which had convened before the defendant entered his plea) that the defendant was innocent until proven guilty beyond a reasonable doubt. *Saffold*, 465 Mich at 270, 279. The *Saffold* Court concluded that although the trial court had not strictly complied with the requirements of MCR 6.302(B)(3),[55] there existed substantial compliance with the rule sufficient to have alerted the defendant to the fact that a guilty plea waived the defendant's right to trial and the attendant constitutional rights. *Saffold*, 465 Mich at 271, 280. "Under the court rule, a failure to state one of the rights at the plea hearing does not require vacating the conviction where[] . . . the [trial] court has directly addressed the defendant regarding the

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[54] The *Al-Shara* Court noted that the district court had "mistakenly relied on [*People v Ward*, 459 Mich 602, 611-614 (1999), opinion corrected on denial of reh 460 Mich 1204 (1999)], in which the Court did not apply the doctrine of substantial compliance but instead emphasized that withdrawal of a guilty plea after conviction and sentencing is disfavored and subject to a showing of a miscarriage of justice[;]" rather, where a defendant raises "a timely motion to set aside a plea in accordance with the temporal restraints set forth in [MCR 6.610(F)(8)], the . . . case is not a collateral attack subject to review under *Ward*[, 459 Mich at 611-614, but] . . . is instead properly considered under the principles of [*Saffold*, 465 Mich 268]." *Al-Shara*, 311 Mich App at 571-572 n 6 (additional citations omitted).

[55] Substantially similar provisions pertaining to advice of rights in district court are found in MCR 6.610(F)(3)(b).

enumerated rights generally and the defendant has otherwise been informed adequately of the omitted right." *Id*.

However, "it remains the rule in Michigan that failure to advise a defendant of his or her *Jaworski* rights during plea proceedings mandates automatic reversal and the setting aside of the defendant's plea." *Al-Shara*, 311 Mich App at 572 (citing *Saffold*, 465 Mich at 273, and holding that the defendant was automatically entitled to set aside his plea where there was a "total omission of two of the three *Jaworski* rights from the record of defendant's plea proceedings" and where the district court "failed to make any reference to defendant's execution of a written advice-of-rights form or to verify that defendant actually read and understood the rights communicated on the form he signed") (additional citations omitted).

"A guilty plea conviction will not be reversed if the judge engages in the required colloquy but fails to mention an item which the record shows was established through, for example, an opening statement of or interjection by the prosecutor or defense counsel in the hearing of the judge and defendant." *People v Spears (On Remand)*, ___ Mich App ___, ___ (2023) (cleaned up). In *Spears*, the Court of Appeals concluded that "while the trial court itself did not advise defendant of the names of the offenses to which he was pleading guilty, the prosecution noted [multiple times] at the plea hearing that defendant would be pleading guilty to a reduced count one of second degree murder and count three weapons felony firearm. *Id*. at ___ (citing MCR 6.302(B)(1) (cleaned up). Further, the *Spears* Court concluded that the prosecution's statements on the record sufficiently satisfied MCR 6.302(B)(2) when it "noted at the plea hearing that 'if the defendant were found guilty of second degree murder, this Court could still impose a maximum sentence of life in prison at the time of sentencing even if he were found guilty of second degree murder'" and "the consecutive, mandatory two years' imprisonment for felony-firearm." *Spears*, ___ Mich App at ___. Finally, the Court concluded that "the often-recited fourth element of second-degree murder, 'without justification or excuse,' actually is part of the 'cluster of ideas' of second-degree murder" and "is not an element of second-degree murder," therefore, "the trial court was not required to establish a factual basis in that regard under MCR 6.302(D)(1)." *Spears*, ___ Mich App at ___.

However, where the defendant "signed an advice of rights form[] . . . recit[ing] the rights contained in MCR 6.302(B)(3) verbatim," and where he "affirmed that these rights were read to him, that he understood them, and that he understood he was relinquishing these rights by pleading guilty," the trial court properly complied with MCR 6.302(B), even if the defendant could not personally read the form due to his limited literacy; "MCR

6.302(B) does not specify a reader—only that the rights on the form were read and understood." *People v Winters*, 320 Mich App 506, 512 (2017).

In *Al-Shara*, 311 Mich App at 573 n 7 (citations omitted), the Court of Appeals specifically addressed the application of the "substantial compliance" doctrine to pleas taken in district court:

> "While MCR 6.610 is not identical to its circuit court counterpart, MCR 6.302, the two rules nonetheless share many common features and the same overarching aim to inform a defendant of the rights waived by entering a plea, as well as the consequences of a plea. Hence, . . . like a circuit court under MCR 6.302, a district court need not conduct the colloquy described in MCR 6.610 verbatim, but it must substantially comply with the rule. And as in the circuit court, whether reversal is required will depend on the nature of the noncompliance, bearing in mind that omission of a *Jaworski* right requires automatic reversal because such a defect is intrinsically harmful and cannot be corrected on remand. Where a *Jaworski* right is not implicated, whether a deviation occurred is judged under the substantial compliance doctrine, and under [MCR 6.610(F)(8)[56]], a defendant is only entitled to relief if the deviation affected his or her substantial rights."

"Because trial rights and sentencing consequences are distinct," the substantial compliance doctrine does not apply to violations of MCR 6.302(B)(2) (applicable to offenses cognizable in circuit court, requiring a trial court to advise defendant of mandatory minimum sentence and maximum possible prison sentence).[57] *People v Brown*, 492 Mich 684, 698 (2012). However, where the trial court incorrectly advised the defendant that the maximum term of imprisonment for the offense "was 20 years when the correct maximum was 10 years," the defendant was not entitled to withdraw his plea; "[b]ecause [the] defendant was not told that he was facing a shorter sentence than he actually was, he [could not] show that he was prejudiced" by the trial court's error. *Winters*, 320 Mich App at 509-511 (interpreting the requirement in MCR 6.302(B)(2) to advise the defendant of the maximum possible penalty for conviction).

On the other hand, the defendant was "entitled to withdraw his plea in its entirety" where the prosecutor, when informing the trial

[56] Formerly MCR 6.610(E)(8).

[57] A substantially similar provision pertaining to advice of rights in district court is found in MCR 6.610(F)(3)(a).

court of the plea agreement and reciting the maximum sentences for the eight offenses to which the defendant pleaded guilty, failed to state the maximum possible sentence for the offense of felon in possession of a firearm; "[g]iven the requirements of MCR 6.302, . . . defendant's guilty plea was not understandingly entered," and the prosecutor's "omission rendered [the] plea proceeding defective." *People v Pointer-Bey*, 321 Mich App 609, 616, 617 (2017).

When a plea is taken and all of the required elements are not satisfied, the case should be remanded to allow the prosecution to establish the missing elements. *People v Mitchell*, 431 Mich 744, 749-750 (1988). If the prosecution is able to do so and there is no contrary evidence, the defendant's conviction should stand. *Id.* at 750. However, if the prosecution is unable to establish that the defendant committed the offense, the trial court must set aside the defendant's conviction. *Id*. If contrary evidence is produced, the matter should be treated as a motion to withdraw the guilty plea, and the trial court must exercise its discretion to decide the matter. *Id*. If the motion is granted, the trial court must set aside the conviction. *Id*.

6.8 Deferral

A. Taking Plea Under Advisement

A court may take a defendant's felony plea or plea agreement "under advisement." MCR 6.302(C)(3)(d); MCR 6.302(F). "A verbatim record must be made of the plea proceeding." MCR 6.302(F). See also *People v Eloby (After Remand)*, 215 Mich App 472, 474 (1996) (noting that, under MCR 6.302(C), "[w]hen a prosecutor and a defendant agree to a specific disposition in exchange for a guilty plea or a plea of nolo contendere, the trial court can either accept or reject the plea, take the plea under advisement, or defer action until the court has had an opportunity to consider the presentence report[]") (additional citation omitted). No similar provision exists in the court rules concerning offenses over which the district court has jurisdiction.[58]

MCL 257.732(21), explicitly prohibits courts from taking under advisement any traffic offense that requires reporting to the Secretary of State:

> "Notwithstanding any other law of this state, a court shall not take under advisement an offense committed

[58] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

> by an individual while operating a motor vehicle for which [the Michigan Vehicle Code] requires a conviction or civil infraction determination to be reported to the secretary of state. A conviction or civil infraction determination that is the subject of this subsection must not be masked, delayed, diverted, suspended, or suppressed by a court. Upon a conviction or civil infraction determination, the conviction or civil infraction determination must immediately be reported to the secretary of state in accordance with this section."

B. Deferred Adjudication Provisions and Problem-Solving Courts

There are several specific statutes authorizing a court to defer sentencing a defendant for a plea-based conviction provided the defendant complies with any terms or conditions on which the period of deferment is based.

In addition to the provisions discussed below, discharge and dismissal of proceedings may be available in a state-certified treatment court[59], which includes a drug treatment court, see MCL 600.1060 *et seq.*; a mental health court, see MCL 600.1090 *et seq.*; a juvenile mental health court, see MCL 600.1099b *et seq.*; or a veterans treatment court, see MCL 600.1200 *et seq.*[60] A case may be completely transferred from a court of original jurisdiction to a state-certified treatment court, prior to or after adjudication, if those courts—with the approval of the chief judge and assigned judge of each court, a prosecuting attorney from each court, and the defendant—have executed a memorandum of understanding as provided in MCL 600.1088(1)(a)-(e). MCL 600.1088(1).

Unless a memorandum of understanding provides otherwise, the original court of jurisdiction maintains jurisdiction over the participant in a drug treatment court, mental health court, or a veteran's treatment court until final disposition of the case, but not longer than the probation period established under MCL 771.2. MCL 600.1070(2); MCL 600.1095(2); MCL 600.1206(2).

Unless a memorandum of understanding provides otherwise, the original court of jurisdiction maintains jurisdiction over a participant in a juvenile mental health court until final disposition of the case. MCL 600.1099h(b). The court may also "receive

[59] See MCL 600.1088(2).

[60] A fifth type of state-certified treatment court, DWI/sobriety court, is governed by MCL 600.1084. See the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9, for more information.

jurisdiction over the juvenile's parents or guardians under . . . MCL 712A.6, in order to assist in ensuring the juvenile's continued participation and successful completion of the juvenile mental health court and may issue and enforce any appropriate and necessary order regarding the parent or guardian." MCL 600.1099h(b).

For a thorough discussion of problem-solving courts and deferred adjudication, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9. For more information on problem-solving courts in general, see the One Court of Justice website.

Other statutes authorizing deferred adjudication include the following:

- **MCL 333.7411, Controlled Substances Act**

  - MCL 333.7411(1)[61] permits a sentencing court to defer further proceedings on a first-time offender's conviction, whether by guilty plea or guilty verdict, for possession or use of specified controlled substances for a period of up to one year. Included in the statutory offenses listed in MCL 333.7411 for which deferment is authorized are several misdemeanor offenses punishable by as much as one year and as little as 90 days. See e.g., MCL 333.7403(2)(c) and MCL 333.7404(2)(a)-(d).

  - When a court opts to defer adjudication under MCL 333.7411(1), no judgment of guilt is entered on the record, and the offender must consent to the deferment. When the offender is placed on probation in lieu of immediate sentencing, the terms and conditions of his or her probation must include payment of a probation supervision fee described in MCL 771.3c. Participation in a drug treatment court is a term or condition that may be imposed on a defendant under § 7411 deferral.

  - If the offender violates a term or condition of probation, "the court may enter an adjudication of guilt and proceed as otherwise provided." MCL 333.7411(1).

  - When an offender fulfills the terms and conditions of his or her period of deferment, the court must

[61] MCL 333.7411(1) is the statutory deferment provision in the Controlled Substances Act, MCL 333.7101 *et seq*.

discharge the offender and dismiss the offender's case without an adjudication of guilt. Except as otherwise provided by law, "[d]ischarge and dismissal under [MCL 333.7411] . . . is not a conviction for purposes of [MCL 333.7411] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under [MCL 333.]7413." MCL 333.7411(1). A person is entitled to only one discharge and dismissal under MCL 333.7411. MCL 333.7411(1).

- All court proceedings under MCL 333.7411 are open to the public. MCL 333.7411(2). "[I]f the record of proceedings . . . is deferred under [MCL 333.7411], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 333.7411(2). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 333.7411(3). This nonpublic record is open, for limited purposes as set out in MCL 333.7411(3)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Health and Human Services. MCL 333.7411(3).

- **MCL 750.350a(4), Parental Kidnapping Act**

  - Deferment is available to a parent convicted by plea or verdict if the parent has no previous kidnapping-related convictions.

  - Without entering an adjudication of guilt and with the parent's consent, the court may defer further proceedings and place the parent on probation pursuant to lawful terms and conditions.

  - Participation in a drug treatment court may be made a term or condition of deferral.

  - If the parent violates a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise authorized.

  - If the parent fulfills the terms and conditions of probation, the court must discharge the parent from probation and dismiss the proceedings against him or her.

  - Discharge and dismissal is without an adjudication of guilt and is not a conviction for purposes of

disqualification or disabilities imposed by law for conviction of a crime, including any additional penalties imposed for second or subsequent convictions.

- A parent is entitled to only one discharge and dismissal under MCL 750.350a. MCL 750.350a(4).

- All court proceedings under MCL 750.350a are open to the public. MCL 750.350a(5). "[I]f the record of proceedings . . . is deferred under [MCL 750.350a], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 750.350a(5). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 750.350a(6). This nonpublic record is open, for limited purposes as set out in MCL 750.350a(6)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Health and Human Services. MCL 750.350a(6).

- **MCL 750.451c, Prostitution Offenses Committed By Human Trafficking Violation Victims**

  - Deferment is available under MCL 750.451c for certain enumerated prostitution-related offenses "if the violation . . . was committed as a direct result of the individual being a victim of a human trafficking violation." MCL 750.451c(1).

  - The offender "bears the burden of proving to the court by a preponderance of the evidence that the violation was a direct result of his or her being a victim of human trafficking." MCL 750.451c(2)(a).

  - Without entering a judgment of guilt and with the consent of the offender and the prosecuting attorney, the court may defer the proceedings, place the offender on probation, and impose any conditions permitted under MCL 771.3 or MCL 750.451c(4). MCL 750.451c(2); MCL 750.451c(4).

  - The court may enter an adjudication of guilt upon a violation of a term or condition of probation. MCL 750.451c(3).

  - The court must enter an adjudication of guilt if the offender commits an enumerated offense or violates an order that he or she receive counseling for violent

behavior or that he or she have no contact with a named individual. MCL 750.451c(5).

- Upon fulfillment of the terms and conditions of probation, the court must discharge the offender and dismiss the proceedings without adjudication of guilt. MCL 750.451c(6). Discharge and dismissal "is not a conviction for purposes of [MCL 750.451c] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime." MCL 750.451c(6).

- All court proceedings under MCL 750.451c "must be open to the public." MCL 750.451c(7). "[I]f the record of proceedings . . . is deferred . . . , the record of proceedings during the period of deferral must be closed to public inspection." MCL 750.451c(7). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record, which is open, for limited purposes as set out in MCL 750.451c(8)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Health and Human Services. MCL 750.451c(8).

- **MCL 762.11, Holmes Youthful Trainee Act (HYTA)**

  - Deferment as a youthful trainee is available to offenders who plead guilty to a criminal offense, other than a felony for which the maximum punishment is life imprisonment, a major controlled substance offense, a traffic offense, or an enumerated criminal sexual conduct offense. See MCL 762.11(3)(a)-(e).

  - Until October 1, 2021, the offense must have occurred on or after the offender's 17th birthday but before his or her 24th birthday; beginning October 1, 2021, the offense must have occurred on or after the offender's 18th birthday but before his or her 26th birthday.[62] MCL 762.11(1)-(2).

  - Participation in a drug treatment court may be made a term or condition of deferral. MCL 762.13(1)(b).

[62] Additionally, an individual over 14 years of age whose jurisdiction has been waived may be eligible for youthful trainee status. MCL 762.15. Consent of the prosecuting attorney is required if the offense occurred after the offender's 21st birthday but before his or her 26th birthday. MCL 762.11(2). The prosecutor must consult with the victim regarding the applicability of the deferral status if the offender is charged with an offense listed in MCL 762.11(3) and the defendant pleads guilty to any other offense or will be eligible for HYTA under MCL 762.11(4). MCL 762.11(2).

- Without entering a judgment of conviction and with the offender's consent, the court may assign the offender to the status of youthful trainee. MCL 762.11(1)-(2).

- MCL 762.11—MCL 762.14 contain provisions specific to the terms and conditions of an individual's deferment as a youthful trainee.

- **MCL 769.4a, Spouse Abuse Act**

  - Deferment is available to an accused convicted by plea or verdict if the accused has no previous convictions for an assaultive crime or has previously had proceedings deferred under MCL 769.4a. MCL 769.4a(1).

  - Specified victims are the offender's spouse or former spouse, a person with whom the offender has had a child, a person with whom the offender has or has had a dating relationship, or a person who resides or has resided in the same household with the offender. MCL 769.4a(1).

  - With the consent of the accused and of the prosecuting attorney in consultation with the victim, the court may, without entering a judgment of guilt, defer further proceedings and place the accused on probation. MCL 769.4a(1).

  - The order of probation may require the accused to pay for and participate in a mandatory counseling program. MCL 769.4a(3).

  - Participation in a drug treatment court may be made a term or condition of deferral. MCL 769.4a(3).

  - If the accused violates a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise authorized. MCL 769.4a(2).

  - The court must enter an adjudication of guilt and proceed as authorized if the accused commits an assaultive crime during probation. MCL 769.4a(4)(a); see also MCL 769.4a(8).

  - The court must enter an adjudication of guilt and proceed as authorized if the accused violates the court's order to receive counseling regarding the accused's violent behavior. MCL 769.4a(4)(b).

- The court must enter an adjudication of guilt and proceed as authorized if the accused violates the court's order that the accused have no contact with a named individual. MCL 769.4a(4)(c).

- If the accused fulfills the terms and conditions of probation, the court must discharge the individual from probation and dismiss the proceedings against him or her. MCL 769.4a(5).

- A person is entitled to only one discharge and dismissal under MCL 769.4a. MCL 769.4a(5).

- Discharge and dismissal is without an adjudication of guilt and is not a conviction for purposes of MCL 769.4a or for purposes of disqualifications or disabilities imposed by law for conviction of a crime. However, a discharge and dismissal *does* constitute a prior conviction for purposes of a prosecution under MCL 750.81(4) or MCL 750.81(5) (certain repeat offenses involving domestic assault or assault of a pregnant individual), or a prosecution under MCL 750.81a(3) for aggravated domestic assault with one or more previous domestic assault convictions. MCL 769.4a(5).

- All court proceedings under MCL 769.4a are open to the public. MCL 769.4a(6). "[I]f the record of proceedings . . . is deferred under [MCL 769.4a], the record of proceedings during the period of deferral must be closed to public inspection." MCL 769.4a(6). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 769.4a(7). This nonpublic record is open, for limited purposes as set out in MCL 769.4a(7)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Health and Human Services. MCL 769.4a(7).

6.9 Admissibility of Pleas and Plea Discussions

See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2, for information on the admissibility of pleas and plea discussions.

6.10 Appealing a Plea-Based Conviction

A. Application for Leave to Appeal

Michigan law does not provide an appeal of right to defendants convicted by plea. See Const 1963, art 1, § 20. Appeal from a plea-based conviction is by application for leave to appeal. *Id.*; MCL 770.3(1)(d). See also MCR 6.302(B)(5); MCR 7.103(A)(1).[63]

MCR 7.105(A)(1)-(2) provides:

> "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
>
> (b) such further time as the trial court or agency may have allowed during that 21-day period."

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 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

[63] According to MCR 6.625, which makes no distinction between appeals based on convictions by plea or verdict, subchapter 7.100 of the Michigan Court Rules governs appeals in misdemeanor cases.

consider the length of and the reasons for the delay in deciding whether to grant the application." *Id*. A defendant must challenge his or her guilty plea within the time allotted for applications for delayed leave to appeal in circuit court under MCR 7.105(G)(2); that is, a defendant must appeal a plea-based conviction no later than six months after entry of the judgment or entry of an order denying a motion to withdraw the plea. MCR 6.610(F)(8); MCR 7.105(G)(2)(a); MCR 7.105(G)(2)(c); see also *People v Clement*, 254 Mich App 387, 390-391 (2002) (applying former MCR 7.103(B)(6)).

B. Appointment of Appellate Counsel

In *Halbert v Michigan*, 545 US 605 (2005), the United States Supreme Court concluded that an indigent defendant who is seeking a discretionary appeal of his or her conviction and was convicted by plea may not be denied the appointment of appellate counsel.[64]

Specifically, the *Halbert* Court held "that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." *Halbert*, 545 US at 610. The *Halbert* Court examined Michigan's appellate court system and noted that an appeal to the Michigan Court of Appeals, whether by right or by leave, is a defendant's first-tier appeal and that, to some degree, the Court of Appeals' disposition of these appeals involves a determination of the appeals' merit. The *Halbert* Court noted that "indigent defendants pursuing first-tier review in the Court of Appeals are generally ill-equipped to represent themselves," a critical fact considering that the Court of Appeals' decision on those defendants' applications for leave to appeal may entail an adjudication of the merits of the appeal.

> "Whether formally categorized as the decision of an appeal or the disposal of a leave application, the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Id*. at 619.

"*Halbert* should not be applied retroactively to cases in which a defendant's conviction has become final." *People v Maxson*, 482 Mich 385, 387 (2008). However, "[f]or those indigent defendants whose pleas were taken after *Halbert* was issued, but before the repeal of

[64] *Halbert* overruled the Michigan Supreme Court's decisions in *People v Harris (Melody)*, 470 Mich 882 (2004), and *People v Bulger*, 462 Mich 495 (2000), and nullified former MCL 770.3a(1) and MCL 770.3a(4), which addressed the appointment of appellate counsel, or the waiver of appointed appellate counsel, to indigent defendants convicted by plea.

MCL 770.3a,[65] there can be no finding of waiver[of the right to counsel; b]ecause indigent defendants whose pleas were taken after June 23, 2005, but before January 9, 2007, could not have clearly understood that they had the right to appointed counsel, they could not have executed a knowing and intelligent waiver of this right." *People v Billings*, 283 Mich App 538, 544-545 (2009).

See also *People v James*, 272 Mich App 182, 196-198 (2006) (noting that, pursuant to *Halbert*, 545 US 605, the defendant had "not waive[d] his right to the appointment [of appellate counsel] at the time of entering his guilty plea on the basis of the circuit court's mere advisement that waiver would occur[,]" and holding that because no right to appellate counsel existed at the time the defendant pleaded guilty, the defendant could not have "intentionally relinquish[ed] a known right[]").

C. Appeal Following the Execution of an Appeal Waiver

"[N]o appeal waiver serves as an absolute bar to all appellate claims," despite the suggestion that an appeal waiver entered at the time of a guilty plea is "a monolithic end to all appellate rights." *Garza v Idaho*, 586 US ___, ___ (2019). "[W]hile signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain." *Id*. at ___ (noting that "even a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver"). "[D]efendants retain the right to challenge whether the waiver itself is valid and enforceable–for example, on the grounds that it was unknowing or involuntary." *Id*. at ___ (finding that "when an attorney's deficient performance costs a defendant an appeal that the defendant otherwise would have pursued, prejudice to the defendant should be presumed [regarding a claim of ineffective assistance of counsel] . . . even when the defendant has, in the course of pleading guilty, signed what is often called an 'appeal waiver'"[66]).

D. No Appeal on Grounds Related to Factual Guilt or Nonjurisdictional Defects

Generally, guilty and nolo contendere pleas waive all nonjurisdictional defects in the proceedings. *People v New*, 427 Mich 482, 488, 491 (1986); see also *People v Eaton*, 184 Mich App 649, 653-654 (1990). However, an unconditional guilty or no contest plea does not necessarily waive a defendant's right to challenge the

[65] Repealed, effective January 9, 2007. See 2006 PA 655.

[66] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Volume 3*, Chapter 1, for more information on postjudgment motions and ineffective assistance of counsel.

state's *jurisdictional* authority to bring the defendant to trial. *New*, 427 Mich at 495-496; *Eaton*, 184 Mich App at 658.[67]

A defendant may not appeal a plea-based conviction on grounds related to the prosecution's capacity to prove the defendant's factual guilt—an appellate challenge to the state's evidence against the defendant is subsumed by a defendant's guilty plea. *New*, 427 Mich at 491. The same is true for a defendant's appeal of a conviction based on a plea of nolo contendere:

> "Since a plea of nolo contendere indicates that a defendant does not wish to contest his [or her] factual guilt, any claims or defenses which relate to the issue of factual guilt are waived by such a plea. Claims or defenses that challenge a state's capacity or ability to prove [the] defendant's factual guilt become irrelevant upon, and are subsumed by, a plea of nolo contendere. . . . Only those defenses which challenge the very authority of the state to prosecute a defendant may be raised on appeal after entry of a plea of nolo contendere." *Id.* at 493 (citations omitted).

E. Appeals Challenging the Constitutionality of the Underlying Statute

"[A] guilty plea by itself" does not bar a defendant "from challenging the constitutionality of the statute of conviction on direct appeal." *Class v United States*, 583 US ___, ___ (2018) (holding the federal defendant could raise his constitutional claims that the statute under which he was convicted violated the Second Amendment and the Due Process Clause where these claims did "not fall within any of the categories of claims that [his] plea agreement forbid[]," such as claims that contradict the terms of an indictment or written plea agreement or claims based on case-related constitutional defects that occurred before entry of the plea, but rather, challenged "the Government's power to criminalize [his] (admitted) conduct").

[67] Jurisdictional defects have been found where a defendant raises issues such as "improper personal jurisdiction, improper subject matter jurisdiction, double jeopardy, imprisonment when the trial court had no authority to sentence [the] defendant to the institution in question, and the conviction of a defendant for no crime whatsoever." *People v Carpentier*, 446 Mich 19, 47-48 (1994) (Riley, J., concurring) (citations omitted). Nonjurisdictional defects include violations of the Interstate Agreement on Detainers (IAD), *People v Wanty*, 189 Mich App 291, 293 (1991); noncompliance with the 180-day rule, *People v Eaton*, 184 Mich App 649, 657-658 (1990); and claims of unlawful search and seizure, *People v West (Halton)*, 159 Mich App 424, 426 (1987).

6.11 Collateral Attack on Uncounseled Plea or Conviction Used for Purpose of Enhancing Charge or Sentence

The Sixth Amendment right to counsel requires that all criminal defendants must be afforded counsel. *Gideon v Wainwright*, 372 US 335, 342-345 (1963). A sentencing judge may not consider a conviction that is invalid under *Gideon*, 372 US 335, when imposing sentence. *People v Moore*, 391 Mich 426, 440 (1974) (citation omitted). Prior convictions, where the record indicates that there was no counsel or formal waiver of counsel (when a right to counsel existed), may not be used to enhance punishment in a subsequent proceeding. *People v Garvie*, 148 Mich App 444, 453 (1986); *People v Schneider*, 132 Mich App 214, 216 (1984) (citations omitted).

MCR 6.610(G)(3) incorporates this constitutional principle:

> "Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction."

"[A]s a matter of federal law, a criminal defendant possesses the constitutional right to collaterally challenge a prior conviction that is used to enhance a sentence when that defendant alleges that the prior conviction was procured in violation of the Sixth Amendment right to counsel." *People v Carpentier*, 446 Mich 19, 28-29 (1994), citing *Custis v United States*, 511 US 485, 487 (1994) (additionally noting that the United States Supreme Court "expressly limited the availability of collateral challenges to these particular Sixth Amendment violations and refused to extend the opportunity for relief to other alleged constitutional infirmities").

A violation of the right to counsel with respect to a prior plea-based conviction is also subject to collateral attack under Michigan law. *People v Ingram*, 439 Mich 288, 296-297 (1992) (citations omitted). While the state has "a compelling interest in championing the finality of criminal judgments, . . . Michigan has recognized the unique import of a defendant's constitutional right to counsel." *Carpentier*, 446 Mich at 29, citing *Ingram*, 439 Mich 288 (additional citation omitted). "[A]n alleged *Gideon*[, 372 US 335,] violation constitutes a jurisdictional defect that may be collaterally challenged by a convicted criminal defendant." *Carpentier*, 446 Mich at 29-30, citing *Custis*, 511 US 485. "A collateral attack on a prior conviction *underlying a present charge* may not be made after a defendant's plea of guilty to the present charge is accepted." *People v Roseberry*, 465 Mich 713, 723 (2002) (emphasis added).

However, a prior plea-based misdemeanor conviction, obtained without benefit of counsel but for which no *incarceration* was imposed, *may* be used in a subsequent criminal prosecution for purposes of sentence augmentation. *People v Reichenbach*, 459 Mich 109, 120 (1998) (holding that "under both the federal and state constitutions, a defendant accused of a misdemeanor is entitled to appointed trial counsel only if 'actually imprisoned'"). See also *Nichols v United States*, 511 US 738, 746-747 (1994) (holding that the use of an uncounseled misdemeanor conviction, where no prison term was imposed, to enhance the prison term for a subsequent offense was consistent with the Sixth and Fourteenth Amendments, because reliance on those types of convictions is consistent with the traditional understanding of the sentencing process, which is less exacting than the process of establishing guilt).

Part B: Procedures Specific to Misdemeanor Pleas[68]

6.12 Introduction

A. Available Pleas

A defendant charged with a misdemeanor offense cognizable in district court may stand mute or plead not guilty, guilty, or nolo contendere. See MCL 774.1a—MCL 774.1c; MCR 6.610(F). These plea alternatives and their applicability to offenses over which the district court has jurisdiction are discussed in detail in the following sections.

B. Applicable Court Rules

Subchapter 6.600 of the Michigan Court Rules, the section devoted to criminal procedure in district court, contains all the information *expressly* applicable to plea proceedings in district court for offenses over which the district court has trial jurisdiction. Subchapter MCR 6.300 (Pleas) contains detailed information about the kinds of pleas available to defendants charged with criminal offenses cognizable by circuit courts. MCR 6.001(A). MCR 6.001(B) does not include subchapter 6.300 in its list of court rules applicable to misdemeanor plea proceedings in district court. However, provisions contained in

[68] This Part discusses the procedures that are specifically applicable to pleas involving misdemeanor offenses over which the district court has trial jurisdiction. See Chapter 2 for discussion of district court jurisdiction. See Part C for discussion of procedures specifically applicable to pleas involving felony offenses and circuit court misdemeanors.

subchapter 6.300 pertaining to plea proceedings involving offenses cognizable in circuit court may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

MCR 6.001(B), which specifically addresses misdemeanor cases, provides: "MCR 6.001 — [MCR] 6.004, [MCR] 6.005(B) and (C), 6.006(A) and (C)-(E), [MCR] 6.009, [MCR] 6.101, [MCR] 6.103, [MCR] 6.104(A), [MCR] 6.105 — [MCR] 6.106, [MCR] 6.125, [MCR] 6.202, [MCR] 6.425(D)(3), [MCR] 6.427, [MCR] 6.430, [MCR] 6.435, [MCR] 6.440, [MCR] 6.441, [MCR] 6.445, [MCR] 6.450, [MCR] 6.451, and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts."

6.13 Authority of District Court Judges and Magistrates to Accept Misdemeanor Pleas[69]

The district court has jurisdiction over all proceedings involving misdemeanors punishable by a fine or imprisonment not exceeding 1 year, or both, and ordinance and charter violations punishable by a fine or imprisonment, or both. MCL 600.8311(a)-(b); see also MCR 6.008(A). A district court has the same power to hear and determine matters within its jurisdiction as does a circuit court over matters within the circuit court's jurisdiction. MCL 600.8317. A district judge must take a plea "as provided by court rule if a plea agreement is reached between the parties." MCL 766.4(3).

MCR 6.008(C)-(E) provide guidance regarding circuit court jurisdiction following bindover in the event that the defendant ultimately pleads guilty to or is convicted of a misdemeanor offense that would normally be cognizable in the district court.

- **Misdemeanor pleas.** "The circuit court retains jurisdiction over any case in which a plea is entered or a verdict rendered to a charge that would normally be cognizable in the district court." MCR 6.008(C).

- **Sentencing.** "The circuit court shall sentence all defendants bound over to circuit court on a felony that either plead guilty to, or are found guilty of, a misdemeanor." MCR 6.008(D).

- **Concurrent jurisdiction and probation officers.** "As part of a concurrent jurisdiction plan, the circuit court and district court may enter into an agreement for district court probation officers to prepare the presentence investigation report and

[69] See Chapter 2 for a thorough discussion of the jurisdiction of district court judges and magistrates.

> supervise on probation defendants who either plead guilty to, or are found guilty of, a misdemeanor in circuit court. The case remains under the jurisdiction of the circuit court." MCR 6.008(E).

To the extent expressly authorized by the chief judge, presiding judge, or only judge of the district, MCL 600.8512a permits a district court magistrate to:

> "(a) Accept an admission of responsibility, decide a motion to set aside a default or withdraw an admission, and order civil sanctions for a civil infraction and order an appropriate civil sanction permitted by the statute or ordinance defining the act or omission.
>
> (b) Accept a plea of guilty or nolo contendere and impose sentence for a misdemeanor or ordinance violation punishable by a fine and which is not punishable by imprisonment by the terms of the statute or ordinance creating the offense."

Additionally, subject to the chief district judge's approval, a district court magistrate has the authority to accept pleas for specified offenses. See MCL 600.8511(a)-(d).

6.14 Record Requirements for Plea Proceedings

Except when a writing is permitted by law or by court rule, a verbatim record of plea proceedings in district court is required. MCL 600.8331; MCR 6.610(C). See also MCL 774.1a (providing that, at arraignment, the defendant's plea must be entered in the district court's minutes). MCR 6.610(F)(5) specifically requires district courts to place plea agreements on the record:

> "The court shall make the plea agreement a part of the record and determine that the parties agree on all the terms of that agreement. The court shall accept, reject or indicate on what basis it accepts the plea."[70]

See also MCL 774.1a (providing that, at arraignment, the defendant's plea must be entered in the district court's minutes).

[70] See Section 6.4 for discussion of plea agreements and sentencing bargains.

6.15 Entering a Plea

At arraignment, a defendant charged with a misdemeanor or ordinance violation *must* enter a plea after the court has informed the defendant of the charge as it is stated in the warrant or complaint. MCL 774.1a.

See the Michigan Judicial Institute's checklist for guilty and no contest pleas.

A. Standing Mute or Pleading Not Guilty

If the defendant refuses to enter a plea at arraignment, the court must order that a plea of not guilty be entered. MCL 774.1a.

With the court's permission, a defendant may stand mute or plead not guilty without a formal arraignment by filing a written statement signed by the defendant and any defense attorney of record. MCR 6.610(D)(4) states:

> "The court may allow a defendant to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement signed by the defendant and any defense attorney of record, reciting the general nature of the charge, the maximum possible sentence, the rights of the defendant at arraignment, and the plea to be entered. The court may require that an appropriate bond be executed and filed and appropriate and reasonable sureties posted or continued as a condition precedent to allowing the defendant to be arraigned without personally appearing before the court."

B. Pleading Guilty or Nolo Contendere

MCR 6.610(F) outlines the required procedure by which a district court may accept a defendant's plea of guilty or nolo contendere. MCR 6.302 outlines the same procedure, albeit with more detail, for accepting a defendant's plea of guilty or no contest to a charged offense cognizable in circuit court.[71] Before accepting the plea, the district court must "determine that the plea is understanding, voluntary, and accurate."[72] MCR 6.610(F)(1).

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[71] Although MCR 6.302 is not specifically applicable to offenses cognizable in district court, see MCR 6.001(B), it may be instructive.

[72] See Section 6.18 for detailed discussion of these factors.

C. Written Plea of Guilty or Nolo Contendere

Under very specific circumstances, a case may be completely disposed of in writing and without the defendant ever having to appear personally before the court. Provided some additional requirements are met, MCR 6.610(F)(7) permits a defendant to enter a written plea of guilty or no contest. "Pleas by mail" are regularly used to accommodate traffic offenders from out of state. See SCAO Form DC 223, *Plea by Mail*. MCR 6.610(F)(7) states:

> "A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if
>
> > (a) the court decides that the combination of the circumstances and the range of possible sentences makes the situation proper for a plea of guilty or nolo contendere;
> >
> > (b) the defendant acknowledges guilt or nolo contendere, in a writing to be placed in the district court file, and waives in writing the rights enumerated in [MCR 6.610(F)(3)(b)]; and
> >
> > (c) the court is satisfied that the waiver is voluntary.
> >
> > A 'writing' includes digital communications, transmitted through electronic means, which are capable of being stored and printed."

6.16 Guilty and Nolo Contendere Pleas[73]

The court rules expressly applicable to procedural matters involving criminal offenses cognizable in district court and those offenses cognizable in circuit court each contain provisions concerning guilty pleas and nolo contendere (no contest)[74] pleas. MCR 6.610(F) outlines the required procedure by which a district court may accept a defendant's plea of guilty or nolo contendere. MCR 6.302 outlines the same procedure, albeit with more detail, for accepting a defendant's plea of guilty or no contest to a charged offense cognizable in circuit court.[75] See the Michigan Judicial Institute's Criminal Pretrial/Trial Quick Reference

[73] See Section 6.4 for discussion of sentence bargains.

[74] A no contest plea is generally recognized as an alternative to a guilty plea. See MCR 6.610(F)(1)(b).

Materials web page for several resources that may prove useful in conducting plea proceedings involving guilty and no contest pleas.

"Before accepting a plea of guilty or nolo contendere, the [district] court shall in all cases comply with [MCR 6.610]." MCR 6.610(F). MCR 6.610(F)(1) provides:

> "The court shall determine that the plea is understanding, voluntary, and accurate. In determining the accuracy of the plea,
>
> > (a) if the defendant pleads guilty, the court, by questioning the defendant, shall establish support for a finding that [the] defendant is guilty of the offense charged or the offense to which the defendant is pleading, or
> >
> > (b) if the defendant pleads nolo contendere, the court shall not question the defendant about the defendant's participation in the crime, but shall make the determination on the basis of other available information."

MCR 6.302 describes a detailed process by which the circuit court is to determine whether a plea is understanding, voluntary, and accurate.[76] See MCR 6.302(B)-(D).

6.17 Required Advice of Rights at Plea Proceedings

MCR 6.610(F)(1)-(9) governs plea proceedings when the charged offense is cognizable in district court. This section discusses in detail a district court's obligations when a defendant pleads guilty or no contest to an offense over which the district court has jurisdiction.

See Section 6.7(D) for a detailed discussion of advice of trial rights, including "*Jaworski* rights,"[77] and the permissible grouping of these rights.

See the Michigan Judicial Institute's Criminal Pretrial/Trial Quick Reference Materials web page for a checklist and flowchart for

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[75] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

[76] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

[77] See *People v Jaworski*, 387 Mich 21 (1972).

proceedings involving misdemeanor guilty and no contest pleas, and a flowchart for proceedings involving misdemeanor not guilty pleas.

A. Advice About the Right To Counsel[78]

MCR 6.610(F)(2) provides:

> "The court shall inform the defendant of the right to the assistance of an attorney. If the offense charged requires on conviction a minimum term in jail, the court shall inform the defendant that if the defendant is indigent the defendant has the right to an appointed attorney. The court shall also give such advice if it determines that it might sentence to a term of incarceration, even if suspended."

B. Waiver of Constitutional Trial Rights

MCR 6.610(F)(3)(b) requires a court to advise a defendant of the trial rights that are waived by a guilty or no contest plea. MCR 6.610(F)(3)(b) provides that the court must advise the defendant

> "that if the plea is accepted the defendant will not have a trial of any kind and that the defendant gives up the following rights that the defendant would have at trial:
>
> > (*i*) the right to have witnesses called for the defendant's defense at trial,
> >
> > (*ii*) the right to cross-examine all witnesses called against the defendant,
> >
> > (*iii*) the right to testify or to remain silent without an inference being drawn from said silence,
> >
> > (*iv*) the presumption of innocence and the requirement that the defendant's guilt be proven beyond a reasonable doubt."

The Michigan Supreme Court has specifically approved of a trial court's "grouping" of a defendant's rights in the court's recital of rights to a defendant. *In re Guilty Plea Cases*, 395 Mich 96, 114-115 (1975).[79]

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[78] See Section 6.7(A) for discussion of the right to counsel at plea proceedings. See also Chapter 4 for a thorough discussion of a criminal defendant's right to counsel.

[79] See Section 6.7 for a detailed discussion of the constitutional rights that are waived by a guilty plea, including "*Jaworski* rights," and the permissible grouping of these rights.

MCR 6.302(B), a rule expressly applicable to matters of procedure involving offenses over which the circuit court has jurisdiction, contains a few details not found in MCR 6.610(F) that may be helpful in assuring that a defendant's plea in district court is understanding and voluntary.[80] MCR 6.302(B) specifically requires that the court speak directly to the defendant(s) and "determine that each defendant understands" the factors listed in MCR 6.302(B)—many, but not all, of which are found in MCR 6.610(F). MCR 6.302(B) requires the court to advise the defendant of the following information not found in MCR 6.610(F):

> "(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea[, and]
>
> (5) if the plea is accepted, the defendant may be giving up the right to appeal issues that would otherwise be appealable if she or he were convicted at trial. Further, any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right[.]"[81] MCR 6.302(B)(4)-(5).

MCR 6.610(F)(4) governs the method by which a district court may inform a defendant (or defendant) of the trial rights listed in MCR 6.610(F)(3)(b). The recital of rights may be made:

> "(a) on the record,
>
> (b) in a writing made part of the file, or

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[80] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *People v Cole*, 491 Mich 325, 330-332, 337-338 (2012) (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea." MCR 6.302(B)(2) was subsequently amended to require this advice by the court). "Because [the Sex Offenders Registration Act (SORA)] is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea" and "the registration requirement must be included in the judgment of sentence." *People v Nunez*, ___ Mich App ___, ___ (2022) (noting that "MCR 6.427(9) provides that for any offense the court must include in the judgment of sentence 'the conditions incident to the sentence'"). While MCR 6.429(A) permits "trial courts to sua sponte amend an invalid judgment of sentence . . . within six months of its entry, [t]he amendment in [*Nunez*] was attempted beyond the six-month limitations period." *Nunez*, ___ Mich App at ___ n 5. The *Nunez* Court concluded that "[it was] too late for the judge to amend or correct the judgment of sentence to add a registration requirement, and the prosecution [was] not empowered to do so by letter." *Id.* at ___. Accordingly, "the failure of the trial court to adhere to the statutory notice requirement and to include SORA registration in the judgment of sentence prevent[ed] any belated application of SORA to [the defendant]" under MCL 28.724(5). *Nunez*, ___ Mich App at ___.

[81] See Section 6.10 for information on appealing plea-based convictions.

> (c) in a writing referred to on the record." MCR 6.610(F)(4).

Except as otherwise provided in MCR 6.610(F)(7) (addressing written pleas), if the court uses a writing as permitted under MCR 6.610(F)(4)(b) or MCR 6.610(F)(4)(c), "the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights." MCR 6.610(F)(4). "The waiver may be obtained without repeating the individual rights." *Id*.

Where the defendant "signed an advice of rights form[] . . . recit[ing] the rights contained in MCR 6.302(B)(3) verbatim," and where he "affirmed that these rights were read to him, that he understood them, and that he understood he was relinquishing these rights by pleading guilty," the trial court properly complied with MCR 6.302(B), even if the defendant could not personally read the form due to his limited literacy; "MCR 6.302(B) does not specify a reader—only that the rights on the form were read and understood." *People v Winters*, 320 Mich App 506, 512 (2017).

Right to a trial by jury. Const 1963, art 1, § 20, provides that "*[i]n every criminal prosecution*, the accused shall have the right to a speedy and public trial by an impartial jury[.]" (Emphasis added.) Accordingly, a defendant has a constitutional right to be tried by a jury in misdemeanor cases even when conviction would not result in imprisonment. *People v Antkoviak*, 242 Mich App 424, 463 (2000). In *Antkoviak*, 242 Mich App at 425-427, the defendant was charged with violating MCL 436.1703(1)(a) (minor in possession of alcohol) and was denied a jury trial by the district court on the ground that conviction would not result in incarceration. The Court of Appeals concluded that Const 1963, art 1, § 20, guarantees a trial by jury to any defendant accused of a *criminal offense*. The Court explained that although MCL 436.1703 proscribes conduct classified as a "petty offense," the conduct prohibited is clearly classified by statute as a "crime" for which a defendant has the right to a trial by jury. *Antkoviak*, 242 Mich App at 471, 481, citing MCL 750.5.

Electing a bench trial. A defendant is entitled to a jury trial "when required by law." MCR 6.610(D)(1)(c)(*iii*). However, a defendant may waive his or her right to a jury trial. MCL 763.3(1) provides, in relevant part:

> "*In all criminal cases* arising in the courts of this state the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury." (Emphasis added.)

MCL 763.3(1) requires, except in cases of minor offenses, that a defendant wishing to waive the right to a jury trial make and sign a written statement of waiver similar in substance to the example contained in the statute.[82] In addition to the written waiver, in cases involving crimes other than minor offenses, "the waiver of trial by jury shall be made in open court after the defendant has been arraigned and has had opportunity to consult with legal counsel." MCL 763.3(2).

See also MCR 6.401,[83] providing that a defendant has the right to be tried by a jury but may waive the right to a jury and choose to be tried by the court. A defendant's election to be tried by the bench requires the prosecutor's consent and the court's approval. *Id*.

C. Advice About Possible Sentence

Before a court may accept a defendant's guilty or no contest plea, the court must inform the defendant of any mandatory minimum jail sentence for a conviction of the offense, as well as the maximum possible penalty permitted by statute. MCR 6.610(F)(3)(a).

The extent to which a trial court may involve itself in sentence negotiations is defined by the Michigan Supreme Court's decisions in *People v Killebrew*, 416 Mich 189 (1982), effectively superseded in part by ADM File No. 2011-19,[84] and *People v Cobbs*, 443 Mich 276 (1993). See Section 6.4 for discussion of sentence negotiations and plea bargains.

6.18 Plea Must Be Understanding, Voluntary, and Accurate

MCR 6.610(F)(1) provides that, before accepting a plea of guilty or nolo contendere, the court must "determine that the plea is understanding, voluntary, and accurate."

"A no-contest or a guilty plea constitutes a waiver of several constitutional rights, including the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers." *People v Cole*, 491 Mich 325, 332 (2012). However, "[f]or a plea to constitute an effective waiver of these rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and

[82] See SCAO Form MC 260, *Waiver of Trial by Jury and Election to be Tried Without Jury*.

[83] Although MCR 6.401 applies to criminal offenses over which the circuit court has jurisdiction and is not expressly applicable to offenses over which the district court has jurisdiction, the rule may be instructive.

[84] Effective January 1, 2014. See 495 Mich lxxix (2013).

knowing." *Id.* at 332-333. "A defendant who has entered a plea does not waive his [or her] opportunity to attack the voluntary and intelligent character of the plea by arguing that his or her counsel provided ineffective assistance during the plea bargaining process." *People v Horton*, 500 Mich 1034, 1034 (2017), citing *Hill v Lockhart*, 474 US 52, 56-57 (1985), and "overrul[ing] *People v Vonins (After Remand)*, 203 Mich App 173, 175-176 (1993), and *People v Bordash*, 208 Mich App 1 (1994), to the extent that they are inconsistent with *Hill*[.]"

It is the duty of the judge to be satisfied that a plea is made freely, with full knowledge of the nature of the accusation, and without undue influence. MCL 768.35. The court may not accept a guilty or nolo contendere (no contest) plea unless it is convinced that the plea is understanding, voluntary, and accurate. MCR 6.302(A); MCR 6.610(F)(1). In other words, a defendant must be afforded due process. See *Cole*, 491 Mich at 332.

A guilty plea should not be accepted by a trial court until facts sufficient to establish the defendant's guilt have been placed on the record. *People v Haack*, 396 Mich 367, 375 (1976).

The adequacy of the factual basis for a guilty plea is reviewed by examining "whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Brownfield (After Remand)*, 216 Mich App 429, 431 (1996), citing *People v Booth*, 414 Mich 343, 360 (1982).

A. Understanding Plea

Before a district court may accept a defendant's guilty or nolo contendere plea, the court must comply with the requirements of MCR 6.610(F), which requires that the court inform the defendant of his or her right to the assistance of an attorney. MCR 6.610(F)(2).

An understanding plea also requires that a defendant be advised of any mandatory minimum jail sentence that would be imposed for conviction of the charged offense as well as the maximum possible penalty for conviction. MCR 6.610(F)(3)(a). Where the trial court incorrectly advised the defendant that the maximum term of imprisonment for the offense "was 20 years when the correct maximum was 10 years," the defendant was not entitled to withdraw his plea; "[b]ecause defendant was not told that he was facing a sentence less than what it actually was, he [could not] show that he was prejudiced" by the trial court's error. *People v Winters*, 320 Mich App 506, 509-511 (2017) (interpreting the requirement in MCR 6.302(B)(2) to advise the defendant of the maximum possible penalty for conviction).

Before accepting a defendant's guilty or no contest plea, the court must also advise the defendant of his or her right to trial and of the rights attendant to the right to trial. MCR 6.610(F)(3)(b).

MCR 6.302(B), a rule expressly applicable to matters of procedure involving offenses over which the circuit court has jurisdiction, contains a few details not found in MCR 6.610(F) that may be helpful in assuring that a defendant's plea in district court is understanding and voluntary.[85] MCR 6.302(B) specifically requires that the court speak directly to the defendant(s) and "determine that each defendant understands" the factors listed in MCR 6.302(B)—many, but not all, of which are found in MCR 6.610(F).

B. Voluntary Plea

In determining a plea's voluntariness, MCR 6.610(F)(6) requires the court to ask the defendant specific questions before accepting the defendant's guilty or nolo contendere plea:

> "The court must ask the defendant:
>
> > (a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;
> >
> > (b) whether anyone has threatened the defendant; and
> >
> > (c) whether it is the defendant's own choice to plead guilty."

[85] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *People v Cole*, 491 Mich 325, 330-332, 337-338 (2012) (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea." MCR 6.302(B)(2) was subsequently amended to require this advice by the court). "Because [the Sex Offenders Registration Act (SORA)] is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea" and "the registration requirement must be included in the judgment of sentence." *People v Nunez*, ___ Mich App ___, ___ (2022) (noting that "MCR 6.427(9) provides that for any offense the court must include in the judgment of sentence 'the conditions incident to the sentence'"). While MCR 6.429(A) permits "trial courts to sua sponte amend an invalid judgment of sentence . . . within six months of its entry, [t]he amendment in [*Nunez*] was attempted beyond the six-month limitations period." *Nunez*, ___ Mich App at ___ n 5. The *Nunez* Court concluded that "[it was] too late for the judge to amend or correct the judgment of sentence to add a registration requirement, and the prosecution [was] not empowered to do so by letter." *Id.* at ___. Accordingly, "the failure of the trial court to adhere to the statutory notice requirement and to include SORA registration in the judgment of sentence prevent[ed] any belated application of SORA to [the defendant]" under MCL 28.724(5). *Nunez*, ___ Mich App at ___.

"In assessing voluntariness, . . . a defendant entering a plea must be 'fully aware of the direct consequences' of the plea." *People v Cole*, 491 Mich 325, 333 (2012), quoting *Brady v United States*, 397 US 742, 755 (1970).

C. Accurate Plea

In determining the accuracy of a guilty plea, "the court, by questioning the defendant, shall establish support for a finding that [the] defendant is guilty of the offense charged *or* the offense to which the defendant is pleading[.]" MCR 6.610(F)(1)(a) (emphasis added).

In determining the accuracy of a nolo contendere plea, "the court shall not question the defendant about the defendant's participation in the crime, but shall make the determination on the basis of other available information." MCR 6.610(F)(1)(b).

6.19 Misdemeanor Pleas Under Michigan Vehicle Code, § 625

Before the court accepts a plea of guilty or nolo contendere for a misdemeanor violation under MCL 257.625, or for a violation under a local ordinance substantially corresponding to MCL 257.625(1) (operating a motor vehicle while intoxicated), MCL 257.625(2) (allowing another person to operate a motor vehicle while under the influence of alcoholic liquor, a controlled substance, and/or other intoxicating substance, or with an unlawful blood alcohol content, or while visibly impaired), MCL 257.625(3) (operating a motor vehicle while visibly impaired), MCL 257.625(6) (zero tolerance), or MCL 257.625(8) (operating a motor vehicle with any amount of certain controlled substances in the body), the court must advise the defendant of the following:

- the maximum possible term of imprisonment;
- the maximum possible fine; and
- that the maximum possible licensing sanctions will be determined based on the defendant's master driving record (kept by the Secretary of State according to MCL 257.204a). MCL 257.625b(4).

The court may accept a defendant's plea to these violations at the conclusion of the pretrial conference held in compliance with MCL 257.625b(2). See Chapter 5 for information on arraignments in cases involving misdemeanor violations of specified sections of MCL 257.625.

6.20 Marine Safety Act Pleas

A person arrested for violating the Marine Safety Act who was given a written notice to appear may tender a plea of guilty or not guilty in person, by representation, or by mail. MCL 324.80168(4). The magistrate or district court judge may accept the plea for purposes of arraignment "with the same effect as though the person personally appeared before him or her." *Id*.

6.21 Accepting a Plea Based on a Citation

Under the MVC, a police officer *must* issue a citation to a person who is arrested without a warrant for "a violation of [the MVC] punishable as a misdemeanor, or an ordinance substantially corresponding to a provision of [the MVC] and punishable as a misdemeanor, under conditions not referred to in [MCL 257.617,[86] MCL 257.619,[87] or MCL 257.727.[88]]" MCL 257.728(1). The citation may serve as a sworn complaint and as a summons to command the initial appearance of the accused and, for misdemeanor traffic cases, to command the accused's response regarding his or her guilt of or responsibility for the violation alleged. MCR 6.615(A)(2)(a)-(b).

A district court magistrate (if authorized to do so under MCL 600.8511(b)) can accept a plea of guilty or not guilty based solely on a citation. MCL 257.728e. However, if the accused pleads not guilty to a misdemeanor, a sworn complaint must be filed with the court before any further proceedings may be conducted. MCL 257.728e. "A warrant for arrest shall not issue for an offense [charged in the citation] until a sworn complaint is filed with the magistrate." MCL 257.728e.

6.22 Refusing To Accept a Plea or Plea Agreement

MCR 6.610(F)(5) permits a district court to reject a plea agreement. The court rule offers no guidance on the procedure or requirements for rejecting a plea made in district court. However, MCR 6.301(A), applicable to procedural matters involving felony offenses, but potentially instructive in cases involving offenses cognizable in district court, permits a court to refuse a defendant's plea as long as the refusal is made pursuant to the court rules. Where a court refuses to accept a

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[86] Leaving the scene of an accident resulting in serious impairment of body function or death. MCL 257.617.

[87] Failing to give the proper information and aid after an accident. MCL 257.619.

[88] Requiring a person who was arrested without a warrant for certain specified violations to be arraigned (if an adult) or taken before the family division of circuit court (if a minor) "without unreasonable delay[.]" MCL 257.727.

defendant's plea, the court must enter a plea of not guilty on the record. *Id*.

6.23 Withdrawing or Challenging a Plea[89]

A. Timing of Motion to Withdraw Plea

A defendant may not challenge a plea on appeal unless the defendant first moves in the trial court to withdraw the plea for noncompliance with applicable court rules. MCR 6.610(F)(8)(a). A defendant may file a motion to withdraw his or her plea before or after sentencing. *Id*. If the motion to withdraw is made after the sentence has been imposed, it must be made within the time for filing a late application for leave to appeal under MCR 7.105(G)(2) (not more than six months after entry of the judgment). MCR 6.610(F)(8)(a); MCR 7.105(G)(2); see also *People v Clement*, 254 Mich App 387, 390, 393 (2002) (applying former MCR 7.103(B)(6)).[90]

B. Standards for Withdrawal of Pleas

When a defendant moves to withdraw his or her plea, the trial court must determine whether a deviation from the court rules occurred during the plea process, and if so, whether the deviation affected the defendant's substantial rights. MCR 6.610(F)(8)(b). If the court concludes that a deviation affecting the defendant's substantial rights occurred, the court must correct the deviation *and* offer the defendant the option of withdrawing his or plea. *Id*. If the court concludes either that no deviation occurred or that any deviation that occurred did not affect the defendant's substantial rights, a defendant may withdraw his or her plea "only if it does not cause substantial prejudice to the [prosecution] because of reliance on the plea." *Id*.

C. Appeal[91]

"An appeal from a misdemeanor case is governed by subchapter 7.100." MCR 6.625(A).

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[89] See Section 6.30 for discussion of withdrawing a felony plea. Court rules and caselaw governing the withdrawal of a guilty plea, although not explicitly applicable to offenses cognizable by the district court, may prove useful in applying the court rules governing withdrawal of a misdemeanor plea.

[90] See Section 6.10 for discussion of appealing a plea-based conviction.

[91] See Section 6.10 for a thorough discussion of appeals from plea-based convictions.

1. Preservation of Right to Appeal

Similar to provisions relative to felony pleas in MCR 6.310(C), MCR 6.610(F)(8) states:

> "The following provisions apply where a defendant seeks to challenge the plea.
>
> > (a) A defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules. Such a motion may be made either before or after sentence has been imposed. After imposition of sentence, the defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.105(G)(2).
> >
> > (b) If the trial court determines that a deviation affecting substantial rights occurred, it shall correct the deviation and give the defendant the option of permitting the plea to stand or of withdrawing the plea. If the trial court determines either a deviation did not occur, or that the deviation did not affect substantial rights, it may permit the defendant to withdraw the plea only if it does not cause substantial prejudice to the people because of reliance on the plea.
> >
> > (c) If a deviation is corrected, any appeal will be on the whole record including the subsequent advice and inquiries."

2. Advice of Right to Counsel

A district court is required to advise a defendant of his or her right to a court-appointed attorney if the court sentences the defendant to a term of incarceration and the defendant wishes to appeal the conviction. MCR 6.610(G)(4) states:

> "Immediately after imposing a sentence of incarceration, even if suspended, the court must advise the defendant, on the record or in writing, that:
>
> > (a) if the defendant wishes to file an appeal and is financially unable to retain a lawyer,

> the local indigent criminal defense system's appointing authority will appoint a lawyer to represent the defendant on appeal, and
>
> (b) the request for a lawyer must be made within 14 days after sentencing."

MCR 6.625(B)-(D) governs the appointment of counsel when requested by an indigent defendant sentenced to a term of incarceration:

> "(B) If the court imposed a sentence of incarceration, even if suspended, and the defendant is indigent, the local indigent criminal defense system's appointing authority must appoint a lawyer if, within 14 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. If the defendant makes a request on the record, the court shall inform the appointing authority of the request the same day. Unless there is a postjudgment motion pending, the appointing authority must act on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the appointing authority must act on the request after the court's disposition of the pending motion and within 14 days after that disposition. If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day of the appointment.
>
> (C) If indigency was not previously determined or there is a request for a redetermination of indigency, the court shall make an indigency determination unless the court's local funding unit has designated this duty to its appointing authority in its compliance plan with the Michigan Indigent Defense Commission. The determination of indigency and, if indigency is found, the appointment of counsel must occur with 14 days of the request unless a postjudgment motion is pending. If there is a postjudgment motion pending, the appointing authority must act on the request after the court's disposition of the pending motion and within 14 days after that disposition.
>
> (D) If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR

> 7.105(A)(3) shall commence on the day the notice of appointment is filed with the court."

Part C: Procedures Specific to Felony Pleas[92]

6.24 Authority of District Court Judges to Accept Felony Pleas

MCL 766.4, governing the scheduling of probable cause conferences and preliminary examinations at the initial arraignment in district court, grants authority to district court judges to accept felony pleas before bindover to circuit court. MCL 766.4(3) provides:

> "A district judge has the authority to accept a felony plea. A district judge shall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. Sentencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken."

See also MCR 6.111, which permits the district court, *following* bindover, to conduct circuit court arraignments under certain circumstances and to take pleas at those proceedings.

6.25 Available Pleas

MCR 6.301, which governs the types of pleas that are available, provides:

> "**(A) Possible Pleas.** Subject to the rules in [Subchapter 6.300], a defendant may plead not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. If the defendant refuses to plead or stands mute, or the court, pursuant to the rules, refuses to accept the defendant's plea, the court must enter a not guilty plea on the record. A plea of not guilty places in issue every material allegation in the information and permits the defendant to raise any defense not otherwise waived.

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[92] This Part discusses the procedures that are specifically applicable to pleas involving felony offenses and misdemeanor offenses over which the *circuit* court has trial jurisdiction. See Chapter 2 for discussion of district court jurisdiction. See Part B for discussion of procedures specifically applicable to misdemeanor arraignments. See Chapter 7 for discussion of post-bindover (circuit court) arraignments.

(B) Pleas That Require the Court's Consent. A defendant may enter a plea of nolo contendere only with the consent of the court.

(C) Pleas That Require the Consent of the Court and the Prosecutor. A defendant may enter the following pleas only with the consent of the court and the prosecutor:

(1) A defendant who has asserted an insanity defense may enter a plea of guilty but mentally ill or a plea of not guilty by reason of insanity. Before such a plea may be entered, the defendant must comply with the examination required by law.

(2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only.

(D) Pleas to Lesser Charges. The court may not accept a plea to an offense other than the one charged without the consent of the prosecutor."

6.26 Plea of Guilty or Nolo Contendere

A. Plea Procedure and Advice of Rights[93]

MCR 6.302, governing pleas of guilty and nolo contendere in felony cases, provides, in part:

"**(A) Plea Requirements.** The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out [MCR 6.302(B)-(E)].

[93] See Section 6.7 for discussion of waiver of trial rights, including "*Jaworski* rights," and the permissible grouping of trial rights when providing the required advice. See the Michigan Judicial Institute's Criminal Pretrial/Trial Quick Reference Materials web page for a checklist and flowchart for felony guilty and no contest pleas and a flowchart for felony not guilty pleas.

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;

(2) the maximum possible prison sentence for the offense, including, if applicable, whether the law permits or requires consecutive sentences, and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or [MCL] 750.520c;

(3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:

(a) to be tried by a jury;

(b) to be presumed innocent until proved guilty;

(c) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;

(d) to have the witnesses against the defendant appear at the trial;

(e) to question the witnesses against the defendant;

(f) to have the court order any witnesses the defendant has for the defense to appear at the trial;

(g) to remain silent during the trial;

(h) to not have that silence used against the defendant; and

(i) to testify at the trial if the defendant wants to testify.

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the

> court at the plea proceeding, or that it was not the defendant's own choice to enter the plea;
>
> (5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right.
>
> The requirements of [MCR 6.302(B)(3) and MCR 6.302(B)(5)] may be satisfied by a writing on a form approved by the State Court Administrative Office.[94] If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights."

A nolo contendere plea may only be entered with the consent of the court. MCR 6.301(B).

B. Understanding, Voluntary, and Accurate Plea Requirements[95]

1. Understanding Plea

For an understanding plea, the court must advise the defendant of the name of the offense; the maximum possible prison sentence; any mandatory minimum sentence for the offense, "including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or [MCL] 750.520c;"[96] and the rights that will be given up (both at trial and on appeal) if the defendant's plea is accepted. MCR 6.302(B).[97]

"The requirements of MCR 6.302(B)(3) and MCR 6.302(B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office." MCR 6.302(B). "If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights." *Id.* The form must be approved by the State Court Administrative Office. See SCAO Form CC 291, *Advice of Rights (Circuit Court Plea)*.

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[94] See SCAO Form CC 291, *Advice of Rights (Circuit Court Plea)*.

[95] See the Michigan Judicial Institute's Criminal Pretrial/Trial Quick Reference Materials web page for a checklist and flowchart for felony guilty and no contest pleas and a flowchart for felony not guilty pleas.

"MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual offender before accepting a guilty plea," and MCR 6.310(C) permits a defendant who is not so apprised to elect either to allow his or her plea and sentence to stand or to withdraw the plea. *People v Brown*, 492 Mich 684, 687 (2012). In *Brown*, 492 Mich at 687-688, the defendant pleaded guilty, as a second-offense habitual offender under MCL 769.10, to second-degree home invasion. The defendant was advised at his plea hearing that the maximum sentence for second-degree home invasion was 15 years in prison; however, the defendant was subsequently sentenced, as an habitual offender, to a maximum prison term of more than 22 years. *Brown*, 492 Mich at 688. The Michigan Supreme Court concluded that MCR 6.302(B)(2) requires that "before pleading guilty, a defendant must be notified of the maximum possible prison sentence with habitual-offender enhancement, because the enhanced maximum becomes the 'maximum possible prison sentence' for the principal offense." *Brown*, 492 Mich at 693-694, overruling *People v Boatman*, 273 Mich App 405, 406-410 (2006). The *Brown* Court additionally held that "MCR 6.310(C) . . . provides the proper remedy for a plea that is defective under MCR 6.302(B)(2), which is to allow the defendant the opportunity to withdraw his or her plea." *Brown*, 492 Mich at 698.

Committee Tip:

It is good practice to ask the defendant whether he or she acknowledges the existence of prior convictions that may result in a sentence as an

[96] Advising the defendant of a requirement for mandatory lifetime electronic monitoring is required because "mandatory lifetime electronic monitoring is part of the sentence itself." *People v Cole*, 491 Mich 325, 327 (2012). "Accordingly, when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring." *Id.* at 337. "Because [the Sex Offenders Registration Act (SORA)] is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea" and "the registration requirement must be included in the judgment of sentence." *People v Nunez*, ___ Mich App ___, ___ (2022) (noting that "MCR 6.427(9) provides that for any offense the court must include in the judgment of sentence 'the conditions incident to the sentence'"). While MCR 6.429(A) permits "trial courts to sua sponte amend an invalid judgment of sentence . . . within six months of its entry, [t]he amendment in [*Nunez*] was attempted beyond the six-month limitations period." *Nunez*, ___ Mich App at ___ n 5. The *Nunez* Court concluded that "[it was] too late for the judge to amend or correct the judgment of sentence to add a registration requirement, and the prosecution [was] not empowered to do so by letter." *Id*. at ___. Accordingly, "the failure of the trial court to adhere to the statutory notice requirement and to include SORA registration in the judgment of sentence prevent[ed] any belated application of SORA to [the defendant]" under MCL 28.724(5). *Nunez*, ___ Mich App at ___.

habitual offender or any other type of enhanced sentence.

For a nolo contendere plea, it is good practice to ensure that the defendant understands that he or she will be sentenced in the same manner as if he or she had tendered a guilty plea. See MCL 767.37.

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2. A Voluntary Plea

"In assessing voluntariness, . . . a defendant entering a plea must be 'fully aware of the direct consequences' of the plea." *People v Cole*, 491 Mich 325, 333 (2012), quoting *Brady v United States*, 397 US 742, 755 (1970). To ensure that a plea is voluntary, the court must determine whether the parties have made a plea agreement, "which may include an agreement to a sentence to a specific term or within a specific range[.]" MCR 6.302(C)(1).[98] Any agreement "must be stated on the record or reduced to writing and signed by the parties,"[99] and "[t]he written agreement shall be made part of the case file." *Id*.

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[97] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *Cole*, 491 Mich at 330-332, 337-338 (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea" MCR 6.302(B)(2) was subsequently amended to require this advice by the court). "Because [the Sex Offenders Registration Act (SORA)] is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea" and "the registration requirement must be included in the judgment of sentence." *People v Nunez*, ___ Mich App ___, ___ (2022) (noting that "MCR 6.427(9) provides that for any offense the court must include in the judgment of sentence 'the conditions incident to the sentence'"). While MCR 6.429(A) permits "trial courts to sua sponte amend an invalid judgment of sentence . . . within six months of its entry, [t]he amendment in [*Nunez*] was attempted beyond the six-month limitations period." *Nunez*, ___ Mich App at ___ n 5. The *Nunez* Court concluded that "[it was] too late for the judge to amend or correct the judgment of sentence to add a registration requirement, and the prosecution [was] not empowered to do so by letter." *Id*. at ___. Accordingly, "the failure of the trial court to adhere to the statutory notice requirement and to include SORA registration in the judgment of sentence prevent[ed] any belated application of SORA to [the defendant]" under MCL 28.724(5). *Nunez*, ___ Mich App at ___.

MCR 6.302(B)(2) previously required courts to inform a defendant, where applicable, that the law permitted or required a consecutive sentence for the plea to be considered understanding as set froth in the holding of *People v Warren*, 505 Mich 196, 217-218 (2020). Effective January 1, 2022, MCR 6.302(B)(2) was amended to eliminate this language to alleviate the challenge of courts attempting to predict at the plea hearing whether consecutive sentencing may be a possibility in the future. See ADM File No. 2019-06. However, under *Warren*, courts are still required to inform a defendant that the law permits or requires a consecutive sentence where the court *knows* that a defendant may be subject to consecutive sentencing. *Warren*, 505 Mich at 217-218.. Additionally, MCR 6.310 has been amended to allow a defendant to withdraw his or her plea if a consecutive sentence will be imposed and the court did not advise the defendant at the entry of his or her plea that the law permits or requires consecutive sentencing. See Staff Comment to ADM 2019-06 for discussion about the amendment to MCR 6.302.

"If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant." MCR 6.302(C)(2).[100]

"A defendant's ignorance of the collateral consequences of a guilty plea does not render the plea involuntary." *People v White*, 337 Mich App 558, 574, 576 (2021) (determining "that the trial court was required to advise defendant of the mandatory consecutive sentencing at the plea hearing under MCR 6.302(A) and due-process principles, [but that did] not mean that defendant [was] automatically entitled to postappeal relief under MCR 6.500 *et seq*.").

3. An Accurate Plea

For an accurate guilty plea, "the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." MCR 6.302(D)(1).[101] A guilty plea should not be accepted by a trial court until facts sufficient to establish the defendant's guilt have been placed on the record. *People v Haack*, 396 Mich 367, 375 (1976).

The defendant's plea was accurate with respect to his conviction of felony-firearm because he admitted at the plea hearing that he possessed a gun during a bank robbery, and this provided a factual basis for the conviction; although the defendant did not have a prior conviction under MCL

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[98] See Section 6.4 for discussion of plea bargains.

[99] "The parties may memorialize their agreement on a form substantially approved by the SCAO." MCR 6.302(C)(1). See SCAO Form MC 414, *Plea Agreement*.

[100] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *Cole*, 491 Mich at 330-332, 337-338 (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea." MCR 6.302(B)(2) was subsequently amended to require this advice by the court). "Because [the Sex Offenders Registration Act (SORA)] is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea" and "the registration requirement must be included in the judgment of sentence." *People v Nunez*, ___ Mich App ___, ___ (2022) (noting that "MCR 6.427(9) provides that for any offense the court must include in the judgment of sentence 'the conditions incident to the sentence'"). While MCR 6.429(A) permits "trial courts to sua sponte amend an invalid judgment of sentence . . . within six months of its entry, [t]he amendment in [*Nunez*] was attempted beyond the six-month limitations period." *Nunez*, ___ Mich App at ___ n 5. The *Nunez* Court concluded that "[it was] too late for the judge to amend or correct the judgment of sentence to add a registration requirement, and the prosecution [was] not empowered to do so by letter." *Id*. at ___. Accordingly, "the failure of the trial court to adhere to the statutory notice requirement and to include SORA registration in the judgment of sentence prevent[ed] any belated application of SORA to [the defendant]" under MCL 28.724(5). *Nunez*, ___ Mich App at ___.

750.227b(1) and therefore should not have been *sentenced* as a second-time offender, "[w]hether [the] defendant 'was a first-, second-, or third-time offender under the felony-firearm act affect[ed] only the duration of the defendant's sentence,'" and any error relating to his lack of a prior conviction did not affect the accuracy of his plea. *People v Pointer-Bey*, 321 Mich App 609, 618 (2017) (citation omitted).

For an accurate nolo contendere plea, the court may not question the defendant about participation in the crime, but must state why a plea of nolo contendere is appropriate, and hold a hearing (unless there has already been one) that establishes support for finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading. MCR 6.302(D)(2). It is appropriate for a trial court to rely on a preliminary examination transcript to furnish the factual basis for a nolo contendere plea. *People v Chilton*, 394 Mich 34, 38-39 (1975).

4. Additional Inquiries

After questioning the defendant, the court is required to ask the attorneys whether there are any promises, threats, or inducements other than those already disclosed on the record and whether the court has complied with MCR 6.302(B), MCR 6.302(C), and MCR 6.302(D). MCR 6.302(E).

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[101] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *People v Cole*, 491 Mich 325, 330-332, 337-338 (2012) (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea." MCR 6.302(B)(2) was subsequently amended to require this advice by the court). "Because [the Sex Offenders Registration Act (SORA)] is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea" and "the registration requirement must be included in the judgment of sentence." *People v Nunez*, ___ Mich App ___, ___ (2022) (noting that "MCR 6.427(9) provides that for any offense the court must include in the judgment of sentence 'the conditions incident to the sentence'"). While MCR 6.429(A) permits "trial courts to sua sponte amend an invalid judgment of sentence . . . within six months of its entry, [t]he amendment in [*Nunez*] was attempted beyond the six-month limitations period." *Nunez*, ___ Mich App at ___ n 5. The *Nunez* Court concluded that "[it was] too late for the judge to amend or correct the judgment of sentence to add a registration requirement, and the prosecution [was] not empowered to do so by letter." *Id*. at ___. Accordingly, "the failure of the trial court to adhere to the statutory notice requirement and to include SORA registration in the judgment of sentence prevent[ed] any belated application of SORA to [the defendant]" under MCL 28.724(5). *Nunez*, ___ Mich App at ___.

Committee Tip:

After advising a defendant of his or her rights, it is good practice to also advise the defendant that there is no absolute right to withdraw a plea, but that he or she may file a motion to withdraw his or her plea before sentencing. MCR 6.310(B).

6.27 Plea of Guilty but Mentally Ill[102]

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. "In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or [MCR 6.302(D)(2)(b)], the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill at the time of the offense to which the plea is entered." MCR 6.303. The reports must be made a part of the record. *Id*.

Additionally, the following statutory conditions must be met under MCL 768.36(2) before a guilty but mentally ill plea may be accepted:

> (1) the defendant has asserted a defense of insanity[103];
>
> (2) the defendant has waived his or her right to trial by jury or judge;
>
> (3) the prosecuting attorney has approved the plea of guilty but mentally ill;
>
> (4) with the defendant's consent, the court has examined the report or reports on criminal responsibility prepared as a result of examinations required by the defendant's assertion of the defense;
>
> (5) a hearing on the issue of defendant's mental illness has been conducted; and
>
> (6) the court is satisfied that the defendant proved by a preponderance of the evidence that he or she was mentally ill at the time of the offense.

[102] See Section 10.2 for discussion of criminal responsibility.

[103] See MCL 768.20a.

These requirements are also incorporated in MCR 6.301(C)(1).

A trial court has discretion whether to accept a defendant's guilty but mentally ill plea. *People v Blue*, 428 Mich 684, 694 (1987).

6.28 Plea of Not Guilty by Reason of Insanity[104]

Before accepting a plea of not guilty by reason of insanity,[105] the court must comply with the requirements of MCR 6.302, except that MCR 6.304(C) (rather than MCR 6.302(D)) governs the manner of determining the accuracy of the plea. MCR 6.304(A).

"Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports prepared and hold a hearing that establishes support for findings that (1) the defendant committed the acts charged, and (2) that, by a preponderance of the evidence, the defendant was legally insane at the time of the offense." MCR 6.304(C).

Legal insanity means that, "as a result of mental illness . . . or as a result of having an intellectual disability," a "person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). However, "[m]ental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity." *Id*.

"After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands that the plea will result in the defendant's commitment for diagnostic examination at the center for forensic psychiatry for up to 60 days, and that after the examination, the probate court may order the defendant to be committed for an indefinite period of time." MCR 6.304(B).

After accepting the defendant's plea, the trial court must immediately commit the defendant to the custody of the center for forensic psychiatry for a period not to exceed 60 days. MCL 330.2050(1).

The court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime. MCR 6.304(D); MCL 330.2050(1).

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[104] See Section 10.2 for discussion of criminal responsibility.

[105] See MCL 768.20a.

The defendant may secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. MCL 768.20a(3). If the defendant is indigent and makes a showing of good cause, the trial court may order the county to pay for an independent psychiatric evaluation. *Id*.

6.29 Refusing to Accept a Defendant's Plea

MCR 6.301(A) permits a court to refuse a defendant's plea as long as the refusal is made pursuant to the court rules. MCR 6.301 applies to circuit court arraignments conducted in district court pursuant to MCR 6.111. MCR 6.111(C). If the court refuses to accept a defendant's plea, the court must enter a plea of not guilty on the record. MCR 6.301(A). "A plea of not guilty places in issue every material allegation in the information and permits the defendant to raise any defense not otherwise waived." MCR 6.301(A).

6.30 Withdrawal of a Plea

A. Withdrawal of Plea Before Acceptance

A defendant has a right to withdraw any plea until the court accepts the plea on the record. MCR 6.310(A).

B. Withdrawal of Plea After Acceptance But Before Sentencing

MCR 6.310(B), which sets out the requirements for withdrawing a plea after the court accepts it, but before the court imposes sentence, provides:

> "Except as provided in [MCR 6.310(B)(3)], after acceptance but before sentence,
>
> > (1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by [MCR 6.310](C).
> >
> > (2) the defendant is entitled to withdraw the plea if

> (a) the plea involves an agreement for a sentence for a specified term or within a specified range, and the court states that it is unable to follow the agreement; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or
>
> (b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose; or
>
> (c) a consecutive sentence will be imposed and the defendant was not advised at the time of his or her plea that the law permits or requires consecutive sentencing in his or her case.
>
> (3) Except as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct after the plea is accepted but before sentencing. For purposes of this rule, misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing."

"MCR 6.310(B) permits [a] defendant to withdraw his [or her] plea before sentencing if withdrawal is in the interest of justice, unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea." *People v Allen*, 498 Mich 954, 955 (2015) (citing MCR 6.310(B)(1) and *People v Jackson*, 203 Mich App 607, 611-612 (1994), and noting that "[t]he trial court applied an erroneous legal standard when it concluded that there was no legal basis for the court to allow the defendant to withdraw his plea unless there was a defect in the plea-taking process") (additional citations omitted).

Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin*, 491 Mich 916, 916 (2012). In *Franklin*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin* Court clarified that "*Grove* has been superseded by MCR 6.310(B)," and cautioned that "in the future, such an error will be 'plain.'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin*, 491 Mich 916, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Id.* at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

In the absence of a procedural error in receiving the plea, a defendant must establish a fair and just reason for withdrawal of the plea. *People v Harris*, 224 Mich App 130, 131 (1997). Examples of fair and just reasons for withdrawal include when the plea resulted from fraud, duress, or coercion, *People v Gomer*, 206 Mich App 55, 58 (1994); when the plea involved erroneous legal advice coupled with actual prejudice to legal rights, *People v Jackson*, 417 Mich 243, 246 (1983); or when the bargain on which the plea was based was illusory, meaning that the defendant received no benefit from the agreement, *Harris*, 224 Mich App at 132. If the facts of the case indicate that the plea was voluntary, the plea will be upheld regardless whether the defendant received consideration in return. *Id.* at 132-133. The defendant's plea bargain was not illusory where the prosecutor's offer "to take the 25-year minimum [for certain fourth-time felony offenders under MCL 769.12(1)(a)] 'off the table' in exchange for defendant's plea [in connection with a bank robbery] . . . was based [on] a misunderstanding of the law. It provided defendant with no actual benefit because he was not subject to MCL 769.12(1)(a);" despite that misunderstanding, the defendant "received considerable benefit for his plea" in that "the prosecutor agreed to reduce [his] habitual offender status to third-offense habitual offender," and "agreed not to charge [him] in connection with a second bank robbery." *People v Pointer-Bey*, 321 Mich App 609, 623, 624 (2017).

If the defendant establishes a fair and just reason for withdrawal of the plea, the burden then shifts to the prosecution to establish that substantial prejudice would result from allowing the defendant to

withdraw the plea. *Jackson*, 203 Mich App at 611-612. To constitute substantial prejudice, the prosecution must demonstrate that its ability to prosecute is impeded by the delay. *People v Spencer*, 192 Mich App 146, 151-152 (1991) (holding that substantial prejudice was not established where trial was set to begin at the time the pleas were entered, and some witnesses were from out of state). In deciding whether a defendant may withdraw a plea, the trial court should bear in mind what is in the interests of justice. *Id.* at 151-152 ("the fact that [the] defendant's pleas may have been induced by inaccurate legal advice combined with his refusal or inability to personally recount a sufficient basis to substantiate the[] charges made it incumbent upon the trial court to allow [the] defendant to withdraw his pleas").

"MCR 6.310(B)(1) [does] not permit [a] circuit court to vacate [a] defendant's plea" where the "defendant [has] neither moved for [withdrawal] nor consented to it." *People v Martinez*, 307 Mich App 641, 647, 653-654 (2014) (holding that where the defendant entered a guilty plea in exchange for the prosecutor's agreement not to bring any additional charges regarding contact with the complainant "'grow[ing] out of [the] same investigation that occurred during [a certain period of years,]'" the "fact that the complainant, after [the] defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact" permitting the court to vacate the defendant's plea under either MCR 6.310 or contract principles).

A sentencing judge who decides not to abide by the terms of a sentence agreement (*Cobbs*[106] agreement) may not tell a criminal defendant what sentence might be imposed before the defendant decides whether to withdraw a guilty plea. MCR 6.310(B)(2)(b); *People v Williams*, 464 Mich 174, 180 (2001).[107]

A trial court may not sua sponte vacate an accepted plea without the defendant's consent, even if the defendant indicates that he or she is innocent. *People v Strong*, 213 Mich App 107, 112 (1995).

"When reviewing whether the factual basis for a plea [is] adequate, th[e] [c]ourt considers whether the factfinder could find the defendant guilty on the basis of the facts elicited from the defendant at the plea proceeding." *People v Fonville*, 291 Mich App 363, 377 (2011).

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[106] *People v Cobbs*, 443 Mich 276 (1993).

[107] See Section 6.4(A)(2) for discussion of *Cobbs* pleas.

> "'A factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted. This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference. Even if the defendant denies an element of the crime, the court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says.'" *Id.* at 377, quoting *People v Thew*, 201 Mich App 78, 85 (1993) (additional and internal citations omitted).

Doubt about the veracity of a defendant's nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, 264 Mich App 139, 150 (2004). When recanted testimony provides a substantial part of the factual basis underlying a defendant's nolo contendere plea, the defendant must prove by a preponderance of credible evidence that the original testimony was untruthful, in order to constitute a fair and just reason for allowing the defendant to withdraw his or her plea. *Id.* at 152. If the defendant meets the burden, the trial court must then determine whether other evidence is sufficient to support the factual basis of the defendant's plea. *Id.* If the defendant fails to meet the burden, or if other evidence is sufficient to support the plea, then the defendant has failed to present a fair and just reason to warrant withdrawal of his or her plea. *Id.*

When a plea is taken and all of the required elements are not satisfied, the case should be remanded to allow the prosecution to establish the missing elements. See *People v Mitchell*, 431 Mich 744, 749-750 (1988). If the prosecution is able to do so and there is no contrary evidence, the defendant's conviction should stand. *Id.* at 750. However, if the prosecution is unable to establish that the defendant committed the offense, the trial court must set aside the defendant's conviction. *Id.* If contrary evidence is produced, the matter should be treated as a motion to withdraw the guilty plea, and the trial court must exercise its discretion to decide the matter. *Id.* If the motion is granted, the trial court must set aside the conviction. *Id.*

C. Withdrawal of Plea After Sentencing

"MCR 6.310(C) permits a defendant to withdraw a guilty plea after sentencing only if the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside." *People v Sanford*, 495 Mich 989, 989 (2014). MCR 6.310(C) provides:

> "(1) The defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and [MCR 7.205(A)(2)(b)(*i*)-(*iii*)].
>
> (2) Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500.
>
> (3) If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals."[108]

"'A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process.'" *Sanford*, 495 Mich at 989-990, quoting *People v Brown*, 492 Mich 684, 693 (2012).

The trial court abused its discretion in denying the defendant's motion to withdraw his plea after sentencing where "there [were] multiple proposed plea agreements and hearings," because the record showed "a lack of clarity with regard to essential sentencing features." *People v Brinkey*, 327 Mich App 94, 95 (2019) (although strict compliance with MCR 6.302 is not essential, "the trial court's noncompliance [was] serious in nature" because "the trial court made no [apparent] effort to ensure that defendant actually knew and understood" the conditions he was pleading guilty under).

"[In general,] criminal defendants may not withdraw a guilty plea on the ground that they were unaware of the future collateral or incidental effects of the initial valid plea." *People v Haynes*, 256 Mich App 341, 349 (2003). However, defense counsel is constitutionally required to inform his or her client that a plea "may carry a risk of adverse immigration consequences," e.g., deportation. *Padilla v Kentucky*, 559 US 356, 369 (2010).[109]

"MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual

[108] A motion to withdraw a plea after sentencing may be deemed presented for filing on the date it is deposited into the institution's outgoing mail if the appellant is pro se, is incarcerated in prison or jail, and meets the other requirements of MCR 1.112. The motion is deemed timely if deposited on or before the filing deadline. MCR 1.112.

offender before accepting a guilty plea," and MCR 6.310(C) permits a defendant who is not so apprised to elect either to allow his or her plea and sentence to stand or to withdraw the plea. *Brown*, 492 Mich at 687. In *Brown*, 492 Mich at 687, the defendant pleaded guilty, as a second-offense habitual offender under MCL 769.10, to second-degree home invasion. The defendant was advised at his plea hearing that the maximum sentence for second-degree home invasion was 15 years in prison; however, the defendant was subsequently sentenced, as an habitual offender, to a maximum prison term of more than 22 years. *Brown*, 492 Mich at 687-688. The Michigan Supreme Court concluded that MCR 6.302(B)(2) requires that "before pleading guilty, a defendant must be notified of the maximum possible prison sentence with habitual-offender enhancement, because the enhanced maximum becomes the 'maximum possible prison sentence' for the principal offense." *Brown*, 492 Mich at 693-694, overruling *People v Boatman*, 273 Mich App 405, 406-410 (2006). The *Brown* Court additionally held that "MCR 6.310(C) . . . provides the proper remedy for a plea that is defective under MCR 6.302(B)(2), which is to allow the defendant the opportunity to withdraw his or her plea." *Brown*, 492 Mich at 698.

D. Evidentiary Hearings

"[W]hether a trial court must hold an evidentiary hearing on a motion to withdraw an allegedly involuntary guilty plea is generally dependent on the facts of the case." *People v Samuels*, 339 Mich App 664, 672-673 (2021). "[A] trial court typically must hold an evidentiary hearing when a question of fact is raised by the defendant's substantiated allegations that his or her guilty plea was involuntary because it was improperly induced." *Id*. at 672. For example, a trial court must conduct an evidentiary hearing when a defendant makes an offer of proof that their plea was induced by counsel's faulty legal advice or when a defendant provides factual support that they were promised a lenient sentence in exchange for the plea. *Id*. at 672. However, a trial court need not hold an evidentiary hearing if the defendant's offer of proof contradicts their testimony at the plea hearing. *Id*. at 274. If a trial court holds an

[109] "[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law[.]" *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004). However, because *Padilla*, 559 US 356, "announced a 'new rule[,]'" it does not apply retroactively on collateral review. *Chaidez v United States*, 568 US 342, 344 (2013). See also *People v Gomez*, 295 Mich App 411, 413-414, 418-419 (2012) (holding that "the new rule of criminal procedure announced in *Padilla*[, 559 US 356,] has prospective application only[]" under both federal and state rules of retroactivity, and that the defendant, who entered a no-contest plea to a drug-possession charge and was subsequently notified that his conviction rendered him subject to deportation, was not entitled to relief from judgment based on *Padilla*, 559 US 356, which was decided several years after he completed his sentence). See Section 6.4(D) for discussion of ineffective assistance of counsel during sentence negotiations.

evidentiary hearing on the defendant's motion to withdraw a guilty plea, "the trial court must consider the facts of the particular case to determine whether the defendant's plea was voluntary." *Samuels*, 339 Mich App at 674.

Generally, defendant must establish by a preponderance of credible evidence that the plea was the product of fraud, duress, or coercion to be entitled to relief. *Samuels*, 339 Mich App at 675. "Although a trial court is generally barred at the evidentiary hearing from considering testimony or affidavits inconsistent with statements made during the plea hearing, guilty pleas may be withdrawn on the basis of promises of leniency if the record contains some other support for the defendant's claim." *Id*. at 675 (cleaned up).

E. Divisibility of Multiple Pleas Arising From Single Plea Agreement

In *People v Blanton*, 317 Mich App 107, 121 (2016), the parties disputed whether, when a defendant pleads guilty to multiple charges under a single plea agreement, MCR 6.310(C) "allows [the] defendant to withdraw his [or her] entire plea or only his [or her] plea to" a charge affected by a defect in the plea-taking process. Before accepting the defendant's guilty plea to charges of felony-firearm and two other offenses, the trial court in *Blanton*, 317 Mich App at 120, failed to advise the defendant of the mandatory minimum sentence (or consecutive nature of the sentence) applicable to the felony-firearm charge. After sentencing, the defendant moved to withdraw his guilty plea in its entirety under MCR 6.310(C) based on the defect in the plea proceeding with respect to the felony-firearm charge. *Blanton*, 317 Mich App at 113. The trial court agreed, rejecting the prosecution's assertion that the defendant should be permitted to withdraw only the plea of guilty of felony-firearm. *Id*. at 114. Noting that there was no binding Michigan precedent on point, the trial court cited *State v Turley*, 149 Wash 2d 395 (2003), for the proposition that "'plea agreements are "package deals" and indivisible,'" and that the defendant was therefore not limited to withdrawing only the "'"defective" portion of his plea.'" *Blanton*, 317 Mich App at 116-117 (citation omitted).

The Court of Appeals affirmed. "Given that there was no precedential authority on [the] issue in Michigan, . . . the trial court [did not] abuse[] its discretion in applying the contractual approach set forth in *Turley*[, 149 Wash 2d 395,]" and in concluding that its failure to advise the defendant of the full nature of the penalty for felony-firearm, in violation of MCR 6.302(B)(2), permitted him to withdraw his guilty pleas to all three charges. *Blanton*, 317 Mich App at 125. "'[C]ontractual analogies may be applied in the context of a plea agreement' if to do so would not 'subvert the ends of

justice.'" *Id.*, quoting *People v Swirles (After Remand)*, 218 Mich App 133, 135 (1996). "Given the nature of the plea-bargaining process in Michigan where both parties often tend to negotiate a 'package deal,' . . . adherence to the [contractual] approach set forth in *Turley* would not 'subvert the ends of justice.'" *Blanton*, 317 Mich App at 122, 126 (noting that the "references in MCR 6.302 and MCR 6.310 to the singular terms 'plea' and 'plea proceeding' [did] not necessarily resolve the issue") (citations omitted). The Court noted that "the objective facts reveal[ed] an intent by the prosecution and [the] defendant to treat the plea agreement as indivisible" where "[the] defendant was charged with multiple offenses in a single Information; he negotiated with the prosecution to allow him to plead guilty to three charges contemporaneously in exchange for the dismissal of the remaining charges and the habitual offender enhancement; a single document contained the terms of the plea agreement; and the trial court accepted [the] defendant's pleas to all three charges at one hearing." *Blanton*, 317 Mich App at 126, citing *Turley*, 149 Wash 2d at 400. Accordingly, "the trial court did not abuse its discretion in allowing [the] defendant to withdraw his plea in its entirety rather than only partially because the plea agreement [was] indivisible." *Blanton*, 317 Mich App at 126.

Because "there was a defect in the plea-taking process [when] no one informed [defendant] that her conviction of unlawfully imprisoning a minor would require her to register under [the Sex Offenders Registration Act]," "the trial court abused its discretion by denying [defendant's] motion to withdraw her plea in its entirety," and by "sever[ing] [her] convictions and permitt[ing] her to withdraw her guilty plea only as to the unlawful imprisonment charge." *People v Coleman*, 327 Mich App 430, 436, 444 (2019) (defendant "should have been afforded the right to withdraw her *entire* plea based upon the defect in the plea-taking process" because the "plea was clearly intended as a package deal").

F. Effect of Withdrawal or Vacation of Plea

"If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered." MCR 6.312. See also *People v Johnson*, 197 Mich App 362, 364 (1992) (citing MCR 6.312 and holding that "[w]hen [the] defendant withdrew his guilty plea, he reopened [the] matter to any of the charges which had been brought or could have been brought against him at the time his plea of guilty was entered").

G. Inadmissibility of Withdrawn Plea

Ordinarily, evidence of a withdrawn or vacated plea and statements made during the plea proceedings are not admissible in any civil or criminal proceedings. MRE 410.[110] However, criminal defendants may waive MRE 410 protections, so long as they are appropriately advised and the statements admitted into evidence are voluntarily, knowingly, and understandingly made. *People v Stevens*, 461 Mich 655, 656-657, 661-663, 668-670 (2000) (holding that where the defendant acknowledged his guilt during plea discussions arising out of proceedings pursuant to an investigative subpoena, but the plea was ultimately not entered, the statements were "not rendered inadmissible by MRE 410, and, if otherwise admissible, [could] be introduced in the prosecutor's case in chief").

H. Appealing a Guilty Plea[111]

1. Preservation of Issues for Appeal

"A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in . . . subchapter [6.300], or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial, court, raising as a basis for withdrawal the claim sought to be raised on appeal." MCR 6.310(D). See also *People v Gaines*, 198 Mich App 130, 131 (1993) (holding that "[the] defendant's challenge concerning the validity of his . . . plea [was] not properly before [the Court of Appeals] because he did not move to withdraw the plea in the trial court") (citations omitted).

MCR 6.310(D) barred review of the defendant's argument on appeal where the defendant failed to file a motion to withdraw his guilty plea but challenged the factual basis for his plea on appeal. *People v Baham*, 321 Mich App 228, 234, 235 (2017) (holding that a challenge to the factual basis of a plea implicates the accuracy of the plea). However, "a claim of ineffective assistance of counsel can serve as a basis for relief relative to a plea despite a failure to comply with MCR 6.310." *Baham*, 321 Mich App at 235.

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[110] See Section 6.9 for discussion of MRE 410.

[111] See Section 6.10 for a thorough discussion of appeals from plea-based convictions.

2. Advice of Right to Counsel

"[I]ndigent defendants who plead guilty or nolo contendere in a Michigan court have a federal constitutional right to the appointment of appellate counsel with regard to first-tier review in th[e] Court [of Appeals]." *People v James*, 272 Mich App 182, 188-189 (2006), citing *Halbert v Michigan*, 545 US 605 (2005).

MCR 6.425(F)(2)-(4) provide:

> "(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that
>
> > (a) the defendant is entitled to file an application for leave to appeal,
> >
> > (b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and
> >
> > (c) the request for a lawyer must be filed within 42 days after sentencing.
>
> (3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and filed within 42 days after sentencing if the defendant wants the court to appoint a lawyer. The court must give the defendant an opportunity to tender a completed request for counsel form at sentencing if the defendant wishes to do so.
>
> (4) A request for counsel must be deemed filed on the date on which it is received by the court or the Michigan Appellate Assigned Counsel System (MAACS), whichever is earlier."

A legally erroneous instruction (e.g., that by pleading no contest, the defendant waived his right to court-appointed counsel except under certain circumstances) under MCR 6.425(F)(2) and *Halbert*, 545 US at 605, may be harmless if the advice-of-rights form the defendant receives at sentencing informs him or her of the right to appointed counsel under all circumstances, regardless of whether the conviction is plea- or trial-based. *People v Frazier*, 485 Mich 1044, 1044 (2010), citing

MCR 6.425(F)(3). The Court noted, however, that "trial judges should take care to advise defendants in plea proceedings of their continuing right to court-appointed counsel if they cannot afford counsel." *Frazier*, 485 Mich at 1044.

See MCR 6.425(G) for more information on the appointment of appellate counsel, preparation of transcripts, and the scope of appellate counsel's responsibilities.

I. Standard of Review

A trial court's decision whether to grant a motion to withdraw a plea is reviewed for an abuse of discretion. *People v Brown*, 492 Mich 684, 688 (2012).

J. Defects in Previous Plea-Based Conviction May Not Necessarily Invalidate Its Use to Enhance Future Offenses

The Michigan Supreme Court refused to permit a defendant to withdraw his plea of guilty of operating a motor vehicle while under the influence of liquor, second offense (OUIL 2d), 14 months after the plea was entered and after he was charged with OUIL 3d, where "retained counsel, in the absence of the prosecutor, knowingly entered a woefully defective plea at arraignment without bringing the defects to the court's attention" in order to "preserve[] the strategic possibility of setting aside the plea if [the] defendant were ever charged with another OUIL offense." *People v Ward*, 459 Mich 602, 604-605 (1999) (holding that such tactics constituted a "transparent manipulation of the system" and refusing to "allow defense counsel to harbor plain error as a parachute in the event of a subsequent OUIL charge").

Chapter 7: Probable Cause Conferences, Preliminary Examinations, and Bindover

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7.1 Introduction

This chapter discusses probable cause conferences, preliminary examinations, bindover, and circuit court (post-bindover) arraignments in felony cases.

Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district or municipal court on or after January 1, 2015,[1] 2014 PA 123 and 2014 PA 124 amended several provisions in the Code of Criminal Procedure and the Revised Judicature Act related to preliminary examinations, probable cause conferences, and the jurisdiction and duties of district court judges and magistrates with respect to pretrial proceedings in felony cases. For a chart outlining the differences in procedures before and after January 1, 2015, as a result of statutory reforms concerning probable cause conferences, preliminary examinations, and felony pleas, see SCAO Memorandum, July 23, 2014. For additional information, see the SCAO's *Best Practices for Probable Cause Conferences and Preliminary Examinations*.

See the following Michigan Judicial Institute Pretrial/Trial Quick Reference Materials: a table including information on the jurisdiction of district court judges and magistrates over preliminary matters in criminal proceedings; a checklist for conducting a probable cause conference; a checklist for a waiver of preliminary examination; and a checklist for conducting a preliminary examination.

7.2 District Court Jurisdiction in Felony Pretrial Proceedings[2]

A. Introduction

A district court has the same power to hear and determine matters within its jurisdiction as does a circuit court over matters within the circuit court's jurisdiction. MCL 600.8317.

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[1] See 2014 PA 123, enacting section 1; 2014 PA 124, enacting section 2.

[2] See the Michigan Judicial Institute's table including information on the jurisdiction of district court judges and magistrates over preliminary matters in all criminal proceedings. For a thorough discussion of district court jurisdiction, see Chapter 2.

Although the district court does not have trial jurisdiction over felony offenses, the district court has jurisdiction over certain pretrial proceedings in felony cases, including initial (district court) arraignments,[3] probable cause conferences,[4] and preliminary examinations. MCL 600.8311(c)-(e); see also MCR 6.008(A) ("The district court has jurisdiction over . . . all felonies through the preliminary examination and until the entry of an order to bind the defendant over to the circuit court."). Following a finding of probable cause at the preliminary examination, a district court judge "may conduct the circuit court arraignment as provided by court rule." MCL 766.13[5]; see also MCR 6.111; MCL 600.8311(f). Additionally, "[a] district judge has the authority to accept a felony plea[and s]hall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties." MCL 766.4(3); see also MCR 6.111(A) ("[a] district court judge shall take a felony plea as provided by court rule if a plea agreement is reached between the parties[]").[6]

MCL 600.8311 provides, in relevant part:

> "The district court has jurisdiction of all of the following:
>
> * * *
>
> (c) Arraignments, the fixing of bail and the accepting of bonds.
>
> (d) Probable cause conferences in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the probable cause conference under . . . MCL 766.4.[7]
>
> (e) Preliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the preliminary examination under . . . MCL 766.1[*et seq*]. There shall not be a preliminary examination for any misdemeanor to be tried in a district court.

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[3] See Chapter 5 for discussion of district court felony arraignments.

[4] See Section 7.5.

[5] See Section 7.29 for discussion of circuit court arraignments.

[6] However, following bindover, "[t]he circuit court retains jurisdiction over any case in which a plea is entered or a verdict rendered to a charge that would normally be cognizable in the district court," MCR 6.008(C), and the circuit court must "sentence all defendants bound over to circuit court on a felony that either plead guilty to, or are found guilty of, a misdemeanor," MCR 6.008(D). See Section 2.5 for discussion of circuit court jurisdiction. See Chapter 6 for discussion of pleas.

[7] See Section 7.5 for discussion of probable cause conferences.

> (f) Circuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under . . . MCL 766.13. Sentencing for felony cases and misdemeanor cases not cognizable by the district court shall be conducted by a circuit judge."[8]

Note—Felony and Misdemeanor Definitions. By statute, an offense designated as a misdemeanor is nevertheless considered a felony for purposes of determining trial-court jurisdiction if it is punishable by more than one year of imprisonment.

- **Felony**. The Michigan Code of Criminal Procedure, MCL 760.1 *et seq.*, defines *felony* as a violation of Michigan's penal law "for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(f); see also MCL 750.7, defining *felony*, for purposes of the Michigan Penal Code, as "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison."

- **Misdemeanor.** The Code of Criminal Procedure defines *misdemeanor* as a violation of Michigan's penal law "that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(n). Some misdemeanors are classified under the Code of Criminal Procedure as *minor offenses*, violations for which the maximum permissible imprisonment does not exceed 92 days and the maximum fine does not exceed $1,000.00. MCL 761.1(m). See also MCL 750.8, defining *misdemeanor*, for purposes of the Michigan Penal Code, as "any act or omission, not a felony, [that] is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court[.]"

A district court's trial-court jurisdiction is limited by MCL 600.8311(a) to misdemeanors that are punishable by not more than one year of imprisonment. However, "circuit court misdemeanors" (sometimes also colloquially referred to as "serious" or "high court" misdemeanors) are punishable by more than one year of

[8] Additionally, the circuit court must "sentence all defendants bound over to circuit court on a felony that either plead guilty to, or are found guilty of, a misdemeanor." MCR 6.008(D).

imprisonment. Any misdemeanor punishable by more than one year of imprisonment is not cognizable in the district court and is considered a felony for purposes of determining trial-court jurisdiction.

B. Jurisdiction and Duties of District Court Magistrates in Pre-Bindover Proceedings[9]

In the context of felony pretrial proceedings, a district court magistrate generally has the authority, subject to the chief district judge's approval, to issue arrest warrants and search warrants, conduct arraignments for a limited number of enumerated offenses, fix bail and set bond, and conduct probable cause conferences. MCL 600.8511. "Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division." MCR 4.401(B).

In addition to setting out certain offenses for which a district court magistrate may be granted arraignment authority,[10] MCL 600.8511 provides, in relevant part:

> "A district court magistrate has the following jurisdiction and duties:
>
> * * *
>
> (e) To issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney[.] . . .
>
> (f) To fix bail and accept bond in all cases.
>
> (g) To issue search warrants, if authorized to do so by a district court judge.
>
> (h) To conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge."

See also MCL 766.1, which provides, in relevant part:

> "A district court magistrate . . . shall not preside at a preliminary examination or accept a plea of guilty or

[9] For a thorough discussion of the authority of district court magistrates, see Chapter 5.

[10] See MCL 600.8511(b)-(c). See Chapter 5 for discussion of district court felony arraignments.

> nolo contendere to an offense or impose a sentence except as otherwise authorized by . . . [MCL 600.8511(a)-(c)]."

Accordingly, a district court magistrate, if authorized by the chief judge, may conduct probable cause conferences; however, a district court judge must conduct all preliminary examinations. See MCL 766.1; MCL 600.8511.[11]

"A district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006." MCR 4.401(E).

7.3 Scheduling the Probable Cause Conference and Preliminary Examination

Unless waived by agreement of the parties, at a felony arraignment, the court must schedule a probable cause conference. MCL 766.4(1)-(2); see also MCR 6.104(E)(4); MCR 6.108(A). Additionally, defendants charged with a felony offense or a misdemeanor offense punishable by more than one year of imprisonment are statutorily entitled to a prompt, fair, and impartial preliminary examination, MCL 766.1, which, unless waived by the defendant with the consent of the prosecuting attorney, must also be scheduled at arraignment, MCL 766.4(1); MCL 766.7; MCR 6.104(E)(4).

MCL 766.4(1) provides, in relevant part:

> "Except as provided in . . . MCL 712A.4,[12] the [judge] before whom any person is arraigned on a charge of having committed a felony shall set a date for a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, and a date for a preliminary examination of not less than 5 days or more than 7 days after the date of the probable cause conference. The dates for the probable cause conference and preliminary examination shall be set at the time of arraignment."

However, "[t]he parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference." MCL 766.4(4). Additionally, "[u]pon the request of the

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[11] However, "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination and acceptance of any written demand or waiver of jury trial." MCL 600.8513(1).

[12] MCL 712A.4 governs traditional waiver of Family Division jurisdiction over a juvenile between the ages of 14 and 17 who is accused of an act that if committed by an adult would be a felony. For discussion of traditional waiver proceedings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 14.

prosecuting attorney, . . . the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present." *Id.*; see also MCR 6.110(B)(2) (adding that "the defendant [must either be] present in the courtroom or [have] waived the right to be present").[13]

MCR 1.108(1) governs the method of computing the relevant time periods under MCL 766.4:

> "The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order."

7.4 Joint Probable Cause Conference and/or Preliminary Examination for Codefendants

MCL 766.4(5) provides:

> "If 1 or more defendants have been charged on complaints listing codefendants with a felony or felonies, the probable cause conference and preliminary examination for those defendants who have been arrested and arraigned at least 72 hours before that conference on those charges shall be consolidated, and only 1 joint conference or 1 joint preliminary examination shall be held unless the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the magistrate finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing."
>
> See also MCR 6.108(E); MCR 6.110(A).

7.5 Probable Cause Conference[14]

"The state and the defendant are entitled to a probable cause conference, unless waived by both parties." MCR 6.108(A). The purpose of a

[13] See Section 7.11(A) for discussion of the immediate commencement of the preliminary examination for purposes of taking a victim's testimony.

[14] See the Michigan Judicial Institute's checklist for conducting a probable cause conference. For additional information, see the SCAO's *Best Practices for Probable Cause Conferences and Preliminary Examinations*.

probable cause conference is to allow the prosecutor, defendant, and defense attorney to discuss plea negotiations, bond modifications, stipulations regarding the case, and any other relevant matters. See MCL 766.4(1)(a)-(d).

MCL 766.4(1) provides, in relevant part:

> "The probable cause conference shall include the following:
>
> (a) Discussions as to a possible plea agreement among the prosecuting attorney, the defendant, and the attorney for the defendant.
>
> (b) Discussions regarding bail and the opportunity for the defendant to petition the magistrate for a bond modification.
>
> (c) Discussions regarding stipulations and procedural aspects of the case.
>
> (d) Discussions regarding any other matters relevant to the case as agreed upon by both parties."

See also MCR 6.108(C) ("[t]he probable cause conference shall include discussions regarding a possible plea agreement and other pretrial matters, including bail and bond modification").

Videoconferencing technology is the preferred mode for conducting probable cause conferences for in-custody defendants. MCR 6.006(C)(1). See also MCR 4.401(E) ("[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006").

District court magistrates have jurisdiction "[t]o conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge." MCL 600.8511(h); see also MCR 6.108(B) ("[a] district court magistrate may conduct probable cause conferences when authorized to do so by the chief district judge and may conduct all matters allowed at the probable cause conference, except taking pleas and imposing sentences unless permitted by statute to take pleas or impose sentences"). However, "[t]he district court judge must be available during the probable cause conference to take pleas, consider requests for modification of bond, and if requested by the prosecutor, take the testimony of a victim." MCR 6.108(D).[15]

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[15] See the SCAO's *Best Practices for Probable Cause Conferences and Preliminary Examinations*, p 1, for recommendations for conducting the probable cause conference ("PCC").

The parties may agree to waive the probable cause conference. MCL 766.4(2) provides:

> "The probable cause conference may be waived by agreement between the prosecuting attorney and the attorney for the defendant. The parties shall notify the court of the waiver agreement and whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea."

See also MCR 6.108(A).

7.6 Pleas

MCL 766.4(3) provides:

> "A district judge has the authority to accept a felony plea. A district judge shall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. Sentencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken."[16]

7.7 Right to a Preliminary Examination[17]

The defendant and the prosecution are entitled to a prompt examination and determination by an examining judge. MCL 766.1; MCR 6.110(A). There is no federal constitutional right to a preliminary examination. *People v Hall*, 435 Mich 599, 603 (1990) (citation omitted). "'In Michigan, the preliminary examination is solely a creation of the Legislature—it is a statutory right.'" *Id*. (citations omitted).

A. General Provisions

MCL 766.1 provides, in relevant part:

> "The state and the defendant are entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is the duty of all

[16] However, following bindover, "[t]he circuit court retains jurisdiction over any case in which a plea is entered or a verdict rendered to a charge that would normally be cognizable in the district court," MCR 6.008(C), and the circuit court must "sentence all defendants bound over to circuit court on a felony that either plead guilty to, or are found guilty of, a misdemeanor," MCR 6.008(D). See Section 2.5 for discussion of circuit court jurisdiction. See Chapter 6 for discussion of pleas.

[17] See the Michigan Judicial Institute's checklist for conducting a preliminary examination.

> courts and public officers having duties to perform in connection with an examination, to bring it to a final determination without delay except as necessary to secure to the defendant a fair and impartial examination."

MCL 766.4(4) provides, in part, that "[i]f a plea agreement is not reached and if the preliminary examination is not waived by the defendant with the consent of the prosecuting attorney, a preliminary examination shall be held as scheduled unless adjourned or waived under [MCL 766.7]."[18] See also MCR 6.110(A), which provides, in part:

> "Where a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination. . . . Upon waiver of the preliminary examination, the court must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint."

"An information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his [or her] statutory right to an examination." MCL 767.42(1).

B. Right to Preliminary Examination on New Charges Added By Amendment of Information

Amendment of an information without an additional preliminary examination may be permissible where the proofs presented at the initial preliminary examination would have supported a bindover on the charge sought to be added, if the amendment does not "cause[] unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt*, 442 Mich 359, 363-365 (1993) (noting that the examining magistrate "is not bound by the limitations of the written complaint[]" and holding that the district court erred in denying the prosecution's motion to amend the information to charge a greater offense at the conclusion of the preliminary examination) (citations omitted). See also *People v McGee*, 258 Mich App 683, 693, 696-697 (2003) (in the absence of unfair surprise or prejudice, the defendant had no right to a preliminary examination on a new charge added by amendment of the information after the defendant waived preliminary examination on the original charge); *People v Fortson*, 202 Mich App 13, 15-17 (1993) ("the trial court [did not err] in

[18] See Section 7.11(B) for discussion of adjournment of the preliminary examination.

allowing the prosecutor to amend the information to add [a] count even though [the] defendant was never bound over on such a charge[]" where the proofs adduced at the preliminary examination supported the new charge and the trial court's refusal to remand the case for another preliminary examination did not result in unfair surprise, inadequate notice, or an insufficient opportunity to defend).

C. Right to Preliminary Examination Following Grand Jury Indictment

A defendant does not have a substantive right to a preliminary examination following a grand jury indictment. *People v Glass*, 464 Mich 266, 271, 282-283 (2001). See also MCR 6.112(B) ("[a]n indictment is returned and filed without a preliminary examination"). However, "if a criminal process begins with a one-man grand jury" under MCL 767.3 and MCL 767.4, "the accused is entitled to a preliminary examination before being brought to trial." *People v Peeler*, 509 Mich 381, 400 (2022).[19]

D. No Right to Preliminary Examination for Fugitive From Justice

"An information may be filed without a preliminary examination against a fugitive from justice[.]" MCL 767.42(2). See also MCR 6.112(B), which states, in part, that "[u]nless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives a preliminary examination."

E. Juvenile's Right to a Preliminary Examination[20]

1. Right to a Preliminary Examination in Automatic Waiver Cases[21]

A prosecutor who "has reason to believe that a juvenile 14 years of age or older but less than 18 years of age has committed a specified juvenile violation"[22] may file a

[19] *Peeler* applies retroactively. *People v Kennedy*, ___ Mich App ___, ___ (2023).

[20] The scope of this section is limited to discussing whether a juvenile has the right to a preliminary examination. Preliminary examination rules specific to cases involving a juvenile are beyond the scope of this benchbook. For a full discussion of preliminary examination requirements in proceedings involving a juvenile, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

[21] See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 16, for more information on automatic waiver proceedings.

[22] For enumerated specified juvenile violations, see MCL 600.606(2)(a)-(i); MCL 712A.2(a)(1)(A)-(I); MCL 764.1f(2)(a)-(i).

complaint and warrant in district court, which divests the family division of the circuit court of jurisdiction. MCL 764.1f(1); MCL 712A.2(a)(1). A juvenile has a right to a preliminary examination in such a case (known as an "automatic waiver" case), and the prosecutor must follow the same preliminary examination procedures as are applicable for adult defendants charged with criminal offenses. See MCR 6.901(A) (the rules in subchapter 6.900 governing automatic waiver cases "take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders"); see also MCR 6.911(A) (governing waiver of preliminary examination by a juvenile represented by an attorney); MCR 6.911(B) (governing transfer to the family division of circuit court following preliminary examination if the examining magistrate "finds that there is no probable cause to believe that a specified juvenile violation occurred or . . . that the juvenile committed the specified juvenile violation, but that [probable cause exists to believe that the juvenile committed] some other offense . . . that if committed by an adult would constitute a crime").

2. Right to a Preliminary Examination in Designated Proceedings[23]

A designated proceeding is "a proceeding in which the prosecuting attorney has designated, or has requested the [Family Division] to designate, the case for trial in the [Family Division] in the same manner as an adult." MCR 3.903(A)(6).

Pursuant to MCL 712A.2d(4), a juvenile has the right to a preliminary examination in some designated cases:

> "If the petition in a case designated under [MCL 712A.2d] alleges an offense that if committed by an adult would be a felony or punishable by imprisonment for more than 1 year, the court shall conduct a probable cause hearing not later than 14 days after the case is designated to determine whether there is probable cause to believe the offense was committed and whether there is probable cause to believe the juvenile committed the offense. . . . A probable cause hearing under this section is the equivalent of the preliminary examination in a court of general criminal jurisdiction and satisfies the requirement for that

[23] See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 15, for more information on designated proceedings, including the procedures and rules regarding preliminary examinations.

> hearing. A probable cause hearing must be conducted by a judge other than the judge who will try the case if the juvenile is tried in the same manner as an adult."

The Michigan Court Rules refer to the probable cause hearing required under MCL 712A.2d(4) as the "preliminary examination." See MCR 3.903(D)(5); MCR 3.953(A).[24]

3. Preliminary Examinations in Traditional Waiver Cases[25]

"If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the [Family Division] in the county in which the offense is alleged to have been committed may waive jurisdiction under [MCL 712A.4] upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense." MCL 712A.4(1). The probable cause determination made pursuant to MCL 712A.4(3) "satisfies the requirements of, and is the equivalent of, the preliminary examination[.]" MCL 712A.4(10).[26]

7.8 Waiver of Preliminary Examination[27]

"The defendant may waive the preliminary examination with the consent of the prosecuting attorney." MCL 766.7; MCR 6.110(A).

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[24] The probable cause hearing (preliminary examination) required under MCL 712A.2d(4) should not be confused with the probable cause conference that is required, in addition to the preliminary examination, in courts of general criminal jurisdiction under MCL 766.4(1) (as amended by 2014 PA 123, effective May 20, 2014). Because the proceedings in a designated case "are criminal proceedings and must afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction," MCL 712A.2d(7), the probable cause conference requirement under MCL 766.4(1) *may* apply to designated proceedings. However, MCL 712A.2d and the court rules governing designated proceedings, including MCR 3.951, have not been amended to reflect the amendment of MCL 766.4(1); therefore, it is unclear to what extent the probable cause conference requirement applies to designated cases.

Additionally, the preliminary examination should be distinguished from the probable cause hearing required under MCR 3.935(D), MCR 3.951(A)(2)(d), and MCR 3.951(B)(2)(d) for the pretrial detention of a juvenile.

See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information on these hearings.

[25] See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 14, for more information on traditional waiver proceedings.

[26] Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015, 2014 PA 123 amended MCL 766.4 to require the court, "*[e]xcept as provided in . . . MCL 712A.4*," to schedule, at arraignment for a felony charge, "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1) (emphasis supplied); see also 2014 PA 123, enacting section 1; MCR 6.104(E)(4).

"An information shall not be filed against any person for a felony until such person has had a preliminary examination . . . unless that person waives his [or her] statutory right to an examination."[28] MCL 767.42(1); see also MCR 6.112(B).

"[A]s long as the defendant is either present in the courtroom or has waived the right to be present, district courts may use videoconferencing to take testimony from any witness in a preliminary examination." MCR 6.006(C)(5)."The use of telephonic, voice, videoconferencing, or two-way interactive video technology[] must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).[29]

"Upon waiver of the preliminary examination, the court must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint." MCR 6.110(A).

A district court magistrate, "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, ... may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination[.]" MCL 600.8513(1). "A defendant neither demanding nor waiving preliminary examination in writing is deemed to have demanded preliminary examination[.]" *Id*.

A. Waiver of Examination Without Counsel and Remand for Examination

"If any person waives his [or her] statutory right to a preliminary examination without having had the benefit of counsel at the time and place of the waiver, upon proper and timely application by the person or his [or her] counsel, before trial or plea of guilty, the court having jurisdiction of the cause, in its discretion, may remand the case to a magistrate for a preliminary examination." MCL 767.42(1).

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[27] See the Michigan Judicial Institute's checklist for waiver of preliminary examination.

[28] However, an information may be filed against a fugitive from justice without conducting a preliminary examination. MCL 767.42(2); MCR 6.112(B).

[29] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." "Notwithstanding any other provision in [MCR 6.006], until further order of the Court, AO No. 2012-7 is suspended.

Denial of a defendant's motion to remand for a preliminary examination under MCL 767.42(1) where defendant waived the examination without benefit of counsel may constitute an abuse of discretion. See *People v Johnson (Van)*, 57 Mich App 117, 121-122 (1974) (holding that the trial court did not abuse its discretion in denying the defendant's motion to remand for preliminary examination where the defendant "knew both of his right to preliminary examination and of his right to counsel[]" at the time of his uncounseled waiver and therefore did not demonstrate prejudice resulting from the denial); *People v Wiggins*, 6 Mich App 340, 343 (1967) (holding that the trial court's stated reason for denying the defendant's motion because of previous adjournments was insufficient to deny the defendant a preliminary examination where it appeared that the adjournments were due to the defendant not being afforded counsel).

B. Waiving the Right to Preliminary Examination by Entering a Plea

"[A] plea of guilty upon arraignment to an information in the circuit court waives a preliminary examination." *People v Losinger*, 331 Mich 490, 497 (1951) (citations omitted).

C. Waiver of Examination in Problem-Solving Courts[30]

If an individual being considered for admission to a drug treatment court, mental health court, or veterans treatment court is charged in a criminal case,[31] his or her admission is subject to, among other things, written waiver of the right to a preliminary examination, with the prosecutor's agreement. MCL 600.1068(1)(c); MCL 600.1094(1)(b); MCL 600.1205(1)(c). An individual who has waived his or her right to a preliminary examination and has pleaded guilty as part of his or her application to a drug treatment court, mental health court, or veterans treatment court and who is not admitted to that court shall be permitted to withdraw his or her plea and is entitled to a preliminary examination.[32] MCL 600.1068(5); MCL 600.1094(3); MCL 600.1205(5).

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[30] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for discussion of problem-solving courts.

[31] Or, in the case of a juvenile who is being considered for admission to a juvenile drug court or juvenile mental health court, the juvenile "is alleged to have engaged in activity that would constitute a criminal act if committed by an adult[.]" MCL 600.1068(1); MCL 600.1099f(1).

[32] Or, in the case of a juvenile who "has admitted responsibility, as part of his or her application to a drug treatment court" or "as part of his or her referral process to a juvenile mental health court," the juvenile may "withdraw his or her admission of responsibility." MCL 600.1068(5); MCL 600.1099f(3).

7.9 Jurisdiction and Venue

A. Jurisdiction of Preliminary Examination and Attendant Hearings

The district court has jurisdiction of "[p]reliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the preliminary examination under . . . MCL 766.1[*et seq*]." MCL 600.8311(e); see also MCR 6.008(A). *Felony* is defined in the Code of Criminal Procedure as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(f). Accordingly, a defendant charged with a "circuit court misdemeanor" (a misdemeanor offense that is punishable by more than one year of imprisonment) is entitled to a preliminary examination under MCL 600.8311(e).[33] See *People v Burrill*, 391 Mich 124, 131, 131 n 12 (1974); see also *People v Smith (Timothy)*, 423 Mich 427, 443-446 (1985).

The district court does not exceed its jurisdiction by ordering discovery relevant to the probable cause determination, or by "conducting a due process hearing before or during the preliminary examination, or before the defendant is bound over for trial." *People v Laws*, 218 Mich App 447, 450-454 (1996). "Certain due process hearings, such as *Miranda*,[34] *Tucker*,[35] and *Walker*[36] hearings, are at times necessary to a proper preliminary examination[,]" and "the district court may rule on such allegations of due process violations where the facts warrant." *Laws*, 218 Mich App at 453-454 (concluding that "because the district court possesses the authority to conduct necessary due process hearings and to assess the credibility of witnesses when determining whether a crime has been committed and whether the defendant committed the crime, the district court's actions in [ordering the in camera review of police reports relevant to the defendant's claims of due process violations] did not exceed its jurisdiction[]" of the preliminary examination under MCL 600.8311).

Under MCL 766.7, the preliminary examination may be adjourned, continued, or delayed, and "[a]n action on the part of the [district

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[33] See Section 7.2(A) for additional discussion of the district court's jurisdiction over preliminary examinations. For a thorough discussion of district court jurisdiction, see Chapter 2.

[34] *Miranda v Arizona*, 384 US 436 (1966). See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3, for discussion of self-incrimination and *Miranda*.

[35] *United States v Tucker*, 404 US 443 (1972).

[36] *People v Walker (On Rehearing)*, 374 Mich 331 (1965).

court] in adjourning or continuing any case does not cause the [district court] to lose jurisdiction of the case." See also *People v Dunson*, 139 Mich App 511, 513 (1985) ("[t]he defect of not bringing [a] defendant to a timely preliminary examination is not[] . . . jurisdictional[]").

B. Venue for Preliminary Examination

MCL 600.8312 sets out general venue rules based on the type of district in which the criminal conduct took place. See Chapter 2 for general discussion of venue.

Special venue rules apply with respect to preliminary examinations. MCL 762.3(3) provides:

> "With regard to . . . examinations conducted for offenses not cognizable by the [district court], the following special provisions apply:
>
> > (a) If an offense is committed on the boundary of 2 or more counties, districts or political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned.
> >
> > (b) If an offense is committed in or upon any railroad train, automobile, aircraft, vessel or other conveyance in transit, and it cannot readily be determined in which county, district or political subdivision the offense was committed, venue is proper in any county, district or political subdivision through or over which the conveyance passed in the course of its journey.
> >
> > (c) Except as otherwise provided in [MCL 762.3(3)(b)], if it appears to the attorney general that the alleged state offense has been committed within the state and that it is impossible to determine within which county, district or political subdivision it occurred, the violation may be alleged to have been committed and may be prosecuted and punished or the examination conducted in such county, district or political subdivision as the attorney general designates. The responsibility and the authority with reference to all steps in the prosecution of such case shall be the same, as between the prosecuting attorney of the county so designated and the attorney general, as though it were an established fact that the alleged

> criminal acts, if committed at all, were committed within that county, district or political subdivision."

A district court has no authority to grant a motion for change of venue before a preliminary examination is held. *In re Attorney General*, 129 Mich App 128, 132 (1983). MCL 762.7, the statute granting courts of record authority to change venue in criminal cases, is only applicable to circuit courts in felony cases. *In re Attorney General*, 129 Mich App at 131.

7.10 Persons Who May Conduct Preliminary Examinations

A preliminary examination must be conducted before an *examining magistrate*. MCL 766.1; MCL 767.42(1). A *magistrate* is defined in the Code of Criminal Procedure as "a judge of the district court or a judge of a municipal court." MCL 761.1(*l*). The term does not include district court magistrates, unless statutory authority explicitly provides them with authority to act as a *magistrate*. *Id.* District court magistrates are not authorized to conduct preliminary examinations. See MCL 600.8511.[37]

Although there is no general rule barring a judge who issued a defendant's arrest warrant from also presiding over the defendant's preliminary examination, "if a defendant requests a [judge] other than a [judge] who has already heard witnesses *ex parte*, such a request should be regarded as reasonable and reasonable efforts exerted toward compliance." *People v Burrill*, 391 Mich 124, 137-138 (1974). "[I]f witnesses [have] been examined[, i]t is arguable that the [judge], having been persuaded through such testimony at the time he [or she] issued the arrest warrant that there was probable cause, might not be wholly objective when asked to reconsider the question at the more formal preliminary examination[.]" *Id.* at 137 (nevertheless holding that where "the affidavit presented to the [judge] was in conclusory form and did not state any of the underlying or operative facts and no witnesses were examined," there was "no prejudice to the accused in having the [judge] who issued the arrest warrant preside at the preliminary examination[]").

[37] However, "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination[.]" MCL 600.8513(1). See Section 7.2(B) for additional discussion of the authority of district court magistrates to conduct pre-bindover proceedings in felony cases. For a thorough discussion of the authority of district court magistrates, see Chapter 5.

Committee Tip:

A common situation calling for the disqualification of a judge is when the judge has issued a search warrant. It is recommended that when the validity of a search warrant is (or will be) challenged at the preliminary examination, the judge who issued the search warrant should disqualify himself or herself from hearing the examination.

In cases in which an initial preliminary examination is held and probable cause is not found, MCR 6.110(F) provides for a subsequent preliminary examination and states that "[e]xcept as provided in MCR 8.111(C)[38], the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge." This rule "prevents 'judge shopping' by requiring that a subsequent examination be before the same [judge], if available, and that additional evidence be presented." *People v Robbins (Darrell)*, 223 Mich App 355, 362 (1997).

7.11 Timing of Preliminary Examinations

"The state and the defendant are entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is the duty of all courts and public officers having duties to perform in connection with an examination, to bring it to a final determination without delay except as necessary to secure to the defendant a fair and impartial examination." MCL 766.1. See also MCR 6.110(A), which states, in part, that "[w]here a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination."

The preliminary examination, unless waived or adjourned, must be scheduled for "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1)[39]; see also MCR 6.104(E)(4). However, "[t]he parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference." MCL 766.4(4).

[38] MCR 8.111(C) provides, in part, that "[i]f a judge is disqualified or for other good cause cannot undertake an assigned case, the chief judge may reassign it to another judge by a written order stating the reason."

[39] See Section 7.5 for discussion of probable cause conferences.

When computing the relevant time periods, the day of the arraignment is not included. See MCR 1.108(1). "The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order." *Id*.

"Unless adjourned by the court, the preliminary examination must be held on the date specified by the court at the arraignment on the warrant or complaint." MCR 6.110(B)(1). A violation of MCR 6.110(B)(1) "is deemed to be harmless error unless the defendant demonstrates actual prejudice." *Id*.

A. Immediate Commencement of Preliminary Examination for Purpose of Taking Victim Testimony

MCL 766.4(4) provides, in relevant part:

> "Upon the request of the prosecuting attorney, . . . the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present. For purposes of this subdivision, 'victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. If that testimony is insufficient to establish probable cause to believe that the defendant committed the charged crime or crimes, the magistrate shall adjourn the preliminary examination to the date set at arraignment. A victim who testifies under this subdivision shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause."

See also MCR 6.110(B)(2) (adding that "the defendant [must either be] present in the courtroom or [have] waived the right to be present[]").

B. Adjournment, Continuance, or Delay of Preliminary Examination

1. Good Cause and/or Consent

The judge may adjourn, continue, or delay the preliminary examination for a reasonable time with the consent of the defendant and prosecuting attorney without a showing of good cause. See MCR 6.110(B)(1); MCL 766.7. Additionally, the preliminary examination may be adjourned, continued, or

delayed without the consent of the defendant or the prosecuting attorney for good cause shown. MCR 6.110(B)(1); MCL 766.7. "If a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment." MCR 6.110(B)(1).

The following are examples of circumstances under which Michigan's appellate courts have determined there was good cause to adjourn a preliminary examination:

- Because of docket congestion due to unusual circumstances, *People v Crawford*, 429 Mich 151, 159 n 8 (1987); see also *People v Twomey*, 173 Mich App 247, 249 (1988) (holding that "[s]imple docket congestion without a showing of unusual circumstances[] . . . does not constitute 'good cause' for adjournment of examinations") (citations omitted).

- To accommodate the absence of a material witness, "where it appears probable that the witness will be produced and will testify[,]" *People v Den Uyl*, 320 Mich 477, 488, 494 (1948) (citations omitted). See also *People v Horne*, 147 Mich App 375, 377-378 (1985) (material witnesses had a conflicting court appearance and a scheduled vacation); *People v Buckner*, 144 Mich App 691, 694 (1985) (victim was hospitalized until the day before the preliminary examination).

- Because defense counsel had previous appointments that he was required to attend, and due to illnesses affecting the prosecutor's wife and the judge, *People v Lewis*, 160 Mich App 20, 32 (1987).

- To appoint counsel and allow appointed counsel to gain familiarity with the case before the preliminary examination, *People v Eddington*, 77 Mich App 177, 186-190 (1977); *People v Brown*, 19 Mich App 66, 68 (1969).[40]

2. Procedure

MCL 766.7 provides, in part:

[40] See, however, MCR 6.005(E) ("[t]he court may refuse to adjourn a proceeding for the appointment of counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel").

> "A magistrate may adjourn a preliminary examination for a felony to a place in the county as the magistrate determines is necessary. The defendant may in the meantime be committed either to the county jail or to the custody of the officer by whom he or she was arrested or to any other officer; or, unless the defendant is charged with treason or murder, the defendant may be admitted to bail."

A judge who adjourns or continues a preliminary examination does not lose jurisdiction of the case. MCL 766.7.

3. Use of Two-Way Interactive Video Technology

A "court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any criminal proceeding." MCR 6.006(A)(2)."The use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).[41]

4. Harmless Error

A violation of MCR 6.110(B)[42] "is deemed to be harmless error unless the defendant demonstrates actual prejudice." See also *Buckner*, 144 Mich App at 694-695 (a preliminary examination timely scheduled then adjourned with no explanation on the record may amount to harmless error if good cause can be established by the record).

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[41] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." "Notwithstanding any other provision in [MCR 6.006], until further order of the Court, AO No. 2012-7 is suspended and trial courts are required to use remote participation technology (videoconferencing under MCR 2.407 or telephone conferencing under MCR 2.406) to the greatest extent possible. Any such proceedings shall comply with the requirements set forth in MCR 2.407(G)." MCR 6.006(E).

[42] MCR 6.110(B)(1) provides that "[i]f the parties consent, the court may adjourn the preliminary examination for a reasonable time[; i]f a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment."

7.12 Discovery Before or at Preliminary Examination

Discovery in felony cases is governed by MCR 6.200 *et seq*. See MCR 6.001(A).

"The district court may order discovery in carrying out its duty to conduct preliminary examinations." *People v Laws*, 218 Mich App 447, 451 (1996). "Discovery may be ordered before the preliminary examination." *Id*. (citation omitted). An in camera review may be used to determine whether the requested evidence is discoverable. See *id*. at 452 (citation omitted). "Discovery should be granted where the information sought is necessary to a fair trial and a proper preparation of a defense[,]" and "[e]ven inadmissible evidence is discoverable if it will aid the defendant in trial preparation." *Id*. (citations omitted). "A defendant has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or innocence." *Id*. (citation omitted). See also MCR 6.201(B)(1).

"[A] district court, before the preliminary examination of an individual charged with a felony, possesses the authority to compel discovery of [certain] witnesses' statements given to the prosecution pursuant to an investigative subpoena." *People v Pruitt*, 229 Mich App 82, 83-84 (1998). Specifically, "in felony cases, a district court has the authority to order the production of statements made by a defendant, codefendant, or accomplice in response to an investigative subpoena, along with any exculpatory information obtained from any witness in response to an investigative subpoena; [however,] it does not have the authority in felony prosecutions to order the production of nonexculpatory statements made by other subpoenaed individuals." *Id*. at 84.

7.13 Subpoenas to Compel Attendance at Preliminary Examination

"Witnesses may be compelled to appear before the magistrate by subpoenas issued by the magistrate, or by an officer of the court authorized to issue subpoenas,[43] in the same manner and with the same effect and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials in the circuit court." MCL 766.11(1). See also MCR 6.110(C), governing the conducting of the preliminary examination (providing that "[t]he court shall allow the prosecutor and the defendant to subpoena and call witnesses"). The judge has "a clear legal duty to compel the appearance of a witness whose testimony [i]s necessary to achieve the ends of justice." *In re Wayne*

[43] Courts of record have the power "[t]o issue process of subpoena, requiring the attendance of any witness in accordance with court rules, to testify in any matter or cause pending or triable in such courts[.]" MCL 600.1455(1).

Co Prosecutor, 110 Mich App 739, 745 (1981) (holding that the judge's refusal to compel the attendance of a witness necessary for the prosecution to establish probable cause for a bindover constituted an abuse of discretion) (citations omitted).

A judge may certify that a witness who is located outside of Michigan is material to a pending criminal matter and recommend that the witness be taken into custody and brought to testify in a prosecution within this state. MCL 767.93(1) states:

> "If a person in a state, which by law provides for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found."

A defendant requesting the presence of an out-of-state witness under MCL 767.93(1) must "(1) designate the proposed witness' location with a reasonable degree of certainty; (2) file a timely petition; and (3) make out a prima facie case that the witness' testimony is material." *People v McFall*, 224 Mich App 403, 409 (1997) (citation omitted). "[T]he party seeking the presence of an out-of-state witness . . . should present evidence in the form of an affidavit of the witness or other competent evidence." *Id*. at 410 (citations omitted).

See also MCL 766.11b(2), providing that "[t]he magistrate shall allow the prosecuting attorney or the defense to subpoena and call a witness from whom hearsay testimony was introduced under [MCL 766.11b[44]] on a satisfactory showing to the magistrate that live testimony will be relevant to the magistrate's decision whether there is probable cause to believe that a felony has been committed and probable cause to believe that the defendant committed the felony."[45]

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[44] MCL 766.11b(1) provides that certain reports "are not excluded by the rule against hearsay and shall be admissible at the preliminary examination without requiring the testimony of the author of the report, keeper of the records, or any additional foundation or authentication[.]" See Section 7.17(A) for more information.

[45] See Section 7.17(A) for discussion of MCL 766.11b.

7.14 Right to Counsel at Preliminary Examinations

A. Authorities Establishing Right to Counsel

The preliminary examination is a critical stage of criminal proceedings, which entitles an indigent defendant to an appointed attorney. *Coleman v Alabama*, 399 US 1, 10 (1970); *People v Carter*, 412 Mich 214, 215, 217-218 (1981). At arraignment, the court must advise the defendant "of entitlement to a lawyer's assistance at all court proceedings[.]" MCR 6.005(A)(1). See also MCL 780.991(1)(c), requiring trial courts to "assure that each criminal defendant is advised of his or her right to counsel[,]" and MCL 780.991(3)(a), requiring the indigent criminal defense system to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant, including a determination regarding whether a defendant is partially indigent[46], . . . not later than at the defendant's first appearance in court."[47]

At the preliminary examination, the defendant "may be assisted by counsel in [the] examination [of defense witnesses] and in the cross-examination of the witnesses in support of the prosecution." MCL 766.12.

B. Advice by Court at Preliminary Examination of Defendant's Right to Counsel

"When a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed." MCL 775.16. See also MCL 780.991(1)(c) (requiring trial courts to "assure that each criminal defendant is advised of his or her right to counsel")[48]; MCR 6.005(E) (if a defendant waived assistance of counsel during arraignment, the record of the preliminary examination and other subsequent proceedings "need show only that the court advised the

[46]Note that the Michigan Indigent Defense Commission (MIDC) must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a). See Chapter 4 for more information on the MIDCA.

[47] See Section 4.4 for discussion of MCL 780.991 and other provisions of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*.

[48] See Section 4.4 for discussion of MCL 780.991 and other provisions of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*.

defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right").[49]

C. Appointment of Counsel at Preliminary Examination

"If the [defendant] states that he or she is unable to procure counsel, the magistrate shall appoint counsel, if the [defendant] is eligible for appointed counsel under the [Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981—MCL 780.1003]."[50] MCL 775.16.

The MIDCA requires the trial court to "assure that each criminal defendant is advised of his or her right to counsel." MCL 780.991(1)(c). It requires the indigent criminal defense system to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . not later than at the defendant's first appearance in court."[51] MCL 780.991(3)(a).[52] See also MCR 6.005(E) (requiring the court, at the preliminary examination, to refer the defendant to the local indigent criminal defense system's appointment authority for the appointment of a lawyer if the defendant "requests a lawyer and is financially unable to retain one").[53]

See Chapter 4 for more information on the MIDCA.

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[49] The continuing relevancy of MCR 6.005(E) following the enactment of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*. (2013 PA 93, effective July 1, 2013), is uncertain.

[50] The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(f)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA).

[51] Note that the MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a).

[52] See Section 4.4 for discussion of the appointment of counsel under the MIDCA.

[53] The continuing relevancy of MCR 6.005(E) following the enactment of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*. (2013 PA 93, effective July 1, 2013), is uncertain.

D. Waiver of Right to Counsel[54]

"The right of self-representation under Michigan law is secured by Const 1963, art 1, § 13 and by statute, MCL 763.1." *People v Williams (Rodney)*, 470 Mich 634, 642 (2004).

MCR 6.005(D) provides, in relevant part:

> "The court may not permit the defendant to make an *initial* waiver of the right to be represented by a lawyer without first
>
> > (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
> >
> > (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.
>
> The court should encourage any defendant who appears without counsel to be screened for indigency and potential appointment of counsel." (Emphasis added).

"[MCR 6.005(D)] embodies the notion that explicit elucidation of a defendant's comprehension of the risks he or she faces by representing himself or herself and the defendant's willingness to undertake those risks reduces the likelihood that a court will inaccurately presume an effective waiver of the right to counsel." *People v Brooks*, 293 Mich App 525, 537 (2011), vacated in part on other grounds 490 Mich 993 (2012).[55]

MCR 6.005(E) governs what a court must do in subsequent proceedings, such as the preliminary examination:

> "If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding . . . need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the

[54] For more information on the waiver of right to counsel, see Chapter 4.

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

> defendant waived that right. Before the court begins such proceedings,
>
> > (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
> >
> > (2) if the defendant requests a lawyer and is financially unable to retain one, the court must refer the defendant to the local indigent criminal defense system's appointing authority for the appointment of one; or
> >
> > (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.
>
> The court may refuse to adjourn a proceeding for the appointment of counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel."

"Compliance with MCR 6.005(D) and [MCR 6.005](E) goes part of the way toward establishing that a defendant has knowingly and voluntarily waived counsel." *Brooks*, 293 Mich App at 538. Before a trial court may grant a defendant's request to proceed in propria persona, it must also determine:

- that the defendant's waiver of counsel is unequivocal;
- that the defendant actually understands the significance and consequences of self-representation; and
- that self-representation will not disrupt, unduly inconvenience, or burden the court. *Id*. (citations omitted).

E. Deprivation of Counsel at Preliminary Examination

"[D]eprivation of counsel at a preliminary examination is subject to harmless-error review." *People v Lewis (Gary)*, 500 Mich 1, 12 (2017). The Court rejected the defendant's argument that he was entitled to automatic reversal of his convictions on the ground that *United States v Cronic*, 466 US 648 (1984), which held that denial of counsel at a critical stage of trial is a structural error requiring automatic reversal, "silently abrogated" *Coleman v Alabama*, 399 US 1 (1970), which remanded for harmless-error analysis where the defendant was denied counsel at a critical stage. *Lewis (Gary)*, 500 Mich at 6-7. "*Coleman* does not permit [the presumption] that a defendant, who was ultimately convicted at an otherwise fair trial, suffered no harm

from the absence of counsel at his preliminary examination[, a]nd that is true even if no evidence from the preliminary examination was used at trial, and even if [the] defendant waived no rights or defenses because of the absence of counsel at the preliminary examination[;]" however, "a court may not simply presume, without more, that the deprivation of counsel at a preliminary examination must have caused the defendant harm." *Lewis (Gary)*, 501 Mich at 10-12 (remanding to the Court of Appeals to consider "the substantive criteria or the procedural framework that should attend such review[]" in order "to give meaning to the [United States] Supreme Court's command [in *Coleman*, 399 US at 11,] to determine whether [the] defendant was 'otherwise prejudiced by the absence of counsel at the preliminary hearing[]'").

"[T]o determine whether the denial of counsel at a preliminary examination amounts to harmless error, courts must consider the factors discussed in [*Coleman*, 399 US at 9]," i.e., whether counsel's examination of witnesses could have enhanced the impeachment of witnesses at trial, preserved the favorable testimony of a witness who did not appear at trial, or resulted in the district court refusing to bind the defendant over; whether counsel could have more effectively discovered the prosecution's case and prepared a better defense; and whether counsel could have made effective arguments on such matters as the necessity of a psychiatric examination or bail. *People v Lewis (Gary) (On Remand)*, 322 Mich App 22, 29 (2017). In addition to the *Coleman* factors, the reviewing court must also consider "any other factors relevant to the particular case, including the lost opportunity to negotiate a plea deal and any prejudice resulting from the failure to file pretrial motions." *Lewis (Gary) (On Remand)*, 322 Mich App at 29.

In *Lewis (Gary) (On Remand)*, 322 Mich App at 34, the Court held that "any error resulting from the denial of counsel at [the] defendant's preliminary examination was harmless[;]" "[g]iven that [the] defendant was convicted at trial on the basis of sufficient evidence, the possibility that counsel could have detected preclusive flaws in the prosecution's probable-cause showing [was] moot[,]" and "although [the] defendant was unrepresented at the preliminary examination, he was appointed new counsel at the next hearing, who . . . could have used the [preliminary examination] transcript for impeachment at trial." *Id.* at 30-31 (additionally noting that the defendant failed to identify any prejudice vis-à-vis the remaining *Coleman* factors or factors related to the specific circumstances of his case, and that he "lost no opportunity to negotiate a plea deal because he lacked counsel").

7.15 Closure of Preliminary Examination to Members of the Public

Upon the motion of any party and satisfaction of certain conditions, a judge has the discretion to close to members of the general public the preliminary examination of a person charged with any of the following offenses:

- Criminal sexual conduct in any degree;
- Assault with intent to commit criminal sexual conduct;
- Sodomy;
- Gross indecency;
- Any other offense involving sexual misconduct. MCL 766.9(1).

To close a preliminary examination to the public, the following conditions must be met:

> "(a) The magistrate determines that the need for protection of a victim, a witness, or the defendant outweighs the public's right of access to the examination.
>
> (b) The denial of access to the examination is narrowly tailored to accommodate the interest being protected.
>
> (c) The magistrate states on the record the specific reasons for his or her decision to close the examination to members of the general public." MCL 766.9(1).

See also MCR 8.116(D).

To determine whether closure of the preliminary examination is necessary to protect a victim or witness, the judge must consider:

> "(a) The psychological condition of the victim or witness.
>
> (b) The nature of the offense charged against the defendant.
>
> (c) The desire of the victim or witness to have the examination closed to the public." MCL 766.9(2).

The judge may close a preliminary examination to protect a party's right to a fair trial only if:

> "(a) There is a substantial probability that the party's right to a fair trial will be prejudiced by publicity that closure would prevent.

> (b) Reasonable alternatives to closure cannot adequately protect the party's right to a fair trial." MCL 766.9(3).

In narrowly tailoring closure to accommodate the interests of a victim testifying about sensitive matters, the judge should close only those portions of the examination in which such matters are discussed. *In re Closure of Preliminary Examination*, 200 Mich App 566, 569-571 (1993).

If the court enters a closure order, it "must forward a copy of the order to the State Court Administrative Office." MCR 8.116(D)(3).

7.16 Sequestration of Witnesses

While conducting the preliminary examination, the judge may exclude any witnesses who have not been examined. MCL 766.10. If requested, or if the judge finds cause, any witnesses may be kept separated so that they cannot converse with each other until after they have testified. *Id*. The judge may also exclude "any or all minors during the examination of such witnesses." *Id*. See also MCL 600.1420 ("[t]he sittings of every court within this state shall be public except that a court may, for good cause shown, exclude from the courtroom other witnesses in the case when they are not testifying and may, in actions involving scandal or immorality, exclude all minors from the courtroom unless the minor is a party or witness[, except in] cases involving national security"); MRE 615 ("[a]t a party's request, the court may order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: (a) a party who is a natural person; (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or (c) a person whose presence a party shows to be essential to presenting the party's claim or defense") Although sequestration of witnesses is discretionary, "[a] request to sequester a witness, reasonably made, should not be denied." *People v Hayden*, 125 Mich App 650, 659 (1983) (citations omitted).

Crime victims have a constitutional right to attend all proceedings the accused has a right to attend. Const 1963, art 1, § 24. The Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., provides that in felony cases and serious misdemeanor cases, the crime victim has "the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness." MCL 780.761; MCL 780.821. For good cause shown, the victim being called as a witness may be sequestered up until he or she first testifies. MCL 780.761; MCL 780.821. Because of the use of the word *trial*, MCL 780.761 and MCL 780.821 presumably do not apply to preliminary examinations. However, the court has general authority to sequester *witnesses*, which likely includes the authority to sequester

victims before or after testifying at preliminary examinations. See MCL 600.1420; MCL 766.10; MRE 615.

7.17 Probable Cause Inquiry and Applicable Evidentiary Standards at Preliminary Examination

"In general terms, the purpose of a preliminary examination is to determine whether a crime was committed and whether there is probable cause to believe that the defendant committed it." *People v Crumbley (On Remand)*, ___ Mich App ___, ___ (2023) (cleaned up). "More specifically, in order to bind a defendant over for trial in the circuit court, the district court must find probable cause that the defendant committed a felony based on there being evidence of each element of the crime charged or evidence from which the elements may be inferred. Probable cause requires enough evidence to cause a person of ordinary caution and prudence to conscientiously entertain a reasonable belief of the defendant's guilt. The district court abuses its discretion by binding over a defendant when the prosecution has failed to present sufficient evidence to support each element of the charged offense." *Id.* at ___ (quotation marks and citations omitted).

"After the testimony in support of the prosecution has been given, the witnesses for the [defendant], if he have any, shall be sworn, examined and cross-examined[.]" MCL 766.12. A district court abuses its discretion when it "[does] not permit the defendant to call witnesses" at the preliminary examination. *People v Brown*, 505 Mich 984, 984-985 (2020).

"Identity is an essential element of every crime." *People v Fairey*, 325 Mich App 645, 649 (2018) (citation omitted). "Evidence supporting that the defendant perpetrated the crime may be circumstantial, but must nevertheless demonstrate reasonable grounds to suspect the defendant's personal guilt." *Id.* (citation omitted). Although "a district court may also rely on inferences to establish probable cause for a bindover," the court abuses its discretion when it fails "to distinguish between a *suspicion* of guilt and a *reasonable belief* that [the defendant] was the person who committed the crime." *Id.* at 651 (holding "a person of ordinary prudence and caution could not infer that [the defendant] carried out his veiled threats to tag absent any actual evidence linking [the defendant] to the acts of tagging"). "Mere suspicion is not the same as probable cause[.]" *Id.*

"'[T]he probable cause required for a bindover is "greater" than that required for an arrest and . . . imposes a different standard of proof[;] . . . [t]he arrest standard looks only to the probability that the person committed the crime as established at the time of arrest, while the preliminary hearing looks both to that probability at the time of the preliminary hearing *and* to the probability that the government will be

able to establish guilt at trial.'" *People v Cohen*, 294 Mich App 70, 76 (2011) (citations omitted). "The district court's [probable cause] inquiry is not limited to whether the prosecution has presented sufficient evidence on each element of . . . the offense, but extends to whether probable cause exists after an examination of the entire matter based on legally admissible evidence." *People v Crippen*, 242 Mich App 278, 282 (2000) (citations omitted).[56] However, "'[a] preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.'"*People v Drake*, 246 Mich App 637, 640 (2001), quoting *Barber v Page*, 390 US 719, 725 (1968).

In determining whether there is probable cause to believe a crime has been committed by the accused, a judge has a duty "to pass judgment on the credibility of the witnesses." *People v Yost*, 468 Mich 122, 127-128 (2003) (citations omitted). "If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the [judge] must let the factfinder at trial resolve those questions of fact[, and t]his requires binding the defendant over for trial." *People v Hudson*, 241 Mich App 268, 278 (2000) (citation omitted); see also *Yost*, 468 Mich at 128; *People v Goecke*, 457 Mich 442, 469-470 (1998). Although "the magistrate must exercise some judgment in analyzing the evidence at the preliminary examination when deciding whether there is probable cause to bind over a defendant,"[57] *People v Anderson*, 501 Mich 175, 184 (2018), "charges should not be dismissed merely because the prosecutor has failed to convince the reviewing tribunal that it would convict[; t]hat question should be reserved for the trier of fact," *People v Perkins*, 468 Mich 448, 452 (2003), citing *Goecke*, 457 Mich at 469-470.

A district court has "the authority to consider defendant's defenses when determining whether to bind him over to the circuit court." *People v Schurr*, ___ Mich App ___, ___ (2024). While affirmative defenses, such as justification and self-defense, must typically be presented at trial, "the inquiry at the preliminary examination is not limited to whether the prosecution has presented evidence on each element of the offense." *Id.* at ___ (quotation marks and citation omitted). Thus, "if the defendant presents evidence that he or she has a complete defense to the charge on the undisputed evidence, it would be improper for the district court to bind over the defendant." *Id.* at ___.

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[56] However, it is unnecessary, in indictments or informations related to murder or manslaughter, to "set forth the manner in which nor the means by which the death of the deceased was caused[.]" MCL 767.71. Instead, MCL 767.71 requires only a charge that the defendant murdered or killed the deceased.

[57] See Section 7.23 for more information on the bindover process.

A. Admission of Evidence in Preliminary Examination

"A preliminary examination is, at its core, an evidentiary hearing." *People v Olney (On Remand)*, 333 Mich App 575, 582, 587 (2020) (concluding that because of this, MCL 768.27c (governing the admissibility of domestic violence offenses), applies to the preliminary examination). MCL 766.11b(1) provides that, with the exception of certain hearsay records and reports enumerated in MCL 766.11b(1)(a)-(d), "[t]he rules of evidence apply at the preliminary examination." See also MCR 6.110(C) ("[t]he court must conduct the [preliminary] examination in accordance with the Michigan Rules of Evidence"). "[W]hile the rules of evidence apply during a preliminary examination, the right of confrontation does not."[58] *People v Olney*, 327 Mich App 319, 331 (2019) (finding that in addition to misunderstanding the law, which alone required reversal, "the circuit court abused its discretion when it granted defendant's motion to quash on the basis that defendant's right of confrontation was violated" during his preliminary examination even though the testimony at the examination would have likely violated the Confrontation Clause and been inadmissible at trial).

"[A]n evidentiary deficiency [such as admission of hearsay testimony] at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error." *People v Hall*, 435 Mich 599, 600-601 (1990). See also 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 . . . improper admission or rejection of evidence, . . . 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").

1. Scope of Examination

MCL 766.4(6) provides:

> "At the preliminary examination, a magistrate shall examine the complainant and the witnesses in support of the prosecution, on oath and, except as provided in [MCL 766.11a (permitting telephonic, voice, or video conferencing)] and [MCL 766.11b (permitting the admission of certain hearsay evidence)], in the presence of the defendant, concerning the offense charged and in regard to

[58] See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3, for more information on Confrontation Clause issues.

> any other matters connected with the charge that the magistrate considers pertinent."

The examining judge "may examine not only the truth of the charge in the complaint, but also other pertinent matters related to the charge[;]" the judge "is not bound by the limitations of the written complaint." *People v Hunt*, 442 Mich 359, 363 (1993) (citation omitted). The court's inquiry at the preliminary examination "is not limited to whether the prosecution has presented sufficient evidence on each element of the offense, but extends to whether probable cause exists after an examination of the entire matter based on legally admissible evidence." *People v Crippen*, 242 Mich App 278, 282 (2000) (citations omitted). Stated another way, "a magistrate's duty at a preliminary examination is to consider all the evidence presented, including the credibility of the witnesses' testimony, and to determine on that basis whether there is probable cause to believe that the defendant committed a crime, i.e., whether the evidence presented is 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.'" *People v Anderson*, 501 Mich 175, 178 (2018), quoting *People v Yost*, 468 Mich 122, 126 (2003) (quotation marks and citation omitted). This determination must be made at the end of the preliminary examination; accordingly, "a magistrate must consider the totality of the evidence presented at that juncture, and . . . a magistrate must do so even if evidence introduced at the outset of the preliminary examination initially appears to have satisfied the elements of a criminal offense." *Anderson*, 501 Mich at 184, citing MCL 766.13.

2. Rules of Evidence and Admissible Hearsay

The preliminary examination must generally be conducted "in accordance with the Michigan Rules of Evidence." MCR 6.110(C). However, MCL 766.11b provides, in relevant part:

> "(1) The rules of evidence apply at the preliminary examination except that the following are not excluded by the rule against hearsay and shall be admissible at the preliminary examination without requiring the testimony of the author of the report, keeper of the records, or any additional foundation or authentication:
>
> > (a) A report of the results of properly performed drug analysis field testing to establish that the substance tested is a controlled substance.

> (b) A certified copy of any written or electronic order, judgment, decree, docket entry, register of actions, or other record of any court or governmental agency of this state.
>
> (c) A report other than a law enforcement report that is made or kept in the ordinary course of business.
>
> (d) Except for the police investigative report, a report prepared by a law enforcement officer or other public agency. Reports permitted under this subdivision include, but are not limited to, a report of the findings of a technician of the division of the department of state police concerned with forensic science, a laboratory report, a medical report, a report of an arson investigator, and an autopsy report.
>
> (2) The magistrate shall allow the prosecuting attorney or the defense to subpoena and call a witness from whom hearsay testimony was introduced under this section on a satisfactory showing to the magistrate that live testimony will be relevant to the magistrate's decision whether there is probable cause to believe that a felony has been committed and probable cause to believe that the defendant committed the felony.[59]

MCL 766.11b irreconcilably conflicts with MCR 6.110(C) (providing that the Michigan Rules of Evidence apply at preliminary examinations) because it permits the admission of evidence that would be excluded under the Michigan Rules of Evidence. *People v Parker*, 319 Mich App 664, 667 (2017). "MCL 766.11b is an enactment of a substantive rule of evidence, not a procedural one[; a]ccordingly, the specific hearsay exception in MCL 766.11b takes precedence over the general incorporation of the Michigan Rules of Evidence found in MCR 6.110(C)." *Parker*, 319 Mich App at 674 (holding that "[t]he district court properly admitted the laboratory report [of the defendant's blood draw at his preliminary examination on a charge of operating while intoxicated] pursuant to the statutory hearsay exception in MCL 766.11b," and "[t]he circuit court abused its

[59] See also MCR 6.110(D)(1).

discretion by remanding [the] defendant's case to the district court for continuation of the preliminary examination").

Because "MCL 766.11b(1) addresses the foundational and authentication requirements for certain *reports and records* at the preliminary examination," certain hearsay *statements* may still be admissible at the preliminary examination. See *People v Olney (On Remand)*, 333 Mich App 575, 586-587 (2020) (emphasis added) (finding that because MCL 768.27c (governing admissibility of statements pertaining to physical injury or domestic violence) "does not contain any reference to admission of records or other documents," but "addresses statements pertaining to physical injury or domestic violence," "[t]he omission of MCL 768.27c from MCL 766.11b(1) does not support [an] attempt to preclude hearsay statements pertaining to domestic violence from admission at the preliminary examination").

See also MRE 1101(b)(8), providing that "[t]he rules — except for those on privilege — do not apply . . . [a]t a preliminary examination in a criminal case, during which hearsay is admissible to prove the ownership, value, or possession of — or right to use or enter — property."

MCR 6.110(D)(2) provides:

> "If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of
>
> > (a) a prior evidentiary hearing, or
> >
> > (b) a prior evidentiary hearing supplemented with a hearing before the trial court, or
> >
> > (c) if there was no prior evidentiary hearing, a new evidentiary hearing."

MCR 6.202 governs the admissibility of forensic laboratory reports and certificates.[60]

3. Collateral Estoppel and Res Judicata

"[D]ismissal of a prosecution at preliminary examination raises no bar under res judicata or collateral estoppel to a subsequent prosecution." *People v Maye*, ___ Mich App ___, ___ (2022) (quotation marks and citation omitted). Indeed, "neither res judicata nor collateral estoppel [preclude] the prosecutor from refiling charges where the same magistrate presided over both examinations and the prosecutor presented additional evidence to support the charge." *Id*. at ___. In *Maye*, "the district court did not bind defendant over . . . as charged in the complaint, [it] discharged defendant as to that charge without prejudice to the prosecutor initiating a subsequent prosecution for the same offense." *Id*. at ___ (quotation marks and citation omitted). Thus, the prosecution "was entitled to reinstate that charge against defendant to seek to present additional evidence at the second preliminary examination before the magistrate who presided over the first preliminary examination." *Id*. at ___. Accordingly, "the circuit court erred by reversing the decision of the district court, which denied defendant's motion to quash the charges against him, rejecting defendant's contention that collateral estoppe[l] barred the refiling of the complaint"; "[u]nder MCR 6.110(F), additional evidence is not limited to newly-discovered evidence." *Maye*, ___ Mich App at ___. See **Section 7.25** for additional information on the prosecutor's right to bring new charges.

B. Examination of Witnesses

1. Generally

"The court shall allow the prosecutor and the defendant to . . . examine and cross-examine witnesses at the preliminary examination." MCR 6.110(C). "After the testimony in support of the prosecution has been given, the witnesses for the [defendant], if he have any, shall be sworn, examined and cross-examined[.]" MCL 766.12. A district court abuses its discretion when it "[does] not permit the defendant to call witnesses" at the preliminary examination. *People v Brown*, 505 Mich 984, 984-985 (2020).

[60] However, MCR 6.202 has not been amended to reflect amendments to MCL 766.11b that were adopted by 2014 PA 123, effective May 20, 2014. See the Michigan Judicial Institute's *Evidence Benchbook* for more information on forensic laboratory reports and certificates.

2. Procedure

"At the preliminary examination, a magistrate shall examine the complainant and the witnesses in support of the prosecution, on oath and, except as provided in [MCL 766.11a and MCL 766.11b],[61] in the presence of the defendant, concerning the offense charged and in regard to any other matters connected with the charge that the magistrate considers pertinent." MCL 766.4(6).

3. Testimony by Telephonic, Voice, or Video Conferencing

"On motion of either party, the magistrate shall permit the testimony of any witness, except the complaining witness, an alleged eyewitness, or a law enforcement officer to whom the defendant is alleged to have made an incriminating statement, to be conducted by means of telephonic, voice, or video conferencing. The testimony taken by video conferencing shall be admissible in any subsequent trial or hearing as otherwise permitted by law." MCL 766.11a.

"[A]s long as the defendant is either present in the courtroom or has waived the right to be present, district courts may use videoconferencing to take testimony from any witness in a preliminary examination." MCR 6.006(C)(4).

"The use of telephonic, voice, videoconferencing, or two-way interactive video technology[] must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).[62]

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[61] MCL 766.11a governs the use of telephonic, voice, or video conferencing at the preliminary examination. MCL 766.11b governs admission of certain hearsay reports and documents.

[62] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." "Notwithstanding any other provision in [MCR 6.006], until further order of the Court, AO No. 2012-7 is suspended." MCR 6.006(E).

Committee Tip:

The trial court should allow the defendant to effectively cross-examine the prosecution witnesses, so that even if a prosecution witness becomes unavailable to testify at trial, MRE 804(a)(5), the prior testimony would still be admissible and not violate the defendant's right to confrontation.

C. Corpus Delicti Rule

"Under the *corpus delicti* rule, 'a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury.'" *People v Schumacher*, 276 Mich App 165, 180 (2007), quoting *People v Konrad*, 449 Mich 263, 269-270 (1995). "In a criminal prosecution, proof of the *corpus delicti* of a crime is required before the prosecution may introduce a defendant's inculpatory statements." *Schumacher*, 276 Mich App at 180. "It is . . . well-accepted that [the *corpus delicti*] rule applies to a preliminary examination." *People v Randall*, 42 Mich App 187, 190 (1972) (citations omitted); see also *People v Cotton*, 191 Mich App 377, 384, 394 (1991).

7.18 Victims' Rights at Preliminary Examination[63]

A. Notice Requirements

Crime victims in Michigan have a constitutional right to notification of court proceedings. Const 1963, art 1, § 24. If requested by the victim, "the prosecuting attorney shall give the victim notice of any scheduled court proceedings and any changes in that schedule." MCL 780.756(2). In addition, the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, provides that, in felony cases, the prosecuting attorney must also provide each victim with notice of the information specified in MCL 780.756(1)(a)-(f) "[n]ot later than 7 days after the defendant's arraignment for a crime, but not less than 24 hours before a preliminary examination[.]" MCL 780.756(1).

[63] For more information on crime victims' rights, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

B. Separate Waiting Areas

"The court shall provide a waiting area for the victim separate from the defendant, defendant's relatives, and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court shall provide other safeguards to minimize the victim's contact with defendant, defendant's relatives, and defense witnesses during court proceedings." MCL 780.757.

C. Limitations on Testimony Identifying a Victim's Address, Place of Employment, or Other Information

MCR 6.201(A)(1) provides for mandatory disclosure to all other parties, upon request, of the names and addresses of all witnesses that a party may call as witnesses at trial, including victims. "[I]n the alternative, a party may provide the name of the witness and make the witness available to the other party for interview[.]" *Id*.

In certain circumstances, the prosecuting attorney may request that a victim's identifying information be protected from disclosure in pretrial proceedings. MCL 780.758(1) provides:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion must be in camera."

D. Immediate Commencement of Preliminary Examination for Purpose of Taking Victim Testimony

MCL 766.4(4) provides, in relevant part:

> "Upon the request of the prosecuting attorney, . . . the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present. For purposes of this subdivision, 'victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. If that testimony is insufficient to establish probable cause to believe that the defendant

> committed the charged crime or crimes, the magistrate shall adjourn the preliminary examination to the date set at arraignment. A victim who testifies under this subdivision shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause."

See also MCR 6.110(B)(2), which provides:

> "Upon the request of the prosecuting attorney, the preliminary examination shall commence immediately at the date and time set for the probable cause conference for the sole purpose of taking and preserving the testimony of the victim, if the victim is present, as long as the defendant is either present in the courtroom or has waived the right to be present. If victim testimony is taken as provided under this rule, the preliminary examination will be continued at the date originally set for that event."

MCR 6.108(D) provides, in part, that "[t]he district judge must be available during the probable cause conference to[,] . . . if requested by the prosecutor, take the testimony of a victim."[64]

7.19 Order for Competency Evaluation at Preliminary Examination[65]

MCR 6.125(B) provides, in part:

> "The issue of the defendant's competence to stand trial or to participate in other criminal proceedings may be raised at any time during the proceedings against the defendant. The issue may be raised by the court before which such proceedings are pending or being held, or by motion of a party. Unless the issue of defendant's competence arises during the course of proceedings, a motion raising the issue of defendant's competence must be in writing. If the competency issue arises during the course of proceedings, the court may adjourn the proceeding[.]"

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[64] See the SCAO's *Best Practices for Probable Cause Conferences and Preliminary Examinations*, p 1, which provides the following recommendation:

> "The court should develop a procedure for how it should be notified regarding whether a plea, request for bond modification, or [preliminary examination] is needed. For example, the prosecutor or the district court magistrate could notify the court whether a [preliminary examination] is necessary."

[65] For more information on issues involving competency, see Chapter 10.

"On a showing that the defendant may be incompetent to stand trial, the court must order the defendant to undergo an examination by a certified or licensed examiner of the center for forensic psychiatry or other facility officially certified by the department of mental health to perform examinations relating to the issue of competence to stand trial." MCR 6.125(C)(1). See MCR 6.125(C)(2)-(5) for rules regarding the defendant's appearance at the examination and regarding the court's authority to detain or commit the defendant in certain circumstances.

"[W]here there is evidence of incompetency prior to the preliminary examination and counsel for [the] defendant requests a determination of competency to stand trial, the examining [judge] should halt preliminary proceedings . . . and refer the defendant . . . for evaluation and recommendation. Upon receipt of the written report and recommendation, the district judge should conduct a hearing and make a determination of competency." *People v Thomas (Billie)*, 96 Mich App 210, 218 (1980). See also MCR 6.125(C)(1); MCR 6.125(E).

"A defendant who is determined incompetent to stand trial shall not be proceeded against while he [or she] is incompetent." MCL 330.2022(1).

7.20 Communicable Disease Testing and Examination[66]

A. Mandatory Testing or Examination

MCL 333.5129(3) provides that if the district court determines there is reason to believe a violation involved sexual penetration or exposure to the body fluid of the defendant, the district court must "order[67] the defendant to be examined or tested for sexually transmitted infection, hepatitis B infection, and hepatitis C infection and for the presence of HIV or an antibody to HIV[]" if he or she is bound over to circuit court for any of the enumerated offenses listed below. Additionally, the *circuit* court must "order the examination or testing if the defendant is brought before it by way of indictment for any of the [enumerated offenses]." *Id*. This testing is required for any of the following offenses:

- Accosting, enticing, or soliciting a child for an immoral purpose, MCL 750.145a.
- Gross indecency between males, MCL 750.338.

[66] A thorough discussion of communicable disease testing requirements is beyond the scope of this benchbook. For more information concerning these requirements, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 5.

[67] See SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

- Gross indecency between females, MCL 750.338a.
- Gross indecency between males and females, MCL 750.338b.
- Aiding and abetting certain prostitution offenses, MCL 750.450.[68]
- Keeping a house of prostitution, MCL 750.452.
- Pandering, MCL 750.455.
- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Fourth-degree criminal sexual conduct, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

With some exceptions, "the examinations and tests must be confidentially administered by a licensed physician, the [Department of Health and Human Services[69]], or a local health department." MCL 333.5129(3). Additionally, the court must "order the defendant to receive counseling regarding sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and acquired immunodeficiency syndrome, including, at a minimum, information regarding treatment, transmission, and protective measures." *Id.*[70]

B. Expedited Examination or Testing for Criminal Sexual Conduct Offenses

Expedited testing and follow-up testing are required under certain circumstances if the defendant is charged with first-, second-, third-, or fourth-degree criminal sexual conduct or with assault with intent to commit criminal sexual conduct. MCL 333.5129(3) provides, in relevant part:

> "If a defendant is bound over to or brought before the circuit court for violating . . . MCL 750.520b, [MCL]

[68] MCL 750.450 is a 93-day misdemeanor, for which no preliminary examination is required. For the penalty provisions of this crime, which also include first-, second-, and third-offense provisions, see MCL 750.451.

[69] See MCL 333.1104(5).

[70] See SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

> 750.520c, [MCL] 750.520d, [MCL] 750.520e, [or MCL] 750.520g, the court shall, upon the victim's request, order the examination or testing [required by MCL 333.5129(3)] to be done not later than 48 hours after the date that the information or indictment is presented and the defendant is in custody or has been served with the information or indictment. The court shall include in its order for expedited examination or testing at the victim's request under this subsection a provision that requires follow-up examination or testing that is considered medically appropriate based on the results of the initial examination or testing."

With some exceptions, "the examinations and tests must be confidentially administered by a licensed physician, the [Department of Health and Human Services[71]], or a local health department." MCL 333.5129(3). Additionally, the court must "order the defendant to receive counseling regarding sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and acquired immunodeficiency syndrome, including, at a minimum, information regarding treatment, transmission, and protective measures." *Id*.[72]

7.21 Record of Preliminary Examination

"A verbatim record must be made of the preliminary examination." MCR 6.110(C). See also MCR 6.006(D). "All proceedings in the district court, except as otherwise provided by law or supreme court rule, shall be recorded." MCL 600.8331.

7.22 Transcript of Testimony

"The court reporter shall transcribe and file the record of the preliminary examination if such is demanded or ordered pursuant to MCL 766.15." MCR 6.113(D).

MCL 766.15 provides, in part:

> "(2) A written transcript of the testimony of a preliminary examination need not be prepared or filed except upon written demand of the prosecuting attorney, defense attorney, or defendant if the defendant is not represented by an attorney, or as ordered sua sponte by the trial court. A

[71] See MCL 333.1104(5).

[72] See SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

written demand to prepare and file a written transcript is timely made if filed within 2 weeks following the arraignment on the information or indictment. A copy of a demand to prepare and file a written transcript shall be filed with the trial court, all attorneys of record, and the court which held the preliminary examination. Upon sua sponte order of the trial court or timely written demand of an attorney, a written transcript of the preliminary examination or a portion thereof shall be prepared and filed with the trial court.

(3) If a written demand is not timely made as provided in subsection (2), a written transcript need not be prepared or filed except upon motion of an attorney or a defendant who is not represented by an attorney, upon cause shown, and when granting of the motion would not delay the start of the trial. When the start of the trial would otherwise be delayed, upon good cause shown to the trial court, in lieu of preparation of the transcript or a portion thereof, the trial court may direct that the defense and prosecution shall have an opportunity before trial to listen to any electronically recorded testimony, a copy of the recording tape or disc, or a stenographer's notes being read back."

7.23 Bindover Following Preliminary Examination

MCL 766.13 provides:

"If the magistrate determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony,[73] the magistrate shall either discharge the defendant or reduce the charge to an offense that is not a felony. If the magistrate determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the magistrate shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the magistrate may conduct the circuit court arraignment as provided by court rule."

[73] See Section 7.17 for information on the probable cause inquiry and applicable evidentiary standards at the preliminary examination.

A. Bindover After Waiver

"Upon waiver of the preliminary examination, the court must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint." MCR 6.110(A).

Committee Tip:

A district court magistrate, "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, . . . may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination[.]" MCL 600.8513(1). However, there is no statutory authority under which a district court magistrate may conduct a bindover proceeding.

B. Bindover After Finding of Probable Cause[74]

"If the magistrate determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the magistrate shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the magistrate may conduct the circuit court arraignment as provided by court rule." MCL 766.13; see also MCR 6.110(E).[75]

C. Bindover on a Greater Offense

A judge may grant a prosecutor's motion to amend a complaint to include a greater offense where the evidence at the preliminary examination supports probable cause as to the elements of the greater offense and the amendment does not cause unacceptable prejudice to the defendant. *People v Hunt (Arthur)*, 442 Mich 359, 364-365 (1993) (holding that the trial court should have allowed the prosecutor, following the preliminary examination, to amend the complaint to charge third-degree criminal sexual conduct instead of gross indecency between males where the greater offense was

[74] See Section 7.17 for information on the probable cause inquiry and applicable evidentiary standards at the preliminary examination.

[75] See Section 7.29 for discussion of circuit court arraignment.

supported by the evidence and the amendment would not cause "unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend[]").

In addition, a judge may, sua sponte, bind a defendant over for trial on a greater offense where the evidence presented at the preliminary examination supports the higher charge and the prosecution does not object. *People v Gonzalez (Ervey)*, 214 Mich App 513, 516-517 (1995).

D. Bindover on a Lesser Offense

"If the magistrate determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the magistrate shall either discharge the defendant or reduce the charge to an offense that is not a felony." MCL 766.13; see also MCR 6.110(F).

"[I]f upon examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he [or she] should not bind the defendant over on the offense charged but may bind him [or her] over on a lesser offense as to which he [or she] is so satisfied." *People v King (Russell)*, 412 Mich 145, 154-155 (1981) (holding that the district court properly bound the defendant over on the offense of manslaughter instead of first- or second-degree murder because malice and premeditation were lacking).

"An examining magistrate has the obligation to consider binding a defendant over on lesser included offenses where such offenses are supported by the evidence offered at the preliminary examination." *People v Harris (Walter)*, 159 Mich App 401, 405-407 (1987) (citations omitted). "Pursuant to [MCL 766.13], even where the charged offense has not been established, if a lesser included offense is established, then [the] defendant should be bound over for trial on that charge." *Harris (Walter)*, 159 Mich App at 405 (holding that, although the district court properly refused to bind the defendant over for trial on an open murder charge where the evidence established that the shooting was accidental, the court erred in dismissing the case where the evidence supported a charge of involuntary manslaughter based on the defendant's grossly negligent conduct) (citation omitted).

E. Bindover When Defendant Is Charged With Open Murder

"[T]he elements of premeditation and deliberation are not required elements for which evidence must be presented at a preliminary examination in order to bind a defendant over for trial on open murder charges." *People v Coddington*, 188 Mich App 584, 593-594 (1991).

F. Jurisdiction of District Court Following Bindover

The district court's jurisdiction over offenses cognizable in the circuit court continues "through the preliminary examination and until the entry of an order to bind the defendant over to the circuit court." MCR 6.008(A). "The circuit court has jurisdiction over all felonies from the bindover from the district court unless otherwise provided by law." MCR 6.008(B). "The failure of the court to properly document the bindover decision shall not deprive the circuit court of jurisdiction." *Id*.

The circuit court acquires jurisdiction over the case and the defendant upon the filing of the magistrate's return[76] binding the defendant over to circuit court following the preliminary examination or the defendant's waiver of preliminary examination. *People v Goecke*, 457 Mich 442, 458 (1998) (citations omitted). "And just as the filing of the magistrate's return confers jurisdiction on the circuit court, . . . it has the effect of *divesting* the district court of jurisdiction[.]" *People v Taylor*, 316 Mich App 52, 54 (2016), citing *People v McGee*, 258 Mich App 683, 695 (2003); *People v Sherrod*, 32 Mich App 183, 186 (1971) (emphasis added). "Having once vested in the circuit court, personal jurisdiction is not lost even when a void or improper information is filed." *Goecke*, 457 Mich at 458-459, citing *In re Elliott*, 315 Mich 662, 675 (1946).

"Once a criminal case has been bound over and jurisdiction has been vested in the circuit court, there are only limited circumstances in which the circuit court may properly remand the case for a new or continued preliminary examination." *Taylor*, 316 Mich App at 55 (citations omitted).

MCR 6.008(C)-(E) provide guidance regarding circuit court jurisdiction following bindover in the event that the defendant ultimately pleads guilty to or is convicted of a misdemeanor offense that would normally be cognizable in the district court.[77]

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[76] See MCL 767.40.

- **Misdemeanor pleas.** "The circuit court retains jurisdiction over any case in which a plea is entered or a verdict rendered to a charge that would normally be cognizable in the district court." MCR 6.008(C).

- **Sentencing.** "The circuit court shall sentence all defendants bound over to circuit court on a felony that either plead guilty to, or are found guilty of, a misdemeanor." MCR 6.008(D).

- **Concurrent jurisdiction and probation officers.** "As part of a concurrent jurisdiction plan, the circuit court and district court may enter into an agreement for district court probation officers to prepare the presentence investigation report and supervise on probation defendants who either plead guilty to, or are found guilty of, a misdemeanor in circuit court. The case remains under the jurisdiction of the circuit court." MCR 6.008(E).

G. Remand to District Court Following Bindover

"A party challenging a bindover decision must do so before any plea of guilty or no contest, or before trial." MCR 6.008(B).

"If, on proper motion, the trial court finds a violation of [MCR 6.110(C) (conduct of examination)], [MCR 6.110(D) (exclusionary rules)], [MCR 6.110(E) (probable cause finding)], or [MCR 6.110(F) (discharge of defendant)], it must either dismiss the information or remand the case to the district court for further proceedings." MCR 6.110(H). MCR 6.110(H) "does not address, and leaves to case law, what effect a violation of these rules or an error in ruling on a motion filed in the trial court may have when raised following conviction." 1989 Staff Comment to MCR 6.110.

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[77] MCR 6.008 was adopted by ADM File No. 2016-35, effective January 1, 2018. Although not binding authority, the Staff Comment to ADM File No. 2016-35 provides:

> "The addition of Rule 6.008 establishes procedures for a circuit court to follow if a defendant bound over to circuit court on a felony either pleads guilty to, or is convicted of, a misdemeanor in circuit court. Remand to district court would remain a possibility in certain limited circumstances, including where the evidence is insufficient to support the bindover, *People v Miklovich*, [375 Mich 536, 539 (1965)]; *People v Salazar*, [124 Mich App 249, 251-252 (1983)], or where there was a defect in the waiver of the right to a preliminary examination, *People v Reedy*, [151 Mich App 143, 147 (1986)]; *People v Skowronek*, [57 Mich App 110, 113 (1975)], or where the prosecutor adds a new charge on which the defendant did not have a preliminary examination, *People v Bercheny*, [387 Mich 431, 434 (1972)], adopting the opinion in *People v Davis*, [29 Mich App 443, 463 (1971)], aff'd *People v Bercheny*, 387 Mich 431 (1972). See also MCR 6.110(H)."

See Section 7.23(G) for discussion of motions to quash for improper bindover and other circumstances permitting remand to district court following bindover.

"Once a criminal case has been bound over and jurisdiction has been vested in the circuit court, there are only limited circumstances in which the circuit court may properly remand the case for a new or continued preliminary examination." *People v Taylor*, 316 Mich App 52, 55 (2016), citing MCR 6.110(H) (additional citations omitted).[78]

- "If a motion to quash is filed and the circuit court determines that the evidence is insufficient to support the bindover, the circuit court is permitted to remand the case for a further examination at which the prosecutor may seek to remedy the shortcoming in the proofs needed to establish probable cause." *Taylor*, 316 Mich App at 55 (citations omitted). See also *People v Miklovich*, 375 Mich 536, 539 (1965).

- "[A] circuit court may remand the case if the defendant waived the right to a preliminary examination and a defect in the waiver existed, if for example the waiver was made without the benefit of counsel." *Taylor*, 316 Mich App at 55 (citations omitted). See also *People v Reedy*, 151 Mich App 143, 147 (1986).

- "The circuit court may . . . remand the case if the prosecutor adds a new charge on which the defendant did not have a preliminary examination." *Taylor*, 316 Mich App at 55 (citations omitted). See also *People v Bercheny*, 387 Mich 431, 434 (1972).

- A circuit court is "authorized to remand a misdemeanor charge to the district court following the dismissal of the last felony charge that was bound over to circuit court." *People v Cramer*, ___ Mich ___, ___ (2023), citing MCL 600.611 (additional citations omitted).

However, if the defendant "[does] not establish any of the appropriate grounds for remanding the case[]" following bindover, the circuit court may not remand the case to the district court. *Taylor*, 316 Mich App at 57. In *Taylor*, 316 Mich App at 56, following preliminary examination and bindover, the circuit court denied the defendants' motions to quash the information; however, the circuit court subsequently granted the defendants' motions to remand the case to the district court on the ground that a "ballistics report prepared after the preliminary examination" was potentially exculpatory. The Court of Appeals reversed the remand order, holding that "[t]he circuit court erred when it remanded the case for

[78] See Section 7.23(F) for discussion of circuit court jurisdiction following bindover.

a continued preliminary examination[]" where "[the d]efendants did not establish any of the appropriate grounds for remanding the case." *Id*. at 57 (noting that "the circuit court denied [the] defendants' motions to quash and thereby upheld the district court's finding of probable cause[,]" "there [was no] waiver by [the] defendants of the right to a preliminary examination that could be deemed defective[,]" "[t]he prosecutor did not seek to add new charges[,]" and "[t]he circuit court did not find a violation of any of the relevant rules related to the conduct of the preliminary examination or the probable cause determination[]"). Because "the circuit court [had] already denied the motions to quash, it was then unnecessary for either the circuit court or the district court to revisit the probable cause determination." *Id*. at 57 (citations omitted). Furthermore, "[t]he emergence . . . of potentially favorable evidence after the preliminary examination does not by itself entitle a defendant to a second or continued preliminary examination[; i]nstead, the trial is generally the appropriate forum in which to present such evidence." *Id*. at 58, 58 n 2 (noting that "the record indisputably establishe[d] that [the] defendants' attorneys were well aware at the preliminary examination of the key underlying fact referenced in the ballistics report that comprised the basis of their subsequent request to remand the case for a continued preliminary examination[]") (citations omitted).

"'A district court magistrate's decision to bind over a defendant and a trial court's decision on a motion to quash an information are reviewed for an abuse of discretion.'" *People v Bass*, 317 Mich App 241, 279 (2016), quoting *People v Dowdy*, 489 Mich 373, 379 (2011). "However, '[t]o the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo.'" *Bass*, 317 Mich App at 279, quoting *People v Miller*, 288 Mich App 207, 209 (2010) (alteration in original). "[E]rror at the preliminary examination stage should be examined under a harmless error analysis." *People v Hall*, 435 Mich 593, 602 (1990) (a defendant bound over for trial to face felony charges on the basis of hearsay testimony erroneously admitted at the preliminary examination did not constitute a ground for vacating her subsequent conviction where she received a fair trial and was not otherwise prejudiced by the error). However, "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018 (2004). See also *People v Bennett*, 290 Mich App 465, 481 (2010) ("the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless").

H. Prosecutor's Appeal to Circuit Court

"'[I]f the prosecutor is of the opinion that the examining [judge] erred in not binding the defendant over for trial, [he or she should] appeal to the circuit court.'" *People v Robbins*, 223 Mich App 355, 361-362 (1997), quoting *People v Nevitt*, 76 Mich App 402, 404 (1977).

A reviewing court may not reverse a judge's bindover decision absent an abuse of discretion. *People v Yost*, 468 Mich 122, 126 (2003). In *Yost*, after a seven-day preliminary exam, the district court refused to bind the defendant over for trial on charges of open murder and felony murder, based on its determination that there was lack of credible evidence of a homicide. *Id*. at 123-124. The prosecutor appealed to the circuit court, which determined that the record established a sufficient basis for finding that a homicide was committed and probable cause to believe that the defendant committed it. *Id*. at 124. The circuit court held that the district court abused its discretion in refusing to bind the defendant over for trial. *Id*. On leave granted, the Supreme Court upheld the circuit court's decision, agreeing with the circuit court that the evidence was sufficient to warrant a bindover and that the district court abused its discretion when concluding that probable cause to bind the defendant over for trial did not exist. *Id*. at 133.

7.24 Setting Case for Trial When There Is Probable Cause to Believe That Defendant Committed a Misdemeanor

"If the court determines at the conclusion of the preliminary examination of a person charged with a felony that the offense charged is not a felony or that an included offense that is not a felony has been committed, the accused shall not be dismissed but the magistrate shall proceed in the same manner as if the accused had initially been charged with an offense that is not a felony." MCL 766.14(1). See also MCR 6.110(E) ("[i]f the court finds probable cause to believe that the defendant has committed an offense cognizable by the district court, it must proceed thereafter as if the defendant initially had been charged with that offense[]").

7.25 Discharge of Defendant and Prosecutor's Right to Bring New Charges

MCR 6.110(F) provides:

> "**Discharge of Defendant. No Finding of Probable Cause.** If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense

> has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense or reduce the charge to an offense that is not a felony. Except as provided in MCR 8.111(C),[79] the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge."

"[D]ismissal of a prosecution at preliminary examination raises no bar under res judicata or collateral estoppel to a subsequent prosecution." *People v Maye*, ___ Mich App ___, ___ (2022) (quotation marks and citation omitted). Indeed, "neither res judicata nor collateral estoppel [preclude] the prosecutor from refiling charges where the same magistrate presided over both examinations and the prosecutor presented additional evidence to support the charge." *Id*. at ___. "Under MCR 6.110(F), additional evidence is not limited to newly-discovered evidence." *Maye*, ___ Mich App at ___.

In *Maye*, the district court "ruled at the preliminary examination that the prosecution failed to present evidence that the police dog had indicated that drugs were present in defendant's vehicle, and thus had failed to present evidence of probable cause for the police to search the vehicle." *Maye*, ___ Mich App at ___. "This was not a determination of an ultimate issue of fact, but rather was a determination that the evidence was insufficient to justify a warrantless search, which could be cured at a subsequent preliminary examination." *Id*. at ___. "Because the district court did not bind defendant over on the possession charge as charged in the complaint, [it] discharged defendant as to that charge without prejudice to the prosecutor initiating a subsequent prosecution for the same offense." *Id*. at ___ (quotation marks and citation omitted). Thus, the *Maye* Court held that the prosecution "was entitled to reinstate that charge against defendant to seek to present additional evidence at the second preliminary examination before the magistrate who presided over the first preliminary examination." *Id*. at ___.

MCR 6.110(F) "prevents 'judge shopping' by requiring that a subsequent examination be before the same [judge], if available, and that additional evidence be presented." *People v Robbins*, 223 Mich App 355, 361 (1997). "[S]ubjecting a defendant to repeated preliminary examinations violates due process if the prosecutor attempts to harass the defendant or engage in 'judge-shopping.'" *Id*. at 363 (citations omitted). See also *People v Dunbar*, 463 Mich 606, 613-614, 617-618 (2001), overruled in part on other grounds by *People v Jackson*, 483 Mich 271, 275 (2009) (holding that where the prosecution moved for dismissal following an adverse evidentiary ruling during the preliminary examination, and a different judge bound

[79] MCR 8.111(C) provides for the reassignment of judges due to disqualification or based upon good cause.

the defendant over for trial following a second preliminary examination, no due process violation occurred because there was no evidence to support a finding that the prosecution had engaged in judge-shopping).

7.26 Bindover Certificate and Return

"Except as provided in [MCL 766.15(2) or MCL 766.15(3) (governing the preparing and filing of a written transcript of the preliminary examination upon demand or by trial court order)], all examinations and recognizances taken by a magistrate . . . shall be immediately certified and returned by the magistrate to the clerk of the court before which the party charged is bound to appear." MCL 766.15(1). "If that magistrate refuses or neglects to return the same, the magistrate may be compelled immediately by order of the court, and in case of disobedience may be proceeded against as for a contempt by an order to show cause or a bench warrant." *Id*.

"Immediately on concluding the [preliminary] examination, the court must certify and transmit to the court before which the defendant is bound to appear the prosecutor's authorization for a warrant application, the complaint, a copy of the register of actions, the examination return, and any recognizances received." MCR 6.110(G).

7.27 Ordering Pretrial Release at the Conclusion of Preliminary Examination

MCL 766.5 provides:

> "If it appears that a felony has been committed and that there is probable cause to believe that the accused is guilty thereof, and if the offense is bailable by the magistrate and the accused offers sufficient bail, it shall be taken and the prisoner discharged until trial.[80] If sufficient bail is not offered or the offense is not bailable by the magistrate, the accused shall be committed to jail for trial. This section shall not prevent the magistrate from releasing the accused on his [or her] own recognizance where authorized by law."

See also MCR 6.106(A). For detailed information about ordering pretrial release, see Chapter 8.

[80] "Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail." MCL 765.6(1). See also Const 1963, art 1, §15.

7.28 Circuit Court Review of Error at Preliminary Examination

A. Motion to Dismiss

"If, on proper motion, the trial court finds a violation of [MCR 6.110(C) (conduct of examination), MCR 6.110(D) (exclusionary rules), MCR 6.110(E) (probable cause finding), or MCR 6.110(F) (discharge of defendant)], it must either dismiss the information or remand the case to the district court for further proceedings." MCR 6.110(H). MCR 6.110(H) "does not address, and leaves to case law, what effect a violation of these rules or an error in ruling on a motion filed in the trial court may have when raised following conviction." 1989 Staff Comment to MCR 6.110.

"A party challenging a bindover decision must do so before any plea of guilty or no contest, or before trial." MCR 6.008(B).

B. Prosecutor's Appeal to Circuit Court

"'[I]f the prosecutor is of the opinion that the examining [judge] erred in not binding the defendant over for trial, . . . [he or she should] appeal to the circuit court.'" *People v Robbins (Darrell)*, 223 Mich App 355, 361-362 (1997), quoting *People v Nevitt*, 76 Mich App 402, 404 (1977).

C. Standard of Review

A reviewing court may not reverse a judge's bindover decision absent an abuse of discretion. *People v Yost*, 468 Mich 122, 126 (2003). "The fact that the [district court judge] may have . . . reasonable doubt that [the] defendant committed the crime [is] not a sufficient basis for refusing to bind [the] defendant over for trial." *Id.* at 133 (citation omitted).

"[E]rror at the preliminary examination stage should be examined under a harmless error analysis." *People v Hall (Lisa)*, 435 Mich 599, 600-602, 615 (1990) (noting that "the availability of an interlocutory appeal affords protection in those cases where an innocent accused should have been screened out by the preliminary examination process[]" and holding that a defendant bound over for trial on the basis of hearsay testimony erroneously admitted at the preliminary examination is not entitled to reversal of a subsequent conviction if he or she received a fair trial and was not otherwise prejudiced by the error); see also *People v Houthoofd*, 487 Mich 568, 593 (2010).

7.29 Circuit Court Arraignment

A. Introduction

The arraignment discussed in this section refers to the *arraignment on the information* that occurs *after* a defendant's preliminary examination, rather than the initial district court arraignment discussed in Chapter 5.[81]

A defendant has a constitutional right to adequate notice of the charges against him or her. *People v Darden*, 230 Mich App 597, 600 (1998). A defendant has a right to be arraigned on the information, at which time the information is read to the defendant or the court informs him or her of the substance of the charges contained in the information. MCR 6.113(A); MCR 6.113(B). "'The purpose of an arraignment is to provide formal notice of the charge against the accused.'" *People v Henry (After Remand)*, 305 Mich App 127, 158 (2014), quoting *People v Waclawski*, 286 Mich App 634, 704 (2009).

B. Waiver of Arraignment

A defendant who is represented by an attorney has the right to enter a plea of not guilty or to stand mute without formal arraignment. MCR 6.113(C) states:

> "A defendant represented by a lawyer may, as a matter of right, enter a plea of not guilty or stand mute without arraignment by filing, at or before the time set for the arraignment, a written statement signed by the defendant and the defendant's lawyer acknowledging that the defendant has received a copy of the information, has read or had it read or explained, understands the substance of the charge, waives arraignment in open court, and pleads not guilty to the charge or stands mute."

A trial court may properly accept waiver of arraignment by mail. *People v Payne (Scott)*, 285 Mich App 181, 191-192 (2009).

The written waiver statement must be signed by the defendant and the defendant's attorney and must acknowledge:

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[81] The *arraignment* discussed in Chapter 5 is the initial arraignment that is conducted in district court for all misdemeanors and felonies. See MCL 600.8311(c); MCR 6.610(D); MCR 6.610(I). The *circuit court arraignment* discussed in this section occurs either after evidence presented at the preliminary examination establishes probable cause that the defendant committed a felony, or after the defendant validly waives his or her right to a preliminary examination. See MCL 766.13; MCL 600.8311(f); MCR 6.110; MCR 6.111.

- that the defendant received a copy of the information;
- that the defendant read the information or has had it read or explained to him or her;
- that the defendant understands the substance of the charge against him or her;
- that the defendant waives an arraignment in open court; and
- that the defendant stands mute or pleads not guilty to the offense charged in the information. MCR 6.113(C).

See SCAO Form CC 261, *Waiver of Arraignment and Election to Stand Mute or Enter Not Guilty Plea*.

> **Note:** MCR 6.113(C) may lack practical application to arraignments conducted by the district court under MCR 6.111. MCR 6.111(A), which provides that a district court judge may conduct the circuit court arraignment *immediately* following bindover, additionally permits the district court judge to accept a felony plea. Bindover after a defendant's preliminary examination or waiver presumes that the defendant *is present* in court.

A waiver of the circuit court arraignment is not invalid "[m]erely because the prosecutor had not filed the information . . . before [the defendant] waived the arraignment[]" if "[the] defendant had an opportunity to review the information before it was filed[] . . . and understood the charges against him[or her]." *People v Henry (After Remand)*, 305 Mich App 127, 158-159 (2014) (citing *People v Nix (Paul)*, 301 Mich App 195, 208 (2013), and noting that under these circumstances, "[the] defendant [could not] show prejudice[]" resulting from the court's failure to conduct the circuit court arraignment).

C. Elimination of Circuit Court Arraignment by Local Administrative Order

"A circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information and any notice of intent to seek an enhanced sentence[pursuant to MCL 769.13], as provided in MCR 6.112(F)[82]." MCR 6.113(E). See SCAO Model Local Administrative Order 26—Elimination of Circuit Court Arraignments.

D. Scheduling the Circuit Court Arraignment

"Unless the trial court does the scheduling of the arraignment on the information, the district court must do so in accordance with the administrative orders of the trial court." MCR 6.110(I). MCR 6.110(I) contemplates the prompt scheduling of an arraignment on an information but also recognizes that practices may vary throughout the state depending on local circumstances. Nonetheless, the subrule appears to require that trial courts establish a local practice by administrative order, subject to Supreme Court review. See MCR 8.112(B)(3).

E. Circuit Court Arraignment in District Court

MCL 766.13 provides, in relevant part:

> "If the magistrate determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charing the defendant with committing a felony, the magistrate shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, *or the magistrate may conduct the circuit court arraignment as provided by court rule*." (Emphasis added.)

MCL 600.8311(f) also specifically grants the district court jurisdiction over "[c]ircuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under . . . MCL 766.13[,]" and provides further that "[s]entencing for felony cases and misdemeanor cases not cognizable by the district court shall be conducted by a circuit judge."

MCR 6.113(A) provides that, unless waived or delayed, "or as otherwise permitted by [court rule], *the court with trial jurisdiction* must arraign the defendant on the scheduled date." (Emphasis added.) However, MCR 6.111 provides an exception to this general rule. MCR 6.111(A) provides that "[t]he circuit court arraignment may be conducted by a district judge in criminal cases cognizable in the circuit court immediately after the bindover of the defendant."[83]

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[82] MCR 6.112(F) provides that "[a] notice of intent to seek an enhanced sentence pursuant to MCL 769.13 . . . must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense."

[83] Although MCL 766.4, MCL 766.13, and MCL 600.8311 were amended, effective May 20, 2014, to specifically authorize district court judges to conduct circuit court arraignments, and although MCR 6.111 was amended, effective January 1, 2015, to reflect these changes, MCR 6.113 has not been amended to reflect the statutory changes.

F. Circuit Court Arraignment Procedures

The court must arraign the defendant on the scheduled date, unless the defendant waives arraignment or the court orders a delay for good cause or as otherwise permitted by the court rules. MCR 6.113(A). However, failure to hold the arraignment on the scheduled date constitutes harmless error, unless the defendant demonstrates actual prejudice. *Id.*; see also *People v Nix (Paul)*, 301 Mich App 195, 208 (2013) ("[a] showing of prejudice is required to merit relief for the failure to hold a circuit court arraignment[]"). "The court may hold the arraignment before the preliminary examination transcript has been prepared and filed." MCR 6.113(A).

MCR 6.113 addresses the procedures for conducting the post-bindover arraignment.

- The prosecutor must provide the defendant with a copy of the information[84] before he or she is asked to plead. MCR 6.113(B).

- Unless waived by the defendant, the court must either tell the defendant the substance of the offense charged in the information or require that the information be read to the defendant. *Id.*

- The court is required to advise the defendant of his or her plea options if the defendant has waived legal representation. *Id.*

- Pleas taken in district court under MCR 6.111 after arraignment for an offense not cognizable in district court must conform to the applicable provisions of MCR 6.301, MCR 6.302, MCR 6.303, and MCR 6.304.[85] MCR 6.111(C); see also MCR 6.113(B). A district court judge *must* take a felony plea as provided by court rule if a plea agreement is reached between the parties. MCR 6.111(A).

- Once a plea is taken under MCR 6.111, it is governed by MCR 6.310. MCR 6.111(C).

- A verbatim record of the arraignment must be made. MCR 6.113(B).

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[84] See MCR 6.112 for provisions governing the information.

[85] See Chapter 6 for discussion of pleas.

Committee Tip:

Before taking a defendant's plea or proceeding to trial, it is imperative to confirm, on the record, that the defendant has been given a copy of the information.

G. Felony Plea in District Court[86]

MCL 766.4(3) provides:

> "A district judge has the authority to accept a felony plea. A district judge shall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. Sentencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken."

See also MCR 6.111(A), which provides, in relevant part:

> "A district court judge shall take a felony plea as provided by court rule if a plea agreement is reached between the parties. Following a plea, the case shall be transferred to the circuit court where the circuit judge shall preside over further proceedings, including sentencing. The circuit court judge's name shall be available to the litigants before the plea is taken."

MCR 6.301(D) prohibits a court from accepting a defendant's plea to an offense lesser than the one charged unless the prosecutor consents.[87] See *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 121-122 (1974) (holding that the prosecutor has discretion to charge a greater, rather than a lesser-included, offense); *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683-684 (1972) (holding that the choice of the statute under which to prosecute the accused is an executive function properly exercised by the prosecutor, not the court).

[86] See Chapter 6 for discussion of pleas.

[87] Although the rules set out in subchapter 6.300 of the Michigan Court Rules are not specifically applicable to district court proceedings, see MCR 6.001(B), these rules may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

Chapter 8: Pretrial Release

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8.1 Purpose and Overview of Bail and Bond

The primary purposes of requiring bail or bond are to ensure that the defendant appears in court and to ensure the safety of the public. See MCR 6.106.[1]

At the defendant's first appearance before the court, the magistrate or judge must order that the defendant be held in custody or released pursuant to MCR 6.106. MCR 6.106(A). There are three types of bail for which a bond is required: cash bail (which includes the posting of 10 percent), secured bail, or unsecured bail (personal recognizance). Denial of pretrial release is permitted only under certain circumstances, discussed in detail in Section 8.4. MCR 6.106(B). If the defendant will be released, the court must determine whether or not he or she will be released on his or her own recognizance or whether bail is required and, if required, establish an amount of bail. MCR 6.106(A). Generally, the court *must* order release on personal recognizance or on an unsecured appearance bond. MCR 6.106(C). Release on personal recognizance is discussed in Section 8.3(A). The court must make specific findings in order to impose conditions on release and in order to release a defendant on money bail. MCR 6.106(D)-(E). "If the court determines for reasons it states on the record that the defendant's appearance or the protection of the public cannot be otherwise assured, money bail, with or without conditions described in [MCR 6.106(D)], may be required." MCR 6.106(E). Conditional release, discussed in Section 8.3(B), and release on cash or secured bail (money bail) is discussed in Section 8.3(C).

The decision whether to grant pretrial release is made after considering various factors, some of which are outlined in MCR 6.106(F)(1), discussed in more detail in Section 8.5.

8.2 Right to Pretrial Release

"Except as otherwise provided by law,[2] a person accused of a criminal offense is entitled to bail." MCL 765.6. See also Const 1963, art 1, § 15. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v Salerno*, 481 US 739, 755 (1987). "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." *Stack v Boyle*, 342 US 1, 4 (1951). "[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused." *Id*. at 5.

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[1] MCR 6.106 applies to both misdemeanor and felony cases. MCR 6.001(A)-(B).

[2] Everyone is entitled to pretrial release, except in certain instances discussed in Section 8.4.

"At the defendant's arraignment on the complaint and/or warrant, unless an order in accordance with this rule was issued beforehand, the court must order that, pending trial, the defendant be

> (1) held in custody as provided in [MCR 6.106(B)];
>
> (2) released on personal recognizance or an unsecured appearance bond; or
>
> (3) released conditionally, with or without money bail (ten percent, cash or surety)." MCR 6.106(A).

Detainees. "Nothing in [MCR 6.106] limits the ability of a jail to impose restrictions on detainee contact as an appropriate means of furthering penological goals." MCR 6.106(B)(6).

Juveniles. Except under specified circumstances where bail may be denied, "the magistrate or court must advise the juvenile of a right to bail as provided for an adult accused. The magistrate or the court may order a juvenile released to a parent or guardian on the basis of any lawful conditions, including that bail be posted." MCR 6.909(A)(1).[3]

8.3 Types of Pretrial Release

A. Personal Recognizance

This type of release requires only the defendant's promise, usually in writing, and does not require the defendant to pay any bail money. *Blacks Law Dictionary* (10th ed).

1. Generally

"If the defendant is not ordered held in custody pursuant to [MCR 6.106(B)], the court must order the pretrial release of the defendant on personal recognizance, or on an unsecured appearance bond, subject to the conditions that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released, unless the court determines that such release will not reasonably ensure the appearance of the defendant as required, or that such release will present a danger to the public." MCR 6.106(C).

"Nothing in [MCR 6.106(C)] may be construed to sanction pretrial detention nor to sanction the determination of pretrial

[3] MCR 6.909 applies to juvenile criminal proceedings in district and circuit courts. MCR 6.001(C).

release on the basis of race, religion, gender, economic status, or other impermissible criteria." MCR 6.106(F)(3).

2. Release on Personal Recognizance Required

A defendant must be released on personal recognizance if he or she has been incarcerated for a period of 28 days or more (misdemeanor cases) or 180 days or more (felony cases) "to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, . . . unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community." MCR 6.004(C).[4] The 28-day and 180-day periods do not include:

> "(1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,
>
> (2) the period of delay during which the defendant is not competent to stand trial,
>
> (3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,
>
> (4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either
>
> > (a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or
> >
> > (b) exceptional circumstances justifying the need for more time to prepare the state's case,
>
> (5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and

[4] MCR 6.004 applies to both misdemeanor and felony cases. MCR 6.001(A)-(B).

> (6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion." MCR 6.004(C).

3. Speedy Trial–Misdemeanor and Felony Cases

A defendant must be released on personal recognizance if he or she has been incarcerated for a period of 28 days or more (misdemeanor cases) or 180 days or more (felony cases) "to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, . . . unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community." MCR 6.004(C). The 28-day and 180-day periods do not include:

> "(1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,
>
> (2) the period of delay during which the defendant is not competent to stand trial,
>
> (3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,
>
> (4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either
>
> > (a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or
> >
> > (b) exceptional circumstances justifying the need for more time to prepare the state's case,
>
> (5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and

(6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion." MCR 6.004(C).

B. Conditional Release

"If the court determines that [a release on personal recognizance] will not reasonably ensure the appearance of the defendant as required, or will not reasonably ensure the safety of the public, the court may order the pretrial release of the defendant on the condition or combination of conditions that the court determines are appropriate including

(1) that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released, and

(2) subject to any condition or conditions the court determines are reasonably necessary to ensure the appearance of the defendant as required and the safety of the public, which may include requiring the defendant to

(a) make reports to a court agency as are specified by the court or the agency;

(b) not use alcohol or illicitly use any controlled substance;

(c) participate in a substance abuse testing or monitoring program;

(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;

(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;

(f) surrender driver's license or passport;

(g) comply with a specified curfew;

(h) continue to seek employment;

(i) continue or begin an educational program;

(j) remain in the custody of a responsible member of the community who agrees to monitor the

> defendant and report any violation of any release condition to the court;
>
> (k) not possess a firearm or other dangerous weapon;
>
> (l) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;
>
> (m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order,[5] the most restrictive provision of the orders shall take precedence until the conflict is resolved. The court may make this condition effective immediately on entry of a pretrial release order and while defendant remains in custody if the court determines it is reasonably necessary to maintain the integrity of the judicial proceedings or it is reasonably necessary for the protection of one or more named persons[;]
>
> (n) satisfy any injunctive order made a condition of release; or
>
> (o) comply with any other condition, including the requirement of money bail as described in [MCR 6.106(E)], reasonably necessary to ensure the defendant's appearance as required and the safety of the public." MCR 6.106(D).

"Nothing in [MCR 6.106(D)] may be construed to sanction pretrial detention nor to sanction the determination of pretrial release on the basis of race, religion, gender, economic status, or other impermissible criteria." MCR 6.106(F)(3).

1. Statutory Authority for Conditional Release To Protect Named Persons

"A judge or district court magistrate may release a defendant under this subsection subject to conditions reasonably necessary for the protection of 1 or more named persons. If a judge or

[5] For example, personal protection orders (PPOs), MCR 3.706(A)(1) ("[a]n order granting a personal protection order must include . . . [a] statement that the [PPO] has been entered, listing the type or types of conduct enjoined[]"). See also MCR 3.207(A).

district court magistrate releases a defendant under this subsection subject to protective conditions, the judge or district court magistrate shall make a finding of the need for protective conditions and inform the defendant on the record, either orally or by a writing that is personally delivered to the defendant, of the specific conditions imposed and that if the defendant violates a condition of release, he or she will be subject to arrest without a warrant and may have his or her bail forfeited or revoked and new conditions of release imposed, in addition to the penalty provided under [MCL 771.3f] and any other penalties that may be imposed if the defendant is found in contempt of court." MCL 765.6b(1).

An order releasing a defendant subject to conditions reasonably necessary for the protection of one or more named persons must contain:

- the defendant's full name;
- the defendant's height, weight, race, sex, date of birth, hair color, eye color, and any other identifying information the judge or district court magistrate considers appropriate;
- the date the conditions become effective;
- the date on which the order will expire; and
- a statement of the conditions imposed. MCL 765.6b(2)(a)-(e).

The court must immediately direct, in writing, that an order under MCL 765.6b(1) or MCL 765.6b(3) be entered into LEIN. The court order can be made using SCAO Form MC 240, *Pretrial Release Order*. MCL 765.6b(4). If the order is rescinded, it must be removed from LEIN. *Id.* See also MCL 765.6b(5); SCAO Form MC 239, *Removal of Entry From LEIN*.

"If a defendant who is charged with a crime involving domestic violence, or any other assaultive crime, is released under [MCL 765.6b(6) and MCL 765.6b(1)], the judge or district court magistrate may order the defendant to wear an electronic monitoring device as a condition of release." MCL 765.6b(6). "In determining whether to order a defendant to wear an electronic monitoring device, the court shall consider the likelihood that the defendant's participation in electronic monitoring will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the victim prior to trial." *Id.* "A defendant described in [MCL 765.6b(6)] shall only be released if he or she agrees to pay the cost of the device

and any monitoring as a condition of release or to perform community service work in lieu of paying that cost." *Id*. "[I]f the court orders the defendant to carry or wear an electronic monitoring device as a condition of release as described in [MCL 765.6b(6)], the court shall also impose a condition that the defendant not purchase or possess a firearm." MCL 765.6b(3).

2. Conditional Release Where Defendant Submitted to Preliminary Roadside Analysis

"A judge or district court magistrate may release under this subsection a defendant subject to conditions reasonably necessary for the protection of the public if the defendant has submitted to a preliminary roadside analysis that detects the presence of alcoholic liquor, a controlled substance, or other intoxicating substance, or any combination of them, and that a subsequent chemical test is pending. The judge or district court magistrate shall inform the defendant on the record, either orally or by a writing that is personally delivered to the defendant, of all of the following:

> (a) That if the defendant is released under this subsection, he or she shall not operate a motor vehicle under the influence of alcoholic liquor, a controlled substance, or another intoxicating substance, or any combination of them, as a condition of release.
>
> (b) That if the defendant violates the condition of release under subdivision (a), he or she will be subject to arrest without a warrant, shall have his or her bail forfeited or revoked, and shall not be released from custody prior to arraignment." MCL 765.6b(7).

The court must immediately direct, in writing, that an order under MCL 765.6b(7) be entered into LEIN. MCL 765.6b(8). The court order can be made using SCAO Form MC 240, *Pretrial Release Order*. If the order is rescinded, it must be removed from LEIN. *Id*. See also MCL 765.6b(9); SCAO Form MC 239, *Removal of Entry From LEIN*.

3. Violation of a Bond Condition

Violation of a bond condition is punishable by criminal contempt because "a court's decision in setting bond is a court order." *People v Mysliwiec*, 315 Mich App 414, 417 (2016)

(noting that "[s]pecifically, a bail decision is an interlocutory order," and rejecting the defendant's contention "that a defendant may not be held in contempt of court for the violation of bond conditions because they are not court orders") (citation omitted). A "bond condition prohibiting the defendant's use of alcohol was a court order punishable by contempt" under MCL 600.1701(g) where the trial court orally ordered that a condition of the defendant's bond was to abstain from possession or consumption of any alcohol and "then issued written mittimuses, which required [the] defendant have no alcohol." *Mysliwiec*, 315 Mich App at 418.[6] See the Michigan Judicial Institute's *Contempt of Court Benchbook* for additional information on criminal contempt.

C. Money Bail

"If the court determines for reasons it states on the record that the defendant's appearance or the protection of the public cannot be otherwise assured, money bail, with or without conditions described in [MCR 6.106(D)], may be required." MCR 6.106(E). See also MCL 765.6(1) (setting forth factors for consideration when fixing bail).

1. Required Considerations for Fixing the Amount of Bail

When setting money bail, the court should recognize the constitutional mandate that "excessive bail shall not be required . . . ." Const 1963, art 1, § 16. See also MCL 765.6(1). "Money bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his [or her] presence is required." *People v Edmond*, 81 Mich App 743, 747-748 (1978).

"The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:

(a) The seriousness of the offense charged.

(b) The protection of the public.

(c) The previous criminal record and the dangerousness of the person accused.

[6] For discussion of contempt of court, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

(d) The probability or improbability of the person accused appearing at the trial of the cause." MCL 765.6(1).

"If the court fixes a bail amount under [MCL 765.6(1)] and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under [MCL 765.6(1)] and executed by a surety approved by the court." MCL 765.6(2). See also MCR 6.106(E)(1). See Section 8.4(C)(2) for more information on the defendant's bail options.

For example, "if the full bail amount were set at $10,000 with a 10% deposit or a $2,500 surety bond, a defendant could post bail either by paying $1,000 to the court . . . or by paying only $250 to a bond provider, who then would post a $2,500 bond with the court." SB 151 (S-1) Bill Analysis, 5/21/04.

2. Defendant's Options for Posting Money Bail

Subject to limitations specified in certain statutes,[7] MCR 6.106(E)(1) provides that the court may require the defendant to:

"(a) post, at the defendant's option,

(*i*) a surety bond[8] that is executed by a surety approved by the court in an amount equal to 1/4 of the full bail amount, or

(*ii*) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by

[A] a cash deposit, or its equivalent, for the full bail amount, or

[B] a cash deposit of 10 percent of the full bail amount, or, with the court's consent,

[C] designated real property; or

(b) post, at the defendant's option:

[7] See Section 8.3(C)(3) for more information on these limitations.

[8] For information about the surety bond process, see SCAO Administrative Memorandum 2017-01, *Surety Bond Process*.

> (*i*) a surety bond[9] that is executed by a surety approved by the court in an amount equal to the full bail amount, or
>
> (*ii*) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by
>
> > [A] a cash deposit, or its equivalent, for the full bail amount, or, with the court's consent,
> >
> > [B] designated real property." See also MCL 765.6(2).

If the court allows the defendant to post a bond secured by real property, it "may require satisfactory proof of value and interest in [the] property[.]" MCR 6.106(E)(2).

"Nothing in [MCR 6.106(E)] may be construed to sanction pretrial detention nor to sanction the determination of pretrial release on the basis of race, religion, gender, economic status, or other impermissible criteria." MCR 6.106(F)(3).

3. Limitations on Defendant's Bail Options

In certain instances, a defendant may not exercise the options set out in MCR 6.106(E)(1)(a)-(b). For example, a person arrested pursuant to a bench warrant issued under MCL 552.631 for failure to pay child support, or pursuant to a felony warrant for failure to pay spousal or child support under MCL 750.165, must deposit a cash bond of not less than $500 or 25 percent of the arrearage, whichever is greater; in its discretion, the trial court may set the cash bond in an amount up to 100 percent of the arrearage, plus costs. MCL 552.631(3); MCL 750.165(3); see also MCL 552.632.

Additionally, MCL 765.6a requires the posting of "a cash bond or a surety other than the [bail] applicant if the applicant (1) [i]s charged with a crime alleged to have occurred while on bail pursuant to a bond personally executed by him [or her]; or (2) [h]as been twice convicted of a felony within the preceding [five] years."

[9]For information about the surety bond process, see SCAO Administrative Memorandum 2017-01, *Surety Bond Process*.

D. Interim Bond

Interim bond occurs *before* arraignment. "Where permitted by law, the court may specify on the warrant the bail that an accused may post to obtain release before arraignment on the warrant[.]" MCR 6.102(F). Interim bond may be set for a person arrested for a misdemeanor or ordinance violation, with or without a warrant. See MCL 780.581; MCL 780.582; MCR 6.102(F). There is no statutory provision that provides for interim bond on felony violations as there is for misdemeanor and ordinance violations. However, MCR 6.102(F) is applicable to felony. See MCR 6.001(A)-(B). In addition, that provision "sets forth a . . . procedure . . . [that] authorizes in felony cases the specification on the warrant of interim bail similar to the procedure . . . authorized by statute in misdemeanor cases. See MCL 780.582 and MCL 780.585." 1989 Staff Comment to MCR 6.102 (note, however, that staff comments are not authoritative constructions by the Michigan Supreme Court).

In some instances, interim bond may be set by law enforcement, see MCL 780.581, while in other instances, the court must set interim bond, see MCL 780.582a. These procedures and requirements are discussed in detail in the following sub-subsections. With the exception of domestic violence cases, protective conditions may not be imposed on an interim bond. MCL 780.582a. Protective conditions may only be imposed by a judge or magistrate. I*d*. The imposition of protective conditions in domestic violence cases is discussed in Section 8.3(D)(4). If the court wants to impose conditions on a defendant in a non-domestic violence case, the court must arraign the defendant first and then it may consider the factors outlined in MCR 6.106.[10]

1. Weekend Arraignment and Interim Bond

For a discussion of weekend arraignment and interim bond, see the State Court Administrative Office Memorandum, *Weekend Arraignment and Interim Bond*, May 7, 2015.

2. Warrantless Arrest

Generally, a person arrested without a warrant for committing a misdemeanor or city, village, or township ordinance

[10] On May 22, 2017, the Department of Licensing and Regulatory Affairs approved proposed standards submitted pursuant to the Michigan Indigent Defense Commission Act (MIDCA) by the Michigan Indigent Defense Commission, including that "[w]here there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment." MIDC Standard 4(A). See Chapter 4 for discussion of the MIDCA.

violation that is punishable by no more than one year imprisonment, or by a fine, or both must be taken "without unnecessary delay" before the most convenient magistrate in the county where the offense was committed to answer the complaint made against him or her. MCL 780.581(1). "[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of [a warrantless] arrest will, as a general matter, [be found to] comply with the promptness requirement" of the federal constitution's Fourth Amendment. *Riverside Co v McLaughlin*, 500 US 44, 56 (1991). However, a probable cause determination is not automatically proper simply because it is made within 48 hours. *Id.* at 56. A delay of less than 48 hours may still be unconstitutional if it is an unreasonable delay. *Id*.

Police authorities may only hold an arrestee for more than 48 hours before arraignment if they can "'demonstrate the existence of a bona fide emergency or other extraordinary circumstance'" that would justify the delay. *People v Whitehead*, 238 Mich App 1, 2 (1999), quoting *Riverside*, 500 US at 57. See also *People v Cain (Cain I)*, 299 Mich App 27, 49-50 (2012), vacated in part on other grounds 495 Mich 874 (2013)[11] (the defendant was not deprived of due process despite not being arraigned until three days after his arrest where "no evidence was obtained as a direct result of the 'undue delay,' which would have begun . . . 48 hours after [the] defendant's arrest[;]" because the evidence against the defendant, including his statement to police and his identification from a photo lineup, was obtained within 48 hours after his arrest, "there was no evidence to suppress").

If a magistrate is not available or an immediate trial may not be had, the arrestee may deposit an interim bond with the arresting officer, his or her direct supervisor, the sheriff, or a deputy in charge of the county jail (if the arrestee is lodged in the county jail) to guarantee the arrestee's appearance at arraignment. MCL 780.581(2). "The bond shall be a sum of money, as determined by the officer who accepts the bond, not to exceed the amount of the maximum possible fine but not less than 20% of the amount of the minimum possible fine that may be imposed for the offense for which the person was arrested." *Id*. See also *People v Hardiman*, 151 Mich App 115, 118 (1986).

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

However, MCL 780.582a sets out two circumstances in which an arrestee must not be released on interim bond. Relevant to this particular discussion,[12] MCL 780.582a(1) prohibits law enforcement from accepting an interim bond where the defendant was arrested without a warrant under MCL 764.15a (arrest for assault of an individual having a child in common, household resident, dating relationship, or spouse/former spouse) or a substantially corresponding local ordinance. MCL 780.582a(1)(a). When a person is arrested without a warrant under MCL 764.15a, the person must be held until he or she can be arraigned or have interim bond set by a judge or district court magistrate. MCL 780.582a(1)(1). See Section 8.3(D)(4) for a detailed discussion of the requirements under MCL 780.582a.

3. Arrest With Warrant

a. Generally

"Where permitted by law, the court may specify on the warrant the bail that an accused may post to obtain release before arraignment on the warrant and, if the court deems it appropriate, include as a bail condition that the arrest of the accused occur on or before a specified date or within a specified period of time after issuance of the warrant." MCR 6.102(F) (applicable to felony cases, MCR 6.001(A)-(B)). See also MCL 765.1; MCL 765.3.

MCR 6.102(F) "authorizes in felony cases the specification on the warrant of interim bail similar to the procedure currently authorized by statute in misdemeanor cases. See MCL 780.582 and MCL 780.585." 1989 Staff Comment to MCR 6.102. MCR 6.102(F) "further authorizes the court, in its discretion, to include an expiration date for the interim bail provision. This option permits the court to set a cut-off date, beyond which release may not be obtained, to prevent the release of a person who may be avoiding arrest. However, setting of an expiration date may also defeat the purpose of the interim bail provision if it is too short or is used in a case where the arrest of the defendant is sought solely in a passive fashion such as awaiting the defendant's stop for a traffic offense." 1989 Staff Comment to MCR 6.102.

[12]The other circumstance under which an arrestee cannot be released on interim bond as provided under MCL 780.581 or MCL 780.583a concerns persons arrested with a warrant, discussed in Section 8.3(D)(3).

"The amount of bail shall not be excessive." MCL 765.6(1). When fixing the amount of bail, the court "shall consider and make findings on the record as to each of the following:

> (a) The seriousness of the offense charged.
>
> (b) The protection of the public.
>
> (c) The previous criminal record and the dangerousness of the person accused.
>
> (d) The probability or improbability of the person accused appearing at the trial of the cause." MCL 765.6.

b. Misdemeanors and Local Ordinance Violations

"Except as otherwise provided in [MCL 780.582a], if a person is arrested with a warrant for a misdemeanor or a violation of a city, village, or township ordinance, and the misdemeanor or violation is punishable by imprisonment for not more than 1 year or by a fine, or both, the provisions of [MCL 780.581][13] shall apply, except that the interim bond shall be directed to the magistrate who has signed the warrant, or to any judge authorized to act in his or her stead." MCL 780.582. Under MCL 780.582a and relevant to this particular discussion, law enforcement is prohibited from accepting an interim bond where the defendant was arrested with a warrant for violating MCL 750.81 or MCL 750.81a (arrest for assault/battery or assault causing serious/aggravated injury) or a substantially corresponding local ordinance. MCL 780.582a(1)(b).

"In cases arising under [MCL 780.582], the magistrate issuing the warrant may endorse on the back thereof a greater or lesser amount for an interim bond." MCL 780.585.

For misdemeanors and local ordinance violations, "[t]he amount of bail shall be:

> (a) Sufficient to assure compliance with the conditions set forth in the bail bond.

[13] MCL 780.581 concerns taking a person arrested without a warrant for a misdemeanor or violation of an ordinance before a magistrate, interim bond, and holding certain arrested persons in a holding cell, holding center, lockup, or county jail.

> (b) Not oppressive.
>
> (c) Commensurate with the nature of the offense charged.
>
> (d) Considerate of the past criminal acts and conduct of the defendant.
>
> (e) Considerate of the financial ability of the accused.
>
> (f) Uniform whether the bail bond be executed by the person for whom bail has been set or by a surety." MCL 780.64(1).

"If a person is charged with an offense punishable by a fine only, the amount of the bail shall not exceed double the amount of the maximum penalty." MCL 780.64(2).

"If a person has been convicted of an offense and only a fine has been imposed, the amount of the bail shall not exceed double the amount of the fine." MCL 780.64(3).

"If a person is arrested for an ordinance violation or a misdemeanor punishable by imprisonment for not more than 1 year or a fine, or both, and if the defendant's operator's or chauffeur's license is not expired, suspended, revoked, or canceled, then the court may require the defendant, in place of other security for the defendant's appearance in court for trial or sentencing or, in addition, to release of the defendant on personal recognizance, to surrender to the court his or her operator's or chauffeur's license." MCL 780.64(4).

c. Release on Interim Cash Bail Provision Included in Warrant

"If an accused has been arrested pursuant to a warrant that includes an interim bail provision, the accused must either be arraigned promptly or released pursuant to the interim bail provision." MCR 6.102(H) (applicable to felony cases, MCR 6.001(A)-(B)).

"The accused may obtain release by posting the bail on the warrant and by submitting a recognizance to appear before a specified court at a specified date and time, provided that

> (1) the accused is arrested prior to the expiration date, if any, of the bail provision;

> (2) the accused is arrested in the county in which the warrant was issued, or in which the accused resides or is employed, and the accused is not wanted on another charge;[14]
>
> (3) the accused is not under the influence of liquor or controlled substance;[15] and
>
> (4) the condition of the accused or the circumstances at the time of arrest do not otherwise suggest a need for judicial review of the original specification of bail.[16] MCR 6.102(H).

"Implicit in [MCR 6.102(H)] is the condition that the accused be satisfactorily identified as the person named in the warrant. Additionally, the rule does not preclude the police agency from requiring the accused to submit to photographing and fingerprinting[17] before being released." 1989 Staff Comment to MCR 6.102.

However, MCL 780.582a sets out two circumstances in which an arrestee must not immediately be released on interim bond. Relevant to this particular discussion,[18] MCL 780.582a(1) prohibits law enforcement from accepting an interim bond where the defendant was arrested with a warrant for a violation of MCL 750.81 (assault and battery) or MCL 750.81a (assault without a weapon inflicting serious or aggravated injury) or a substantially corresponding local ordinance "and the person is a spouse or former spouse of the victim of the violation, has or has had a dating relationship with the victim of the violation, has had a child in common with the victim of the violation, or is a person who resides or has resided in the same household as the victim of the violation." MCL 780.582a(1)(b). When a person is arrested with a warrant under the conditions set out in MCL

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[14] "The purpose of this limitation is to preclude the availability of interim bail to a person who may be avoiding arrest." 1989 Staff Comment to MCR 6.102.

[15] MCR 6.102(H)(3) "does not preclude interim bail release of an accused who was under the influence of liquor at the time of arrest but who is no longer in that condition." 1989 Staff Comment to MCR 6.102.

[16] MCR 6.102(H)(4) "is a catch-all provision and should be applied in good faith." 1989 Staff Comment to MCR 6.102.

[17] See MCL 28.243 and Section 3.13 for information on the collection of biometric data, which includes fingerprints.

[18] The other circumstance under which an arrestee cannot be released on interim bond as provided under MCL 780.581 or MCL 780.583a concerns persons arrested without a warrant, discussed in Section 8.3(D)(2).

780.582a(1)(b), the person must be held until he or she can be arraigned or have interim bond set by a judge or district court magistrate. MCL 780.582a(1). See Section 8.4(D)(4) for a detailed discussion of the requirements under MCL 780.582a.

4. Imposing Protective Conditions Before Release on Interim Bond in Domestic Violence Cases

Certain individuals are not eligible to be released on interim bond by law enforcement, and instead, must "be held until [they] can be arraigned or have interim bond set by a judge or district court magistrate if either of the following applies: "(a) [t]he person is arrested without a warrant under . . . MCL 764.15a, or a local ordinance substantially corresponding to that section[,]" or "(b) [t]he person is arrested with a warrant for a violation of . . . MCL 750.81 [or MCL] 750.81a, or a local ordinance substantially corresponding to [MCL 750.81] and the person is a spouse or former spouse of the victim of the violation, has or has had a dating relationship with the victim of the violation, or is a person who resides or has resided in the same household as the victim of the violation." MCL 780.582a(1). See also MCL 780.581(1); MCL 780.582.

Note that the protective conditions permitted by MCL 780.582a are limited to cases involving domestic violence, and the only protective condition that may be imposed is that "the person released shall not have or attempt to have contact of any kind with the victim." MCL 780.582(2). See also State Court Administrative Office Memorandum, *Changes to MCR 6.106 - Pretrial Release*, November 13, 2015.

"If a judge or district court magistrate sets interim bond under [MCL 780.582a], the judge or magistrate shall consider and may impose the condition that the person released shall not have or attempt to have contact of any kind with the victim." MCL 780.582a(2). "[MCL 780.582a] does not limit the authority of judges or district court magistrates to impose protective or other release conditions under other applicable statutes or court rules." MCL 780.582a(7).

"If a judge or district court magistrate releases under [MCL 780.582a] a person subject to protective conditions, the judge or district court magistrate shall inform the person on the record, either orally or by a writing that is personally delivered to the person, of the specific conditions imposed and that if the person violates a condition of release, he or she will be subject to arrest without a warrant and may have his or her bond

forfeited or revoked and new conditions of release imposed, in addition to any other penalties that may be imposed if he or she is found in contempt of court." MCL 780.582a(3).

"An order or amended order issued under [MCL 780.582a(3)] shall contain all of the following:

> (a) A statement of the person's full name.
>
> (b) A statement of the person's height, weight, race, sex, date of birth, hair color, eye color, and any other identifying information the judge or district court magistrate considers appropriate.
>
> (c) A statement of the date the conditions become effective.
>
> (d) A statement of the date on which the order will expire.
>
> (e) A statement of the conditions imposed, including, but not limited to, the condition prescribed in [MCL 780.582a(3)]." MCL 780.582a(4).

"The judge or district court magistrate shall immediately direct a law enforcement agency within the jurisdiction of the court, in writing, to enter an order or amended order issued under [MCL 780.582a(3)] into the law enforcement information network [(LEIN)] as provided by . . . MCL 28.211 to [MCL 28.215]." MCL 780.582a(5). "If the order or amended order is rescinded, the judge or district court magistrate shall immediately order the law enforcement agency to remove the order or amended order from the [LEIN]." *Id*. See also SCAO Form MC 239, *Removal of Entry From LEIN*.

If a person granted conditional release on bail under MCL 780.582a is subsequently arrested without a warrant for violating the conditions imposed, the arresting police agency or the officer in charge of the jail may release the person on interim bond if, in the opinion of the agency or officer, it is safe to do so. MCL 764.15e(3). The bond may not be more than $500 and must request the person to appear at the opening of court the next business day. *Id*. If the person is held for more than 24 hours before being brought before the court, "the officer in charge of the jail shall note in the jail records why it was not safe to release the defendant on interim bond[.]" *Id*.

"[I]f an arrestee is released on bail, development of DNA identification revealing the defendant's unknown violent past

> can and should lead to the revocation of his conditional release. . . . It is reasonable in all respects for the State to use an accepted [DNA] database to determine if an arrestee is the object of suspicion in other serious crimes, suspicion that may provide a strong incentive for the arrestee to escape and flee." *Maryland v King*, 569 US 435, 439, 455 (2013) (holding that the collection and analysis of an arrestee's DNA according to Combined DNA Index System (CODIS)[19] procedures "[a]s part of a routine booking procedure for serious offenses" did not violate the Fourth Amendment where the DNA sample was used to identify the arrestee as the perpetrator of an earlier unsolved rape).

8.4 Denial of Pretrial Release

A. Generally

"With certain exceptions, a criminal defendant in Michigan is entitled as a matter of constitutional right to have reasonable bail established for pretrial release." *People v Davis*, 337 Mich App 67, 74 (2021), citing Const 1963, art 1, § 15. See also MCL 765.5; MCR 6.106(B). This subsection addresses those exceptions.

Although often cited together, MCL 765.5 conflicts with Const 1963, art 1, § 15 and MCR 6.106 insofar as the statute "*prohibits* the trial court from granting pretrial release to [certain] defendant[s] if the proof of the defendant's guilt is evident or the presumption of guilt is great," while the constitutional provision and court rule "*permit*[] the trial court to deny pretrial release to [those] defendant[s] if proof of the defendant's guilt is evident or the presumption of guilt is great, but does not mandate denial of bail." *Davis*, 337 Mich App at 81, 84-85 (addressing the conflict with respect to defendants charged with murder and finding that although the court rule does not "explicitly state the grounds for denial of pretrial release to a defendant charged with murder," it references and closely echoes the constitutional provision, which is "paramount to other laws in this state and is the law to which other laws must conform"). Accordingly, under the court rule and constitutional provision, bail may be denied to a defendant when one of the following circumstances applies and when proof of the defendant's guilt is evident or the presumption of guilt is great:

> (1) the defendant is charged with committing a violent felony, and during the 15 years preceding the

[19] For more information on CODIS, see https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet.

> commission of the violent felony, the defendant had been convicted of two or more violent felonies under the laws of Michigan or substantially similar laws of the United States or another state arising out of separate incidents. Const 1963, art 1, § 15(a); MCR 6.106(B)(1)(a)(*ii*)(B).
>
> (2) the defendant is charged with murder or treason. Const 1963, art 1, § 15(b); MCR 6.106(B)(1)(a)(*i*).
>
> (3) the defendant is charged with CSC-I, armed robbery, or kidnapping with intent to extort money or another valuable thing, "unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person." Const 1963, art 1, § 15(c); MCR 6.106(B)(1)(b).
>
> (4) the defendant is charged with committing a violent felony, and at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony. Const 1963, art 1, § 15(d); MCR 6.106(B)(1)(a)(*ii*)(A).

In *Davis*, the Court found that Const 1963, art 1, § 15 "does not prevent a trial court from granting bail to a defendant charged with murder, nor does the constitutional provision impose upon the trial court the duty to determine whether the proof is evident or the presumption of guilt great before *granting* bail to a person charged with murder or treason." *Davis*, 337 Mich App at 77. However, "failure to determine whether the proof is evident or the presumption is great before *denying* bail therefore would be an abuse of the trial court's discretion."[20] *Id* (emphasis added).

"Nothing in [MCR 6.106] limits the ability of a jail to impose restrictions on detainee contact as an appropriate means of furthering penological goals." MCR 6.106(B)(6).

"DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness[,]" and will thus "inform a court's determination whether the individual should be released on bail." *Maryland v King*, 569 US 435, 439, 453 (2013) (holding that the collection and analysis of an arrestee's DNA according to Combined DNA Index System (CODIS)[21] procedures

[20] The Court did not address whether the holding in this case may apply to the other offenses listed in the constitutional provision and court rule.

[21] For more information on CODIS, see https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet.

"[a]s part of a routine booking procedure for serious offenses" did not violate the Fourth Amendment where the DNA sample was used to identify the arrestee as the perpetrator of an earlier unsolved rape).

The rules of evidence do not apply to proceedings with respect to release on bail or otherwise. MRE 1101(b)(3).

B. Custody Order

"If the court determines as provided in [MCR 6.106(B)(1)] that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense, within which trial must begin or the court must immediately schedule a hearing and set the amount of bail." MCR 6.106(B)(3). See also Const 1963, art 1, § 15.

The court must state the reasons for an order of custody on the record and on SCAO Form MC 240b, *Custody Order*. MCR 6.106(B)(4). The completed form must be placed in the court file. *Id*.

"The court may, in its custody order, place conditions on the defendant, including but not limited to restricting or prohibiting defendant's contact with any other named person or persons, if the court determines the conditions are reasonably necessary to maintain the integrity of the judicial proceedings or are reasonably necessary for the protection of one or more named persons." MCR 6.106(B)(5). "If an order under [MCR 6.106(B)(5)] is in conflict with another court order, the most restrictive provisions of the orders shall take precedence until the conflict is resolved." MCR 6.106(B)(5).[22]

C. Custody Hearing

"A court having jurisdiction of a defendant may conduct a custody hearing if the defendant is being held in custody pursuant to [MCR 6.106(B)] and a custody hearing is requested by either the defendant or the prosecutor." MCR 6.106(G)(1). "The purpose of the hearing is to permit the parties to litigate all of the issues relevant to challenging or supporting a custody decision pursuant to [MCR 6.106(B)]." MCR 6.106(G)(1).

"At the custody hearing, the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor

[22]See also State Court Administrative Memorandum, *Changes to MCR 6.106 - Pretrial Release*, November 13, 2015.

are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses." MCR 6.106(G)(2)(a).

"The rules of evidence, except those pertaining to privilege, are not applicable." MCR 6.106(G)(2)(b). "Unless the court makes the findings required to enter an order under [MCR 6.106(B)(1)], the defendant must be ordered released under [MCR 6.106(C) or MCR 6.106(D)]." MCR 6.106(G)(2)(b). "A verbatim record of the hearing must be made." *Id*.

D. Juveniles

"If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or the court may deny bail:

> (a) to a juvenile charged with first-degree murder, second-degree murder, or
>
> (b) to a juvenile charged with first-degree criminal sexual conduct, or armed robbery,
>
> > (*i*) who is likely to flee, or
> >
> > (*ii*) who clearly presents a danger to others." MCR 6.909(A)(2).[23]

"The juvenile in custody or detention must be maintained separately from the adult prisoners or adult accused as required by MCL 764.27a." MCR 6.909(B)(4).

1. Confinement in a Juvenile Facility

"Except as provided in [MCR 6.909(B)(2)] and in MCR 6.907(B), a juvenile charged with a crime and not released must be placed in a juvenile facility while awaiting trial and, if necessary, sentencing, rather than being placed in a jail or similar facility designed and used to incarcerate adult prisoners." MCR 6.909(B)(1).

2. Confinement in a Jail

"On motion of a prosecuting attorney or a superintendent of a juvenile facility in which the juvenile is detained, the magistrate or court may order the juvenile confined in a jail or similar

[23] MCR 6.909 applies to juvenile criminal proceedings in district and circuit courts. MCR 6.001(C).

facility designed and used to incarcerate adult prisoners upon a showing that

> (a) the juvenile's habits or conduct are considered a menace to other juveniles; or
>
> (b) the juvenile may not otherwise be safely detained in a juvenile facility." MCR 6.909(B)(2).

3. Confinement in a Family Division Operated Facility

"The juvenile shall not be placed in an institution operated by the family division of the circuit court except with the consent of the family division or on order of a court as defined in MCR 6.903(C)." MCR 6.909(B)(3).

4. Speedy Trial

"Within 7 days of the filing of a motion, the court shall release a juvenile who has remained in detention while awaiting trial for more than 91 days to answer for the specified juvenile violation unless the trial has commenced. In computing the 91-day period, the court is to exclude delays as provided in MCR 6.004(C)(1)-(6) and the time required to conduct the hearing on the motion." MCR 6.909(C).

8.5 Rationale for Decision Regarding Type of Pretrial Release and Conditions

MCR 6.106(F) addresses factors the court must consider when determining which pretrial release option to use and what terms and conditions to impose.

"In deciding which release to use and what terms and conditions to impose, the court is to consider relevant information, including

> (a) defendant's prior criminal record, including juvenile offenses;
>
> (b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
>
> (c) defendant's history of substance abuse or addiction;
>
> (d) defendant's mental condition, including character and reputation for dangerousness;

> (e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;
>
> (f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
>
> (g) the availability of responsible members of the community who would vouch for or monitor the defendant;
>
> (h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence[;] and
>
> (i) any other facts bearing on the risk of nonappearance or danger to the public." MCR 6.106(F)(1).

"DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness[,]" and will thus "inform a court's determination whether the individual should be released on bail." *Maryland v King*, 569 US 435, 439, 453 (2013) (holding that the collection and analysis of an arrestee's DNA according to Combined DNA Index System (CODIS)[24] procedures "[a]s part of a routine booking procedure for serious offenses" did not violate the Fourth Amendment where the DNA sample was used to identify the arrestee as the perpetrator of an earlier unsolved rape).

"If the court orders the defendant held in custody pursuant to [MCR 6.106(B)] or released on conditions in [MCR 6.106(D)] that include money bail, the court must state the reasons for its decision on the record." MCR 6.106(F)(2). "The court need not make a finding on each of the enumerated factors." *Id*.

"Nothing in [MCR 6.106(F)] may be construed to sanction pretrial detention nor to sanction the determination of pretrial release on the basis of race, religion, gender, economic status, or other impermissible criteria." MCR 6.106(F)(3).

The rules of evidence do not apply to proceedings with respect to release on bail or otherwise. MRE 1101(b)(3).

[24] For more information on CODIS, see https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet.

8.6 Review of Release Decision

A. Appeals

"A party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision." MCR 6.106(H)(1). "There is no fee for filing the motion." *Id*.

"The reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion." MCR 6.106(H)(1).

Upon a finding of an abuse of discretion by the lower court in fixing bail, the trial court may only modify the bail provisions (including the amount of the money bail) after having considered the factors mandated by the court rule governing bail (MCR 6.106(F)(1)(a)-(i)). See *People* v *Weatherford*, 132 Mich App 165, 170 (1984).

B. Modification of Release Decision

1. Before Arraignment on the Information

"Prior to the defendant's arraignment on the information, any court before which proceedings against the defendant are pending may, on the motion of a party or its own initiative and on finding that there is a substantial reason for doing so, modify a prior release decision or reopen a prior custody hearing." MCR 6.106(H)(2)(a).

2. At or Following Arraignment on the Information

"At the defendant's arraignment on the information and afterwards, the court having jurisdiction of the defendant may, on the motion of a party or its own initiative, make a de novo determination and modify a prior release decision or reopen a prior custody hearing." MCR 6.106(H)(2)(b).

3. Burden of Going Forward

"The party seeking modification of a release decision has the burden of going forward." MCR 6.106(H)(2)(c).

The rules of evidence do not apply to proceedings with respect to release on bail or otherwise. MRE 1101(b)(3).

"In reviewing a bail decision, more than perfunctory compliance [with the applicable court rule] is required . . . .

Defendants also must be allowed to present any additional material evidence, which could have originally been considered in the setting of bail, if the evidence was not available when bail was originally set." *People* v *Spicer*, 402 Mich 406, 410-411 (1978).

4. Court Forms

If the release order is modified, SCAO Form MC 240, *Pretrial Release Order*, should be competed.

C. Emergency Release

"If a defendant being held in pretrial custody under [MCR 6.106] is ordered released from custody as a result of a court order or law requiring the release of prisoners to relieve jail conditions, the court ordering the defendant's release may, if appropriate, impose conditions of release in accordance with [MCR 6.106] to ensure the appearance of the defendant as required and to protect the public." MCR 6.106(H)(3). "If such conditions of release are imposed, the court must inform the defendant of the conditions on the record or by furnishing to the defendant or the defendant's lawyer a copy of the release order setting forth the conditions." *Id*. Note that bond conditions are addressed on SCAO Form MC 240, *Pretrial Release Order*, which the defendant should sign.

8.7 Bond Forfeiture

See SCAO's table detailing disbursement procedures under different circumstances. See also SCAO Administrative Memorandum 2017-01, *Surety Bond Process*, for additional discussion. Note that a district court magistrate does not have the authority to sign an order revoking release and forfeiting bond. See MCL 600.8511 (detailing a district court magistrate's authority without granting authority to revoke release or forfeit bond).

A. Default, Arrest of Accused, and Release of Surety

Upon a finding that a defendant has failed to comply with conditions of release, the court may issue a warrant.[25] MCR 6.106(I)(2). See SCAO Form MC 229, *Motion*, *Affidavit*, *and Bench Warrant*. See also SCAO Administrative Memorandum 2017-01, *Surety Bond Process*. Upon issuing the bench warrant, the court

[25] Additionally, violation of a bond condition is punishable by criminal contempt. *People v Mysliwiec*, 315 Mich App 414, 418 (2016). See Section 8.3(B).

should set a show cause date, prepare SCAO Form MC 218, *Order Revoking Release and Forfeiting Bond*, *Notice of Intent to Enter Judgment*, and sign and mail the form to the defendant, the surety agent, anyone who posted bond, and the prosecutor. SCAO Administrative Memorandum 2017-01, *Surety Bond Process*. However, MCL 600.8511 does not confer to a district court magistrate the authority to sign SCAO Form MC 218, *Order Revoking Release and Forfeiting Bond*, *Notice of Intent to Enter Judgment*. See SCAO Administrative Memorandum 2017-01, *Surety Bond Process*. If the defendant has failed to appear, the court must notify the surety "within 7 days after the date of the [defendant's] failure to appear[.]" MCL 765.28(1). The court should complete SCAO Form MC 218a. If judgment is entered, the court should prepare, sign, and mail SCAO Form MC 238, *Judgment After Bond Forfeiture*.

"If the defendant has failed to comply with the conditions of release, the court may, pursuant to MCR 6.103, issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.

> (a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bail or bond has been ordered, to anyone who posted bail or bond.
>
> (b) If the defendant does not appear and surrender to the court within 28 days after the revocation date, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant and anyone who posted bail or bond for an amount not to exceed the full amount of the bail, and costs of the court proceedings, or if a surety bond was posted, an amount not to exceed the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. If the defendant does not within that period satisfy the court that there was compliance with the conditions of release other than appearance or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant alone for an amount not to exceed the full amount of the bond, and costs of the court proceedings.
>
> (c) The 10 percent bail deposit made under [MCR 6.106(E)(1)(a)(*ii*)(B)] must be applied to the costs and, if

> any remains, to the balance of the judgment. The amount applied to the judgment must be transferred to the county treasury for a circuit court case, to the treasuries of the governments contributing to the district control unit for a district court case, or to the treasury of the appropriate municipal government for a municipal court case. The balance of the judgment may be enforced and collected as a judgment entered in a civil case." MCR 6.106(I)(2).

"Notwithstanding any provision of law to the contrary and except in cases where the complaint is for an assaultive crime or an offense involving domestic violence, in the event that a defendant fails to appear for a court hearing and it is the defendant's first failure to appear in the case, there is a rebuttable presumption that the court must wait 48 hours before issuing a bench warrant to allow the defendant to voluntarily appear. If the defendant does not appear within 48 hours, the court shall issue a bench warrant unless the court believes there is good reason to instead schedule the case for further hearing." MCL 764.3(1). "The court may overcome the presumption under [MCL 764.3(1)] and issue an immediate bench warrant for the defendant's failure to appear if the court has a specific articulable reason to suspect that any of the following apply:

> (a) The defendant has committed a new crime.
>
> (b) A person or property will be endangered if a bench warrant is not issued.
>
> (c) Prosecution witnesses have been summoned and are present for the proceeding.
>
> (d) The proceeding is to impose a sentence for the crime.
>
> (e) There are other compelling circumstances that require the immediate issuance of a bench warrant." MCL 764.3(3).

The court must state its reasons for departing from the presumption under MCL 764.3(1) if it issues an immediate bench warrant. MCL 764.3(4). "When a court delays the issuance of a warrant, the court shall not revoke the release order or declare bail money deposited or the surety bond, if any, forfeited. Upon the issuance of the arrest warrant, the court may then enter an order revoking the release order and declaring the bail money deposited, personal recognizance bond, surety bond, or 10% bond, if any, forfeited." MCL 764.3(2).

1. No Constitutional Right to Counsel at Bond Revocation Hearing

"[A] bond revocation hearing [is] not a 'critical stage' in [a criminal] proceeding because it [does] not have any effect on the determination of [the] defendant's guilt or innocence[;]" accordingly, where the hearing is "completely independent from [the] defendant's jury trial, the presence of counsel [is] not constitutionally required." *People v Collins*, 298 Mich App 458, 470 (2012).

2. Release of Surety After Accused is Detained

"In all criminal cases where a person has entered into any recognizance for the personal appearance of another and such bail and surety afterwards desires to be relieved from responsibility, he or she may, with or without assistance, arrest or detain the accused and deliver him or her to any jail or to the sheriff of any county." MCL 765.26(1). "In making the arrest or detainment, he or she is entitled to the assistance of any peace officer." *Id*.

"The sheriff or keeper of any jail is authorized to receive the principal and detain him or her in jail until he or she is discharged." MCL 765.26(2). "Upon delivery of his or her principal at the jail by the surety or his or her agent or any officer, the surety shall be released from the conditions of his or her recognizance." *Id*.

3. Mittimus

"Whenever the prosecuting attorney of a county is satisfied that a person who has been recognized to appear for trial has absconded, or is about to abscond, and that his or her sureties or either of them have become worthless, or are about to dispose or have disposed of their property for the purpose of evading the payment or the obligation of such bond or recognizance or with intent to defraud their creditors, and that prosecuting attorney makes a satisfactory showing to this effect to the court having jurisdiction of that person, the court or judge shall promptly grant a mittimus to the sheriff or any peace officer of that county, commanding him or her forthwith to arrest the person so recognized and bring him or her before the officer issuing the mittimus and on the return of that mittimus may, after a hearing on the merits, order him or her to be recommitted to the county jail until such time as he or she gives additional and satisfactory sureties, or is otherwise discharged." MCL 765.26(3).

"MCL 765.26 . . . intend[s] to reward a surety who, through its own diligence, apprehends and surrenders the principal to the appropriate authorities." *In re Forfeiture of Surety Bond*, 208 Mich App 369, 372-373 (1995) (surety "was not released from liability inasmuch as it failed to pursue its statutory remedies despite the fact that it was plainly aware of [the] defendant's whereabouts during the period between his default and subsequent arrest").

4. Providing Surety Notice of Defendant's Failure to Appear

"If a defendant fails to appear, within 7 days after the date of the failure to appear the court shall serve each surety notice of the failure to appear." MCL 765.28(1). "The notice must be served upon each surety in person, left at the surety's last known business address, electronically mailed to an electronic mail address provided to the court by the surety, or mailed by first-class mail to the surety's last known business address. However, if the notice is served by first-class mail, it must be mailed separately from the notice of intent to enter judgment." *Id*. "Each surety must be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond." *Id*. "If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond." *Id*. "If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court." *Id*. "Execution must be awarded and executed upon the judgment in the manner provided for in personal actions." *Id*. See also SCAO Form MC 218a (notice to surety of defendant's failure to appear).

Where "the trial court did not even mail the notice [of the defendant's default] until the eighth day" following the defendant's failure to appear, "the notice was not timely" under MCL 765.28(1). *In re Forfeiture of Bail Bond (People v Stanford)*, 318 Mich App 330, 335-336 (2016), additionally citing MCR 6.106(I)(2).[26] Furthermore, although "notice of the hearing on the motion to enter judgment against the surety was timely pursuant to MCR 3.604(I)(2)" where it was mailed by the court 29 days before the scheduled hearing, "that [did] not obviate the fact [that] the surety did not receive proper

notice of the default itself"; rather, because "the court failed to give the surety immediate notice within seven days" of the default, "the court [could not] require the surety to pay the surety bond." *Stanford*, 318 Mich App at 335-337 (noting that "MCL 765.28(1) and MCR 3.604(I)(2) do not conflict" because they govern "two separate and distinct events"; MCL 765.28(1) governs "the procedure for providing a surety notice of a default," while MCR 3.604(I)(2) governs "the procedure to provide notice of a hearing on a motion for judgment").

Under MCL 765.28(1), "[o]nce a default occurs, the surety must be given an opportunity to appear before the court and show cause why the judgment should not be entered against it for the full amount of the bond. If good cause is not shown, the court must enter a judgment against the surety on the bond for any amount it deems appropriate up to the full amount of the bond." *In re Forfeiture of Surety Bond*, 208 Mich App at 374.[27] "The judgment is as 'enforceable, reviewable and appealable' as any other judgment rendered in a personal action." *Id.*, quoting *People v Evans*, 434 Mich 314, 331 (1990) (additional citations omitted). See also SCAO Administrative Memorandum 2017-01, *Surety Bond Process*.

However, "a court's failure to comply with the seven-day notice provision of MCL 765.28(1) bars forfeiture of a bail bond posted by a surety." *In re Bail Bond Forfeiture (People v Gaston)*, 496 Mich 320, 339 (2014), overruling *In re Forfeiture of Bail Bond (On Remand)*, 276 Mich App 482 (2007).[28] "When a statute provides that a public officer 'shall' do something within a specified period of time and that time period is provided to safeguard someone's rights or the public interest, as does the statute here, it is mandatory, and the public officer who fails to act timely is prohibited from proceeding as if he or she had acted within the statutory notice period." *Gaston*, 496 Mich at 339-340 ("vacat[ing] the trial court's orders to the extent that the orders forfeited the bail bond posted by the surety and ordered the surety to pay [the full amount of the bond]").

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[26] *Stanford*, 318 Mich App 330, addressed a former version of MCL 765.28(1), which was amended—in response to *Stanford*, according to legislative analyses—by 2017 PA 174, effective February 19, 2018. The amendment eliminated a requirement that the clerk of the court enter a default on the record and clarified that the required surety notice may be served in person, left at the surety's last known address, mailed electronically, or mailed by first-class mail. MCL 765.28(1).

[27] At the time *In re Bail Bond Forfeiture*, 496 Mich 320 (2014) was decided, MCL 765.28 required "immediate notice not to exceed 7 days after the date of the failure to appear"; the statute was amended effective February 19, 2018, to require notice "within 7 days after the date of the [defendant's] failure to appear[.]" See 2017 PA 174.

[28] The Court in *Gaston*, 496 Mich 320, construed a former version of MCL 765.28(1), which was amended by 2017 PA 174, effective February 19, 2018.

Similarly, where the surety receives timely notice of the motion to enter judgment under MCR 3.604(I)(2),[29] but the notice itself is not timely under MCL 765.28(1), "the court cannot require the surety to pay the surety bond." *In re Bail Bond Forfeiture*, 318 Mich App 330, 337 (2016) (the notice sent to the surety was postmarked eight days after the defendant failed to appear in violation of MCL 765.28(1)).[30]

B. Setting Aside Bond Forfeiture

The trial court must consider a motion to set aside a bond forfeiture judgment under the standards set out in MCL 765.28(2) and MCL 600.4835. *People v Bray*, 481 Mich 888, 889 (2008).

"[T]he court shall set aside the forfeiture and discharge the bail or surety bond within [1[31]] year from the date of forfeiture judgment if the defendant has been apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person." MCL 765.28(2).[32] "If the bond or bail is discharged, the court shall enter an order to that effect with a statement of the amount to be returned to the surety." *Id*. See also SCAO Administrative Memorandum 2017-01, *Surety Bond Process*.

"The circuit court for the county in which such court was held, or in which such recognizance was taken, may, upon good cause shown, remit any penalty, or any part thereof, upon such terms as appear just and equitable to the court." MCL 600.4835. "But [MCL 600.4835] does not authorize such court to remit any fine imposed by any court upon a conviction for any criminal offense, nor any fine imposed by any court for an actual contempt of such court, or for disobedience of its orders or process." *Id*.

"The court shall set aside the forfeiture and discharge the bail or bond, within 1 year from the time of the forfeiture judgment, in

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[29] "MCL 765.28(1) and MCR 3.604(I)(2) do not conflict[]" because they govern "two separate and distinct events[;]" "MCL 765.28(1) [governs] the procedure for providing a surety notice of a [defendant's failure to appear, while] MCR 3.604(I)(2)[] . . . [governs] the procedure to provide notice of a hearing on a motion for judgment." *In re Forfeiture of Bail Bond (People v Stanford)*, 318 Mich App 330, 335 (2016) (additionally noting that if a conflict existed, the statute would control, as provided by MCR 3.604(A)).

[30] At the time *In re Bail Bond Forfeiture*, 318 Mich App 330 (2016) was decided, MCL 765.28 required "immediate notice not to exceed 7 days after the date of the failure to appear"; the statute was amended effective February 19, 2018, to require notice "within 7 days after the date of the [defendant's] failure to appear[.]" See 2017 PA 174.

[31] It appears that the numeral "1" was inadvertently omitted from MCL 765.28(2) when MCL 765.28(1) was amended by 2017 PA 174, effective February 19, 2018.

[32] "[MCL 765.28(2)] does not apply if the defendant was apprehended more than 56 days after the bail or bond was ordered forfeited and judgment entered and the surety did not fully pay the forfeiture judgment within that 56-day period." MCL 765.28(3).

accordance with [MCL 765.15(2)] if the person who forfeited bond or bail is apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person." MCL 765.15(1).

MCL 765.28, as amended in 2002 "to allow for a [bond] forfeiture judgment to be set aside," is not "the sole and exclusive remedy" for commercial sureties; rather, "the remedy under MCL 600.4835 [(generally permitting the court to remit any penalty)] remains viable[.]" *Calvert Bail Bond Agency, LLC v St Clair Co*, 314 Mich App 548, 552, 554, 556 (2016) (holding that the trial court erred in dismissing the plaintiff bail bond agency's claim for remittance under MCL 600.4835 on the ground that MCL 765.28 was the exclusive remedy for the return of sums paid to the defendant county on bond forfeiture judgments). "MCL 765.28(2) [and MCL 765.28(3)] provide a 'safe harbor,' in which, if certain conditions are satisfied, a surety is *entitled* to a remittance of the forfeiture it paid[, and the] court lacks any discretion[;] . . . MCL 600.4835, on the other hand, gives the court discretion to remit forfeited recognizances" as it deems just and equitable. *Calvert Bail Bond Agency*, 314 Mich App 555. Therefore, the two statutes "do not conflict because each statute can be given its full effect without affecting the other." *Id.* at 555. See also SCAO Administrative Memorandum 2017-01, *Surety Bond Process*.

"[A] person is 'apprehended' within the meaning of [MCL 765.15(1)][33] when that person is held in custody in another state." *In re Forfeiture of Bail Bond*, 209 Mich App 540, 543 (1995) (trial court erred in denying a bond depositor's motion to set aside a forfeiture on the ground that the defendant, who had been taken into custody in New Jersey on unrelated charges seven months after the forfeiture was entered and remained in custody there at the time of the depositor's motion, "had not been returned to the county where the bond was posted[]" and had therefore not been "apprehended" within the meaning of former MCL 765.15(a)); see also *In re Forfeiture of Bail Bond*, 229 Mich App 724, 728 (1998) ("the first criterion [of former MCL 765.15(a) (that the defendant be 'apprehended')] was met by [the] defendant's apprehension in New Jersey within one year of the forfeiture judgment").

"[T]he following considerations are among those relevant to determining whether 'the ends of justice have not been thwarted': (1) the depositor's role, if any, in hiding the defendant, failing to assist in the apprehension of the defendant, or affirmatively assisting in the apprehension of the defendant; (2) the length of time

[33] Effective May 1, 1994, 1993 PA 343 amended MCL 765.15 and redesignated former MCL 765.15(a) as MCL 765.15(1). The amendment did not substantively change this provision.

elapsing between the defendant's failure to appear and his [or her] ultimate apprehension; (3) the extent to which evidence has been lost (e.g., death or unavailability of witnesses, fading of witnesses' memories) or whether the prosecution's case has otherwise been affected by the delay; (4) the extent to which the defendant has committed additional crimes before apprehension, and the seriousness of such crimes; (5) the extent to which there has been a psychological or emotional effect upon the initial victim as a result of the defendant being at large; (6) the extent to which the defendant's apprehension was involuntary; and (7) the extent to which extradition or other legal procedures have been required, thereby causing additional delays in carrying out justice." *In re Forfeiture of Bail Bond*, 229 Mich App at 729-731 (noting that "[w]hile a depositor obviously risks losing the funds deposited if the defendant fails to appear, a depositor does not, by virtue alone of providing funds for a bond, undertake an affirmative duty to produce the defendant[; r]ather, . . . the depositor's involvement, if any, in either hiding or apprehending the defendant is simply a relevant consideration in determining whether 'the ends of justice have not been thwarted'").

"[T]he costs of 'apprehending the person' under [MCL 765.15(1)] include a jurisdiction's costs in locating the defendant, as well as any extradition costs.." *In re Forfeiture of Bail Bond*, 229 Mich App at 731-732 (noting that "[t]he county's costs to locate the defendant (e.g., man-hours of investigative time, professional and support personnel costs, telephone calls) are all part of the costs of apprehension").

For additional discussion on this topic, see SCAO Administrative Memorandum 2017-01, *Surety Bond Process*.

8.8 Termination of Release Order

A. Conditions Met

"If the conditions of the release order are met and the defendant is discharged from all obligations in the case, the court must vacate the release order, discharge anyone who has posted bail or bond, and return the cash (or its equivalent) posted in the full amount of the bail, or, if there has been a deposit of 10 percent of the full bail amount, return 90 percent of the deposited money and retain 10 percent." MCR 6.106(I)(1).

B. Defendant Not Convicted

If the defendant deposited an amount equal to 10 percent of the bail but at least $10.00, and was *not* convicted of the charge, "the entire sum deposited shall be returned to the accused." MCL 780.66(6).

C. Bail or Bond Executed by the Defendant Applied to Fines, Costs, or Assessments

"If money was deposited on a bail or bond executed by the defendant, the money must be first applied to the amount of any fine, costs, or statutory assessments imposed and any balance returned, subject to [MCR 6.106(I)(1)]." MCR 6.106(I)(3). See also MCL 780.66(8); MCL 780.67(7).

"If the court ordered the defendant to pay a fine, costs, restitution, assessment, or other payment, the court shall order the fine, costs, restitution, assessment, or other payment collected out of cash bond or bail personally deposited by the defendant under [MCL 765.1 *et seq*.], and the cash bond or bail used for that purpose shall be allocated as provided in [MCL 775.22]." MCL 765.15(2). "Upon presentation of a certified copy of the order, the treasurer or clerk having the cash, check, or security shall pay or deliver it as provided in the order to the person named in the order or to that person's order." *Id*.

"If the cash, check, or security is in the hands of the sheriff or any officer other than the treasurer or clerk, the officer holding it shall dispose of the cash, check, or security as the court orders upon presentation of a certified copy of the court's order." MCL 765.15(3).

D. Bond or Bail Discharged

"If the bond or bail is discharged, the court shall enter an order to that effect with a statement of the amount to be returned to the surety." MCL 765.28(2). See also MCL 765.15(2) ("If bond or bail is discharged, the court shall enter an order with a statement of the amount to be returned to the depositor.")

E. Table Detailing Disbursement Procedures

See SCAO's table detailing disbursement procedures under different circumstances. See also SCAO Administrative Memorandum 2017-01, *Surety Bond Process*, for additional discussion.

8.9 Revocation of Release on Conviction

"A defendant convicted of an assaultive crime and awaiting sentence shall be detained and shall not be admitted to bail unless the trial court finds by clear and convincing evidence that the defendant is not likely to pose a danger to other persons and that [MCL 770.9b] does not apply." MCL 770.9a(1).

"A defendant convicted of sexual assault of a minor and awaiting sentence shall be detained and shall not be admitted to bail." MCL 770.9b(1).

8.10 Release Pending Appeal

"During the time between the trial court judgment and the decision of the court to which an appeal is taken, the trial judge may admit the defendant to bail, if the offense charged is bailable[34] and if the offense is not an assaultive crime as defined in [MCL 770.9a]." MCL 770.8.

"During the pendency of an appeal or application for leave to appeal, a justice or judge of the court in which the appeal or application is filed may admit the defendant to bail, if the offense charged is bailable and if the offense is not an assaultive crime as defined in [MCL 770.9a] or sexual assault of a minor as described in [MCL 770.9b]." MCL 770.9.

The right of a defendant to bail upon appeal by the prosecutor is governed by MCL 770.9a and MCL 765.7. MCL 770.12(3). "If an appeal is taken by or on behalf of the people of the state of Michigan from a court of record, the defendant shall be permitted to post bail on his or her own recognizance, pending the prosecution and determination of the appeal, unless the trial court determines and certifies that the character of the offense, the respondent, and the questions involved in the appeal, render it advisable that bail be required." MCL 765.7.

8.11 Standard of Review

A district court magistrate's decision is reviewed de novo as an appeal of right in district court. *People v Wershe*, 166 Mich App 602, 607 (1988); MCL 600.8515. A bail decision by a district court judge at the close of a preliminary examination does not constitute a review of the initial bail decision made by a magistrate at the arraignment; the bail decision following preliminary examination is a new bail decision and, once

[34] See Const 1963, art 1, § 15 and MCR 6.106(B)(1)–(4), for offenses for which a defendant is not entitled to bail.

entered, it is the decision subject to review and deference as set out in the court rules. *Wershe*, 166 Mich App at 606.

A trial court's decision regarding forfeiture of a bail bond is reviewed for an abuse of discretion. See *In re Forfeiture of Surety Bond*, 208 Mich App 369, 375 (1995); *People v Munley*, 175 Mich App 399, 403 (1989). Similarly, decisions on a motion to set aside a bond forfeiture are reviewed for an abuse of discretion. *In re Forfeiture of Bail Bond*, 229 Mich App 724, 727 (1998).

If a party files a motion seeking review of a release decision, the lower court's order may not be stayed, vacated, modified, or reversed unless the reviewing court finds an abuse of discretion. MCR 6.106(H)(1). If the reviewing court finds an abuse of discretion, it may only modify the release decision after considering the factors set out in MCR 6.106(F)(1)(a)–(i). *People v Weatherford*, 132 Mich App 165, 170 (1984) (trial court should not have increased the amount of the defendant's bail because there was no finding of an abuse of discretion, and because the trial court did not consider any of the court rule factors in raising the amount of bail).

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9.1 Introduction

This chapter concerns pretrial procedures, procedural pretrial motions, and pretrial motions to suppress evidence. For detailed information on specific motions, refer to the relevant sections in the benchbook.

Part A: Pretrial Procedures

9.2 Pretrial Procedures—Generally

In general, the Michigan Court Rules do not provide for motion practice in criminal proceedings;[1] accordingly, the rules for civil motion practice apply. See MCR 6.001(D).

A. Form of Motions

"An application to the court for an order in a pending action must be by motion." MCR 2.119(A)(1). "Unless made during a hearing or trial, a motion must (a) be in writing, (b) state with particularity the grounds and authority on which it is based, (c) state the relief or order sought, and (d) be signed by the party or attorney as provided in MCR 1.109(D)(3) and [MCR 1.109](E)." MCR 2.119(A)(1).

"A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based, and must comply with the provisions of MCR 7.215(C)[2] regarding citation of unpublished Court of Appeals opinions." MCR 2.119(A)(2). "Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 double spaced pages, exclusive of attachments and exhibits." MCR 2.119(A)(2)(a). See *People v Leonard*, 224 Mich App 569, 578-579 (1997) (defendant brief in excess of the 20-page limit "was justified" where the matter was "'very complicated[]'"). "Except as permitted by the court or as otherwise provided in [the Michigan Court Rules], no

[1] Note, however, that should a court rule or statute provide something contrary to what is provided in MCR 2.119 (the civil motion practice rule), that other court rule or statute applies. See MCR 6.001(D)(1); MCR 6.001(D)(3).

[2] MCR 7.215(C)(1) provides:

> "An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party must explain the reason for citing it and how it is relevant to the issues presented. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears."

reply briefs, additional briefs, or supplemental briefs may be filed." MCR 2.119(A)(2)(b). "Quotations and footnotes may be single-spaced[, a]t least one-inch margins must be used, and printing shall not be smaller than 12-point type." MCR 2.119(A)(2)(c).

"Except where electronic filing has been implemented, a copy of a motion or response (including brief) filed under [MCR 2.119] must be provided by counsel to the office of the judge hearing the motion." MCR 2.119(A)(2)(d). "The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten." *Id*. A judge's copy is not required where electronic filing has been implemented. *Id*.

The motion and a notice of hearing on the motion may be combined into one document. MCR 2.119(A)(3).

B. Time for Service and Filing of Motions and Responses

"Notwithstanding any other provision of [MCR 2.107], until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions in [MCR 2.107(C)(4)]." MCR 2.107(G).

"Unless a different period is set by [the court rules] or by the court for good cause, a written motion (other than one that may be heard ex parte), notice of the hearing on the motion, and any supporting brief or affidavits must be served as follows: (a) at least 9 days before the time set for the hearing, if served by first-class mail, or (b) at least 7 days before the time set for the hearing, if served by delivery under MCR 2.107(C)(1) or [MCR 2.107(C)](2) or MCR 1.109(G)(6)(a)." MCR 2.119(C)(1).

"Unless a different period is set by [the court rules] or by the court for good cause, any response to a motion (including a brief or affidavits) required or permitted by [the court rules] must be served as follows: (a) at least 5 days before the hearing, if served by first-class mail, or (b) at least 3 days before the hearing, if served by delivery under MCR 2.107(C)(1) or [MCR 2.107(C)](2) or MCR 1.109(G)(6)(a)." MCR 2.119(C)(2).

"If the court sets a different time for serving a motion or response its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order." MCR 2.119(C)(3).

"Unless the court sets a different time, a motion must be filed at least 7 days before the hearing, and any response to a motion required or

permitted by [the court rules] must be filed at least 3 days before the hearing." MCR 2.119(C)(4).

C. Pretrial and Early Scheduling Conferences

1. District Court

"The court, on its own initiative or on motion of either party, may direct the prosecutor and the defendant, and, if represented, the defendant's attorney to appear for a pretrial conference." MCR 6.610(B). "The court may require collateral matters and pretrial motions to be filed and argued no later than this conference." *Id*.

2. Circuit Court

"At any time after the commencement of the action, on its own initiative or the request of a party, the court may direct that the attorneys for the parties, alone or with the parties, appear for a conference." MCR 2.401(A). "The court shall give reasonable notice of the scheduling of a conference." *Id*. "More than one conference may be held in an action." *Id*. At an early scheduling conference, or at any other time if the court concludes that it would facilitate the progress of the case, the court must establish times for events including filing motions and scheduling trial. MCR 2.401(B)(2)(a). The court may adopt other provisions it deems appropriate. *Id*.

3. Scheduling Orders

The scheduling of events in a scheduling order must take into consideration the nature and complexity of the case, including the issues involved; the number and location of parties and potential witnesses, including experts; the extent of expected and necessary discovery; and the availability of reasonably certain trial dates. MCR 2.401(B)(2)(b).

"The scheduling order may also include provisions concerning initial disclosure, discovery of ESI [(electronically stored information)], any agreements the parties reach for asserting claims of privilege or for protection as trial-preparation material after production, preserving discoverable information, and the form in which ESI shall be produced." MCR 2.401(B)(2)(c).

The scheduling of events in a scheduling order requires meaningful consultation with all counsel of record, whenever reasonably practical. MCR 2.401(B)(2)(d).

D. Evidentiary Hearing

A defendant is generally entitled to an evidentiary hearing where the admissibility of evidence is challenged on constitutional grounds. *People v Reynolds*, 93 Mich App 516, 519 (1979). But "where it is apparent to the court that the challenges are insufficient to raise a constitutional infirmity, or where the defendant fails to substantiate the allegations of infirmity with factual support, no hearing is required." *People v Johnson*, 202 Mich App 281, 285 (1993).

"The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible." MRE 104(a). "In so deciding, the court is not bound by evidence rules, except those on privilege." *Id.*; MRE 1101(b)(1). In determining whether the proffered evidence is admissible under the technical requirements of the rules of evidence, the trial court applies a preponderance of the evidence test. *Bourjaily v United States*, 483 US 171, 175-176 (1987).

"Although it is always preferable for purposes of appellate review that a trial court explain its reasoning and state its findings of fact with respect to pretrial motions, the court is not required to do so by court rule." *People v Shields*, 200 Mich App 554, 558 (1993). See MCR 2.517(A)(4). "The court may state . . . findings and conclusions on the record or include them in a written opinion." MCR 2.517(A)(3).

A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217 (2008). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *Id.* at 217. A trial court's findings of fact are reviewed for clear error. MCR 2.613(C).

E. Timing of Disposition

"Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and for production of transcripts. Decisions, when possible, should be made from the bench or within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission. For the purpose of [MCR 8.107], the time of submission is the time the last argument or presentation in the matter was made, or the expiration of the time allowed for filing the last brief or production of transcripts, as the case may be." MCR 8.107(A). Matters not decided within 56 days of submission must be identified on the quarterly "Report as to Matters Undecided." MCR 8.107(B).

9.3 Discovery

MCR 6.201 governs the scope of criminal discovery in Michigan. *People v Phillips*, 468 Mich 583, 588-589 (2003). See also AO 1994-10 (stating that discovery in criminal cases is governed by MCR 6.201, not MCL 767.94a). Either the subject of discovery must be set out in MCR 6.201, or the party seeking discovery must show good cause why the trial court should order the requested discovery. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 448 (2006).

"The provisions of MCR 6.201, except for MCR 6.201(A), apply in all misdemeanor proceedings." MCR 6.610(E)(1). "MCR 6.201(A) only applies in misdemeanor proceedings . . . if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, then the defendant must also comply with MCR 6.201(A)." MCR 6.610(E)(2).

"Except as otherwise provided in MCR 2.302(B)(6)[3], electronic materials are to be treated in the same manner as nonelectronic materials under [MCR 6.201]." MCR 6.201(K). "Nothing in [MCR 6.201] shall be construed to conflict with MCL 600.2163a."[4] MCR 6.201(K).

A. Mandatory Disclosure

MCR 6.201(A)[5] governs mandatory disclosure and provides that "[i]n addition to disclosures required by provisions of law other than MCL 767.94a,[6] a party upon request must provide all other parties:

> (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended

[3] MCR 2.302(B)(6) provides that "[a] party need not provide discovery of ESI [(electronically stored information)] from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery if the requesting party shows good cause, considering proportionality under [MCR 2.302(B)(1)] and the limitations of [MCR 2.302(C)]. The court may specify conditions for the discovery, including allocation of the expense, and may limit the frequency or extent of discovery of ESI (whether or not the ESI is from a source that is reasonably accessible)."

[4] MCL 600.2163a authorizes special arrangements for witnesses in certain situations.

[5] MCR 6.201(A) is applicable to felonies and, in limited circumstances starting May 1, 2020, to misdemeanors. See MCR 6.001(A); MCR 6.610(E)(1)-(2), amended by ADM File No. 2018-23. "MCR 6.201(A) only applies in misdemeanor proceedings . . . if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, then the defendant must also comply with MCR 6.201(A)." MCR 6.610(E)(2).

[6] Discovery in criminal cases is governed by MCR 6.201, not by MCL 767.94a. AO 1994-10.

without leave of the court no later than 28 days before trial;[7]

(2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;

(3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;

(4) any criminal record that the party may use at trial to impeach a witness;

(5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and

(6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction, including the cost of providing copies of electronically recorded statements. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence."

1. Written/Recorded Statements Under MCR 6.201(A)(2)

"Under [MCR 6.201(A)(2)], a party must provide to all other parties upon request any *written or recorded* statement by a lay witness whom the party intends to call as a witness at trial, except that a defendant is not obliged to provide his [or her] own statement." *People v Tracey*, 221 Mich App 321, 324 (1997).

"An attorney's interview notes with witnesses intended to be called at trial are not 'statements' within the definition provided

[7] "MCR 6.201(A) exclusively concerns a party's obligation to provide a list of the names and addresses of all witnesses whom may be called at trial or, in the alternative, the party can provide the names of the witnesses and make them available for interviews." *People v Jack*, 336 Mich App 316, 325 (2021). This differs from the requirement in MCR 6.201(B)(2) regarding the prosecutor's duty to provide police reports an interrogation records. *Jack*, 336 Mich App at 325. See Section 9.3(B) for more information on discovery under MCR 6.201(B), and Section 9.5(A) for more information on witness discovery.

by [Michigan] discovery rules. Accordingly, neither side is obligated to provide these notes pursuant to a request under MCR 6.201(A)(2)." *People v Holtzman*, 234 Mich App 166, 189 (1999).

2. Inspections of Physical Evidence Under MCR 6.201(A)(6)

"MCR 6.201(A)(6) [(in part, authorizing the court to order a party be given the opportunity to retest tangible physical evidence)] does not provide the trial court with the authority to order the [Michigan State Police (MSP)] to retest its own evidence." *People v Green*, 310 Mich App 249, 256-257 (2015). "Rather, it merely provides the court with the authority to provide [the] *defendant* with the opportunity to test any tangible physical evidence." *Id*. at 257 (trial court abused its discretion in ordering an MSP lab analyst to retest a vial of the defendant's blood that had already been tested by the analyst; trial court could only order that the defendant be given the opportunity to retest his blood sample).

B. Discovery of Information Known to the Prosecuting Attorney

MCR 6.201(B)[8] governs discovery of information known to the prosecuting attorney, and provides that "[u]pon request, the prosecuting attorney must provide each defendant:

> (1) any exculpatory information or evidence known to the prosecuting attorney;[9]
>
> (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;
>
> (3) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;
>
> (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

[8] Effective May 1, 2020, MCR 6.201(B) applies in all misdemeanor proceedings. See MCR 6.610(E)(2), amended by ADM File No. 2018-23.

[9] Although there is no constitutional right to discovery in a criminal case, "due process . . . requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the evidence." *People v Jackson*, 292 Mich App 583, 591 (2011), citing *Brady v Maryland*, 373 US 83 (1963). See Section 9.3(J) on establishing a *Brady* violation.

> (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case."

"[A]bsent an applicable exception provided for in MCR 6.201, a prosecutor is required to produce unredacted police reports under MCR 6.201(B)(2)." *People v Jack*, 336 Mich App 316, 326 (2021). In *Jack*, the prosecutor "provided a redacted police report" that omitted "addresses, phone numbers, and birthdates of several witnesses who were also included on the prosecutor's witness list," arguing that "MCR 6.201(A)(1) allows a prosecuting attorney to redact witness contact information from police reports otherwise discoverable under MCR 6.201(B)[.]" *Jack*, 336 Mich App at 320, 322. "MCR 6.201(A)(1) and MCR 6.201(B)(2) are two separate provisions that deal with two distinct disclosure requirements. MCR 6.201(A)(1) exclusively concerns a party's obligation to provide a list of the names and addresses of all witnesses whom may be called at trial or, in the alternative, the party can provide the names of the witnesses and make them available for interviews. On the other hand, MCR 6.201(B)(2) concerns the prosecutor's obligation to provide police reports and interrogation records. The information required to be disclosed under [MCR 6.201(A)(1) and MCR 6.201(B)(2)] is separate and distinct, and the prosecution must comply with the separate requirements of each section of the court rule. *Jack*, 336 Mich App at 325-326 (noting "the prosecutor may request a protective order under MCR 6.201(E)[10] or pursue a modification under MCR 6.201(I)[11]" on remand). "[R]edaction of police reports and interrogation records is permitted only when the information relates to an ongoing investigation." *Jack*, 336 Mich App at 324.

Because "contact information of crime *victims* in discoverable police reports" "is not automatically shielded," "a trial court must determine in each case whether there is good cause to enter a protective order under MCR 6.201(E) or to modify the discovery rules under MCR 6.201(I)." *People v Antaramian*, ___ Mich App ___, ___ (2023). "[MCL 780.758(2) of the CVRA] does not permit a prosecutor's office to automatically redact victim contact information from police reports before discovery in a criminal case." *Antaramian*, ___ Mich App at ___. "MCL 780.758(3) similarly does not authorize a prosecutor's office to implement a policy for redacting victim contact information in police reports produced during discovery." *Antaramian*, ___ Mich App at ___. "Even the provisions under MCL 780.581(1) . . . are not automatic." *Antaramian*, ___ Mich App at ___. "[MCR 6.201(E)] provides the prosecutor with an avenue to seek judicial permission to withhold otherwise presumptively discoverable contact information." *Antaramian*, ___ Mich App at ___

[10] See Section 9.3(E).

[11] See Section 9.3(I).

(noting the "Prosecutor's Office could . . . seek redaction on a case-by-case basis"). The Court of Appeals opined that the "trial court compounded the error by accepting the prosecution's generalized allegations, essentially affirming the prosecutor's office's automatic redaction policy[, which] is not permitted under the plain language of the court rule." *Id*. at ___. The "trial court must articulate good cause stemming from the facts of [the] case to enter a protective order addressing each proposed redaction." *Id*. at ___.

"'The focus of required disclosure [under MCR 6.201(B)(5) and *Brady v Maryland*, 373 US 83 (1963),] is not on factors which may motivate a prosecutor in dealing subsequently with a witness, but rather on facts which may motivate the witness in giving certain testimony.'" *People v Bosca*, 310 Mich App 1, 32-33 (2015), rev'd in part ___ Mich ___ (2022) (holding that where the details of a witness's plea agreement were read into the trial court record and defense counsel was given the opportunity to cross-examine the witness, "the prosecution made the requisite disclosure sufficient to permit the jury to evaluate [the witness's] credibility"; although "[the] defendant contend[ed] that the trial court ultimately was more lenient (than the prosecution had recommended) in its sentencing of [the witness], there [was] no demonstration that the more lenient sentencing was the result of any undisclosed sentencing agreement") (citations omitted and alteration added).

"For due process purposes, there is a crucial distinction between failing to disclose evidence that has been developed and failing to develop evidence in the first instance." *People v Thurmond*, ___ Mich App ___, ___ (2023) (citation omitted). "Although the prosecution is required to disclose evidence that has been developed, it is not required to develop evidence that defendant hopes will provide him with a defense." *Id*. at ___ (cleaned up). Put differently, "due process does not generally require the prosecution to seek and find exculpatory evidence, or search for evidence that will support a defendant's case[.]" *People v Dimambro*, 318 Mich App 204, 213 (2016), citing *People v Coy*, 258 Mich App 1, 21 (2003). However, "'the individual prosecutor [does have] a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police[.]" *Dimambro*, 318 Mich App at 213, quoting *Kyles v Whitley*, 514 US 419, 437 (1995) (first alteration in original).

C. Prohibited Discovery

MCR 6.201(C)[12] governs prohibited discovery, and provides that "[n]otwithstanding any other provision of this rule, there is no right

[12] Effective May 1, 2020, MCR 6.201(C) applies in all misdemeanor proceedings. See MCR 6.610(E)(2), amended by ADM File No. 2018-23.

to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in [MCR 6.201(C)(2)]."

"If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.

> (a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the trial court shall suppress or strike the privilege holder's testimony.
>
> (b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
>
> (c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
>
> (d) The court shall seal and preserve the records for review in the event of an appeal
>
> > (*i*) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or
> >
> > (*ii*) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.
>
> (e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide." MCR 6.201(C)(2).

"[D]efendants generally have no right to discover privileged records absent certain special procedures, such as an in camera review of the

privileged information conducted by the trial court." *People v Davis-Christian*, 316 Mich App 204, 207-208 (2016), citing MCR 6.201(C)(1)-(2). "[A] defendant's 'generalized assertion of a need to attack the credibility of his accuser [does] not establish the threshold showing of a reasonable probability that the records contain information material to his defense sufficient to overcome the various statutory privileges.'" *People v Allen*, 331 Mich App 587, 602 (2020), vacated in part on other grounds 507 Mich 856 (2021)[13] (alteration in original), quoting *People v Stanaway*, 446 Mich 643, 650 (1994).

1. In Camera Reviews

"In a criminal sexual conduct prosecution, an in camera review 'promotes the state's interests in protecting the privacy rights of the alleged rape victim while at the same time safeguards the defendant's right to a fair trial.'" *People v Davis-Christian*, 316 Mich App 204, 208 (2016), quoting *People v Hackett*, 421 Mich 338, 350 (1984) (trial court abused its discretion when it disregarded the court rule and controlling caselaw and articulated its own standard for allowing in camera reviews). See also *People v Stanaway*, 446 Mich 643 (1994), on which the current version of MCR 6.201 is based. See MCR 6.201, staff comment to 1996 amendment.

2. Work-Product Privilege

"[T]he work-product privilege applies in the context of criminal proceedings to the work product of the prosecutor." *Gilmore*, 222 Mich App at 453. And "to the extent that the prosecutor may be entitled to discovery of materials in defense counsel's possession . . . the work-product privilege would apply with equal force." *Id*. at 453 n 9.

D. Excision

"When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder." MCR 6.201(D).[14] "The party must inform the other party that nondiscoverable information has been excised and withheld." *Id*. "On motion, the court must conduct a hearing in camera to determine whether the reasons for the excision are justifiable." *Id*. "If the court upholds the

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

[14] Effective May 1, 2020, MCR 6.201(D) applies in all misdemeanor proceedings. See MCR 6.610(E)(2), amended by ADM File No. 2018-23.

excision, it must seal and preserve the record of the hearing for review in the event of an appeal." *Id*.

E. Protective Orders

"On motion and a showing of good cause, the court may enter an appropriate protective order." MCR 6.201(E).[15] "In considering whether good cause exists, the court shall consider[:]

- the parties' interests in a fair trial;
- the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats;
- the risk that evidence will be fabricated; and
- the need for secrecy regarding the identity of informants or other law enforcement matters." MCR 6.201(E) (bullets added).

"On motion, with notice to the other party, the court may permit the showing of good cause for a protective order to be made in camera." MCR 6.201(E). "If the court grants a protective order, it must seal and preserve the record of the hearing for review in the event of an appeal." *Id*.

F. Timing of Discovery

"Unless otherwise ordered by the court, the prosecuting attorney must comply with the requirements of [MCR 6.201] within 21 days of a request under [MCR 6.201] and a defendant must comply with the requirements of [MCR 6.201] within 21 days of a request under [MCR 6.201]." MCR 6.201(F).[16]

G. Copies

"Except as ordered by the court on good cause shown, a party's obligation to provide a photograph or paper of any kind is satisfied by providing a clear copy." MCR 6.201(G).[17]

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[15] Effective May 1, 2020, MCR 6.201(E) applies in all misdemeanor proceedings. See MCR 6.610(E)(2), amended by ADM File No. 2018-23.

[16] Effective May 1, 2020, MCR 6.201(F) applies in all misdemeanor proceedings. See MCR 6.610(E)(2), amended by ADM File No. 2018-23.

[17] Effective May 1, 2020, MCR 6.201(G) applies in all misdemeanor proceedings. See MCR 6.610(E)(2), amended by ADM File No. 2018-23.

H. Continuing Duty to Disclose

"If at any time a party discovers additional information or material subject to disclosure under [MCR 6.201], the party, without further request, must promptly notify the other party." MCR 6.201(H).[18] See also *People v Aldrich*, 246 Mich App 101, 133 n 7 (2001) ("[p]rosecutors have a 'continuing' duty to disclose . . . material evidence").

I. Modification

"On good cause shown, the court may order a modification of the requirements and prohibitions of [MCR 6.201]." MCR 6.201(I).[19]

J. Failure to Comply with Discovery Requirements

"If a party fails to comply with [MCR 6.201], the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances." MCR 6.201(J).[20] "Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity." *Id*. An attorney who willfully violates a discovery rule or a court order issued pursuant to a discovery rule may be subject to court-ordered sanctions, including contempt of court. *Id*.; see MCL 600.1701(g).[21] A court's order under MCR 6.201(J) is reviewable for abuse of discretion. MCR 6.201(J).

K. Suppression of Evidence - *Brady* Violation

"'[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process [(i.e. a *Brady* violation)] where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution,'" and irrespective of whether defense counsel exercised "reasonable diligence" to discover the evidence. *People v Chenault*, 495 Mich 142, 149, 152, 155 (2014), quoting *Brady v Maryland*, 373 US 83, 87 (1963), and overruling *People v Lester*, 232 Mich App 262 (1998).[22] In order to

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[18] Effective May 1, 2020, MCR 6.201(H) applies in all misdemeanor proceedings. See MCR 6.610(E)(2), amended by ADM File No. 2018-23.

[19] Effective May 1, 2020, MCR 6.201(I) applies in all misdemeanor proceedings. See MCR 6.610(E)(2), amended by ADM File No. 2018-23.

[20] Effective May 1, 2020, MCR 6.201(J) applies in all misdemeanor proceedings. See MCR 6.610(E)(2), amended by ADM File No. 2018-23.

[21] See the Michigan Judicial Institute's *Contempt of Court Benchbook* for information on contempt proceedings.

establish a *Brady* violation, a defendant must establish that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material." *Chenault*, 495 Mich at 155, citing *Strickler v Greene*, 527 US 263, 281-282 (1999).

1. Materiality

"[F]undamental fairness requires the government to disclose evidence that calls an individual's guilt into question when it charges them with a crime"—"[t]he legal test for determining whether relief follows the government's failure to give an accused exculpatory information" is whether the suppressed evidence was "material." *People v Christian*, ___ Mich ___, ___ (2022). "To establish materiality[of alleged *Brady* evidence], a defendant must show that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" *People v Chenault*, 495 Mich 142, 150 (2014), quoting *United States v Bagley*, 473 US 667, 682 (1985). However, in evaluating the materiality of suppressed evidence, "'[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he [or she] received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Chenault*, 495 Mich at 157, quoting *Kyles*, 514 US at 434. "A defendant need not demonstrate by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Christian*, ___ Mich at ___ (cleaned up). See *Smith v Cain*, 565 US 73, 75-76 (2012) (the petitioner established a *Brady* violation where a police investigator's undisclosed notes contained statements directly contradicting an eyewitness's trial testimony; because the eyewitness's testimony constituted the sole evidence linking the petitioner to the crime, the evidence was "material" within the meaning of *Brady*, 373 US at 87); *Dimambro*, 318 Mich App at 221 (expert testimony regarding undisclosed medical examiner photographs "demonstrate[d] that there [was] a reasonable probability that the outcome of the trial might have been different had the photographs been disclosed to the defense"

[22] "In contrast to the three-factor *Brady* test articulated by the United States Supreme Court [in *Strickler v Greene*, 527 US 263, 281-282 (1999)]," the Michigan Court of Appeals "adopted a four-factor *Brady* test in 1998[]" that included the requirement that the defendant "'could [not] . . . have obtained [the evidence] himself [or herself] with any reasonable diligence[.]'" *Chenault*, 495 Mich at 151, quoting *Lester*, 232 Mich App at 281 (internal citation omitted). The *Chenault* Court "reject[ed] the addition of a diligence requirement to the *Brady* test and . . . overrule[d] *Lester*[, 232 Mich App 262]." *Chenault*, 495 Mich at 152.

where the photographs may have revealed that the child-victim's injuries were not intentionally inflicted).

2. Favorable Evidence

"Evidence is favorable to the defense when it is either exculpatory or impeaching. When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule of *Brady*." *People v Dimambro*, 318 Mich App 204, 216 (2016) (cleaned up).

"[T]he United States Supreme Court has not specifically delineated the outlines of what constitutes 'favorable evidence'" under *Brady*, and "even the most generous reading of the 'favorable evidence' standard would [not] require the prosecution to disclose evidence whose utility lay only in helping a defendant contour a portion of his cross-examination of a key state witness." *People v Banks*, 249 Mich App 247, 255 (2002); see also *People v Dickinson*, 321 Mich App 1, 5-6 (2017).

3. Scope of *Brady* Duty

The *Brady* duty extends to impeachment evidence and exculpatory evidence. *Youngblood v West Virginia*, 547 US 867, 869 (2006). A *Brady* violation even occurs when the government fails to turn over evidence that is known only to the police, and not to the prosecutor. *Youngblood*, 547 US at 869-870.

4. Caselaw

The suppression by the prosecution of "the transcript of an interview with its most important witness," where "[t]he transcript reveal[ed] that what the witness said in the interview differed from a later interview and the testimony he provided at both the preliminary examination and at trial" meet the materiality threshold "[b]ecause the suppressed evidence undermine[d] the prosecution's star witness's testimony—testimony which [was] the thread that tie[d] together the rest of the evidence[.]" *People v Christian*, ___ Mich ___, ___ (2022). "The transcript [was] material because the defendants . . . demonstrated a reasonable probability that had it been disclosed, the result of the trial would have been different" because "[i]t would have been powerful impeachment evidence of . . . the prosecution's central witness, making the defendants' argument that he was fabricating his story more likely." *Id.* at ___. "And if the jury did not believe [the central witness], the other evidence would also be less believable." *Id.* at ___ (holding

that defendants were entitled to a new trial "[b]ecause the prosecution suppressed evidence that was both favorable and material to the defense).

Where defendant was charged with arson, "the disclosure of the fire chiefs' changes in opinion [regarding the fire's point of origin] for the first time at trial amount[ed] to a *Brady* violation." *People v Burger*, 331 Mich App 504, 518 (2020). The change in opinion "was favorable to defendant because it was consistent with [the testimony of defendant's expert] and provided a basis to impeach the fire chiefs' testimony." *Id*. "Although the evidence suppressed by the prosecution was favorable to defendant and material to the case," defendant failed to establish that he was entitled to relief "because [he did] not show[] that earlier disclosure would have affected the outcome of trial." *Id*. at 519 (noting "defendant was able to present [expert] testimony, which concluded the chiefs' reports were deficient").

In *People v Dimambro*, 318 Mich App 204, 211, 222 (2016), the Michigan Court of Appeals held that, where autopsy photographs that were under the control of the medical examiner were not turned over to either the prosecution or the defense until after the defendant's trial, "the prosecution's failure to disclose the . . . photographs constituted a *Brady* violation" requiring a new trial; "whether inadvertent or not, . . . the prosecution suppressed the photographs for *Brady* purposes, despite the fact that the medical examiner had sole possession of them[.]" "[G]iven a county's medical examiner's duty [under the county medical examiners act, MCL 52.201 *et seq.*,] to act on the government's behalf in cases involving violent or unexpected deaths in Michigan, . . . (1) the medical examiner may be understood as acting on the government's behalf in a particular case, . . . and (2) responsibility for evidence within the medical examiner's control may be imputed to the government, even if unknown to the prosecution." *Dimambro*, 318 Mich App at 215 (quotation marks and citations omitted).

L. Determining a Remedy[23]

"When determining an appropriate remedy for a discovery violation, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances[.]" *People v*

[23]"The provisions of MCR 6.201, except for MCR 6.201(A), apply in all misdemeanor proceedings." MCR 6.610(E)(1). "MCR 6.201(A) only applies in misdemeanor proceedings . . . if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, then the defendant must also comply with MCR 6.201(A)." MCR 6.610(E)(2).

Jackson, 292 Mich App 583, 591 (2011) (internal quotation omitted). For example, where the prosecution's failure to disclose a transcript of a witness's prior statements, given pursuant to an investigative subpoena, violated MCR 6.201(A)(2) but did not constitute a *Brady* violation, precluding the prosecution from questioning the witness regarding the statements and allowing defense counsel to review the transcript before cross-examining the witness did not constitute an abuse of discretion. *Jackson*, 292 Mich App at 590-592.

If an inadvertent discovery violation is established, a trial court may grant a continuance, if requested, to alleviate any harm by allowing both parties to prepare for the new evidence without requiring the exclusion of relevant evidence. *People v Elston*, 462 Mich 751, 764 (2000). See also *People v Banks*, 249 Mich App 247, 252 (2002), where the trial court did not abuse its discretion in denying the defendant's motion for a mistrial based on the prosecution's inadvertent failure to disclose a police report because the defendant's credibility and case were not completely destroyed by the discovery violation under the facts of the case.

9.4 Bill of Particulars

MCR 6.112(E) provides that "[t]he court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense." However, MCL 767.44 *requires* a bill of particulars "if seasonably requested by the respondent[.]" MCL 767.44 provides "statutory short forms" that may be used in the bill of particulars. *People v Strutenski*, 39 Mich App 72, 73 (1972). For example, the statutory short form for murder is "A.B. murdered C.D."; the statutory short form for manslaughter is "A.B. killed C.D." MCL 767.44.

Accordingly, "[w]hen a statutory short-form information is used, the defendant has a statutory right to a bill of particulars, while when the common law long-form of information is used, the trial court may in its discretion order a bill of particulars." *People v Johnson*, 427 Mich 98, 109-110 (1986). "Once a bill of particulars is supplied, a defendant has a right 'to have the trial confined to the particulars set up therein.'" *Id.* at 110, quoting *People v Ept*, 299 Mich 324, 326 (1941). Accordingly, "the procedural implementation of MCL 767.44 assures that the defendant will have notice in advance of trial of the factual basis underlying the alleged offense." *Johnson*, 427 Mich at 110.

9.5 Witnesses

A. Witness Disclosure

"[A] party upon request must provide all other parties[] . . . the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial." MCR 6.201(A)(1).[24] **Note:** While MCL 767.94a concerns disclosure of certain material or information by the defendant to the prosecuting attorney, MCR 6.201 controls discovery in criminal cases. *People v Phillips*, 468 Mich 583, 587-589 (2003); Administrative Order No. 1994-10, 447 Mich cxiv (1994).

"The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers." MCL 767.40a(1). "The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known." MCL 767.40a(2).[25] However, "the prosecution [does not have] an affirmative duty to present the 'entire res gestae,' or call at trial all of the witnesses who were present when a crime occurred." *People v Steanhouse*, 313 Mich App 1, 15 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017)[26] (citation omitted).

"Although the prosecutor did not include [a potential witness] as a known res gestae witness on his witness list, the . . . omission did not prejudice defendant[] . . . or violate his right to present a defense; . . . [b]ecause defendant implicated [the potential witness] in the [crime], it [was] apparent that defendant was aware that [the potential witness] could be a res gestae witness." *Steanhouse*, 313 Mich App at 15 (citations omitted). "Because [the potential witness] invoked his Fifth Amendment privilege against self-incrimination and refused to testify, neither the prosecution nor the defense could call [him] as a witness;" therefore, the prosecution did not "commit[] a plain error

[24]"The provisions of MCR 6.201, except for MCR 6.201(A), apply in all misdemeanor proceedings." MCR 6.610(E)(1). "MCR 6.201(A) only applies in misdemeanor proceedings . . . if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, then the defendant must also comply with MCR 6.201(A)." MCR 6.610(E)(2).

[25]"MCL 767.40a does not conflict with or inform MCR 6.201[.]" *People v Jack*, 336 Mich App 316, 319 n 2 (2021) (further finding the statute irrelevant to interpreting MCR 6.201(A) and MCR 6.201(B) as they relate to the prosecutor redacting information in a police report).

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

affecting defendant's substantial rights by failing to include [the potential witness] on the witness list as a res gestae witness, notifying the trial court of the need to inform [the potential witness] of his Fifth Amendment right against self-incrimination, and failing to call [him] as a witness." *Id*. at 16 (citation omitted).

"[W]hen providing a defendant with the list of witnesses the prosecutor 'intends to produce' at trial, a witness may not be 'endorsed in the alternative' as an 'and/or' witness." *People v Everett*, 318 Mich App 511, 522 (2017) (holding that the statute plainly requires a prosecutor to either endorse a witness that he or she intends to call under MCL 767.40a(3) or amend the witness list pursuant to MCL 767.40a(4) to add or remove a witness; the statute does not allow for an "in-between 'alternative' witness who may or may not be produced on the whim of the prosecutor").

"[T]he trial court's decision to allow removal of [an endorsed witness] from the prosecutor's witness list without consideration of whether there was good cause to do so [as required under MCL 767.40a(4)] was an abuse of discretion[.]" *Everett*, 318 Mich App at 520. "[T]o remove [the witness's] name from the witness list, the prosecutor was required to comply with MCL 767.40a(4)[,]" and the prosecutor could not avoid the requirements of MCL 767.40a(4) by labeling the witness an "alternative" witness. *Everett*, 318 Mich App at 524-525 (nevertheless concluding that the defendant failed to establish that he was prejudiced by the error where there was "nothing in the lower court record to suggest that the prosecutor lacked good cause for removing [the witness] from the prosecution's witness list[]" and there was "no indication of the testimony she would have offered[]" or whether the defendant "would have benefited from" it).

B. Amending Witness List

The prosecutor may amend the witness list "at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4). The court's decision whether to permit amendment of the witness list is reviewed for an abuse of discretion. *People v Callon*, 256 Mich App 312, 325-326 (2003) (trial court did not abuse its discretion in finding good cause to allow the prosecutor to amend its witness list where the witness – a critical witness to the prosecution's case – was inadvertently omitted, and where there was no unfair prejudice to the defense in allowing the amendment).

C. Defendant's Right to Present Witnesses

A fundamental element of due process is a defendant's right to present witnesses in his or her favor. *Washington v Texas*, 388 US 14, 19 (1967); US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1.

1. Prosecutor's Duty to Provide Reasonable Assistance to Defendant

A prosecutor is obligated to provide reasonable assistance to locate witnesses on a defendant's request. MCL 767.40a(5). The defendant's request must be made in writing at least 10 days before trial or at such other time as the court directs. *Id*. The prosecutor may object to the request if the request is unreasonable, see *id*., by filing a pretrial motion requesting a hearing on the reasonableness of the request, *id*.

MCL 767.40a(5) does not limit its application to any certain *types* of witnesses. *People v Koonce*, 466 Mich 515, 522-523 (2002). Accordingly, the prosecutor was required to "give 'reasonable assistance' [to the defendant in locating an accomplice witness] without regard to the witness' accomplice status." *Id*. at 523.

2. Material Witness

If there is a material witness without whose testimony an indigent defendant cannot safely proceed to trial, the trial court may, in its discretion, order that a subpoena be issued and served on the defendant's behalf. MCL 775.15. The material witness must be paid for attending the trial in the same manner as if he or she had been subpoenaed by the prosecution. *Id*.

a. Witness Outside State

To implement a defendant's constitutional and statutory rights to compulsory process when a material witness resides outside of the state, Michigan has adopted the Uniform Act to "secure the attendance of witnesses from without a state in criminal proceedings." *People v McFall*, 224 Mich App 403, 407-408 (1997); MCL 767.91 *et seq*. To properly invoke the procedures under the act, a defendant must "(1) designate the proposed witness' location with a reasonable degree of certainty; (2) file a timely petition; and (3) make out a prima facie case that the witness' testimony is material." *McFall*, 224 Mich App at 409.

b. Requiring Bond

If there is a danger of losing the testimony of a material witness, the trial court may require the witness to post bond, following a hearing on the matter. MCL 767.35; MCL 765.29. If the witness does not post bond as ordered, the court must order the witness committed to jail until he

or she posts bond or is discharged by the court. MCL 767.35.

c. Appointment of Expert Witness for Indigent Defendant

When considering whether to appoint an expert witness for an indigent defendant, trial courts must apply the due process analysis set forth in *Ake v Oklahoma*, 470 US 68 (1985). *People v Kennedy*, 502 Mich 206, 225 (2018). *Ake* is the controlling law in this area and analysis under MCL 775.15 (as frequently occurred previously) is improper because "MCL 775.15 by its express terms, does not provide for the appointment of expert witnesses. It merely provides a means for subpoenaing certain witnesses and for paying their costs of attending trial." *Kennedy*, 502 Mich at 222. The *Kennedy* opinion overrules *People v Jacobsen*, 448 Mich 639 (1995) and *People v Tanner*, 469 Mich 437 (2003), to the extent those cases did not apply *Ake* and hold (or suggest) that MCL 775.15 governs a request by an indigent defendant for the appointment of an expert at government expense. *Kennedy*, 502 Mich at 225.

A trial court must consider three relevant factors when determining whether to appoint an expert witness for an indigent defendant: (1) "the private interest that will be affected by the action of the State"; (2) "the governmental interest that will be affected if the safeguard is to be provided"; and (3) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake*, 470 US at 77; see also *Kennedy*, 502 Mich at 215.

In addition, the *Kennedy* Court adopted the reasonable probability standard set forth in *Moore v Kemp*, 809 F2d 702 (CA 11, 1987), "as the appropriate standard for courts to apply in determining whether an indigent criminal defendant is entitled to the appointment of an expert at government expense under *Ake's* due process analysis." *Kennedy*, 502 Mich at 227-228. *Moore* provides:

> "[A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, . . . a

> defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof – by preparing counsel to cross-examine the prosecution's experts or by providing rebuttal testimony – he must inform the court of the nature of the prosecution's case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime. By the same token, if the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense, as the defendant did in *Ake*. In each instance, the defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary. [While] defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide, . . . defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense's case." *Moore*, 809 F2d at 712.

Accordingly, "'a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.'" *Kennedy*, 502 Mich at 228. Further, "when a defendant requests an expert to present an affirmative defense, a defendant must make the additional showing

of a substantial basis for the defense." *People v Propp*, 508 Mich 374, 381 (2021).

Caselaw examples. "[T]he trial court . . . erred by concluding that expert testimony regarding false confessions was not permitted under [*People v Kowalski*, 492 Mich 106 (2012)]," "because *Kowalski* concerned whether a trial court properly applied the rules of evidence following a *Daubert* hearing and did not hold as a matter of law that false-confession testimony is universally inadmissible[.]" *People v Warner*, 339 Mich App 125, 147 (2021). "Nonetheless, . . . the trial court did not abuse its discretion by denying [defendant's motion to appoint a false-confession expert] because defendant did not show that a reasonable probability existed 'that denial of expert assistance would result in a fundamentally unfair trial'" where "defendant indicated that the proposed false-confession experts 'would speak not to the fact that the defendant made a false confession but instead would speak to the attributes associated with false confessions and the interviewer bias of [the detective].'" *Id*. at 147 ("[e]ven without expert testimony, defendant was able to present evidence and argument that his confession was false").

In *Propp*, 508 Mich at 378, the defendant was charged with open murder and requested an expert to assist him in advancing the defense that the victim's death was an accident. The Michigan Supreme Court held that the Michigan Court of Appeals erred by requiring the defendant to show a substantial basis for the defense because the defense of accident was not an affirmative defense; rather, it negated the element of intent for the charge of first-degree premeditated murder, which the prosecutor had the burden to prove. *Id*. at 381-383.

On remand, the Court of Appeals held that "the trial court did not commit any error entitling defendant to a new trial by denying his motion to appoint a defense expert on the subject of erotic asphyxiation" because "no additional expert testimony was necessary to explain such a simple concept to the jury—i.e., that defendant was claiming that he did not intend to kill the victim and that he must have done so accidentally while restricting her airflow (at her request) during a consensual sexual encounter." *People v Propp (On Remand)*, 340 Mich App 652, 661 (2022). Accordingly, the Court of Appeals determined that "it is not reasonably probable that the

denial of this expert assistance resulted in a fundamentally unfair trial." *Id.*

d. Funding the Appointed Expert

By failing to provide any "substantive analysis to explain why it believed that defendant's requested sum [of $42,650] was [highly] excessive" or "explain how it arrived at the sum of $2,500," the trial court erred in issuing its award for expert witness funding to the defendant. *People v Williams*, 328 Mich App 408, 417 (2019) (the matter was remanded for the trial court "to take into consideration the principles set forth in *Kennedy* in determining the amount of funds to reimburse defendant . . . so as to satisfy constitutional requirements," while giving "[s]pecial attention . . . to the *Kennedy* Court's adoption of the 'reasonable probability' standard articulated . . . in *Moore*").

The Michigan Indigent Defense Commission's Standard 3 provides, in part, that "[c]ounsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case[, and r]easonable requests must be funded as required by law."[27] A defendant may qualify for public funds for an expert even if he or she has retained counsel. See *People v Ceasor*, 507 Mich 884 (2021) (finding "counsel performed deficiently" by failing to make such a request and that defendant demonstrated prejudice because there was no victim who could provide an account, no eyewitnesses, no corroborative physical evidence, and no apparent motive to harm; in cases like this, "the expert *is* the case") (quotation marks and citations omitted).

"[MIDC Standard 3] does not conflict with a trial judge's discretion to permit the appointment of an expert witness. Rather, the standard notes that experts must be funded '*as required by law*.' In other words, the request must be funded 'as required by' the very authority which [the plaintiff] accuses MIDC of disregarding." *Oakland Co v State of Michigan*, 325 Mich App 247, 267 (2018) (quotation marks and citations omitted). In addition, standard 3 does not "in any way interfere with the trial court's gatekeeping functions under MRE 702." *Oakland Co*, 325 Mich App at 259.

[27] See MIDC Minimum Standards. See Section 4.4 for discussion of the Michigan Indigent Defense Counsel Act (MIDCA), MCL 780.981 *et seq*.

See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4, for more information on expert witnesses, including funding.

Part B: Procedural Pretrial Motions

9.6 Adjournment or Continuance

A. Generally

"The trial of criminal cases shall take precedence over all other cases[.]" MCL 768.2. "No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown in the manner provided by law for adjournments, continuances and delays in the trial of civil causes in courts of record: [p]rovided, [t]hat no court shall adjourn, continue or delay the trial of any criminal cause by the consent of the prosecution and accused unless in his [or her] discretion it shall clearly appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done." *Id*.

"The court may refuse to adjourn a proceeding for the appointment of counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel." MCR 6.005(E).

The moving party has the burden of establishing good cause for an adjournment. MCL 768.2; MCR 2.503(B)(1).

Denial of a continuance may violate a defendant's right to due process in certain circumstances. *Ungar v Sarafite*, 376 US 575, 589 (1964). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.* at 589.

B. Considerations

If the defendant requests a continuance, the following factors should be considered:

- whether the defendant is asserting a constitutional right (e.g., the right to counsel);
- whether the defendant has a legitimate reason for asserting the right (e.g., a bona fide irreconcilable dispute with counsel over whether to call alibi witnesses);
- whether the defendant was negligent with regard to any delay in his or her request;
- whether the defendant requested previous adjournments; and
- whether the defendant can demonstrate that prejudice would result from a denial of the request. *People v Williams (Charles)*, 386 Mich 565, 578 (1972); *People v Lawton*, 196 Mich App 341, 348 (1992).

Adjournments were warranted in the following situations:

- When defense counsel sought to withdraw. *Williams (Charles)*, 386 Mich at 575-576.
- Preparation of defense expert witness endorsed on day of trial. *People v Wilson (Roy)*, 397 Mich 76, 81-82 (1976).
- New statements made by witnesses shortly before trial. *People v Suchy*, 143 Mich App 136, 142-146 (1985)
- Defendant requested properly fitted clothes to replace ill-fitting clothes brought for trial. *People v Turner (Clarence Duane)*, 144 Mich App 107, 110-111 (1985).

An adjournment was not warranted where the defendant "did not attempt to locate and secure potential expert witnesses until soon before the trial began[,]" failed to "move for an adjournment until the *day before trial*[,]" "had already caused his trial to be delayed for several months[,]" and "fail[ed] to show that the absence of [the expert witness] prejudiced him in any significant way." *People v Daniels (Daniel)*, 311 Mich App 257, 266-268 (2015) (citations omitted).

A trial court's desire to expedite the court's docket is *not* a sufficient reason to deny an otherwise proper request for a continuance. *Williams (Charles)*, 386 Mich at 577 (emphasis added).

C. Standard of Review

A trial court's grant or denial of a party's request for a continuance is reviewed for an abuse of discretion. *People v Jackson (Walter)*, 467 Mich 272, 276 (2002).

Even if the trial court abused its discretion in denying a defendant's request for a continuance, the defendant must still establish that he or she was prejudiced by the court's decision. *Williams (Charles)*, 386 Mich 565, 574 (1972); *Daniel (Daniels)*, 311 Mich App 257, 266 (2015) (citation omitted).

9.7 Motions for Rehearing or Reconsideration

"Unless another rule provides a different procedure for reconsideration of a decision . . . , a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion." MCR 2.119(F)(1). "No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs." MCR 2.119(F)(2). "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." MCR 2.119(F)(3).

"The purpose of MCR 2.119(F) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties. The time requirement for filing a motion for reconsideration or rehearing insures that the motion will be brought expeditiously." *Bers v Bers*, 161 Mich App 457, 462 (1987) (internal citation omitted).

"[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). See also *People v Walters (Jayne)*, 266 Mich App 341, 350 (2005) ("the palpable error provision in MCR 2.119(F)(3) is not mandatory and only provides guidance to a court about when it may be appropriate to consider a motion for rehearing or reconsideration[]").

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. Similarly, "'rehearing [or reconsideration] will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur.'" *People v White (Kadeem) (White (Kadeem) III)*, 493 Mich 962, 962 (2013), quoting *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883).

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, 658-661 (2012) (holding that "once a transfer of venue is made, the transferee court has full jurisdiction over the action 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[]").

"[A] circuit court, sitting as an appellate court, [may] reconsider a judgment or order." *Walters (Jayne)*, 266 Mich App at 349.

9.8 Joinder and Severance

A. Single Defendant

1. Charging Joinder

"The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses." MCR 6.120(A). "Each offense must be stated in a separate count." *Id.* "Two or more informations or indictments against a single defendant may be consolidated for a single trial." *Id.*

2. Postcharging Permissive Joinder or Severance

"On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in [MCR 6.120(C)], the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B).

"[A] defendant who agrees to have the charges against him considered in two trials [cannot] later successfully argue that the

second trial offends the Fifth Amendment's Double Jeopardy Clause." *Currier v Virginia*, 585 US ___, ___ (2018).[28]

"Joinder is appropriate if the offenses are related. For purposes of [MCR 6.120], offenses are related if they are based on

> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1).

"Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial." MCR 6.120(B)(2).

Joinder was appropriate in the following circumstances:

- Offenses were related where the evidence indicated that the defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package drugs for distribution. *People v Williams*, 483 Mich 226, 233-235 (2009).

- Offenses were related where the evidence demonstrated that the defendant engaged in ongoing acts related to his scheme of preying on young, teenage girls from his high school; used text messages to communicate with the victims and encouraged them to keep their communications secret; requested naked photographs from the victims and threatened to cut off ties with them if they refused; and used his parents' basement to isolate some of the young girls and sexually penetrate them. *People v Gaines*, 306 Mich App 289, 305 (2014).

- The trial court's denial of the defendant's motion to sever was not an abuse of discretion where the defendant's "attempted escape from jail happened 12 days after the murder and appeared to be a crime of opportunity rather than part of a previous scheme or plan connected with the other crimes," but "[the] defendant's attempts to cover up the murder, evade arrest, and escape from jail [could]

[28]See Section 9.10 for more information on double jeopardy.

be seen as a series of connected acts." *People v Oros*, 320 Mich App 146, 166 (2017), overruled in part on other grounds 502 Mich 229 (2018).[29]

- Evidence was not particularly complex (six charges of indecent exposure because there were six separate instances of indecent exposure), and the drain on the parties' resources, the potential for harassment of the witnesses, and the convenience of the witnesses all weighed in favor of not bifurcating the trial. *People v Campbell*, 316 Mich App 279, 294 (2016), overruled on other grounds by *People v Arnold*, 502 Mich 438 (2018).[30]

"If the court acts on its own initiative, it must provide the parties an opportunity to be heard." MCR 6.120(B)(3).

3. Right of Severance for Unrelated Offenses

"On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in [MCR 6.120(B)(1)]." MCR 6.120(C).

Denial of the defendant's motion for severance was appropriate in the following circumstances:

- Because evidence regarding the defendant's possession of child sexually abusive material would have been admissible at a separate trial on the CSC-I charges at issue, the defendant could not establish that a different outcome was likely had the charges been severed and separate trials held. *People v Girard*, 269 Mich App 15, 18 (2005).

- Because evidence pertaining to the other tax evasion charges would have been admissible in each of the trials as evidence of intent. *People v Duranseau*, 221 Mich App 204, 208 (1997).

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

[30]It is unclear whether the remaining portions of *Campbell (Michael)* are binding precedent. For more information on the precedential value of an opinion with negative subsequent history, see our note.

B. Multiple Defendants

1. Permissive Joinder

"An information or indictment may charge two or more defendants with the same offense." MCR 6.121(A). "It may charge two or more defendants with two or more offenses when

> (1) each defendant is charged with accountability for each offense, or
>
> (2) the offenses are related as defined in MCR 6.120(B)." MCR 6.121(A).

"When more than one offense is alleged, each offense must be stated in a separate count." MCR 6.121(A). "Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment under [MCR 6.121]." MCR 6.121(A).

2. Right of Severance for Unrelated Offenses

"On a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B)." MCR 6.121(B).

3. Right of Severance for Related Offenses

"On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). "The decision to try two defendants jointly or separately lies within the discretion of the trial court, and that decision will not be overturned absent an abuse of that discretion." *People v Furline*, 505 Mich 16, 20 (2020).

"Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 346 (1994). "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision. *Id*. at 346-347.

"The affidavit or offer of proof must state 'facts on which the court might determine whether . . . a joint trial might result in prejudice.'" *Furline*, 505 Mich at 20, quoting *Hana*, 447 Mich at

339 (cleaned up). "[S]everance may be warranted when defendants' mutually exclusive or antagonistic defenses create a serious risk of prejudice." *Furline*, 505 Mich at 21 (quotation marks and citation omitted). "[T]he defenses must be irreconcilable and create such great tension that a jury would have to believe one defendant at the expense of the other." *Id*. (quotation marks and citation omitted). "Defenses are mutually exclusive . . . if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant"; "[p]rejudice requiring reversal occurs only when the competing defenses are so antagonistic at their cores that both cannot be believed." *Id*. (quotation marks and citations omitted).

The trial court did not err in denying defendant's motion for severance where defendant's affidavit consisted of "contextual" statements that were "not relevant to the severance analysis," or related to prejudice that was "obviated by the prosecutor's agreement not to offer [the complained of] evidence." *Furline*, 505 Mich at 23 (thus, defendant's affidavit lacked concrete facts that fully supported his claim that the lack of severance resulted in prejudice; the Court further found that no prejudice actually occurred during defendant's trial).

4. Discretionary Severance

"On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants." MCR 6.121(D). "Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of the witnesses, and the parties' readiness for trial." *Id*. See also MCL 768.5 ("[w]hen 2 or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court").

"[I]n line with MCL 768.5 and MCR 6.121(D), . . . the decision to sever or join defendants lies within the discretion of the trial court." *People v Hana*, 447 Mich 325, 331 (1994). Michigan caselaw has established a strong policy in favor of joint trials, and denial of a defendant's motion for separate trials will not be reversed on appeal absent an abuse of discretion and an affirmative showing of prejudice to the substantial rights of the accused. *People v Carroll*, 396 Mich 408, 414 (1976).

C. Use of Dual Juries as an Alternative to Severance

Dual juries may be used to avoid the problems arising from a joint trial of defendants with antagonistic defenses. *People v Hoffman*, 205 Mich App 1, 19 (1994). The use of separate juries is merely a partial form of severance and should be evaluated using the factors applicable to a motion for separate trials. *People v Hana*, 447 Mich 325, 331 (1994). "The dual-jury procedure should be scrutinized with the same concern in mind that tempers a severance motion, i.e., whether it has prejudiced the substantial rights of the defendant." *Id*. at 351-352. "The precise issue is whether there was prejudice to substantial rights after the dual-jury system was employed." *Id*. at 352.

D. Standard of Review

A trial court's ruling on a motion for joinder or severance is reviewed for an abuse of discretion. *People v Hana*, 447 Mich 325, 331 (1994). Whether the charges are related is a question of law that is reviewed de novo. *People v Girard*, 269 Mich App 15, 17 (2005).

9.9 Motion to Dismiss[31]

No court rule or statute specifically addresses a motion to dismiss criminal charges. MCR 2.504 is the civil court rule governing dismissal of actions. Ordinarily a motion to dismiss is used to address issues such as double jeopardy or entrapment, where the remedy is dismissal of the case.

The trial court exceeds its authority when it dismisses the information against a defendant at a pretrial stage of the proceedings, *People v Morrow*, 214 Mich App 158, 165 (1995), because the prosecutor has exclusive authority to decide whom to prosecute. *People v Williams (Anterio)*, 244 Mich App 249, 254 (2001). MCL 767.29 governs the prosecution's practice of *nolle prosequi*, i.e., discontinuing or abandoning an indictment.

A trial court's decision on a motion to dismiss is reviewed for an abuse of discretion. *People v Stone*, 269 Mich App 240, 242 (2005).

[31] See Section 7.23(G) for discussion of motions to quash the information (improper bindover).

9.10 Double Jeopardy Issues

A. Generally

The right to be free from twice being placed in jeopardy for the same offense is guaranteed to criminal defendants by the federal and Michigan Constitutions, as well as by statute. US Const, Am V; Const 1963, art 1, § 15; MCL 763.5; *People v Nutt*, 469 Mich 565, 574 (2004). US Const, Am V provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]" The Double Jeopardy Clause applies to the states through the Fourteenth Amendment. *North Carolina v Pearce*, 396 US 711, 717 (1969). Const 1963, art 1, § 15 provides: "No person shall be subject for the same offense to be twice put in jeopardy." This provision is "essentially identical to its federal counterpart" and was intended to be "construed consistently with the corresponding federal provision." *Nutt*, 469 Mich at 575, 594.

"Both federal and Michigan double jeopardy provisions afford three related protections: (1) against a second prosecution for the same offense after acquittal, (2) against a second prosecution for the same offense after conviction, and (3) against multiple punishments for the same offense. [*Nutt*, 469 Mich] at 574; *Pearce*, [396 US 711]." *People v Ford*, 262 Mich App 443, 447 (2004).

"The purposes of double jeopardy protections against successive prosecutions for the same offense are to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching." *Ford*, 262 Mich App at 447. "[T]he purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended." *Id.* at 447-448.

"Double-jeopardy protections only apply to multiple *criminal* punishments"; "the constitutional provision against double jeopardy is not violated when a civil penalty serves a purpose distinct from any punitive purpose." *Dep't of Environmental Quality v Sancrant*, 337 Mich App 696, 704 (2021) (quotation marks and citation omitted). The following factors should be analyzed "in determining whether a remedy in a civil case should be considered a punishment for double-jeopardy purposes:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of

> punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned." *Sancrant*, 337 Mich App at 705 (quotation marks and citation omitted).

Because "double-jeopardy clauses generally do not prohibit subjecting a defendant to both criminal and civil penalties for the same act," "the first question to be answered in the double jeopardy analysis is whether the first punishment was criminal or civil[.]" *People v Adams*, ___ Mich App ___, ___ (2023). "[P]rison disciplinary proceedings are not part of a criminal prosecution and thus do not call into play all those rights due a defendant in a criminal prosecution." *Id.* at ___ (quotation marks and citation omitted). Indeed, "prison administrative proceedings and the corresponding punishments have been consistently treated as purely administrative and have been found not to invoke double jeopardy and other constitutional protections." *Id.* at ___.

In *Adams*, the Court of Appeals held that "MDOC policies reflect an intent to create an administrative/civil punishment for violation of prison policy," therefore, "the intent in providing punishment for violation of prison policies is to provide a civil punishment, as the punishment is primarily for discipline and other recognized administrative benefits of the penal institution." *Adams*, ___ Mich App at ___. However, "there are some very limited circumstances in which punishments imposed in a civil process may still raise double jeopardy concerns. Thus, although a civil punishment is presumed not to invoke double jeopardy protections, it may be shown to be equivalent to a criminal punishment by the clearest proof that the penalty is so punitive in purpose or effect that it is rendered criminal." *Id.* at ___ (quotation marks and citation omitted). "[W]here the legislative body has indicated an intention to establish a civil penalty, [courts] have inquired further whether the statutory scheme was so punitive either in purpose or effect, as to transform what was clearly intended as a civil remedy into a criminal penalty." *Id.* at ___ (quotation marks and citation omitted). After considering the factors restated in *Dep't of Environmental Quality v Sncrant*, 337 Mich App 696, 705 (2021), the *Adams* Court concluded "that the administrative punishment authorized by the policy did not transform the civil remedy into a criminal punishment."*Adams*, ___ Mich App at ___. Accordingly, the Court of Appeals held "that the double jeopardy protections afforded by the state and federal constitutions were not implicated when the state brought criminal charges against defendant based upon the same conduct resulting in his prior administrative confinement. There was not the 'clearest proof' that the

administrative punishment defendant received under MDOC policies was criminal." *Id*. at ___.

B. Multiple Prosecutions for the Same Offense

"[T]he Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. Therefore, a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. Similarly, the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is based upon an egregiously erroneous foundation." *People v Simmons (On Reconsideration)*, 338 Mich App 70, 79 (2021) (quotation marks and citations omitted), rev'd in part on other grounds ___ Mich ___ (2022).[32] "An acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, a mistaken understanding of what evidence would suffice to sustain a conviction, or a misconstruction of the statute defining the requirements to convict. Consequently, an acquittal is final even if it is based on an erroneous *evidentiary* ruling that precluded the prosecution from introducing evidence that would have been sufficient to convict the defendant." *Id*. at 79-80 (quotation marks, alterations, and citations omitted). Additionally, "an acquittal includes a ruling by the court that the evidence is insufficient to convict, a factual finding that necessarily establishes the criminal defendant's lack of criminal culpability, and any other ruling which relates to the ultimate question of guilt or innocence. On the other hand, a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise." *Id*. at 80 (quotation marks and citations omitted). "Whether a judgment of a lower court is an acquittal for purposes of double jeopardy is not to be controlled by the form of the judge's action. Rather, an appellate court must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id*. at 81 (quotation marks and citations omitted).

However, a circuit court "acting in an appellate capacity" has "authority under MCR 7.114(D) and MCR 2.119(F)" to reconsider and reverse "its own order of acquittal" because it is "not final" and "subject to appellate review or reconsideration." *People v Simmons*, ___ Mich ___, ___ (2022). Accordingly, the Michigan Supreme Court reversed that part of *People v Simmons (On Reconsideration)*, 338 Mich

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

App 70 (2021), that held "double jeopardy would bar a retrial of the defendant in the [district court] because the [circuit court] entered an order of acquittal." *Simmons*, ___ Mich at ___.

1. *Blockburger*/Same Elements Test

"If the Legislature specifically authorizes cumulative punishments under two statutes, the multiple-punishment strand of double jeopardy is not implicated." *People v Fredell*, 340 Mich App 221, 231 (2022). Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, a court cannot punish a defendant for both offenses in a single trial. *Id*. at 231. When legislative intent is not clear, courts must apply the "abstract legal elements" test (also called the *same-elements* test) to determine whether the Legislature intended to classify two offenses as the same offense for double jeopardy purposes. *Id*. at 232. "Application of the same-elements test, commonly known as the '*Blockburger* test,' is the well-established method of defining the Fifth Amendment term 'same offence.'" *People v Nutt*, 469 Mich 565, 576 (2004); *Blockburger v United States*, 284 US 299, 304 (1932). The *Blockburger* test "'focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Nutt*, 469 Mich at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975). In other words, "it is not a violation of double jeopardy to convict a defendant of multiple offenses if each of the offenses for which defendant was convicted has an element that the other does not." *Fredell*, 340 Mich App at 232 (cleaned up) (holding that convicting the defendant of involuntary manslaughter and operating while intoxicated (OWI) causing death did not violate double jeopardy because involuntary manslaughter required proof of an element that OWI causing death did not).

2. *Ashe*/Collateral Estoppel

Collateral estoppel means "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." *Ashe v Swenson*, 397 US 436, 443 (1970). The rule of collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy." *Id*. at 444-445. "Where a previous judgment of acquittal was based upon a general verdict, . . . a court [must] 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury

could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Id*. (holding that the Double Jeopardy Clause prohibited the defendant from being prosecuted for robbing a poker player after an acquittal in a previous trial for robbing a different player from the same game established that he was not one of the robbers) (citation omitted). However, *Ashe* presents a narrow set of circumstances: "a court's ultimate focus remains on the practical identity of offenses, and the only available remedy is the traditional double jeopardy bar against the retrial of the same offense – not a bar against the relitigation of issues or evidence." *Currier Virginia*, 585 US ___, ___ (2018). "If a second trial is permissible, the admission of evidence at that trial is governed by normal evidentiary rules – not by the terms of the Double Jeopardy Clause." *Id*. at ___ (further declining to "import into criminal double jeopardy law the civil law's more generous 'same transaction' or same criminal 'episode' test"). *Id*. at ___.

"*Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." *Currier*, 585 US at ___. "To say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, we must be able to say that 'it would have been *irrational* for the jury' in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second." *Id*. at ___, quoting *Yeager v United States*, 557 US 110, 119-120 (2009).

"If a single trial on multiple charges would suffice to avoid a double jeopardy complaint, 'there is no violation of the Double Jeopardy Clause when [the defendant] elects to have the . . . offenses tried separately and persuades the trial court to honor his election.'" *Currier*, 585 US at ___, quoting *Jeffers v United States*, 432 US 137, 152 (1977) (alteration in original) (this is true regardless whether the first trial yielded an acquittal or a conviction; while *Ashe* only applies to trials following acquittal, the Double Jeopardy Clause protects against multiple prosecutions for the same offense after conviction *or* acquittal). "[A] defendant who agrees to have [multiple] charges against him considered in two trials [cannot] later successfully argue that the second trial offends the Fifth Amendment's Double Jeopardy Clause[.]" *Currier*, 585 US at ___. Defendant's assertion that he was forced to seek two trials to avoid having the jury consider evidence of his prior convictions (to establish a charge of felon in possession of a firearm) was meritless. *Id*. at ___. "[D]ifficult strategic choices like these are 'not the same as no choice,' and the Constitution 'does not . . . forbid requiring' a

litigant to make them." *Id*. at ___ (citations omitted; alteration in original).

3. "Separate Sovereign" Rule

Under "the dual-sovereignty doctrine, a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns." *Puerto Rico v Sanchez Valle*, 579 US 59, 62 (2016). "[A] State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute, . . . [o]r the reverse may happen[.]" *Gamble v United States*, 587 US ___, ___ (2019).

In determining "whether two prosecuting authorities are different sovereigns for double jeopardy purposes, . . . [the] narrow, historically focused question" is "whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same 'ultimate source.'" *Id*. at ___ (citing *United States v Wheeler*, 435 US 313, 320 (1978), and holding that "the ultimate source of Puerto Rico's prosecutorial power" is the United States Congress, which "authorized and approved its Constitution, from which [its] prosecutorial power now flows[;]" accordingly, Puerto Rico and the United States "are not separate sovereigns" and therefore cannot "successively prosecute a single defendant for the same criminal conduct").

The Double Jeopardy Clause does not bar successive state and federal prosecutions of a defendant for offenses arising from the same criminal episode. *People v Davis*, 472 Mich 156, 162 (2005). Because federal and state prosecutorial authority are derived from two distinct and independent sources, a defendant whose conduct violates both federal and state law commits two offenses subject to punishment by both sovereigns. *Id*. at 163-164; see also *Sanchez Valle*, 579 US at 69 (noting that "the States are separate sovereigns from the Federal Government" for purposes of double jeopardy because "[t]he States' 'powers to undertake criminal prosecutions'" do not derive from the United States Congress; rather, "the States rely on 'authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment'").

The dual sovereignty rule for successive federal and state prosecutions also applies to cases involving prosecutions by different *states* for the same criminal conduct; double jeopardy does not prohibit successive state prosecutions where a defendant's conduct violates the law in more than one state and

more than one state seeks to prosecute the defendant for a crime resulting from that conduct. *Davis*, 472 Mich at 158, 166-169 (noting that a state is a sovereign separate from another state when it derives its prosecutorial authority from a source independent of the other state's source of authority); see also *Sanchez Valle*, 579 US at 69 (noting that "the States are separate sovereigns . . . from one another" for double jeopardy purposes). In *Davis*, the Double Jeopardy Clause did not bar the State of Michigan from prosecuting a defendant who had already been convicted and sentenced in Kentucky for offenses under Kentucky law that arose from the same conduct on which Michigan based its charges against the defendant. *Id.* at 158-159, 168-169.

While the Double Jeopardy Clause "prohibits separate prosecutions for the same offense," "it does not bar successive prosecutions by the same sovereign." *Denezpi v United States*, 596 US ___, ___ (2022). In *Denezpi*, the defendant's "single act led to separate prosecutions for violations of a tribal ordinance and a federal statute." *Id.* at ___. On appeal, the defendant argued that "the dual-sovereignty doctrine requires that the offenses be both enacted *and* enforced by separate sovereigns." *Id.* at ___. However, the *Denezpi* Court observed that "an offense defined by one sovereign is necessarily a different offense from that of another sovereign" because "the sovereign source of a law is an inherent and distinctive feature of the law itself[.]" *Id.* at ___. Accordingly, "the two offenses can be separately prosecuted without offending the Double Jeopardy Clause—even if they have identical elements and could not be separately prosecuted if enacted by a single sovereign." *Id.* at ___. "This dual-sovereignty principle applies where two entities derive their power to punish from wholly independent sources." *Id.* at ___ (quotation marks and citation omitted). While the "doctrine has come up most frequently in the context of the States," it applies to "Indian tribes too." *Id.* at ___ (noting "[t]his case presents a twist on the usual dual-sovereignty scenario . . . involv[ing] a single sovereign . . . that enforced its own law . . . after having separately enforced the law of another sovereign"). Consequently, the *Denezpi* Court held that the Double Jeopardy Clause did not prohibit the defendant's "separate prosecutions for violations of a tribal ordinance and a federal statute" because "the Tribe and the Federal Government are distinct sovereigns" and "those 'offence[s]' are not 'the same.'" *Id.* at ___ (alteration in original).

4. Retrial

"The very application of the Double Jeopardy Clause necessarily requires more than one trial." *People v Wilson*, 496 Mich 91, 101 (2014), abrogated on other grounds by *Bravo-Fernandez v United States*, 580 US 5, ___ (2016). See also *People v McKewen*, 326 Mich App 342, 351, 352 (2018) (a single trial resulting in defendant's conviction for two inconsistent charges (assault with intent to do great bodily harm less than murder and felonious assault) did not violate his constitutional protection against double jeopardy;[33] however, it was improper for the trial court to allow the inconsistent verdict to stand, and the Court affirmed the assault with intent to do great bodily harm less than murder conviction and vacated the felonious assault conviction).

a. Retrial Following Entry of a Directed Verdict of Acquittal

When a trial court grants a defendant's motion for a directed verdict of acquittal, the prohibition against double jeopardy generally prevents further action against the defendant based on the same charges. *People v Nix (Terressa)*, 453 Mich 619, 626-627 (1996). "However, the trial court's characterization of its ruling is not dispositive, and what constitutes an 'acquittal' is not controlled by the form of the action." *People v Mehall*, 454 Mich 1, 5 (1997). Rather, a reviewing court must "determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v Martin Linen Supply Co*, 430 US 564, 571 (1977); see also *Mehall*, 454 Mich at 5. "Retrial is not permitted if the trial court evaluated the evidence and determined that it was *legally insufficient* to sustain a conviction." *Id.* at 6.

"[R]etrial is barred when a trial court grants an acquittal because the prosecution . . . failed to prove an 'element' of the offense that, in actuality, it did not have to prove." *Evans v Michigan*, 568 US 313, 317 (2013). In *Evans*, 568 US at 315, "[w]hen the State of Michigan rested its case at [the defendant's] arson trial, the [trial] court entered a directed verdict of acquittal, based upon its view that the State had not provided sufficient evidence of a particular element of the offense." However, "the unproven 'element' was not actually a required element at all." *Id.* The United States

[33]See Section 9.10(B)(4)(c) and Section 12.15(B) for discussion of inconsistent verdicts.

Supreme Court held that "a midtrial acquittal in these circumstances is an acquittal for double jeopardy purposes[.]" *Id*. at 316. Accordingly, the defendant's "trial ended in an acquittal when the trial court ruled the State had failed to produce sufficient evidence of his guilt." *Id*. at 330. "The Double Jeopardy Clause thus bars retrial for his offense and should have barred the State's appeal." *Id*., reversing *People v Evans*, 491 Mich 1 (2012).[34]

b. Retrial Prohibited Following Premature Declaration of Mistrial[35]

"If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity." *People v Beck*, ___ Mich ___, ___ (2022) (quotation marks and citation omitted). "It is the prosecutor's 'heavy' burden to show manifest necessity." *Id*. at ___.[36] "To declare a mistrial, the trial court must find the facts justifying the mistrial. When such procedures are not followed, there is no manifest necessity for declaring a mistrial." *Id*. at ___. In *Beck*, "during deliberations, a juror informed the judge that another juror may have done outside research on the case. *Id*. at ___. "The trial court did poll the jury by written note, go on the record with counsel to discuss the matter, and briefly consider each side's proposed alternatives to a mistrial. However, the court's consideration of the matter was too abrupt, and its conclusions were not supported by sufficient evidence." *Id*. at ___ (holding that "although the trial court may have believed it was acting with an abundance of caution, the standard for declaring a mistrial was not satisfied"). "The nature of the juror's outside research was unclear to the trial court and yet, instead of further probing what the juror researched and whether it would affect the proceedings, the trial court summarily declared a

[34] On April 5, 2013, the Michigan Supreme Court, "in conformity with the mandate of the Supreme Court of the United States[]" in *Evans*, 568 US 313, entered an order vacating its judgment and opinion in *Evans*, 491 Mich 1, and affirming the judgment of the Wayne County Circuit Court. *People v Evans*, 453 Mich 959, 959-960 (2013).

[35] See Chapter 12 for more information on mistrial.

[36] "Determining whether manifest necessity exists to justify the declaration of a mistrial requires a balancing of competing concerns: the defendant's interest in completing his trial in a single proceeding before a particular tribunal versus the strength of the justification for a mistrial." *Beck*, ___ Mich at ___ (quotation marks and citation omitted). Courts "are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes[.]" *Id*. at ___ (quotation marks and citation omitted).

mistrial." *Id*. at ___. "Further, despite learning through polling the jurors that only one other juror had knowledge of the outside research, the trial court concluded that the entire jury was tainted." *Id*. at ___. Finally, "the trial court's consideration of less drastic alternatives failed to sufficiently determine the extent of any jury taint and whether it was limited to jurors who could be excused and replaced. Due to these failures, the trial court did not adequately find a justification for mistrial that outweighed the defendant's interest in continuing the trial." *Id*. at ___.

c. Retrial Due to Deadlocked Jury

Retrial after a mistrial due to a deadlocked jury does not violate the Double Jeopardy Clause. *Renico v Lett*, 559 US 766, 773 (2010).

Where, "[b]efore the jury concluded deliberations . . . , [the jury foreperson] reported that [the jury] was unanimous against guilt on charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide[,]" and where the jury then continued deliberations before a mistrial was declared because the jury remained hopelessly deadlocked, the Double Jeopardy Clause did not bar the defendant's retrial on all of the charged offenses. *Blueford v Arkansas*, 566 US 599, 601, 603-605, 610 (2012). Although the jury was instructed to consider the offenses in order, from greater to lesser, and to proceed to each lesser offense only after agreeing that the defendant was not guilty of the greater offenses, "the foreperson's announcement of the jury's unanimous votes on capital and first-degree murder [did not] represent[] . . . a resolution of some or all of the elements of those offenses in [the defendant's] favor." *Id*. at 606. "The foreperson's report was not a final resolution of anything[,] . . . [and t]he jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report[;]" because it was possible for the "jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes[,] . . . the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses[.]" *Id*. at 606, 608.

d. Retrial Following Dismissal for Improper Venue or other Prejudicial Trial Errors

"When a conviction is reversed because of a trial error, this Court has long allowed retrial in nearly all circumstances." *Smith v United States*, 599 US ___, ___ (2023). The Constitution does not require "a different outcome when the conviction is reversed because the prosecution occurred in the wrong venue and before a jury drawn from the wrong location." *Id*. at ___. The "appropriate remedy for prejudicial trial error, in almost all circumstances, is simply the award of a retrial, not a judgment barring reprosecution." *Id*. at ___ (recognizing violations of the Speedy Trial Clause as one exception to this general rule).

e. Collateral Estoppel and Retrial in Situations Involving Inconsistent Verdicts

"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 5, ___ (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." *People v Gates (Gregory)*, 434 Mich 146, 158 (1990). "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 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).

f. Cross-Over Collateral Estoppel and Criminal Trial Following Civil Trial

Cross-over estoppel is "'the application of collateral estoppel in the civil-to-criminal context.'" *People v Zitka*, 325 Mich App 38, 45 (2018), quoting *People v Trakhtenberg*, 493 Mich 38, 48 (2012). "[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." *People v Gates (Gregory)*, 434 Mich 146, 155 (1990). Although the Supreme Court "has recognized the application of collateral estoppel in the civil-to-criminal context," it "has "cautioned *against* its use." *People v Ali*, 328 Mich App 538, 542 (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*, 328 Mich App at 548. 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 540.

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,"[37] the

[37] "See, e.g., *Barrow v Pritchard*, 235 Mich App 478, 484-485 (1999)." *Trakhtenberg*, 493 Mich at 48.

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

C. Reversed Criminal Contempt Conviction

"[S]ummary criminal contempt proceedings are not subject to the constitutional protections against double jeopardy." *In re Contempt of Murphy*, ___ Mich App ___, ___ (2023). Accordingly, "if a criminal conviction for contempt of court from a summary proceeding is reversed on appeal, double jeopardy will not bar the matter from being taken up in a nonsummary proceeding on remand." *Id*. at ___. "As compared to regular criminal trials and nonsummary proceedings, summary proceedings serve different purposes and, more importantly, are subject to materially different procedures. A person who is held in criminal contempt in a summary proceeding has not been subject to the harassment of a criminal trial. If the person is successful on appeal and has the conviction reversed, then remand for a nonsummary proceeding before a different judge does not pose a risk of successive trials." *Id*. at ___.

D. Multiple Punishments for the Same Offense

"The multiple punishments strand of double jeopardy 'is designed to ensure that courts confine their sentences to the limits established by the Legislature' and therefore acts as a 'restraint on the prosecutor and the Courts.'" *People v Miller*, 498 Mich 13, 17-18 (2015) (citation omitted).

"The multiple punishments strand is not violated '[w]here "a legislature specifically authorizes cumulative punishment under two statutes[.]"'" *Miller*, 498 Mich at 18 (citations omitted). "Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to

cumulatively punish a defendant for both offenses in a single trial[; 't]hus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.'" *Id.* (citations omitted).

"[W]hen considering whether two offenses are the 'same offense' in the context of the multiple punishments strand of double jeopardy, [a court] must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments." *Miller*, 498 Mich at 19. "If the legislative intent is clear, courts are required to abide by this intent." *Id.* "If, however, the legislative intent is not clear, courts must then apply the abstract legal elements test articulated in [*People v Ream*, 481 Mich 223 (2008),] to discern legislative intent." *Miller*, 498 Mich at 19. The *Ream* test

> "focuses on the statutory elements of the offense to determine whether the Legislature intended for multiple punishments. Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if 'each of the offenses for which [the] defendant was convicted has an element that the other does not . . . .' This means that, under the *Ream* test, two offenses will only be considered the 'same offense' where it is impossible to commit the greater offense without also committing the lesser offense." *Miller*, 498 Mich at 19, citing *Ream*, 481 Mich at 225-226, 238, 241.

"When the dispositive question is whether the Legislature intended two convictions to result from a single statute, it presents a 'unit of prosecution' issue[,]" and "[t]he question is whether the Legislature intended a single criminal transaction to give rise to multiple convictions." *People v Perry*, 317 Mich App 589, 602 (2016), citing *People v Wakeford*, 418 Mich 95, 111-112 (1983). If "no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended." *Perry*, 317 Mich App at 604 (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, citing *Wakeford*, 418 Mich at 113-114.

1. Caselaw Examples: No Double Jeopardy Violation

The following are examples of crimes requiring proof of an element that the other does not, i.e., no double jeopardy violations found:

- Armed robbery, MCL 750.529, and felonious assault, MCL 750.82(1). *People v Chambers*, 277 Mich App 1, 8-9 (2007).

- Assault with intent to commit great bodily harm, MCL 750.84, and felonious assault, MCL 750.82. *People v Strawther*, 480 Mich 900 (2007).

- Second-degree murder, MCL 750.317, operating a vehicle under the influence of intoxicating liquor or a controlled substance (OUIL) causing death, MCL 257.625(4), and operating a vehicle with a suspended license causing death, MCL 257.904(4). *People v Bergman*, 312 Mich App 471, 491, 492 (2015).

- First-degree felony murder, MCL 750.316(1)(b), and the predicate felony of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1). *People v Ream*, 481 Mich 223, 240-241 (2008).

- Carjacking, MCL 750.529a, and assault with intent to rob while armed, MCL 750.89. *People v McGee*, 280 Mich App 680, 684-685 (2008).

- Carjacking, MCL 750.529a, and unlawfully driving away a motor vehicle (UDAA), MCL 750.413. *People v Cain (Cain II)*, 495 Mich 874, 874-875 (2013).

- First-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), and second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a). *People v Duenaz*, 306 Mich App 85, 115 (2014).

- First-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c), and third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(c). *People v Garland*, 286 Mich App 1, 5-6 (2009).

- Prisoner in possession of a controlled substance, MCL 801.263(2), and delivery of marijuana, MCL 333.7401(2)(d)(*iii*). *People v Williams*, 294 Mich App 461, 468-470 (2011).

- Refusing or resisting collection of biometric data, MCL 28.243a(1), and resisting, obstructing, or assaulting a police officer, MCL 750.81d(1). *People v Kammeraad*, 307 Mich App 98, 144-145 (2014).

- Resisting, obstructing, or assaulting a police officer, MCL 750.81d(1), and assault of a prison

employee, MCL 750.197c(1). *Kammeraad*, 307 Mich App at 145.

- Unlawful imprisonment, MCL 750.349b, and assault with a dangerous weapon (felonious assault), MCL 750.82. *People v Bosca*, 310 Mich App 1, 41-42 (2015), rev'd in part ___ Mich ___ (2022).

- Felony-firearm, MCL 750.227b, and felon-in-possession, MCL 750.224f. *People v Thigpen*, ___ Mich App ___, ___ (2023).

- Possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, when receiving or concealing stolen firearms or ammunition, MCL 750.535b, is the predicate felony. *People v Mitchell*, 456 Mich 693, 694-695 (1998).

- Possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon (CCW), MCL 750.227. *People v Sturgis*, 427 Mich 392, 396, 409-410 (1986).

- First-degree home invasion, MCL 750.110a(2), and felonious assault, MCL 750.82. *People v Conley*, 270 Mich App 301, 311-312 (2006).

- Possession and delivery of the same controlled substance, *People v Dickinson*, 321 Mich App 1, 4-5 (2017), or possession and manufacture of the same controlled substance, *People v Baham*, 321 Mich App 228, 245-250 (2017).

- A single conviction for one count of first-degree murder supported by two theories (e.g., premeditated murder and felony murder). *People v Bigelow*, 229 Mich App 218 (1998). See also *People v Williams*, 475 Mich 101, 103-105 (2006).

2. Caselaw Examples: Double Jeopardy Violation

The following are examples of crimes requiring proof of the same elements, i.e., double jeopardy violations found:

- Operating while intoxicated (OWI), MCL 257.625(1), and operating while intoxicated causing serious impairment of the body function of another person (OWI-injury), MCL 257.625(5). *People v Miller*, 498 Mich 13, 15, 25-26 (2015).

- Assault with intent to rob while armed, MCL 750.89, and armed robbery, MCL 750.529. *People v Gibbs*, 299 Mich App 473, 488-491 (2013).

- Two separate counts of first-degree home invasion, MCL 750.110a(2), where there was only one home invasion supported by two theories. *People v Baker*, 288 Mich App 378, 386 (2010).

- Larceny of property valued at $20,000 or more, MCL 750.356(2)(a), and receiving or concealing stolen property valued at $20,000 or more, MCL 750.535(2)(a), "when the convictions arise from the same criminal act because a person who steals property necessarily possesses stolen property." *People v Carson*, ___ Mich App ___, ___ (2024).

- Operating/maintaining a methamphetamine laboratory, MCL 333.7401c(2)(a), and operating/maintaining a methamphetamine laboratory within 500 feet of a residence, MCL 333.7401c(2)(d). *People v Meshell*, 265 Mich App 616, 630-633 (2005).

- Aggravated indecent exposure, MCL 750.335a(1) and MCL 750.335a(2)(b), and indecent exposure, MCL 750.335a(1) and MCL 750.335a(2)(a). *People v Franklin*, 298 Mich App 539, 547 (2012).

- Assault by strangulation, MCL 750.84(1)(b), and assault with intent to commit great bodily harm less than murder, MCL 750.84(1)(a). *People v Barber (On Remand)*, 332 Mich App 707, 718 (2020).

- Second-degree murder, MCL 750.317, and statutory involuntary manslaughter, MCL 750.329. *People v Wafer*, 509 Mich 31, 50-51 (2022).

E. Standard of Review

A double jeopardy challenge presents a question of constitutional law that is reviewed de novo. *People v Conley*, 270 Mich App 301, 310 (2006).

9.11 Speedy Trial

A. Right to a Speedy Trial

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan Constitutions, as well as by statute. US Const,

Am VI; Const 1963, art 1, § 20; MCL 768.1. "The defendant and the people are entitled to a speedy trial and to a speedy resolution of all matters before the court." MCR 6.004(A).[38] "'The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest.'" *People v Patton*, 285 Mich App 229, 236 (2009), quoting *People v Williams (Cleveland)*, 475 Mich 245, 261 (2006). "Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice." MCR 6.004(A). To preserve the issue of speedy trial for appeal, a defendant must make a formal demand for a speedy trial on the record. *People v Cain (Janice)*, 238 Mich App 95, 111 (1999).

In deciding whether a defendant has been afforded a speedy trial, the Michigan Supreme Court adopted the four-part balancing established by the United States Supreme Court in *Barker v Wingo*, 407 US 514 (1972). *People v Collins (Harold)*, 388 Mich 680 (1972). When a defendant claims a violation of the right to a speedy trial, the trial court must consider four factors: (1) the length of delay; (2) the reasons for the delay; (3) the defendant's assertion of the right; and (4) any prejudice to the defendant. *People v McLaughlin*, 258 Mich App 635, 644 (2003).

B. Length of the Delay

"Although not determinative of a speedy trial claim, length of delay is a factor that triggers an investigation of the speedy trial issue." *People v Hammond*, 84 Mich App 60, 67 (1978). Where there has been a delay of at least six months after a defendant's arrest, further investigation into a claim of denial of the right to a speedy trial is necessary. *People v Daniel (Hank)*, 207 Mich App 47, 51 (1994). For a delay of 18 months or more, prejudice to the defendant is presumed and the burden shifts to the prosecution to rebut the presumption. *People v Collins (Harold)*, 388 Mich 680, 695 (1972). Where the delay following a defendant's arrest is less than 18 months, the defendant bears the burden of showing prejudice by reason of the delay. See *id*.

C. Reasons for the Delay

Regarding the second prong—reasons for delay—the court balances the conduct of both the prosecution and the defendant. *Collins*

[38] The Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]" and therefore does not "apply to the sentencing phase of a criminal prosecution[.]" *Betterman v Montana*, 578 US 437, 439-441(2016) (holding "that the Clause does not apply to delayed sentencing[]"). However, "although the Speedy Trial Clause does not govern[inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id*. at 439.

(Harold), 388 Mich at 690. "The reasons for delay are examined by [the court] and each period of delay is assigned to either the prosecutor or the defendant." *People v Ross (Edward)*, 145 Mich App 483, 491 (1985).

Ordinarily, "delays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned[,]" because "assigned counsel generally are not state actors for purposes of a speedy-trial claim." *Vermont v Brillon*, 556 US 81, 92, 94 (2009). However, it is possible that an assigned counsel's delay could be charged to the state if a breakdown in a state's public defender system caused the delay. *Id.* at 94.

"[I]f the defendant has not contributed to the delay, a period of otherwise unexplained inaction in excess of 180 days in the prosecution of a charge pending against an inmate is per se a violation of the statute, unless the people make an affirmative showing of exceptional and unavoidable circumstances which hamper the normally efficient functioning of the trial courts." *People v Forrest*, 72 Mich App 266, 273 (1976).

"Where a delay is unexplained, it is charged to the prosecution." *Ross (Edward)*, 145 Mich App at 491. "Although delays inherent in the court system, e.g., docket congestion, 'are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial.'" *People v Gilmore*, 222 Mich App 442, 460 (1997), quoting *People v Wickham*, 200 Mich App 106, 111 (1993).

Delays occasioned by the prosecution's successful pursuit of an interlocutory appeal are "'taken out of the calculation,'" and therefore, are not attributable to either party when determining whether a defendant's right to a speedy trial has been violated. *People v Waclawski*, 286 Mich App 634, 664 (2009), quoting *People v Missouri*, 100 Mich App 310, 321 (1980).

D. Assertion of the Right

A defendant's assertion of his or her right to a speedy trial is the third factor the court must consider in determining whether the right to a speedy trial has been violated. *Cain (Janice)*, 238 Mich App at 112. While failure to assert the right to a speedy trial does not automatically constitute a waiver of the right, it is strong evidentiary support for the conclusion that the defendant's right was not violated. *Collins (Harold)*, 388 Mich at 692-694. In *People v Missouri*, 100 Mich App 310, 322 (1980), the Court of Appeals concluded that the defendants' assertion of the right to a speedy trial two weeks before trial and nearly 30 months after indictment was strong evidence that

the delay had not caused a serious deprivation of their right to a speedy trial.

E. Resulting Prejudice

The final inquiry into a claim of a speedy trial violation is whether the defendant experienced any prejudice as a result of the delay. *Collins (Harold)*, 388 Mich at 694. There are two types of prejudice a defendant may experience: (1) prejudice to his or her person; and (2) prejudice to his or her defense. *Id.* at 694. "Prejudice to his [or her] person would take the form of oppressive pretrial incarceration leading to anxiety and concern." *Id.* "Prejudice to his [or her] defense might include key witnesses being unavailable." *Id.* "Impairment of defense is the most serious, 'because the inability of a defendant to adequately prepare his [or her] case skews the fairness of the entire system.'" *Id.*, quoting *Barker*, 407 US at 514.

General allegations of *possible* prejudice (e.g., witness's memories fade, financial burden) are insufficient. *Gilmore*, 222 Mich App at 462. Rather, a defendant must "specifically argue[] how the delay caused him [or her] prejudice." *People v Rivera*, 301 Mich App 188, 194 (2013) (the defendant's "general statement that being in prison on unrelated charges for 10 months caused prejudice[]" did not constitute a "basis . . . to conclude that [he] was denied his right to a speedy trial[]").

F. Recognizance Release

"MCR 6.004(C) . . . allows for the release on bond of defendants who are jailed for more than 180 days as a result of pending charges." *People v Lown*, 488 Mich 242, 249 (2011). Specifically, MCR 6.004(C) provides:

> "In a felony case in which the defendant has been incarcerated for a period of 180 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, or in a misdemeanor case in which the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance, unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community."

"In computing the 28-day and 180-day periods, the court is to exclude

> (1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,
>
> (2) the period of delay during which the defendant is not competent to stand trial,
>
> (3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,
>
> (4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either
>
> > (a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or
> >
> > (b) exceptional circumstances justifying the need for more time to prepare the state's case,
>
> (5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and
>
> (6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion." MCR 6.004(C).

G. Untried Charges Against State Prisoners—180-Day Rule

MCR 6.004(D)(1) provides that, except for crimes exempted by MCL 780.131(2)[39]:

> "the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or

[39] MCL 780.131(2) exempts crimes committed by a state correctional facility inmate while incarcerated in the facility or after the inmate has escaped but before being returned to Department of Corrections custody.

> complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail." See also MCL 780.131.

MCR 6.004(D)(2) sets out the remedy for a violation of the 180-day rule:

> "In the event that action is not commenced on the matter for which request for disposition was made as required in [MCR 6.004(D)(1)], no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information, or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." See MCL 780.133.

The 180-day rule does not require that trial be commenced within 180 days, but rather, that the prosecution make good-faith efforts on the case during the 180-day period, and that the prosecution then promptly proceed to prepare the case for trial. *People v Hendershot*, 357 Mich 300, 304 (1959). If the prosecution takes preliminary action within the 180-day period but the initial action is followed by inexcusable delay that shows an intent not to promptly bring the case to trial, the court may find the absence of good-faith action and dismiss the case. *Id*. at 303-304. For example, in *People v Davis*, 283 Mich App 737, 743-744 (2009), the trial court erred in dismissing the pending charges against the defendant, because the prosecution commenced proceedings against the defendant within 180 days of receiving notice from the Department of Corrections that the defendant was incarcerated, thereby satisfying the requirements of MCL 780.131 (prisoner must be brought to trial within 180 days) and MCL 780.133 (dismissal required only if action has not been commenced within 180 days). "The prosecution made good-faith efforts to proceed promptly with pretrial proceedings," and "[t]here [wa]s no indication that any delay in bringing [the] defendant to trial was inexcusable or demonstrated an intent not to promptly bring the case to trial." *Davis*, 283 Mich App at 743. See also *People v Lown*, 488 Mich 242, 246-247 (2011) (180-day rule was satisfied where the prosecutor commenced action within 180 days after receiving notice from the Department of Corrections, proceeded promptly to prepare the case for trial, and was ready for trial within the 180-day period).

Conversely, a trial court abuses its discretion if it dismisses criminal charges under the "180-day rule" when "a significant amount of the delay in bringing defendant's case to trial was not the fault of the prosecutor, but rather resulted from our Supreme Court's decision to suspend jury trials in the early days of the Covid pandemic." *People v Witkoski*, 341 Mich App 54, 56 (2022). However, if the "trial courts [had] remained open for jury trials, but subject to heightened Covid-19 safety measures," "the prosecutor would have been expected to bring the case to trial promptly because a jury trial would have been permitted." *Id*. at 63.

The statutory time period of 180 days begins to run when the prosecution receives notice from the Department of Corrections:

> "The statutory trigger is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges. The statute does not trigger the running of the 180-day period when the Department of Corrections actually learns, much less should have learned, that criminal charges were pending against an incarcerated defendant." *People v Williams*, 475 Mich 245, 259 (2006), overruling *People v Hill*, 402 Mich 272 (1978), and *People v Castelli*, 370 Mich 147 (1963), to the extent they were inconsistent with MCL 780.131.

See also *People v Rivera*, 301 Mich App 188, 192 (2013) (noting that "[t]he clear language of MCL 780.131(1) provides that the MDOC must send written notice, by certified mail, *to the prosecutor* to trigger the 180-day requirement[,]" and holding that because "the MDOC sent a notice to the district court[] . . . [but] did not send, by certified mail, a notice to the prosecuting attorney[,] . . . the 180-day rule was never triggered, so it could not have been violated[]").

Unless specifically excepted under MCL 780.131(2), the 180-day rule applies to *any* untried charge against *any* prisoner, without regard to potential penalty. *Williams*, 475 Mich at 254-255 (2006), overruling *People v Smith*, 438 Mich 715 (1991), to the extent of its inconsistency with MCL 780.131.

H. Extradition and Detainers

The Michigan statutes concerning extradition are found in the Michigan Code of Criminal Procedure. See MCL 776.9—MCL 776.13. A thorough discussion of extradition law is beyond the scope of this benchbook. For general information concerning extradition, see *Extradition To and From the United States: Overview of the Law and Recent Treaties*; see also Wikipedia, *Extradition law in the United States*.

"The purpose of the [Interstate Agreement on Detainers (IAD)] is to facilitate the prompt disposition of outstanding charges against an inmate incarcerated in another jurisdiction." *People v Patton*, 285 Mich App 229, 232 (2009). A detainer, under the IAD, MCL 780.601 *et seq.*, is generally defined as "a notification filed with the institution in which an individual is serving a sentence, advising that the prisoner is wanted to face pending charges in the notifying state." *People v Shue*, 145 Mich App 64, 70 (1985). "'Once a detainer is filed, it is then that the IAD is triggered and compliance with the provisions of the agreement is required.'" *Patton*, 285 Mich App at 232, quoting *People v Gallego (Luis)*, 199 Mich App 566, 574 (1993). The IAD applies only to prisoners serving a prison sentence; it does not apply to a person in custody awaiting extradition. *People v Monasterski*, 105 Mich App 645, 653 (1981).

Article III of the IAD involves prisoner-initiated extradition and requires the prisoner to be brought to trial within 180 days after delivering to the prosecutor and appropriate court notice of imprisonment and a request for a final disposition, unless good cause is showing to grant a necessary or reasonable continuance. MCL 780.601, Article III(a); *People v Waclawski*, 286 Mich App 634, 646 (2009). See *People v Swafford*, 483 Mich 1 (2009), and *People v Duenaz*, 306 Mich App 85 (2014), for more detailed information on Article III of the IAD.

Article IV(c) of the IAD involves prosecutor-initiated extradition and requires trial to commence within 120 days of the prisoner's arrival in the state, unless good cause is shown to grant a necessary or reasonable continuance. MCL 780.601, Article IV(c); *Waclawski*, 286 Mich App at 646; *People v Harris (Michael)*, 148 Mich App 506, 513 (1986). See *Harris (Michael)*, 148 Mich App 506, and *People v Stone*, 269 Mich App 240 (2005), for more detailed information on Article IV of the IAD.

I. Standard of Review

"Whether a defendant was denied his [or her] constitutional right to a speedy trial is a mixed question of law and fact." *Gilmore*, 222 Mich App at 459. Factual findings are reviewed for clear error, and constitutional questions of law are reviewed de novo. *Id*.

Part C: Pretrial Motions to Suppress Evidence[40]

[40] See Chapter 11 for discussion of suppression of evidence on Fourth Amendment grounds.

9.12 Motion to Suppress Evidence

A. Timing

Generally, "[a] motion to suppress evidence must be made in advance of trial[.]" *People v Manning*, 243 Mich App 615, 625 (2000). However, a motion to suppress evidence may be made during trial, within the trial court's discretion. *People v Ferguson*, 376 Mich 90, 93-94 (1965); *People v Gentner, Inc*, 262 Mich App 363, 368 (2004). The trial court need not permit an untimely motion to suppress when the factual circumstances giving rise to the issue were known to the defendant before trial and could have been raised in advance. *Ferguson*, 376 Mich at 94-95.

B. Evidentiary Hearing

"By filing [a] motion to suppress prior to trial, the defendant . . . follow[s] the proper procedure[, and] the trial judge act[s] correctly by holding a separate evidentiary hearing to consider the ruling." *People v Kinnebrew*, 75 Mich App 81, 83 (1977). However, "a motion to suppress [may be] decided on the basis of the record of the preliminary examination" transcript if the parties so stipulate. *People v Kaufman*, 457 Mich 266, 276 (1998); MCR 6.110(D)(2). If the defendant testifies at an evidentiary hearing, the defendant's testimony is not admissible at trial on the question of guilt or innocence. *People v Walker (Lee)*, 374 Mich 331, 338 (1965).

C. Support for Motion

"[T]rial counsel's failure to raise [a] Fourth Amendment challenge [could not] be excused for not foreseeing a change in the law" where "there was existing precedent that would have strongly supported a motion to suppress[.]" *People v Hughes (On Remand)*, 339 Mich App 99, 109 (2021). Though the case involved a matter of first impression (a search of data extracted from defendant's cell phone), "it was based on two *fundamental* sources of relevant law: (a) the Fourth Amendment's particularity requirement, which limits an officer's discretion when conducting a search pursuant to a warrant and (b) . . . recognition of the extensive privacy interests in cellular data [as discussed in *Riley v California*, 573 US 373 (2014)]." *Hughes (On Remand)*, 339 Mich App at 108 (quotation marks and citation omitted; emphasis in original). "[W]hile there was no authority directly addressing the Fourth Amendment question at issue in [the] case, there were well-established broader principles to draw from and caselaw to analogize–as defendant's appointed appellate counsel did in a timely submitted brief to [the Court of Appeals] and as attorneys generally do on a regular basis. Because there was existing precedent

that would have strongly supported a motion to suppress, trial counsel's failure to raise the Fourth Amendment challenge [could not] be excused for not foreseeing a change in the law." *Id*. at 109. However, the *Hughes* Court did "not hold that trial counsel was required to make an argument precisely mirroring the analysis set forth in [the caselaw]. But, based on the existing authority discussed in [the caselaw], it [was] objectively reasonable to have expected trial counsel to raise a Fourth Amendment argument and, at the very least, preserve [the] issue for appeal." *Id*. at 109 (noting "trial counsel had three opportunities to move for suppression of defendant's cell-phone data on the ground that it violated the Fourth Amendment and failed to do so").

D. Interlocutory Appeal

"Where the trial court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the court reconsider whether pretrial release is appropriate." MCR 6.126.

E. Standard of Review

A trial court's factual findings at a suppression hearing are reviewed for clear error, and the ultimate ruling on a motion to suppress is reviewed de novo. *People v Jones (Jeffrey)*, 279 Mich App 86, 90 (2008).

9.13 Motion to Suppress Identification of Defendant

A. Generally

Identification testimony is admissible unless a pretrial identification procedure was impermissibly suggestive; however, even if a pretrial identification procedure was impermissibly suggestive, identification testimony is admissible if it did not create a substantial risk of misidentification considering the totality of the circumstances. *Manson v Brathwaite*, 432 US 98, 110, 114 (1977); *Neil v Biggers*, 409 US 188, 199-200 (1972). "'[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *People v Hickman*, 470 Mich 602, 607 (2004), quoting

Moore v Illinois, 434 US 220, 227 (1977). "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302 (1993). Generally, once the defendant shows an impermissibly suggestive pretrial identification, testimony about the identification is inadmissible at trial. *Id*. at 303.

"[E]vidence of an unnecessary first-time-in-court identification procured by the prosecution—a state actor—implicates a defendant's due-process rights in the same manner as an in-court identification that is tainted by an unduly suggestive out-of-court identification procedure employed by the police." *People v Posey*, ___ Mich ___, ___ (2023) (vacating the portion of the Court of Appeals' opinion which held "that the reliability criteria could not be applied given that there was no improper law-enforcement activity and no pretrial identification of defendant obtained through an unnecessarily suggestive pretrial process"). "Because the same due-process rights are affected, trial courts must consider reliability factors such as those at issue when an in-court identification is tainted by an unduly suggestive out-of-court identification procedure." *Id*. at ___. In *Posey*, the Michigan Supreme Court held that due-process rights are "implicated when the prosecution—another agent of the state—conducts an unnecessarily suggestive *in-court* law-enforcement procedure by obtaining an in-court identification of a defendant by a witness who was unable to identify a defendant at any point prior to that identification." *Id*. at ___ (extending "the due-process based preadmissibility screening protections from [*People v Gray*, 457 Mich 107, 115-116 (1998), and *People v Kachar*, 400 Mich 78, 95-96 (1977)] to witness identifications of a defendant that take place for the first time at trial").

To determine if a witness has an independent basis for an in-court identification, a court should evaluate the following factors:

> "1. Prior relationship with or knowledge of the defendant.
>
> 2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor affecting sensory perception and proximity to the alleged criminal act.
>
> 3. Length of time between the offense and the disputed identification. . . .
>
> 4. Accuracy or discrepancies in the pre-lineup or show-up description and defendant's actual description.

> 5. Any previous proper identification or failure to identify the defendant.
>
> 6. Any identification prior to lineup or showup of another person as defendant.
>
> 7. [T]he nature of the alleged offense and the physical and psychological state of the victim. . . .
>
> 8. Any idiosyncratic or special features of defendant." *Kachar*, 400 Mich at 95-96 (alteration in original).

"[T]rial court[s] should be aware of the benefits of conducting a *Wade*[41] hearing when identification is an issue." *People v Baker*, 103 Mich App 255, 258 (1981). "Where the risk of a tainted in-court identification is alleged, this procedure is a useful tool to aid the trial court's determination of whether an independent basis for that identification exists." *Id.*"An appellate court reviews a trial court's determination following a *Wade* hearing by examining the totality of the circumstances surrounding the challenged pretrial identification and determining whether those procedures were so impermissibly suggestive that they gave rise to a substantial likelihood of misidentification." *People v Hampton*, 138 Mich App 235, 238 (1984).

If a pretrial identification procedure was unduly suggestive, in-court identification of the defendant at trial is inadmissible as the fruit of the illegal procedure unless the prosecution establishes by clear and convincing evidence (at a separate evidentiary hearing held outside the presence of the jury) that the in-court identification is based on observations of the suspect independent of the illegal pretrial identification. *Gray*, 457 Mich at 115.

"Given the scope of human diversity," a witness is not required to "accurately guess the age of another person—at least, one who is neither obviously a child nor obviously a senior—with any more precision than a decade or so, especially on the basis of a single visual interaction with little context from which an age could otherwise be deduced." *People v Ratcliff*, 299 Mich App 625, 629 (2013), vacated in part on other grounds 495 Mich 876 (2013)[42] (a robbery victim's statement that the perpetrator "appeared to be in his twenties," where the defendant was actually 17, did not render the identification "inherently unreliable or implausible").

"Any discrepancy between [a witness's] initial description and [a] defendant's actual appearance is relevant to the weight of such

[41] *United States v Wade*, 388 US 218 (1967).

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

evidence, not to its admissibility." *People v Davis*, 241 Mich App 697, 705 (2000).

B. Right to Counsel

Absent an intelligent waiver by the defendant, counsel is required to be present at a lineup. *People v Frazier* , 478 Mich 231, 244 n 11 (2007), citing *Wade* , 388 US at 237. However, "the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings." *Hickman*, 470 Mich at 603. In *Hickman*, 470 Mich at 610, the challenged identification took place "on-the-scene" and before the initiation of adversarial proceedings; therefore, counsel was not required. The Michigan Supreme Court's decision in *Hickman* overruled its previous decision in *People v Anderson*, 389 Mich 155 (1973), where "the right to counsel was extended to all pretrial corporeal identifications, including those occurring before the initiation of adversarial proceedings." *Hickman*, 470 Mich at 605. However, "identifications conducted before the initiation of adversarial judicial criminal proceedings could still be challenged" on the basis that a defendant's due process rights were violated by unnecessarily suggestive procedures. *Id*. at 607.

The defendant was not entitled to a corporeal lineup with counsel rather than a photographic lineup where he was in custody for another offense at the time of the lineup; under *Hickman*, 470 Mich at 607, "a defendant's right to counsel 'attaches only to . . . [an] identification conducted at or after the initiation of adversarial judicial proceedings[,]'" and adversarial proceedings for the subject offense had not yet been initiated when the photographic lineup occurred. *People v Perry*, 317 Mich App 589, 596-597 (2016) (extending the reasoning of *Hickman*, 470 Mich at 603-604, 607-609—which addressed a *corporeal* identification—to a *photographic* lineup).

There is no right to counsel at precustodial investigatory photographic lineups. *People v Kurylczyk*, 443 Mich 289, 302 (1993). In *Hickman*, 470 Mich at 609 n 4, the Michigan Supreme Court declined to address whether a defendant has the right to an attorney during a photographic lineup *after* the initiation of adversarial judicial proceedings, because *Hickman* involved a corporeal identification conducted *before* the initiation of adversarial judicial proceedings.

There is no right to have counsel present at a post-lineup interview of a witness. *People v Sawyer*, 222 Mich App 1, 3-4 (1997).

The prosecution has the burden of proving by clear and convincing evidence that the defendant waived his or her right to counsel. *People v Daniels*, 39 Mich App 94, 96-97 (1972). Additionally, "for identifications made at a confrontation out of the presence of [the]

defendant's attorney, the burden is on the prosecution to show fairness." *People v Young)*, 21 Mich App 684, 693-694 (1970). "When counsel is present at the lineup, the burden is on the defendant to prove [that] the lineup was impermissibly suggestive." *People v Morton*, 77 Mich App 240, 244 (1977).

C. Evaluating a Lineup's or Showup's[43] Suggestiveness, Necessity, and Reliability

In determining whether to suppress an identification procedure, the court should first determine whether the procedure was suggestive. See *People v Sammons*, 505 Mich 31, 41 (2020). If the procedure was suggestive, the next inquiry is whether it was necessary. See *id*. at 47. Finally, a court should evaluate the reliability of the procedure; even if the procedure was unnecessarily suggestive, "the evidence it produce[s] could still be admissible" unless it "created a substantial likelihood of misidentification." *Id*. at 49 (quotation marks and citation omitted). "Exclusion of evidence of an identification is required when (1) the identification procedure was suggestive, (2) the suggestive nature of the procedure was unnecessary, and (3) the identification was unreliable." *Id*. at 41.

A lineup may be so suggestive and conducive to irreparable misidentification that an accused is denied due process of law. *Stovall v Denno*, 388 US 293, 301-302 (1967). "[D]ue process concerns arise . . . when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry v New Hampshire*, 565 US 228, 238-239 (2012). When the police use such a procedure, "due process requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" *Id*. at 239, quoting *Neil v Biggers*, 409 US 188, 201 (1972).

A court must consider the totality of the circumstances to determine whether an identification procedure is fair. *People v Kurylczyk*, 443 Mich 289, 311-312 (1993). Nonexhaustive factors the court should consider when determining whether an unnecessarily suggestive identification is reliable include: "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation." *Sammons*, 505 Mich at 51 (quotation marks and citation omitted).

[43] See Section 9.13(E) for more information on showups.

"[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry*, 565 US at 238. Rather, "[w]hen no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Id.* at 233, 234, 240 (where an eyewitness, in response to a police officer's request for a more specific description of the perpetrator of a theft, pointed out her window at the petitioner, who was standing near another officer, the trial court did not err in denying the petitioner's motion to suppress the identification without first conducting a preliminary assessment of its reliability; no such inquiry was required because "law enforcement officials did not arrange the suggestive circumstances surrounding [the] identification").

- **Physical Differences of Lineup Participants**

"'Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants.'" *People v Craft*, 325 Mich App 598, 610 (2018), quoting *People v Hornsby*, 251 Mich App 462, 466 (2002). "Generally, physical differences affect the weight of an identification, not its admissibility." *Craft*, 325 Mich App at 610 (holding that defendant had not met his burden to show entitlement to a *Wade*[44] hearing). Identification of the defendant was not impermissibly suggestive merely because "there was some variance between the participants' heights and weights" when defendant ranked "somewhere in the lower-middle of the sample[.]" *Craft*, 325 Mich App at 611. The defendant also failed to establish that there were "any marked differences in complexion" or "marked variance in the physical build" among the participants that would substantially distinguish defendant. *Id.* at 611.

- **Attire of Lineup Participants**

"[I]t is generally preferable to present lineup participants in attire which is not indicative of their confinement (or alternatively to present all lineup participants in jailhouse attire)." *Craft*, 325 Mich App at 611. However, in *Craft*, the "defendant [failed to show] that the lineup was so suggestive as to distinguish substantially [him]

[44] *United States v Wade*, 388 US 218 (1967).

from the other participants" where he was one of two participants wearing an orange jumpsuit. *Id*. at 611 (holding any error in the admission of identification of defendant would have been harmless in light of "[s]everal other pieces of evidence presented at trial [that] tended to establish defendant's identity").

D. Photo Lineup

A photographic lineup should generally not be used if a suspect is in custody or if the suspect could be compelled to take part in a corporeal lineup. *People v Strand*, 213 Mich App 100, 104 (1995) (photographic lineup was permissible because defendant not in custody at the time; because he was also not under arrest, he could not be compelled to participate in a corporeal lineup). "However, this rule is subject to certain exceptions, including situations in which a corporeal lineup is not feasible because 'there are insufficient numbers of persons available with the defendant's physical characteristics.'" *People v Cain (Darryl) (Cain I)*, 299 Mich App 27, 47-48 (2012), vacated in part on other grounds by *People v Cain (Darryl) (Cain II)*, 495 Mich 874 (2013),[45] quoting *People v Currelley*, 99 Mich App 561, 564 (1980) ("there were not enough young black men with similar physical characteristics to [the] defendant]" and "[u]nder the circumstances, a photographic lineup was clearly proper[because the] defendant would have suffered significant prejudice if he had been placed in a corporeal lineup with men of difference races or ages").

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *Gray (Allen)*, 457 Mich at 111. The same standard of "unduly suggestive" applies to photo lineups as well as corporeal lineups:

> "[A] suggestive lineup is not necessarily a constitutionally defective one. Rather, a suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification. The relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification." *People v Kurylczyk*, 443 Mich 289, 306 (1993) (internal citation omitted).

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

A trial court does not clearly err in allowing identification testimony based on a photographic lineup where the defendant "does not indicate any unique differences about his [or her] photograph that served to make the lineup unduly suggestive and there are none apparent on the record[.]" *People v Henry (After Remand)*, 305 Mich App 127, 161 (2014).

"[P]lacing [a] defendant's photograph first in a lineup is [not] inherently suggestive, and in a random assortment the first slot is no less [sic] likely than any other." *People v Blevins*, 314 Mich App 339, 350 (2016). However, showing a witness only a *single* photograph or a group in which one person is singled out can be impermissibly suggestive. *Gray (Allen)*, 457 Mich at 111. For example, "the police officer's presentation of a single photograph to the victim accompanied by the question 'was this the guy who shot you?' was highly suggestive[,]" and "insufficient record evidence exist[ed] to conclude that the trial court erred when, in determining whether the suggestive procedure was necessary under the circumstances, it . . . did not find that exigency required an expedited identification procedure or that a less suggestive identification procedure would have been too burdensome to conduct[.]" *People v Thomas (Elisah)*, 501 Mich 913, 913 (2017). The trial court appropriately "determined that the identification was unreliable under the totality of circumstances[]" where "the victim viewed the assailant's partially obscured face for no more than seven seconds on a dark city street with no streetlights while a gun was pointed at him[, t]he description the victim gave to police officers was generic and could have described many young men in the area[, and] . . . the victim's description of the assailant changed[;]" furthermore, "the trial court did not err in determining that the victim's in-court identification lacked an independent basis sufficient to 'purge the taint caused by the illegal' identification procedure[.]" *Id.* at 913-914 (citations omitted).

Nevertheless, the use of a single photograph "only to help confirm the identity of the person the witness had already identified[as defendant]—using a nickname—as the [perpetrator of a murder]" did not violate due process where "[t]he witness testified that he knew, and grew up with, the [defendant]." *People v Woolfolk*, 304 Mich App 450, 457-458 (2014), aff'd on other grounds 497 Mich 23 (2014) (citing *Kurylczyk*, 443 Mich at 302-303, and *Gray (Allen)*, 457 Mich at 111, 114-115, and holding that "the prior relationship and the witness's identification of the [defendant] by name before seeing the photograph established an untainted, independent basis for the in-court identification").

In *Blevins*, 314 Mich App at 350, the Court of Appeals rejected, as "pure speculation," the defendant's argument that because

"[photographic] lineups [in which he was identified] were not 'double blind,' . . . the officers conducting the lineup[s] might have subtly or unconsciously suggested a 'correct' choice to the witnesses." The defendant "had ample opportunity to argue why the *specific* witnesses against him should have been deemed unreliable," and "[a]ny infirmities [in the witnesses' testimony] either were or could have been presented to the jury, . . . [which] was properly instructed to consider these infirmities." *Id*. at 350.

E. Showup Identification

"A showup is a police procedure in which a suspect is shown singly to a witness for identification[.]" *People v Sammons*, 505 Mich 31, 36 n 1 (2020) (quotation marks, alteration, and citation omitted). While a showup identification is suggestive by nature, "[t]here are instances in which a fair and nonsuggestive procedure simply is not possible." *Id*. at 47-48 (noting that a showup identification was necessary where "the only witness to a murder had been stabbed 11 times and was in the hospital awaiting a major surgery needed to save her life," and it was unknown how long the witness might live).

In *Sammons*, the showup identification process was suggestive because the witness "could plainly see for himself that defendant . . . [was] involved in a criminal investigation–being the subject of a showup *is* involvement in a criminal investigation." *Sammons*, 505 Mich at 45. Additionally, the witness "testified that he understood he was taken to see defendant [at the police station] for the purpose of making an identification." *Id*. (noting that "[t]he suggestiveness of a showup is aggravated when it is conducted in a police stationhouse"). "[T]he suggestiveness was unnecessary because there was no reason, except perhaps police convenience, to use a suggestive procedure[.]" *Id*. at 36, 48 (noting the witness "did not arrive at the police station until 4 to 5 hours" after the defendant was arrested and "there was no ongoing danger"). Furthermore, "the prosecution [did not meet] its burden to show that the indicia of reliability" was "strong enough to outweigh the competing effect of the police-arranged suggestive circumstances[.]" *Id*. at 55 (quotation marks and citation omitted). Specifically, "the showup was not reliable" because the witness's "opportunity to view the criminal at the time of the crime was . . . poor," the witness did "not appear to have focused on the physical features of the [defendant]," the witness's "description was wrong about the most specific details of the suspects," and "[t]he level of certainty of the witness at the confrontation [was] difficult to evaluate because it was not documented." *Id*. at 36, 51-54 (although "the identification's unreliability was exposed to the jury through cross-examination and . . . the jury was instructed to evaluate the reliability of the identification," "the error was not harmless because the

prosecution's case was significantly less persuasive without the showup").

F. Defendant's Request for a Lineup

A trial court has discretion to grant a defendant's motion for a lineup. *People v McAllister*, 241 Mich App 466, 471 (2000). "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *Id.* at 471. "[T]here is a due process right to a lineup in an appropriate case." *People v Gwinn*, 111 Mich App 223, 249 (1981) (internal quotation omitted). Considerations include "the benefits to an accused, the burden to the prosecution, police, courts, and witnesses, and the timeliness of the motion involved." *Id.* at 249.

G. Standard of Review

"[A] trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Harris (Isaiah)*, 261 Mich App 44, 51 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

Chapter 10: Mens Rea Requirements and Selected Defenses

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10.1 Mens Rea and Criminal Liability

MCL 8.9, which applies to certain crimes committed on or after January 1, 2016,[1] sets out general criminal liability and statutory construction standards for determining the culpable mental state that is required for a criminal offense.

A. Applicability

MCL 8.9 applies only to crimes committed on or after January 1, 2016. See MCL 8.9(1).

MCL 8.9(7) provides that MCL 8.9 "does not apply to, and shall not be construed to affect, crimes under[:]"

- the Michigan Vehicle Code, MCL 257.1 *et seq.*;
- the Public Health Code, MCL 333.1101 *et seq.*;
- the Identity Theft Protection Act, MCL 445.61 *et seq.*;
- the Michigan Penal Code, MCL 750.1 *et seq.*; or
- Chapter 752 of the Michigan Compiled Laws.

B. General Criminal Liability Standards

MCL 8.9(1) provides:

> "Except as otherwise provided in [MCL 8.9], a person is not guilty of a criminal offense committed on or after January 1, 2016 unless both of the following apply:
>
> > (a) The person's criminal liability is based on conduct that includes either a voluntary act or an omission to perform an act or duty that the person is capable of performing.
> >
> > (b) The person has the requisite degree of culpability for each element of the offense as to which a culpable mental state is specified by the language defining the offense."

MCL 8.9(8)-(9) provide:

> "(8) If a statute defining an offense prescribes a culpable mental state but does not specify the element to which it

[1] MCL 8.9 was added by 2015 PA 250, effective December 22, 2015.

applies, the prescribed culpable mental state applies to each material element of the offense that necessarily requires a culpable mental state.

(9) The mere absence of a specified state of mind for an element of a covered offense shall not be construed to mean that the legislature affirmatively intended not to require the prosecution to prove any state of mind."

C. Strict Liability

MCL 8.9(2) provides:

> "If the statutory language defining a criminal offense does not specify any degree of culpability and plainly imposes strict criminal liability for the conduct described in the statute, then culpability is not required for a person to be guilty of the offense. The fact that a subsection of a statute plainly imposes strict liability for an offense defined in that subsection does not by itself plainly impose strict criminal liability for an offense defined in another subsection of that statute that does not specify a degree of culpability."

D. Degree of Culpability Satisfying Intent, Knowledge, or Recklessness Requirement

MCL 8.9(5) provides:

> "If a statute defining a criminal offense provides that negligence suffices to establish an element of the offense, then intent, knowledge, or recklessness is also sufficient culpability to satisfy that element. If recklessness suffices to establish an element of an offense, then knowledge or intent is also sufficient culpability to satisfy that element. If knowledge suffices to establish an element of an offense, then intent is also sufficient culpability to satisfy that element."

E. Unspecified Mens Rea

MCL 8.9(3) provides:

> "Except as provided in [MCL 8.9(4)], if statutory language defining an element of a criminal offense that is related to knowledge or intent or as to which mens rea could reasonably be applied neither specifies

> culpability nor plainly imposes strict liability, the element of the offense is established only if a person acts with intent, knowledge, or recklessness."

MCL 8.9(4) provides, however, that MCL 8.9(3) "does not relieve the prosecution of the burden of proving the culpable mental state required by any definition incorporated into the offense."

F. Voluntary Intoxication[2]

MCL 8.9(6) provides:

> "It is not a defense to a crime that the defendant was, at the time the crime occurred, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound. However, it is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily ingested a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired."[3]

See Section 10.2(E) for additional discussion of intoxication as a defense.

G. Intent and Strict Liability Under the Common Law

"Whether the Legislature intended a statute to impose strict liability or intended it to require proof of criminal intent is a matter of statutory interpretation[.]" *People v Haveman*, 328 Mich App 480, 484 (2019) (quotation marks and citation omitted). "Criminal intent can be one of two types: the intent to do the illegal act alone (general criminal intent) or an act done with some intent beyond the doing of the act itself (specific intent)." *Id.* at 485 (quotation marks and citation omitted). To determine whether an offense requires specific or general intent, a court must look to the legislative intent and the specific language of the statute. *People v Henry (Scott)*, 239 Mich App 140, 144 (1999). "Words typically found in specific intent statutes include 'knowingly,' 'willfully,' 'purposely,' and 'intentionally.'" *People v Davenport (Bruce)*, 230 Mich App 577, 580 (1998).

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[2] See Section 10.2(E) for additional discussion of intoxication as a defense.

[3] See also MCL 768.37, which contains substantially similar language.

"'[W]here the criminal statute is a codification of the common law, and where mens rea was a necessary element of the crime at common law,' courts will interpret statutes as including 'knowledge as a necessary element,' even where the Legislature fails to include such language." *Haveman*, 328 Mich App at 486, quoting *People v Quinn*, 440 Mich 178, 185-186 (1992). "On the other hand, 'where the offense in question does not codify a common-law offense and the statute omits the element of knowledge or intent, the United States Supreme Court examines the intent of the Legislature to determine whether it intended that knowledge to be proven as an element of the offense, or whether it intended to hold the offender liable regardless of what he knew or did not know." *Haveman*, 328 Mich App at 486, quoting *Quinn*, 440 Mich at 186.

"Strict liability for a criminal offense is disfavored . . . based on the axiom that wrongdoing must be conscious to be criminal." *Haveman*, 328 Mich App at 487 (quotation marks and citation omitted). "That principle explains why 'courts will infer an element of criminal intent when an offense is silent regarding mens rea unless the statute contains an express or implied indication that the legislative body intended that strict liability be imposed.'" *Id*. at 487, quoting *People v Kowalski*, 489 Mich 488, 499 n 12 (2011).

"Relevant to determining whether the Legislature intended to make an offense strict liability is:

> '(1) whether the statute is a codification of common law;
>
> (2) the statute's legislative history or its title;
>
> (3) guidance to interpretation provided by other statutes;
>
> (4) the severity of the punishment provided;
>
> (5) whether the statute defines a public-welfare offense, and the severity of potential harm to the public;
>
> (6) the opportunity to ascertain the true facts; and
>
> (7) the difficulty encountered by prosecuting officials in proving a mental state.'" *Haveman*, 328 Mich App at 480, quoting *People v Adams*, 262 Mich App 89, 93-94 (2004).

10.2 Defenses Involving a Defendant's Mental Status[4]

A. Competence To Stand Trial

"'[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him [or her] of his [or her] due process right to a fair trial.'" *People v Kammeraad*, 307 Mich App 98, 137 (2014), quoting *Drope v Missouri*, 420 US 162, 172 (1975) (first alteration in original).

"The protection afforded by the Due Process Clause requires that a court sua sponte hold a hearing regarding competency when any evidence raises a bona fide doubt about the competency of the defendant." *In re Carey*, 241 Mich App 222, 227-228 (2000). See US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17; *Cooper v Oklahoma*, 517 US 348, 355-356 (1996) (a state may not proceed with a criminal trial after the defendant has demonstrated that he or she is more likely than not incompetent); *Pate v Robinson*, 383 US 375, 385-386 (1966) (where evidence introduced at trial on behalf of the accused raised a bona fide doubt as to his competence, the trial court's failure to sua sponte conduct a competency hearing deprived the accused of his constitutional right to a fair trial); *People v Ray*, 431 Mich 260, 270 n 5 (1988).

1. General Test

"[A] criminal defendant's mental condition at the time of trial must be such as to assure that he [or she] understands the charges against him [or her] and can knowingly assist in his [or her] defense." *People v McSwain*, 259 Mich App 654, 692 (2003); see also *Dusky v United States*, 362 US 402, 402-403 (1960) (concluding that "the test must be whether he [or she] has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding—and whether he [or she] has a rational as well as factual understanding of the proceedings against him[or her]") (quotation marks omitted). "To protect this right to due process, Michigan has enacted statutes and a court rule regarding the competency of criminal defendants." *Kammeraad*, 307 Mich App at 137; see MCL 330.2020 *et seq.*; MCR 6.125.

MCL 330.2020(1) states that a criminal defendant is presumed competent to stand trial unless "he [or she] is incapable because

[4] This section addresses the competency provisions of the Mental Health Code, MCL 330.2020 *et seq.*, as they apply in criminal proceedings. For discussion of competency determinations in juvenile delinquency proceedings, governed by MCL 330.2060—MCL 330.2074 and MCL 712A.18n—MCL 712A.18s, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 7.

of his [or her] mental condition of understanding the nature and object of the proceedings against him [or her] or of assisting in his [or her] defense in a rational manner." In making this determination, the court must assess "the capacity of a defendant to assist in his [or her] defense by his [or her] ability to perform the tasks reasonably necessary for him [or her] to perform in the preparation of his [or her] defense and during his [or her] trial." *Id*.

The standard for competence to plead guilty is the same as that for competency to stand trial. *Godinez v Moran*, 509 US 389, 396-400 (1993), citing *Dusky*, 362 US 402.

2. Medication and Competence

A defendant's competence may be based on the defendant's medicated state. See MCL 330.2020(2). A defendant is not incompetent when medication makes the defendant competent, even if the defendant would be incompetent without the medication. MCL 330.2020(2); *People v Mette*, 243 Mich App 318, 331 (2000). "However, when the defendant is receiving such medication, the court may, prior to making its determination on the issue of incompetence to stand trial, require the filing of a statement by the treating physician that such medication will not adversely affect the defendant's understanding of the proceedings or his [or her] ability to assist in his [or her] defense." MCL 330.2020(2). See also *Sell v United States*, 539 US 166, 180-183 (2003) (holding that the involuntary administration of drugs solely for trial competence purposes is permitted in certain rare instances).

3. Raising the Issue of Competence

The issue of competency may be raised at any time during the proceedings against a defendant, MCR 6.125(B), "including proceedings in the district court, or subsequent to trial, such as sentencing[,]" 1989 Staff Comment to MCR 6.125.

The question of competency to stand trial may be raised by either party or by the court. MCL 330.2024; MCR 6.125(B). Indeed, "[b]ecause the conviction of a legally incompetent defendant is a deprivation of due process, evidence that raises a 'bona fide' doubt as to competence obligates a sanity hearing sua sponte." *Ray*, 431 Mich at 270 n 5, quoting *Pate*, 383 US at 385; see also *Kammeraad*, 307 Mich App at 138.

4. Determination Whether Competency Inquiry is Required

The trial court's decision regarding the necessity of further inquiry as to the defendant's competence is reviewed for an abuse of discretion. *Kammeraad*, 307 Mich App at 138.

The test "'is whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.'" *Kammeraad*, 307 Mich App at 138-139 (citation omitted). "[E]vidence of a defendant's irrational behavior, his [or her] demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." *Drope*, 420 US at 180. "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id*.

The trial court is not required to accept without question an attorney's representations concerning the competence of his or her client, although counsel's expression of doubt in that regard is a factor that should be considered when determining whether further inquiry is required. *Drope*, 420 US at 177 n 13.

The trial court did not abuse its discretion in failing to order a competency examination where the court "was able to personally observe [the] defendant's behavior and conduct, hear live [the] defendant's remarks and the tone of and inflections in his voice, and directly assess [the] defendant's demeanor, attitude, and comments[.]" *Kammeraad*, 307 Mich App at 140-141.

5. Order for Competency Examination

A trial court must order a competency examination upon a showing that the defendant may be incompetent to stand trial. MCL 330.2026(1); MCR 6.125(C)(1). The examination must be conducted "by a certified or licensed examiner of the [Center for Forensic Psychiatry] or other facility officially certified by the department of mental health to perform examinations relating to the issue of competence to stand trial." MCR 6.125(C)(1); see also MCL 330.2026(1).[5] "The defendant must appear for the examination as required by the court." MCR 6.125(C)(2); see also MCL 330.2026(1). The examining center or facility must submit a

written report to the court within 60 days of the date of the order for examination. MCL 330.2028(1).

On a showing of good cause by either party, the court may order an independent examination. MCR 6.125(D).[6] However, "[b]ecause of a presumption that the Center for Forensic Psychiatry or other facility officially certified by the Department of Mental Health will properly perform their functions, 'good cause' justifying an independent competency examination should arise only in exceptional cases." 1989 Staff Comment to MCR 6.125.

6. Hearing

A competency hearing must be held within five days of the court's receipt of the examiner's written report, or on conclusion of the proceedings then before the court, whichever is sooner, unless an adjournment is granted upon a showing of good cause. MCR 6.125(E); MCL 330.2030(1).

The court must determine the issue of competency based on evidence admitted at the hearing. MCL 330.2030(2). Absent objection, the examiner's written report is admissible at the hearing; however, it is not admissible for any other purpose. MCL 330.2030(3); see also MCL 330.2028(3); MCL 330.1750(2)(f) (a privileged communication "made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge[]" may be disclosed, "but only with respect to issues to be determined in proceedings concerned with the competence of the patient to stand trial[]"). The defense, prosecution, and court may present additional relevant evidence at the hearing. MCL 330.2030(3).

See SCAO Form MC 205, *Finding and Order on Competency*, for the possible findings and orders upon conclusion of a competency hearing. If the defendant is found incompetent to stand trial, the court must determine whether there is a substantial probability that, if provided treatment, the defendant will attain competence to stand trial within 15 months or within a period of one-third of the maximum sentence the defendant could receive if convicted of the offense, whichever is less. MCL 330.2031; MCL 330.2034(1).

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[5] "The Center for Forensic Psychiatry, located outside Ann Arbor, hosts Michigan's only certified forensic facility and conducts all competency and criminal responsibility evaluations ordered in Michigan criminal proceedings." *People v Kowalski (Jerome)*, 492 Mich 106, 114 n 8 (2012) (opinion by Kelly, J.).

[6] See SCAO Form MC 204, *Order for Competency Examination*.

"Absent a hearing at which the prosecutor [can] present evidence regarding [a] defendant's ability to attain competence," a court may not "render[] any decision regarding [the] defendant's continued incompetence." *People v Davis (Demond)*, 310 Mich App 276, 294 (2015) (citing MCL 330.2030(2) and holding that the trial court erred in determining, based solely on the examiner's report, that the defendant would likely not achieve competency within the statutory period).

7. Commitment for Treatment

The court may direct the prosecutor to file a petition asserting that the defendant requires treatment if the court concludes there is not a substantial probability that the defendant will attain competence with treatment during the required time period. MCL 330.2031; see MCL 330.2034(1). If the court determines that there is a substantial probability that treatment will enable the defendant to attain competency, the court may order treatment and commit the defendant to the custody of the Department of Mental Health for that purpose. MCL 330.2032(3). The court must receive treatment reports as required by MCL 330.2038. The court is required to redetermine the issue of the defendant's competency to stand trial after the receipt of each report, unless the defendant waives a hearing and redetermination, or whenever deemed appropriate by the court. MCL 330.2040(1).

The defendant may not be detained in excess of 15 months or a term longer than one-third of the sentence possible for conviction of the offense, whichever is less, or after charges against the defendant have been dismissed. MCL 330.2034(1).

8. Motions and Evidence Preservation During Defendant's Incompetence

If the defendant's presence is not essential to a fair hearing and decision, pretrial motions must be heard and decided while a defendant is incompetent. MCR 6.125(F); MCL 330.2022(2).

MCL 330.2022(3) provides:

> "When it appears that evidence essential to the case the defense or prosecution plans to present might not be available at the time of trial, the court shall allow such evidence to be taken and preserved. Evidence so taken shall be admissible at the trial only if it is not otherwise available. Procedures for the taking and preserving of

> evidence under this subsection, and the conditions under which such evidence shall be admissible at trial, shall be provided by court rule."

9. Dismissal and Reinstatement of Charges

If a defendant is determined to be incompetent to stand trial, the charges must be dismissed when the prosecutor notifies the court of his or her intention not to prosecute the case, or after 15 months have passed since the date on which the defendant was originally determined incompetent to stand trial. MCL 330.2044(1). The 15-month period is calculated on a total time basis rather than on a continuous basis; "a defendant may not be committed, by reason of incompetence to stand trial on criminal charges, for periods *totaling* fifteen months." *People v Miller (Willie)*, 440 Mich 631, 633, 641-642 (1992) (emphasis added).

"MCL 330.2044 'is the procedural vehicle for enforcing a defendant's right not to be confined solely because of incompetency[,]'" and "MCL 330.2044(1) provides only two circumstances meriting a trial court's dismissal of the criminal action: (a) upon notification by the prosecution of its intent to drop the charges and (b) if the defendant remains incompetent to stand trial 15 months after the original incompetency ruling." *Davis (Demond)*, 310 Mich App at 295, quoting *Miller (Willie)*, 440 Mich at 636. Accordingly, a court lacks the statutory authority to dismiss a case under MCL 330.2044(1) over the prosecutor's objections where "15 months [have] not elapsed since the [court's] original incompetency determination." *Davis (Demond)*, 310 Mich App at 278, 295. Additionally, a delay in beginning a defendant's treatment is an insufficient basis for a finding that the defendant is unlikely to attain competence; rather, under MCL 330.2032, the "court's focus must be 'whether, *if provided a course of treatment*, a substantial probability exists that a defendant found to be incompetent will attain competence within the time limit established[.]'" *Davis (Demond)*, 310 Mich App at 304 (quoting *Miller (Willie)*, 440 Mich at 638, and holding that the trial court erred in dismissing the charges against the defendant, without a hearing, based on a "four-month delay between being adjudged incompetent to stand trial and beginning treatment[]").

If the charges were dismissed under MCL 330.2044(1)(b) (i.e., on the basis that 15 months had elapsed after the date on which the defendant was originally determined incompetent to stand trial), charges may be reinstated against a defendant as follows:

- If the crime charged was punishable by a life sentence, the prosecutor may at any time petition the court for permission to refile the charges. MCL 330.2044(3).

- If the crime charged was not punishable by a life sentence, the prosecutor may, within the period of time after the charges were dismissed equal to one-third of the maximum sentence that the defendant could receive on the charges, petition the court for permission to refile the charges. MCL 330.2044(3).

MCL 330.2044(4) provides:

> "The court shall grant permission to again file charges if after a hearing it determines that the defendant is competent to stand trial. Prior to the hearing, the court may order the defendant to be examined by personnel of the center for forensic psychiatry or other qualified person as an outpatient, but may not commit the defendant to the center or any other facility for the examination."

A trial court's failure to dismiss charges against a defendant under MCL 330.2044(1)(b) because a period of 15 months has elapsed is a procedural violation that "does not deprive the trial court of jurisdiction[;] nor does a violation of [MCL 330.2044(1)(b)], standing alone, furnish a basis on which to reverse an otherwise valid conviction." *Miller (Willie)*, 440 Mich at 633, 636. Rather, under MCL 330.2044(3)-(4), "reversal of a conviction would be warranted in respect to nonlife offenses only where the time lapse from initial adjudication of incompetence exceeds one[-]third of the maximum sentence or causes prejudice to the defendant's substantive rights." *Miller (Willie)*, 440 Mich at 636-637, 642-643 (holding that although the trial court erred in denying the defendant's motions to dismiss under MCL 330.2044(1)(b) where he had been adjudicated incompetent for a total of 26 months, the defendant's conviction could not be reversed on that basis; because MCL 330.2044(3)-(4) would have permitted the refiling of charges against the defendant had the trial court dismissed them as required under MCL 330.2044(1)(b), the defendant suffered no prejudice to his substantive rights).

10. Use of Competency Evidence for Other Purposes

MCL 330.2028(3) provides:

> "The [examiner's] opinion concerning competency to stand trial derived from the [competency] examination may not be admitted as evidence for any purpose in the pending criminal proceedings, except on the issues to be determined in the hearings required or permitted by [MCL 330.2030 and MCL 330.2040]. The foregoing bar of testimony shall not be construed to prohibit the examining qualified clinician from presenting at other stages in the criminal proceedings opinions concerning criminal responsibility, disposition, or other issues if they were originally requested by the court and are available. Information gathered in the course of a prior examination that is of historical value to the examining qualified clinician may be utilized in the formulation of an opinion in any subsequent court ordered evaluation."

See also MCL 330.2030(3) (providing that the written examiner's report is inadmissible for any purpose in the pending criminal proceeding other than determining competence).

11. Standard of Review

The trial court's initial decision regarding whether further inquiry is necessary due to a bona fide doubt as to the defendant's competence is reviewed for an abuse of discretion. *Kammeraad*, 307 Mich App at 138. Likewise, the ultimate "'determination of a defendant's competence is within the trial court's discretion[.]'" *Id*. (citation omitted).

Committee Tip:

Courts sometimes confuse the concepts of competency *and* criminal responsibility. *Competency, as discussed above, addresses the defendant's current understanding of the nature of the proceedings against him or her and his or her ability to assist in presenting a defense. The concept of criminal responsibility, as discussed in the following subsections, addresses whether the defendant was legally insane, at the time of the offense, as a result of mental illness or intellectual disability.*

B. Insanity and Criminal Responsibility

"It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense." MCL 768.21a(1). A person "is legally insane if, as a result of mental illness . . . or as a result of having an intellectual disability," he or she "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law." MCL 768.21a(1).

Insanity is an affirmative defense for which the defendant has the burden of proof by a preponderance of the evidence. MCL 768.21a(1); MCL 768.21a(3). Although the prosecution must still prove each element of the offense beyond a reasonable doubt, it "is not required to rebut an affirmative defense." *People v Haynie*, 327 Mich App 555, 564 (2019), rev'd in part on other grounds 505 Mich 1096 (2020),[7] citing *People v Mette*, 243 Mich App 318, 330 (2000). Whether a defendant has shown that he or she is insane is a question for the jury. *Haynie*, 327 Mich App at 564. On appeal, the determination as to whether the defendant met the burden of proof during a jury trial will be reviewed de novo – as a sufficiency of the evidence issue. *Id*.

"[I]nsanity is a defense to all crimes, including general intent and strict liability offenses." *People v Moore*, 497 Mich 1043, 1043 (2015) (citing MCL 768.21a and noting that the Court of Appeals had misinterpreted *People v Carpenter*, 464 Mich 223 (2001), "in stating that insanity is not a defense to general intent crimes").

1. Timely Notice Required

A defendant in a felony case must file and serve on the court and the prosecuting attorney a notice of his or her intention to assert the defense of insanity not less than 30 days before trial, or at another time as directed by the court. MCL 768.20a(1). If the defendant fails to file and serve the written notice prescribed in MCL 768.20a, the court must exclude evidence offered by the defendant for the purpose of establishing the defendant's insanity. MCL 768.21(1).

2. Examinations, Experts, and Reports

If the defendant serves a notice of intent to assert an insanity defense, he or she must be referred for an examination by personnel of the Center for Forensic Psychiatry, or by other

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

qualified personnel, "for a period not to exceed 60 days from the date of the order." MCL 768.20a(2). See SCAO Form MC 206, *Order for Evaluation Relative to Criminal Responsibility*.

The defendant must fully cooperate with the examination. MCL 768.20a(4). The failure to cooperate, if established at a hearing prior to trial, bars any testimony relating to the insanity defense. *Id*. MCL 768.20a(4) does not unconstitutionally infringe on a defendant's constitutional right to present a defense, and it is not unconstitutionally vague. *People v Hayes*, 421 Mich 271, 274-275, 283, 288 (1984).

Both the prosecution and defense may obtain examinations from independent examiners of their own choosing. MCL 768.20a(3). The defendant must notify the prosecuting attorney at least five days before such an independent evaluation. *Id*. On a showing of good cause, a court may order the county to pay for an indigent defendant's independent psychiatric evaluation. *Id*.

Any examiner, including an independent examiner, must prepare and submit to both parties a written report. MCL 768.20a(6).

MCL 768.20a(5) provides:

> "Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense."

See also *People v Toma*, 462 Mich 281, 292-293 (2000) (the statutory prohibition against using a defendant's statement to a mental health professional "is a clear expression by the Legislature that these statements cannot be admitted at trial except on the issue of insanity[]").

"Where expert testimony is presented in support of an insanity defense, the probative value of the expert's opinion depends on the facts on which it is based." *People v Lacalamita*, 286 Mich App 467, 470 (2009). "Further, a trial court must generally defer to a jury's determination, unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe [the testimony], or [the testimony] contradicted indisputable

physical facts or defied physical realities[.]" *Id*. (quotation marks and citations omitted; first and second alterations in original).

3. Insanity Standard

The insanity defense is an affirmative defense.[8] MCL 768.21a. MCL 768.21a(1) sets forth the test for criminal insanity:

> "It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness . . . , or as a result of having an intellectual disability . . . , that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity."[9]

"'Insanity by definition is an extreme of mental illness'"; "one must be mentally ill before he [or she] can be found insane, but the converse is not true."*People v Ramsey*, 422 Mich 500, 513 (1985) (opinion by Brickley, J.), quoting *People v Fultz*, 111 Mich App 587, 590 (1981).

Determining whether a defendant is legally insane is a two-step process: First, it must be determined whether the defendant has proven by a preponderance of the evidence that he or she was mentally ill and/or intellectually disabled; second, if so, it must be determined whether the defendant has proven by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct, or to conform that conduct to the requirements of the law. See *Ramsey*, 422 Mich at 513-514; *People v Jackson*, 245 Mich App 17, 23-24 (2001); MCL 768.21a(1); M Crim JI 7.11(3)-(6).The phrase in MCL 768.21a, "substantial capacity," modifies both the cognitive and the volitional functions in an insanity defense. *Jackson*, 245 Mich App at 20 n 3. See also *People v Carpenter*, 464 Mich 223, 230-231 (2001).

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[8] See M Crim JI 7.11, *Legal Insanity; Mental Illness; Intellectual Disability; Burden of Proof*.

[9] See M Crim JI 7.9, *The Meanings of Mental Illness, Intellectual Disability and Legal Insanity*.

Trial courts may use the "policeman at the elbow" standard to assess the volitional element of an insanity defense. *Jackson*, 245 Mich App at 20-22. The *policeman at the elbow* standard is "one of many avenues of inquiry" the court may allow to determine whether a defendant had substantial capacity to control his or her conduct. *Jackson*, 245 Mich App at 21.

> "[T]he hypothetical [of the *policeman at the elbow* standard] is directly probative of one dimension of a defendant's capacity to control his conduct as required by law. Certainly, if credible testimony offered by a defendant establishes that he could not refrain from acting even if faced with immediate capture and punishment, then the defendant would have gone a long way toward establishing that he lacked the requisite substantial capacity to conform to requirements of the law." *Jackson*, 245 Mich App at 21 (emphasis added).

4. Intoxication[10]

"An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances." MCL 768.21a(2); see also *People v Carpenter*, 464 Mich 223, 231 n 5 (2001) (voluntary intoxication alone is not sufficient to support a defendant's claim of legal insanity); *People v Caulley*, 197 Mich App 177, 187, 187 n 3 (1992) (noting that "an individual who is voluntarily intoxicated does not have grounds for an absolute defense based upon his [or her] insanity[,]" with the exception that the defense may apply "if the voluntary continued use of mind-altering substances results in a settled condition of insanity before, during, and after the alleged offense"); M Crim JI 7.10(1); M Crim JI 7.10(3). See also *People v Matulonis*, 115 Mich App 263, 267 (1982) ("long-term voluntary intoxication resulting in physical brain deterioration could form the basis of a viable insanity defense").

"Involuntary intoxication is intoxication that is not self-induced and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant." *People v Caulley*, 197 Mich App 177, 187 (1992) (quotation marks and citation

[10] This discussion focuses on introducing intoxication to prove an insanity defense. For a discussion on intoxication as a standalone defense, see Section 10.2(E).

omitted). "[T]he defense of involuntary intoxication is part of the defense of insanity when the chemical effects of drugs or alcohol render the defendant temporarily insane." *Id.*, citing *People v Wilkins*, 184 Mich App 443, 448-449 (1990) (defendant who was convicted of vehicular manslaughter claimed he was temporarily insane at the time of the collision as a result of involuntary intoxication caused by the combined effect of alcohol and prescription medication). Involuntary intoxication as a defense requires a defendant to "demonstrate that the involuntary use of drugs created a state of mind equivalent to insanity." *Caulley*, 197 Mich App at 187.

The same procedural requirements that apply to an insanity defense also apply to an involuntary intoxication defense[11]—a defendant must give pretrial notice to the court and the prosecution of his or her intention to raise a defense of involuntary intoxication. See MCL 768.20a(1). Involuntary intoxication may result from the use of prescribed medications and "can constitute a complete defense if the defendant was unexpectedly intoxicated because of the ingestion of a medically prescribed drug." *Caulley*, 197 Mich App at 188.

To prove involuntary intoxication in cases involving prescription medication, three things must be established:

- First, the defendant must prove that he or she "[did] not know or have reason to know that the prescribed drug [was] likely to have the intoxicating effect." *Caulley*, 197 Mich App 177, 188 (1992).

- Second, the defendant's intoxication must have been caused by the prescribed drug and not another intoxicant. *Id.*

- Third, the defendant must show that he or she was rendered temporarily insane as a result of his or her intoxicated condition. *Id.*

5. Caselaw Discussing Sufficiency of the Evidence

"[T]here was sufficient evidence to support the jury's determination that defendant was not legally insane at the time of the assault" because the victim "testified that defendant acted normal prior to the assault" and "[t]he verdict show[ed] that the jury . . . did not believe the experts' opinions that defendant was legally insane at the time of the assault." *People v Haynie*, 327 Mich App 555, 568 (2019) (noting that "[i]t is the role of the jury,

[11]See Section 10.2(B)(2) for more information on the requirements of an insanity defense.

not this Court, to weigh the evidence and the credibility of witnesses"), rev'd in part on other grounds 505 Mich 1096 (2020).[12]

6. Psychiatrists and Privileged Communications

Unless the patient has waived the privilege, privileged communications must not be disclosed in criminal cases or proceedings, or in proceedings preliminary to such cases or proceedings, except in the circumstances set out in MCL 330.1750. MCL 330.1750(1); see also MCR 2.314(B). "After claiming the defense of insanity and authorizing the release of medical information, [a] defendant can no longer claim an intent to preserve the sanctity of the physician-patient privilege." *People v Sullivan (John)*, 231 Mich App 510, 517 (1998).

"When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined [the defendant]." *Kansas v Cheever*, 571 US 87, 94 (2013) (citation omitted). The Court explained:

> "A defendant 'has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' . . . [W]here a party provides testimony and then refuses to answer potentially incriminating questions, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'" *Id* (citations omitted).

7. Preliminary and Final Jury Instructions and Possible Verdicts

If a defendant asserts a defense of insanity in a criminal action tried before a jury, the court must preliminarily instruct the jury on the definitions of mental illness, intellectual disability, and legal insanity[13] immediately before the commencement of testimony, especially expert testimony. MCL 768.29a(1); see M Crim JI 7.9. However, failure to give a preliminary instruction

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

[13] See Section 10.2(B).

before an offer of testimony on insanity is a nonconstitutional error that is subject to harmless-error review. *People v Grant (Andre)*, 445 Mich 535, 537, 543-554 (1994).

MCL 768.29a(2) provides:

> "At the conclusion of the trial, where warranted by the evidence, the charge to the jury shall contain instructions that it shall consider separately the issues of the presence or absence of mental illness and the presence or absence of legal insanity and shall also contain instructions as to the verdicts of guilty, guilty but mentally ill, not guilty by reason of insanity, and not guilty with regard to the offense or offenses charged and, as required by law, any lesser included offenses."

See M Crim JI 7.11; M Crim JI 7.12. For verdict forms reflecting the possible verdicts set out in MCL 768.29a(2), see M Crim JI 3.25; M Crim JI 3.27; M Crim JI 3.29; M Crim JI 3.31.[14]

8. Acquittal by Reason of Insanity

The court must immediately commit any person who is acquitted of a criminal charge by reason of insanity to the custody of the Center for Forensic Psychiatry for a period not to exceed 60 days. MCL 330.2050(1). The court must forward to the Center a full report, in the form of a settled record, of the facts concerning the crime the person committed but of which he or she was acquitted by reason of insanity. *Id*. See SCAO Form MC 207, *Commitment Order*, *Not Guilty by Reason of Insanity*.

Within the 60-day period, the Center for Forensic Psychiatry must file a report with the court, prosecuting attorney, and defense counsel. MCL 330.2050(2). The report must contain a summary of the crime the person committed but of which he or she was acquitted by reason of insanity, an opinion as to whether the person meets the criteria of a person requiring treatment or for judicial admission as defined by MCL 330.1401 or MCL 330.1515, and the facts upon which the opinion is based. MCL 330.2050(2).

After receipt of the report, the court may direct the prosecuting attorney to file with the probate court of the person's county of residence, or of the county in which the criminal trial was held, a petition pursuant to MCL 330.1434 or MCL 330.1516 for an order

[14] See Section 10.2(C) for discussion of a verdict of guilty but mentally ill.

of hospitalization or an order of admission to a facility. MCL 330.2050(3).

C. Guilty but Mentally Ill

A person who is mentally ill or has an intellectual disability but who is not legally insane may be found *guilty but mentally ill* of a charged offense. *People v Carpenter*, 464 Mich 223, 237 (2001).

1. By Trier of Fact

If a defendant asserts a defense of insanity in compliance with MCL 768.20a, the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following: (1) the defendant is guilty beyond a reasonable doubt of an offense; (2) the defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time the offense was committed; and (3) the defendant has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law. MCL 768.36(1). See also MCL 768.29a(2) (requiring the trial court to instruct the jury, if warranted by the evidence, that it may find the defendant guilty but mentally ill); M Crim JI 3.25; M Crim JI 3.27; M Crim JI 3.29; M Crim JI 3.31. The legislative purpose behind the creation of the guilty but mentally ill verdict was to limit the number of defendants who were improperly being relieved of all criminal responsibility by way of the insanity verdict. *Ramsey (Bruce)*, 422 Mich at 512; *People v Stephan*, 241 Mich App 482, 491-492 (2000).

M Crim JI 7.12 provides, in part:

> "(2) To find the defendant guilty but mentally ill, you must find each of the following:
>
> (3) First, the prosecutor has proven beyond a reasonable doubt that the defendant is guilty of a crime.
>
> (4) Second, that the defendant has proven by a preponderance of the evidence that [he / she] was mentally ill, as I have defined that term for you, at the time of the crime.
>
> (5) Third, that the defendant has not proven by a preponderance of the evidence that [he / she] lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of [his/

her] conduct or to conform [his / her] conduct to the requirements of the law." (Alterations in original.)

2. By Plea

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302 (accepting guilty or nolo contendere pleas). MCR 6.303. In addition, "the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill at the time of the offense to which the plea is entered." *Id*. "The reports must be made a part of the record." *Id*.

D. Diminished Capacity

Diminished capacity is not a cognizable defense in Michigan. *People v Carpenter*, 464 Mich 223, 237 (2001)[15]; see also *People v Abraham*, 256 Mich App 265, 271 n 2 (2003). "[The] Legislature, by enacting the comprehensive statutory framework [set out in MCL 768.20a, MCL 768.21a, and MCL 768.36], has . . . conclusively determined when mental incapacity can serve as a basis for relieving one from criminal responsibility[,]" and MCL 768.36(3) "demonstrate[s] [the Legislature's] policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Carpenter*, 464 Mich at 237.[16]

E. Intoxication as a Defense

"Intoxication has been defined as a 'disturbance of mental or physical capacities resulting from the introduction of any substance into the body.'" *People v Caulley*, 197 Mich App 177, 187 (1992) (citation omitted). Whether and to what extent an intoxication defense may be viable depends on whether the intoxication was voluntary or

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[15] See also *Metrish v Lancaster*, 569 US 351 (2013), reversing *Lancaster v Metrish*, 683 F3d 740, 742, 744-754 (CA 6, 2012), in which the Sixth Circuit Court of Appeals granted the petitioner habeas relief on the ground that the retroactive application of *Carpenter (James)*, 464 Mich 223, was objectively unreasonable because the defense of diminished capacity was well-established and its abolition was unforeseeable when the petitioner committed his crime. "[T]he Michigan Supreme Court [in *Carpenter (James)*] rejected a diminished-capacity defense that the court reasonably found to have no home in a comprehensive, on-point statute enacted by the Michigan Legislature[;]" accordingly, "[f]airminded jurists could conclude that [*Carpenter (James)* was] not 'unexpected and indefensible by reference to [existing] law.'" *Lancaster*, 569 US at 366, 368 (citation omitted).

[16] See also *People v Moore*, 497 Mich 1043, 1043 (2015) (noting that under MCL 768.21a "*insanity* is a defense to all crimes, including general intent and strict liability offenses[,]" and that "the Court of Appeals [in *People v Moore*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2014 (Docket No. 315193),] misinterpreted" *Carpenter*, 464 Mich 223, "in stating that insanity is not a defense to general intent crimes[]") (emphasis added).

involuntary. "The characterization of intoxication as either voluntary or involuntary depends upon the facts of each case." *Id*.

1. Voluntary Intoxication

"Voluntary or self-induced intoxication is caused by substances which the defendant knows or ought to know have the tendency to cause intoxication and which he [or she] knowingly introduced or allowed to be introduced into his [or her] body[.]" *People v Caulley*, 197 Mich App 177, 187 (1992) (citation and quotation marks omitted).

"'[T]he enactment of MCL 768.37[] . . . [has] abolished the defense of voluntary intoxication except in one narrow circumstance[.]'" *People v Nickens*, 470 Mich 622, 631 n 7 (2004) (citation omitted). MCL 768.37 provides, in part:

> "(1) Except as provided in [MCL 768.37(2)], it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.
>
> (2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.

MCL 8.9(6) similarly provides:

> "It is not a defense to a crime that the defendant was, at the time the crime occurred, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound. However, it is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily ingested a legally obtained and properly used medication or other substance and

> did not know and reasonably should not have known that he or she would become intoxicated or impaired."

See also M Crim JI 6.2.

The Michigan Supreme Court has noted that the near-abolishment of the voluntary intoxication defense "'has significantly diminished the need to categorize crimes as being either "specific" or "general" intent crimes.'" *Nickens*, 470 Mich at 631 n 7 (citation omitted).

The Fifth Amendment was not violated when the trial court permitted the prosecution to "introduc[e] evidence from a court-ordered mental evaluation of [the] criminal defendant to rebut [the] defendant's presentation of expert testimony in support of a defense of voluntary intoxication." *Kansas v Cheever*, 571 US 87, 89-90, 98 (2013) (holding that "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence[]").

2. Involuntary Intoxication

"Involuntary intoxication is intoxication that is not self-induced and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant." *People v Caulley*, 197 Mich App 177, 187 (1992) (citation and quotation marks omitted).

When a defendant asserts that he or she was involuntarily intoxicated at the time of an offense, the defendant has effectively raised an insanity defense; "the defense of involuntary intoxication is part of the defense of insanity when the chemical effects of drugs or alcohol render the defendant temporarily insane." *Caulley*, 197 Mich App at 187, citing *People v Wilkins*, 184 Mich App 443, 448-449 (1990).[17] A defendant claiming involuntary intoxication as a defense must "demonstrate that the involuntary use of drugs created a state of mind equivalent to insanity." *Caulley*, 197 Mich App at 187. Because the involuntary intoxication defense is evaluated in terms of the insanity defense, the same procedural requirements apply, and a defendant must provide pretrial notice to the court and the prosecution of the intention to assert a defense of

[17] See Section 10.2(B) for discussion of insanity.

involuntary intoxication as prescribed by MCL 768.20a(1). *Wilkins*, 184 Mich App at 449-450.

Involuntary intoxication may be caused by the use of prescribed medications, and "[s]uch intoxication can constitute a complete defense if the defendant was unexpectedly intoxicated because of the ingestion of a medically prescribed drug." *Caulley*, 197 Mich App at 188. To prove involuntary intoxication in cases involving prescription medication, three things must be established:

- First, the defendant must prove that he or she "[did] not know or have reason to know that the prescribed drug [was] likely to have the intoxicating effect." *Caulley*, 197 Mich App at 188.
- Second, the defendant's intoxication must have been caused by the prescribed drug and not another intoxicant. *Id*.
- Third, the defendant must show that he or she was rendered temporarily insane as a result of his or her intoxicated condition. *Id*.

Where a defendant has successfully established these three things, the jury must be instructed on the issue of involuntary intoxication and insanity. See *id.*; see also M Crim JI 7.10(2).

10.3 Entrapment

A. Generally

"The overall purpose of the entrapment defense is to deter the corruptive use of governmental authority by invalidating convictions that result from law enforcement efforts that have as their effect the instigation or manufacture of a new crime by one who would not otherwise have been so disposed." *People v Juillet*, 439 Mich 34, 52 (1991) (opinion by Brickley, J.). "The challenge focuses exclusively upon the nature of the police conduct which, if improper, will not be mitigated, justified or excused in any fashion by the disposition of the accused." *People v D'Angelo*, 401 Mich 167, 182 (1977).

"[E]ntrapment is not a defense that negates an essential element of the charged crime." *Juillet*, 439 Mich at 52. "Instead, it presents facts that are collateral to the crime that justify barring the defendant's prosecution." *Id*. Unlike some other defenses, such as insanity, a defendant's claim of entrapment does not require an assessment of

the defendant's guilt or innocence of the crime charged. *People v White*, 411 Mich 366, 387 (1981).

B. Hearing

When the defendant raises the issue of entrapment, whether before or during trial, the trial court must conduct an evidentiary hearing outside the presence of the jury. *D'Angelo*, 401 Mich at 177-178. Both the prosecution and the defendant may present evidence, and the defendant has the burden of proving the claim of entrapment by a preponderance of the evidence. *Id.* at 178, 183. The trial court must make findings of fact. *Juillet*, 439 Mich at 61. If the trial court concludes that the defendant was entrapped, the case must be dismissed and the defendant must be discharged. *D'Angelo*, 401 Mich at 184.

C. Test for Entrapment

A defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. *People v Johnson*, 466 Mich 491, 498 (2002); *People v Fyda*, 288 Mich App 446, 456 (2010). A defendant may prove police entrapment solely through reprehensible conduct; police instigation is not a prerequisite to a claim of entrapment. *People v Akhmedov*, 297 Mich App 745, 754 (2012); *Fyda*, 288 Mich App at 456.

The test for entrapment used in Michigan is an objective test that "focuses primarily on the investigative and evidence-gathering procedures used by the governmental agents[]" in order to "determine whether the police conduct in question has as its 'probable and likely outcome the instigation rather than the detection of criminal activity.'" *Juillet*, 439 Mich at 53-54 (citation omitted). "[A]lthough the objective test is mainly concerned with the existence of reprehensible police conduct, consideration must be given to 'the willingness of the accused to commit the act weighed against how a *normally law-abiding person* would react *in similar circumstances*.'" *Id.* at 54 (citation omitted). Thus, "not all generally offensive police conduct will necessarily support a claim of entrapment." *Id.*

> "When examining whether governmental activity would impermissibly induce criminal conduct, several factors are considered: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he [or she] was charged, (3) whether there were any long time lapses between the investigation and the

> arrest, (4) whether there existed any inducements that would make commission of the crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted." *Johnson (Jessie)*, 466 Mich at 498-499; see also *Fyda*, 288 Mich App at 457.

That the police "'present[ed] the defendant with the opportunity to commit the crime of which he [or she] was convicted[]' . . . is insufficient to support a finding of entrapment." *Fyda*, 288 Mich App at 460 (citation omitted). For example, the fact that undercover officers engaged in "'friendly banter' . . . that induced [the defendant] to sell them" drugs "[did] not establish 'impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances[.]'" *People v Vansickle*, 303 Mich App 111, 116 (2013), quoting *Fyda*, 288 Mich App at 456.

"'An official may employ deceptive methods to obtain evidence of a crime as long as the activity does not result in the manufacturing of criminal behavior.'" *Vansickle*, 303 Mich App at 117 (citation omitted). In *Vansickle*, 303 Mich App at 113-114, 117, the trial court properly denied the defendant's motion to dismiss based on entrapment where the defendant, "a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*," sold marijuana to undercover police officers who were posing as legitimate patients at a medical marijuana dispensary. "[The] defendant was not a target of the undercover investigation of the marijuana dispensary[,] . . . the officers were not familiar with [the] defendant[,]" and "the officers did not appeal to [the] defendant's sympathy, offer him any unusually attractive inducements or excessive consideration, or use any other means to pressure [him] to sell them marijuana[;]" rather, they "merely provided [him] with an opportunity to commit the crime, which is insufficient to establish entrapment." *Vansickle*, 303 Mich App at 116-117.

"Reprehensible conduct by an informant may be attributed to the police if a sufficient agency relationship exists between the informant and the police." *Akhmedov*, 297 Mich App at 754. "However, police do not commit entrapment when they do not become involved with the

informant until after the criminal transaction is complete." *Id*. at 754-756 (holding that no entrapment occurred during three separate drug transactions because an agency relationship did not exist between the police and an informant during the period when the informant groomed the defendant in the weeks leading up to the series of drug deals, the police only became involved with the informant on the day of the first transaction, and the police and informant "had no further contact after the first transaction[]").

D. Entrapment by Estoppel

Entrapment by estoppel applies "[w]hen a citizen reasonably and in good faith relies on a government agent's representation that the conduct in question is legal, under circumstances where there is nothing to alert a reasonable citizen that the agent's statement is erroneous[.]" *People v Woods (Robert)*, 241 Mich App 545, 548 (2000). The due process principle underlying the doctrine of entrapment by estoppel is fairness to a well-intentioned citizen who unwittingly breaks the law while relying on government agents' statements under circumstances where reliance is reasonable. *Id*. at 548. "However, when a citizen who should know better unreasonably relies on the agent's erroneous statement, or when the 'statement' is not truly erroneous, but just vague or contradictory, the defense is not applicable." *Id*. at 548-549.

"'[T]he entrapment by estoppel defense applies where the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement.'" *Woods (Robert)*, 241 Mich App at 558 (citation omitted; alteration in original).

An assertion of entrapment by estoppel as a defense to a specific intent offense must be "reasonable" or "justified." *People v Zitka*, 325 Mich App 38, 52 (2018) (it was unreasonable to rely on a city attorney's statement in a stipulated agreement in a civil action involving a local zoning ordinance for purposes of a criminal case brought under criminal state law; in addition, the local civil case only involved only one of the three businesses included in the present criminal case). Further, a defendant's belief that he or she is operating in compliance with the law is immaterial to whether he or she committed a general intent offense because a defendant need not intend to violate the law to be culpable for a general intent offense. *Id*.

E. Standard of Review

Whether the police entrapped a defendant is reviewed de novo as a matter of law, "but the trial court's specific findings of fact are reviewed for clear error." *Vansickle*, 303 Mich App at 114, citing *Fyda*, 288 Mich App at 456. See also *Johnson (Jessie)*, 466 Mich at 497 ("[a] trial court's finding of entrapment is reviewed for clear error[]"). "Findings of fact are clearly erroneous if [the reviewing court is] left with a firm conviction that the trial court made a mistake." *Vansickle*, 303 Mich App at 115, citing *Fyda*, 288 Mich App at 456.

10.4 Alibi

"Although alibi is frequently characterized as a defense, it is in fact merely a rebuttal of the prosecution's evidence. The defendant may not be required to 'prove' an alibi[.]" *People v Burden*, 395 Mich 462, 466 (1975). See Section 10.4(D) for more information on burden of proof.

A. Notice and Timing

MCL 768.20 requires the defendant to give written notice to the prosecuting attorney of his or her intent to offer an alibi:

> "If a defendant in a felony case proposes to offer in his [or her] defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his [or her] intention to claim that defense. The notice shall contain, as particularly as is known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant's notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense." MCL 768.20(1).

Within ten days after receipt of the notice, but not later than five days before trial, "or at such other time as the court may direct," the prosecuting attorney must file and serve on the defendant a notice of rebuttal containing the names of the witnesses the prosecuting attorney proposes to call to controvert the defendant's alibi. MCL 768.20(2). Each party has a continuing duty to promptly disclose the names of additional witnesses that come to the respective party's attention who may be called to establish or rebut an alibi. MCL

768.20(3). Additional witnesses not identified in the first notices may be permitted to testify if the moving party gives notice to the opposing party and shows that the additional witness's name was not known when the notice required under MCL 768.20(1) or MCL 768.20(2) was due, and could not have been discovered with due diligence. MCL 768.20(3). "Due diligence is defined as doing everything reasonable, not everything possible[.]" *People v LeFlore (After Remand)*, 122 Mich App 314, 319 (1983).

MCL 768.20 "leaves the trial court with considerable discretion to allow or disallow the testimony of rebuttal witnesses when a timely notice has not been filed[;]" however, "such a decision may be overturned upon review if the court's discretion is abused." *People v Travis*, 443 Mich 668, 679-680 (1993).

B. Failure to Provide Timely Notice

MCL 768.21(1) provides that if the defendant fails to give timely notice of his or her intent to raise an alibi as required under MCL 768.20, the court must exclude evidence offered for the purpose of establishing the alibi. Similarly, MCL 768.21(2) provides that if the prosecuting attorney has failed to give timely notice of rebuttal as required under MCL 768.20, the court must exclude that rebuttal evidence. Furthermore, MCL 768.21(1) and MCL 768.21(2) provide that even if timely notice is given by both parties, the court must exclude testimony from witnesses not particularly identified in the required notices.

Despite the language in MCL 768.21 indicating that the court "shall exclude" alibi or rebuttal evidence where the offering party has not complied with the notice requirements of MCL 768.20, the Supreme Court has held that the phrase "or at such other time as the court may direct[]" in MCL 768.20(2)[18] "preserves the trial court's discretion to fix the timeliness of notice in view of the circumstances." *Travis*, 443 Mich at 678-679.

To determine whether an undisclosed alibi witness's testimony should be admitted, the court should consider:

- the amount of prejudice that resulted from the failure to disclose;
- the reason for nondisclosure;

[18] Although the Court in *Travis*, 443 Mich at 678-679, was specifically addressing the prosecutor's rebuttal notice requirement under MCL 768.20(2), the similar phrase "or at such other time as the court directs[]" appears in MCL 768.20(1) (governing the defendant's requirement to provide notice of the intent to raise an alibi defense).

- the extent to which the harm caused by nondisclosure was mitigated by subsequent events;
- the weight of the properly admitted evidence supporting the defendant's guilt; and
- other relevant factors arising out of the circumstances of the case. *Travis*, 443 Mich at 682.

"This test takes into account not only the diligence of the prosecution, but also the conduct of the defendant and the degree of harm done to the defense. It tends to protect the prosecution in cases where the defendant is at fault or where the defendant suffers little or no prejudice. At the same time, it tends to protect the defendant when the conduct of the prosecution unfairly limits the defendant's choice of trial strategy[.]" *Travis*, 443 Mich at 683.

Even if timely notice of an alibi is not given, a defendant may nevertheless testify to an alibi without corroborative evidence, and is still entitled to an alibi instruction. *People v McGinnis*, 402 Mich 343, 345-346, 346 n 4 (1978).

C. Impeachment with Alibi Notice

Filing a notice of alibi defense does not require the defendant to proceed with that defense at trial, and no comment should be made by the prosecuting attorney or the court upon the failure to do so; "'[s]uch comment is tantamount to shifting the burden of proof by allowing the jury to make adverse inferences from [the] defendant's or the alibi witness's failure to testify.'" *People v McCray*, 245 Mich App 631, 637 n 1 (2001) (citation omitted); see also *People v Dean*, 103 Mich App 1, 6-7 (1982).

However, if a defendant proffers an alibi, the prosecutor may comment on the defendant's failure to produce corroborating witnesses, if doing so does not infringe upon his or her right not to testify. *People v Fields*, 450 Mich 94, 111-113 (1995). Similarly, a jury may be informed that a defendant's alibi witness failed to come forward to inform the police of any exculpatory information; the prosecution is not required to establish a foundation for the admission of such evidence. *People v Gray*, 466 Mich 44, 46-47 (2002), citing *People v Phillips*, 217 Mich App 489, 494 (1996). In *Gray*, 466 Mich at 48, quoting *Phillips*, 217 Mich App at 495-496, the Court stated:

> "'A juror or other factfinder is certainly qualified to consider whether offered reasons for an alibi witness' delay in coming forward make sense, ring true, or are otherwise persuasive. The timeliness of an alibi account may be highly probative of its truthfulness; it may, in

> fact, be the best or only way to determine whether the alibi is credible. A witness should not be able to take the timeliness issue from the factfinder by fabricating "good" reasons for not coming forward earlier. . . . The credibility of an alibi witness, regarding both the alibi account and the failure to come forward earlier with that account, should not be taken from the jury through the imposition of any special foundational requirement.'"

A notice of alibi constitutes an admission by a party opponent under MRE 801(d)(2)(c), and may be used to impeach a defendant's credibility at trial when his or her testimony is inconsistent with the contents of the alibi notice. *McCray*, 245 Mich App at 635-637. This situation, however, is distinguishable from a situation in which "a prosecutor [improperly] attempts to comment on a defendant's failure to put forth an alibi defense after he [or she] has filed a notice of alibi defense, or comment on the defendant's failure to produce a witness listed on a notice of alibi, when the defendant has *not* presented an alibi defense." *Id.* at 637 n 1 (emphasis added).

D. Burden of Proof

"Although alibi is frequently characterized as a defense, it is in fact merely a rebuttal of the prosecution's evidence. The defendant may not be required to 'prove' an alibi[.]" *People v Burden*, 395 Mich 462, 466 (1975).

"Testimony in support of an alibi may accomplish no more than the raising of a reasonable doubt as to the sufficiency of the proofs connecting an accused with the crime alleged or render such proofs unsatisfactory. . . . In other words, an alibi may fail as a substantive defense and yet serve to raise a reasonable doubt as to the guilt of an accused." *Burden*, 395 Mich at 466-467 (quotation marks, emphasis, and citation omitted).

"[If] any reasonable doubt exists as to the presence of the defendant at the scene of the crime at the time the offense was committed (if such presence is necessary to commit the crime), the defendant must . . . be acquitted." *Burden*, 395 Mich at 467.

A defendant does not have the burden of proving his or her alibi defense, but a defendant does "ha[ve] the burden of producing at least some evidence in support of his claim of alibi, possibly sufficient evidence to raise a reasonable doubt." *People v Fiorini*, 85 Mich App 226, 229-230 (1978).

E. Cross-Examination of Alibi Witness

No special foundation is required before cross-examining an alibi witness about the witness's failure to come forward with the alibi information at an earlier time. *People v Gray*, 466 Mich 44, 49 (2002) (overruling the holding of *People v Fuqua*, 146 Mich App 250, 255-256 (1985), that the prosecution must first make a showing that it would have been natural for the alibi witness to tell his or her story to the police before trial).

F. Jury Instruction

M Crim JI 7.4 is the jury instruction for lack of presence (alibi):

> "(1) You have heard evidence that the defendant could not have committed the alleged crime because [he / she] was somewhere else when the crime was committed.
>
> (2) The prosecutor must prove beyond a reasonable doubt that the defendant was actually there when the alleged crime was committed. The defendant does not have to prove [he / she] was somewhere else.
>
> (3) If, after carefully considering all the evidence, you have a reasonable doubt about whether the defendant was actually present when the alleged crime was committed, you must find [him / her] not guilty." (Alterations in original.)

Where the defendant raises an alibi defense and requests the instruction, failure to give it is error requiring reversal. *McGinnis*, 402 Mich at 345-347. "While a defendant's general denial of the charges against him [or her] does not constitute an alibi defense, if a defendant gives specific testimony regarding his [or her] whereabouts at the time in question, it is alibi testimony the same as if another witness had given the testimony[.]" *Id*. at 346, citations omitted.

Failing to give an unrequested alibi instruction is not reversible error, "so long as the court gives a proper instruction on the elements of the offense and on the requirement that the prosecution prove each element beyond a reasonable doubt." *People v Burden*, 395 Mich 462, 467(1975).

G. Standard of Review

The decision of a trial court to permit or preclude alibi witnesses is reviewed for an abuse of discretion. See *Travis*, 443 Mich 679-680.

10.5 Abandonment and Renunciation

Abandonment and renunciation are both affirmative defenses that are similar in concept but that differ in the specific crimes to which they apply. "'An affirmative defense is one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it[.]'" *People v Sorscher*, 151 Mich App 122, 132 (1986), quoting 21 Am Jur 2d, Criminal Law, § 183, p 338.

A. Abandonment (Attempt Crimes)

Voluntary abandonment is an affirmative defense OKto criminal attempt under MCL 750.92.[19] *People v Kimball*, 109 Mich App 273, 286 (1981), mod on other grounds 412 Mich 890 (1981).[20,21] "'Abandonment by the defendant is 'voluntary' when it is the result of repentance or a genuine change of heart.'" *People v Cross*, 187 Mich App 204, 206 (1991), quoting Dressler, Understanding Criminal Law, § 27.08, p 356. Voluntary abandonment is not a defense to conspiracy. *People v Heffron*, 175 Mich App 543, 547-548 (1988). In *Heffron*, the Court explained,

> "it is not illogical to allow the defense of abandonment to the substantive offense but not the conspiracy. The substantive offense was not complete until the act of burning the house was carried out, while the conspiracy was complete upon formation of the unlawful agreement to burn the house regardless of whether the act was actually carried out." *Id*. at 548.

Involuntary abandonment is not a defense to criminal attempt. *Kimball*, 109 Mich App at 287. Abandonment is *not* voluntary when:

> "the defendant fails to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances which increase the probability of detention or apprehension. Nor is the abandonment 'voluntary' when the defendant fails to consummate the attempted offense after deciding to postpone the criminal conduct until another time or to substitute another victim or another but similar objective." *Id*. at 286-287.

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[19] See M Crim JI 9.4, *Abandonment As Defense to Attempt*.

[20] In *Kimball*, 109 Mich App at 283-286, the Court uses the terms *voluntary abandonment* and *renunciation* interchangeably when discussing the affirmative defense to criminal attempt.

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

"[I]t is no defense that a defendant fails to carry through to completion the crime attempted because of the intervention of outside forces, because circumstances turn out to be different than expected, or because the defendant meets more resistance [than] expected." *Kimball*, 109 Mich App at 280. "[A] victim's entreaties or pleadings may constitute 'unanticipated difficulties' or 'unexpected resistance[.]'" *People v McNeal*, 152 Mich App 404, 417 (1986), disagreed with on other grounds by *People v Jaffray*, 445 Mich 287 (1994).[22,23] In *McNeal*, the victim's repeated appeals to let her go because she had tests to take at school and her promise not to tell anyone about the defendant's criminal conduct amounted to "unanticipated difficulties" or "unexpected resistance" that negated the defendant's claim of voluntary abandonment. *McNeal*, 152 Mich App at 409.

See *Cross*, 187 Mich App at 205, where the defendant was apprehended as he began climbing the prison's inner fence in an apparent attempt to escape. According to the *Cross* Court, "abandonment is not voluntary where it is made in the face of apprehension or due to a realization that the attempted crime cannot successfully proceed. Indeed, to conclude otherwise would be to hold that a criminal who is caught in the act of committing a crime can avoid criminal punishment merely by ceasing the criminal attempt and surrendering to the authorities." *Id*. at 210.

See also *People v Stapf*, 155 Mich App 491, 496 (1986), where the defendant hid under a dock near a lake after he dragged a minor female into the woods but let her go after he saw a flash and thought someone was coming. According to the Court, "defendant's abandonment was not voluntary. . . . Defendant's actions in going to the lake and hiding under a dock reinforced the idea that he abandoned his attempt because he thought someone was coming and he feared getting caught. . . . [C]ircumstances which increase the probability of apprehension negate the voluntariness of abandonment." *Id*.

3. Burden of Proof

"Abandonment is an affirmative defense, and the burden is on the defendant to establish by a preponderance of the evidence voluntary and complete abandonment of a criminal purpose." *People v Cross*, 187 Mich App 204, 206 (1991); see also *People v Kimball*, 109 Mich App 273, 286 (1981), mod on other grounds 412 Mich 890 (1981).[24] "[T]he trial court must evaluate whether

[22]*People v Jaffray*, 445 Mich 287, 308 (1994), disagreed with *McNeal*'s explanation of *secret confinement*.

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

the defendant has produced 'some evidence from which the jury can conclude that the essential elements' of affirmative defenses are present and determine if the jury must be instructed on the defenses." *People v Smith*, 501 Mich 902, 902 (2017), quoting *People v Lemons*, 454 Mich 234, 246 (1997). Shifting the burden of proof to the defendant is not unconstitutional, because voluntary abandonment is an affirmative defense and does not negate an element of the offense. *Kimball*, 109 Mich App at 286 n 7.

4. Voluntary Abandonment Is a Jury Question

Whether voluntary abandonment has been established is usually a jury question, and any challenge to that determination goes to the weight of the evidence not the sufficiency of the evidence. *People v McNeal*, 152 Mich App 404, 415 (1986), disagreed with on other grounds by *People v Jaffray*, 445 Mich 287 (1994).[25] "A trial court may direct a verdict if an affirmative defense is established by proofs presented by the prosecution." *McNeal*, 152 Mich App at 416.

B. Renunciation (Solicitation Crimes)[26]

1. Statutory Authority

Renunciation is an affirmative defense to the crime of solicitation to commit a felony. MCL 750.157b(3)-(4). MCL 750.157b(4) states:

> "It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the actor notified the person solicited of his or her renunciation and either gave timely warning and cooperation to appropriate law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited, provided that conduct does not occur. The defendant shall establish by a preponderance of

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

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

[26] See M Crim JI 10.7, *Renunciation as a Defense to Solicitation*.

> the evidence the affirmative defense under this subsection."

2. Pertinent Caselaw

The affirmative defense of renunciation requires a defendant to

> "(1) notify the solicitee of the solicitor's intent to renounce the crime *and* either (2)(a) warn and cooperate with law enforcement officials or (2)(b) engage in other substantial efforts to prevent the event solicited from occurring." *People v Crawford*, 232 Mich App 608, 618 (1998).

The crime of "[s]olicitation is complete when the solicitation is made. A contingency in the plan may affect whether the [intended crime will be committed], but does not change the solicitor's intent that the [crime be committed]." *Crawford*, 232 Mich App at 616 (citation omitted). In *Crawford*, the Court of Appeals held that a defendant's failure to pay the money for soliciting the murder of a witness scheduled to testify at the defendant's embezzlement trial did not, without more, constitute notice of renunciation. *Id*. at 618. "[MCL 750.157b(4)] requires renunciation 'under circumstances manifesting a *voluntary and complete* renunciation of his or her criminal purpose[.]'" *Crawford*, 232 Mich App at 618. The Court of Appeals determined that the

> "defendant's mere nonpayment may be attributed to other reasons: that defendant, though still intending that the witness die, was simply unable to obtain funds for the down payment; or . . . that defendant's nonpayment . . . represented an attempt to obtain something for nothing." *Id*.

The Court further explained "that defendant's failure to make a down payment on the murder did not satisfy the required notice element of the renunciation defense." *Crawford*, 232 Mich App at 618. Even if the defendant's nonpayment constituted notice, the Court noted that "defendant completely failed to demonstrate any attempt to either warn and cooperate with law enforcement or engage in other substantial efforts to stop [the person solicited] from killing the witness." *Id*. at 619.

10.6 Accident

A defendant may raise the defense of accident in a murder case or in a case involving a specific intent crime.[27] The court may deny a request for

an accident defense jury instruction if the evidence does not support the defense. See *People v Hawthorne*, 474 Mich 174, 179, 184-185 (2006) (a court *improperly* denies the instruction when its absence undermines the reliability of the verdict).

10.7 Confabulation

Confabulation is the process of filling gaps in memory with fantasy, a danger of obtaining information through hypnosis. *People v Gonzales* (*Gonzales I)*, 415 Mich 615, 624 (1982), mod on other grounds 417 Mich 1129 (1983).[28] The *Gonzales I* Court explained:

> "The hypnotic state is a condition of altered consciousness marked by heightened suggestibility. A subject in a hypnotic state may not have accurate recall. A hypnotized subject is highly susceptible to suggestion, even that which is subtle and unintended. Such suggestion may be transmitted either during the hypnotic session or before it by such persons as, in this case, the policemen investigating the killing. The person under hypnosis experiences a compelling desire to please either the hypnotist or others who have asked the person hypnotized to remember or who have urged that it is important that he or she remember certain events. The subject may produce the particular responses he believes are expected of him. In this state of hypersuggestibility and hypercompliance the subject will unconsciously create answers to the questions which the hypnotist asks if he cannot recount the details being sought. This process of filling the gaps of memory with fantasy is called confabulation. Neither the person hypnotized nor the expert observer can distinguish between confabulation and accurate recall in any particular instance. Finally, a witness who is uncertain of his recollections before being hypnotized will become convinced through the process that the story he told under hypnosis is true and correct in every respect. This effect not only persists, but the witness's conviction of the absolute truth of his hypnotically induced recollection grows stronger each time he is asked to repeat the story." *Gonzales I*, 415 Mich at 623-624.

As a general rule, a witness's posthypnotic testimony is inadmissible at trial. In *Gonzales I*, 415 Mich at 626-627, the Court stated:

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[27] See M Crim JI 7.1, *Murder: Defense of Accident (Involuntary Act)*; M Crim JI 7.2, *Murder: Defense of Accident (Not Knowing Consequences of Act);* M Crim JI 7.3a, *Accident as Defense to Specific Intent Crime*.

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

> "The process of hypnosis is not a reliable means of accurately restoring forgotten incidents or repressed memory, and to permit posthypnotic testimony would unfairly denigrate the defendant's right to cross-examination. Therefore, we hold that until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion, or fantasy, and until the barriers which hypnosis raises to effective cross-examination are somehow overcome, the testimony of witnesses which has been tainted by hypnosis must be excluded in criminal cases."

A witness may testify to facts recalled before he or she was hypnotized if the party proffering the testimony demonstrates that the facts were known to the witness before hypnosis. *People v Nixon*, 421 Mich 79, 90 (1984). "In order to ensure that the witness' trial testimony is based solely on facts recalled and related prior to hypnosis, . . . the party offering the testimony must establish its reliability by clear and convincing evidence." *Id*.

"The use of statements obtained *prior* to hypnosis for substantive, impeachment, and other purposes is governed by the same rules applicable to other prior recorded statements." *Nixon*, 421 Mich at 91 n 3.

10.8 Duress

"Duress is a common-law affirmative defense."[29] *People v Lemons*, 454 Mich 234, 245 (1997). "It is applicable in situations where the crime committed avoids a greater harm." *Id* at 246. "A successful duress defense excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act; the compulsion or duress overcomes the defendant's free will and his actions lack the required *mens rea*." *People v Luther*, 394 Mich 619, 622 (1975). "[D]uress is not a valid defense to homicide" or "to the crime of possession of a dangerous weapon by an inmate." *People v Ramsdell*, 230 Mich App 386, 400 (1998) (quotation marks and citation omitted).

> **Note:** Duress is not the same as necessity. "'The difference between the defenses of duress and necessity is that the source of compulsion for duress is the threatened conduct of another human being, while the source of compulsion for necessity is the presence of natural physical forces.'" *People v Hubbard*, 115 Mich App 73, 77 (1982), quoting *People v Hocquard*, 64 Mich App 331, 337 n 3 (1975).

[29] See M Crim JI 7.6, *Duress*.

A. Elements of Defense

The essential elements of duress are:

> "'A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened harm.'" *People v Lemons*, 454 Mich 234, 246-247 (1997), quoting *People v Luther*, 394 Mich 619, 623 (1975).

"In other words, to raise the affirmative defense of duress, the defendant must offer evidence that the prohibited act was done under circumstances that excuse its commission." *Lemons*, 454 Mich at 247 n 17.

"A mere threat of future injury is insufficient to support a defense of duress." *People v Ramsdell*, 230 Mich App 386, 401 (1998). "Rather the threatened danger must be present, imminent, and impending." *Id*. Additionally, danger must not have resulted from the negligence or fault of the person claiming the defense. *Lemons*, 454 Mich at 247.

B. Factors That May Preclude a Duress Defense

A duress defense may be forfeited under the following circumstances:

- If the defendant fails to take advantage of a reasonable opportunity to escape, when escape could be accomplished without unduly exposing himself or herself to death or seriously bodily harm; and
- If the defendant fails to discontinue his or her conduct as soon as the alleged duress is no longer coercive. *People v Lemons*, 454 Mich 234, 247 n 18 (1997)

C. Burden of Proof

A defendant must establish a prima facie case of the elements of duress before he or she is entitled to a jury instruction on the defense. *People v Lemons*, 454 Mich 234, 248 (1997). In other words, to properly raise the affirmative defense of duress, the defendant must

introduce some evidence from which the jury could conclude that the elements of duress are satisfied. *People v Luther*, 394 Mich 619, 623 (1975). Once the defense is successfully raised, the prosecutor must prove beyond a reasonable doubt that the defendant did not act under duress. *People v Terry*, 224 Mich App 447, 453-454 (1997).

D. Caselaw and Application

"[D]uress may be asserted as an affirmative defense to felony murder if it is a defense to the underlying felony." *People v Reichard*, 505 Mich 81, 83 (2020). In *People v Gafken*, ___ Mich ___, ___ (2022), the Supreme Court held that "*Reichard's* rationale extends to allowing duress to be asserted as an affirmative defense to what is known as depraved-heart second-degree murder"[30] and "error in denying the defense was not harmless." "Depraved-heart murder does not present the choice between sparing one's own life or taking the life of an innocent. It is not kill or be killed. Rather, the choice presented here is like the choice in *Reichard*: lose one's life or commit a lesser felony than intentional murder[.]" *Id*. at ___. "Because [defendant] alleges that she chose to do the lesser evil, a duress defense is available." *Id*. at ___. Further, the error was not harmless because the "denial of the defense, coupled with the trial court's exclusion of any evidence that [defendant was threatened], effectively left [defendant] with no defense at all." *Id*. at ___ (declining to address the burden issue because it was not included in order granting oral argument on the application).

10.9 Statutes of Limitations

"[A] statute of limitations defense . . . in a criminal case is a nonjurisdictional, waivable affirmative defense." *People v Burns*, 250 Mich App 436, 439 (2002). MCL 767.24 sets out the applicable statute of limitation for each crime.

A. Nonresident Tolling of a Statute of Limitations

The period of limitations applicable to an offense is tolled for "[a]ny period during which the party charged[31] did not usually and

[30]Malice is a required element of second-degree murder. *Gafken*, ___ Mich at ___. For a depraved-heart second-degree murder charge, the "theory for proving malice can be shown by the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result." *Id*. at ___ (quotation marks and citation omitted).

[31] "The term 'party charged' simply refers to the party . . . who [is] charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply." *People v James*, 326 Mich App 98, 109 (2018) ("the proposition that . . . defendant must have been a 'suspect' or an 'accused' prior to the expiration of the untolled limitations period, is inapposite").

publicly reside within this state[.]" MCL 767.24(11). Any time during which the party charged did not usually and publicly reside in Michigan is not counted as "part of the time within which the respective indictments may be found and filed." MCL 767.24(11). The tolling provision "applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect." MCL 767.24(12).

A trial court may retroactively apply an extended limitations period under MCL 767.24, if "the preamended version of the statute of limitations had not yet expired at the time the amended version extending the period limitations became effective[.]" *People v Chesebro*, 185 Mich App 412, 418-419 (1990) (the trial court should have applied the amended period of limitations, which would have allowed the charge to be filed by the victim's 21st birthday, because the amended period of limitations became effective one month before the preamended six-year period expired).

"The tolling provision [is] all-encompassing, indicating that any period during which a defendant did not reside in Michigan could not be considered when calculating the time within which charges must be found and filed, i.e., the pertinent limitations period." *People v Kasben*, 324 Mich App 1, 10 (2018). "[C]harges not yet time-barred by an existing period of limitations are subject to a new period of limitations set forth in an amended statute." *Id*. at 11, citing *People v Russo*, 439 Mich 584, 588 (1992). In *Kasben*, the trial court properly refused to dismiss the CSC-I charge brought against the defendant in 2015 for conduct that occurred in 1983 because the statute of limitations was tolled when the defendant left Michigan, and the applicable statute of limitations was amended twice during that time, extending the limitations period indefinitely. *Kasben*, 324 Mich App at 8-11. (finding that even though the crime was subject to a six-year limitations period at the time it was committed, six years had not passed when the limitations period was first extended in 1987 to run for six years or until the victim's 21st birthday, the limitations period was then tolled when the defendant left Michigan before the victim's 21st birthday, and the limitations period had not yet expired before the statute was amended in 2001 to run indefinitely).

The nonresident tolling provision in MCL 767.24(11)[32] applies even when a defendant resides "openly and publicly" in a state other than Michigan. *People v Crear*, 242 Mich App 158, 163-165 (2000), overruled on other grounds *People v Miller*, 482 Mich 540, 561 n 26 (2008)[33] (a new trial is not always required when a juror at trial would have been excusable for cause). See *People v Blackmer*, 309

[32] Formerly MCL 767.24(7).

Mich App 199, 202 (2015) (finding that because "the plain and unambiguous language of the nonresident tolling provision [of MCL 767.24] provided that the limitations period was tolled for any period in which a defendant was not customarily and openly living in Michigan"; "[d]efendant's subjective intent [to return to Michigan] is irrelevant").

Whether a person "usually and publicly" resides in Michigan for purposes of the tolling provision in MCL 767.24(11) is a question of fact for the jury. *People v Allen*, 192 Mich App 592, 597 (1992).

The tolling provision in MCL 767.24 does not violate a nonresident defendant's constitutional rights to interstate travel and equal protection. *People v James*, 326 Mich App 98, 112 (2018). "The tolling provision . . . only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's borders." *Id*. at 104. "The Legislature distinguishes between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes. There are rational grounds for doing so, including the investigation, prosecution, and, indeed, the very discovery of previously unreported crimes." *Id*. at 112.

B. Factual Disputes About a Limitations Period

Factual disputes about a statute of limitations issue arising under MCL 767.24 are questions to be decided by a jury. *People v Artman*, 218 Mich App 236, 239 (1996). See also *People v Wright*, 161 Mich App 682, 686 (1987), where the Court of Appeals "liken[ed] the statute of limitations issue to the question of venue in criminal proceedings, which, although likewise bearing on the jurisdiction of the trial court, is one of fact for the jury."

C. Waiver of a Statute of Limitations Defense

An unconditional guilty or no contest plea waives the defendant's right to assert a statute of limitations defense, because "[t]he purpose of a criminal statute of limitations is clearly related to determining the factual guilt of a defendant." *People v Allen*, 192 Mich App 592, 602 (1992). See also *People v Burns*, 250 Mich App 436, 441-442 (2002) (statute of limitations defense must be waived in order for a trial court to instruct a jury on lesser included offenses for which the statute of limitations has expired).

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

10.10 Consent in Criminal Sexual Conduct Cases

An alleged victim of criminal sexual conduct need not show that he or she resisted the defendant. See M Crim JI 20.27, *Consent*. Consent may be raised as an affirmative defense to criminal sexual conduct offenses when a defendant produces enough evidence to place consent at issue, and the defense of consent is not precluded by law.[34] *People v Thompson*, 117 Mich App 522, 528 (1982) (CSC-I based on commission of an underlying felony—kidnapping). When a defendant produces sufficient evidence to give rise to the issue of an affirmative defense, the prosecutor must disprove the affirmative defense beyond a reasonable doubt. *Id*. See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 4, for more information on consent as an affirmative defense.

10.11 Mistake of Fact

A defendant may raise a mistake of fact defense in certain cases involving sexual misconduct offenses. See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 4, for more information.

[34] See, for example, MCL 750.520e(1)(e), which specifically precludes consent as an affirmative defense to the offense of CSC-IV where the actor was a mental health professional, and the sexual contact occurs during or within two years after the victim was the actor's client (and not the actor's spouse).

Chapter 11: Fourth Amendment Search and Seizure Issues

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11.1 Suppression of Evidence on Fourth Amendment Grounds–Generally

The Fourth Amendment of the United States Constitution, US Const, Am IV, and its state constitution counterpart, Const 1963, art 1, § 11, prohibit "unreasonable searches and seizures absent a warrant based upon probable cause[.]" *People v Kazmierczak*, 461 Mich 411, 417 (2000). US Const, Am IV provides:

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

Similarly, Const 1963, art 1, § 11 provides, in part:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."[1]

"[T]he Michigan Constitution is to be construed to provide the same protection as that secured by the Fourth Amendment, *absent compelling reason to impose a different interpretation*." *People v Katzman*, 505 Mich 1053, 1053 (2020) (quotation marks and citation omitted). The reasonableness of a warrantless search or seizure is determined by balancing the governmental interest that allegedly justifies the intrusion against the particular intrusion upon the individual's constitutional protected rights. *Terry v Ohio*, 392 US 1, 20-22 (1968); *People v Nelson*, 443 Mich 626, 637 (1993).

"Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings." *In re Forfeiture of $176,598*, 443 Mich 261, 265 (1993); see *Mapp v Ohio*, 367 US 643 (1961). The exclusionary rule "is a cornerstone of American jurisprudence that affords individuals the most basic protection against arbitrary police conduct." *In re Forfeiture of $176,598*, 443 Mich at 265.

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[1] Const 1963, art 1, § 11 additionally contains the following "antiexclusionary clause":

> "The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."

See *People v Goldston*, 470 Mich 523, 537-538 (2004) (concluding that this clause operates as a restriction on application of the exclusionary rule to the enumerated items unless required under the federal constitution). See Section 11.9 for discussion of the exclusionary rule.

However, there are exceptions to the exclusionary rule and situations in which the exclusionary rule does not apply. *People v Hellstrom*, 264 Mich App 187, 193-194 n 3 (2004).[2]

The protections against unreasonable searches and seizures provided in the United States and Michigan constitutions apply to three general categories of encounters between the police and citizens:

- Situations in which there is no restraint upon the citizen's liberty and the officer is seeking the citizen's voluntary cooperation through non-coercive questioning, *People v Shabaz*, 424 Mich 42, 56-57 (1985);
- Investigatory stops (*Terry*[3] stops), which are limited to brief, non-intrusive detentions, and the police must have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime, *Shabaz*, 424 Mich at 57; and
- Arrests, for which the Fourth Amendment requires that the police have probable cause to believe that a person has committed or is committing a crime, *Shabaz*, 424 Mich at 59.

There is a strong preference that searches and seizures be made pursuant to a search warrant. *United States v Ventresca*, 380 US 102, 106 (1965). This Chapter generally discusses warrantless searches and seizures. For discussion of the issuance of search warrants, see Chapter 3. For discussion of exceptions to the warrant requirement, see Section 11.6.

11.2 Collection of Data by a Federal Agency

"This state or a political subdivision of this state shall not assist, participate with, or provide material support or resources to a federal agency to enable it to collect or to facilitate in the collection or use of a person's electronic data or metadata, unless 1 or more of the following circumstances apply:

(a) The person has given informed consent.

(b) The action is pursuant to a warrant that is based upon probable cause and particularly describes the person, place, or thing to be searched or seized.

[2] See Section 11.9 for discussion of the exclusionary rule and its exceptions.

[3] *Terry v Ohio*, 392 US 1 (1968).

(c) The action is in accordance with a legally recognized exception to warrant requirements.

(d) The action will not infringe on any reasonable expectation of privacy the person may have.

(e) This state or a political subdivision of this state collected the electronic data or metadata legally." MCL 37.263.

11.3 Existence of a Search or Seizure

The text of the Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.'" *United States v Jacobsen*, 466 US 109, 113 (1984). The Fourth Amendment requires that any search or seizure be reasonable. See *Payton v New York*, 445 US 573, 584 (1980). "Even when based on probable cause, . . . a warrantless search or seizure inside a suspect's home is presumptively unreasonable." *People v Hammerlund*, 504 Mich 442, 452 (2019). "[T]he Fourth Amendment has drawn a firm line at the entrance of the house, which absent exigent circumstances may not be reasonably crossed without a warrant."[4] *Id*. at 452 (quotation marks, alterations, and citation omitted). However, "[w]arrantless arrests that take place in public upon probable cause do not violate the Fourth Amendment."[5] *Id*. at 452.

Note that "the plain view doctrine addresses the validity of warrantless *seizures*, not searches," whereas "[t]he open view analysis must be applied to determine whether [an officer's observation] through the corner window was an unreasonable *search* prohibited by the Fourth Amendment." *People v Barbee*, 325 Mich App 1, 6, 7 (2018) (quotation marks and citation omitted; second emphasis added).

A. Searches and Reasonable Expectation of Privacy

Police conduct constitutes a *search* subject to Fourth Amendment restrictions when it (1) "violate[s] a person's 'reasonable expectation of privacy,'" *United States v Jones*, 565 US 400, 406 (2012), quoting *Katz v United States*, 389 US 347, 360 (1967) (Harlan, J., concurring); (2) involves a physical trespass or intrusion in an attempt to find something or obtain information, *Jones*, 565 US at 406-407; or (3) obtains by sense-enhancing technology any information about the interior of the home that could not otherwise have been obtained without a physical intrusion, at least where the technology in question is not in general public use, *Kyllo v United States*, 533 US 27, 34-35, 40 (2001). See *Jones*, 565 US at 407-408 (noting that Justice

[4]See Section 11.6(A) for information on exigent circumstances.

[5]See Section 3.15 for information on warrantless arrests in public.

Harlan's concept of "reasonable expectation of privacy" as discussed in *Katz*, 389 US at 360-361, and its progeny "did not narrow the Fourth Amendment's scope" or otherwise "erode the principle 'that, when the Government . . . engage[s] in *physical* intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment,'" irrespective of any inquiry into a person's reasonable expectation of privacy) (citation omitted; emphasis added); *Florida v Jardines*, 569 US 1, 11 (2013) (noting that "[t]he *Katz* reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas") (quoting *Jones*, 565 US at 409); *Kyllo*, 533 US at 29-30, 34-35, 40 (noting that even if no significant invasion of privacy occurred through the use of a thermal-imaging device to detect relative amounts of heat radiating from a house, "'[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted,'" and the conclusion that the use of thermal-imaging technology constituted a search was necessary for the "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted") (citation omitted).

Establishing that a governmental intrusion violated a person's reasonable expectation of privacy for Fourth Amendment purposes requires both "that a person ha[s] exhibited an actual (subjective) expectation of privacy," and "that the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 US at 361 (Harlan, J., concurring). When police conduct does not affect a defendant's legitimate interest in privacy, the conduct cannot be characterized as a search, and the conduct therefore does not merit Fourth Amendment analysis. *Illinois v Caballes*, 543 US 405, 408 (2005), citing *Jacobsen*, 466 US at 123.

"[T]he Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process[;]" "[t]he Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause[, which] . . . can happen when the police hold someone without any reason before the formal onset of a criminal proceeding[, or] . . . when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements." *Manuel v City of Joliet*, *Illinois*, 580 US 357, ___ (2017) (holding that where the petitioner was arrested without probable cause and was detained for several weeks after a judicial finding of probable cause that was based on fabrications in the criminal complaint, he "stated a Fourth Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial

detention[]"). "If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment." *Id.* at ___.

Under the open view doctrine, "no Fourth Amendment 'search' occurs where a law enforcement officer observes incriminating evidence or unlawful activity from a non-intrusive vantage point." *People v Barbee*, 325 Mich App 1, 7 (2018) (quotation marks and citation omitted).

Curtilage and open fields. "The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept." *Dow Chemical Co v United States*, 476 US 227, 235 (1986). However, neither outdoor areas of private property outside the curtilage of the home, *Oliver v United States*, 466 US 170, 176-179 (1984), nor outdoor areas of business property, *Dow Chemical Co*, 476 US at 238-239, are protected spaces within the meaning of the Fourth Amendment. Thus, physically trespassing on open fields outside the curtilage is not a search; nor is using advanced photographic technology to view an outdoor industrial complex from the air. *Dow Chemical Co*, 476 US at 239; *Oliver*, 466 US at 179. See Section 11.7(A) for more information on curtilage searches.

Vehicle parked on public street. There is no reasonable expectation of privacy relative to movements in a vehicle parked on a public street. Thus, there is no trespass by police when they observe an occupant's movement therein. *Barbee*, 325 Mich App at 10. See also *People v Anthony*, 327 Mich App 24, 35 (2019) ("[b]ecause the officers needed no justification whatsoever to drive down the street, their individual motivation for going there can be of no constitutional significance").

Information generally available to or conveyed to third parties. There is no reasonable expectation of privacy in information disclosed or conveyed to third parties, including the interior of a greenhouse open to the sky and the flying public, *Florida v Riley*, 488 US 445, 450-451 (1989) (plurality opinion); garbage put out on the curb for collection, *California v Greenwood*, 486 US 35, 39-41 (1988); phone numbers conveyed to the phone company in the act of dialing, *Smith v Maryland*, 442 US 735, 742-745 (1979); financial transactions conveyed to a bank, *United States v Miller*, 425 US 435, 442-443 (1976); or statements made to an undercover informant, *United States v White*, 401 US 745, 751-753 (1971) (plurality opinion).

Testing of bodily fluids. Urine, breath, and blood tests are searches within the meaning of the Fourth Amendment. *Birchfield v North Dakota*, 579 US 438, 455, 447 n 1 (2016); *People v Chowdhury*, 285 Mich

App 509, 523-525 (2009). Breath tests are so minimally intrusive, however, that they may be done without a warrant incident to a valid drunk driving arrest. *Birchfield*, 579 US at 474. Blood tests, on the other hand, require a warrant absent exigent circumstances, and the natural dissipation of alcohol from the blood does not automatically establish exigent circumstances. *Missouri v McNeely*, 569 US 141, 147 (2013).[6]

Use of drug-sniffing dogs. There is no reasonable expectation of privacy in the smell of contraband narcotics, and the use of a drug-detection dog is therefore generally not a search subject to Fourth Amendment restrictions. *United States v Place*, 462 US 696, 697-698, 706-707 (1983). However, the entry of the curtilage of the home to allow the dog to sniff the home is a search subject to the Fourth Amendment's restrictions, *Jardines*, 569 US at 11-12, and prolonging a traffic stop to enable a dog to be brought to the scene may be a seizure subject to the Fourth Amendment if the stop is prolonged beyond the time reasonably required to complete the stop, *Rodriguez v United States*, 575 US 348, 350 (2015).

Use of flashlight. The use of a flashlight or other form of illumination to see an area that is obscured by darkness does not in and of itself constitute a constitutionally-protected search. *United States v Dunn*, 480 US 294, 305 (1987); *Texas v Brown*, 460 US 730, 739-740 (1983) (plurality opinion); *United States v Lee*, 274 US 559, 563 (1927); *People v Barbee*, 325 Mich App 1, 11 (2018).

Use of GPS tracking device. "[T]he attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search . . . within the meaning of the Fourth Amendment." *Jones*, 565 US at 402, 404-406 (noting the Court's obligation to "'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted[,]'" and holding that when "[t]he Government physically occupied private property for the purpose of obtaining information[,]" it conducted a search in violation of the Fourth Amendment's warrant requirement) (citation omitted).

Use of historical cell phone records. There is a legitimate expectation of privacy in the record of physical movements captured through cell site location information (CSLI), and the fact that the information is obtained from a third party does not overcome Fourth Amendment protections. *Carpenter v United States*, 585 US ___, ___ (2018). Therefore, the government's acquisition of CSLI constitutes a search within the meaning of the Fourth Amendment. *Id*. at ___ (obtaining a court order for CSLI records pursuant to the Stored Communications

[6] See Section 11.6(A) for discussion of exigent circumstances.

Act[7] was insufficient to justify a search since the required showing under the Act - reasonable grounds to believe the records are relevant and material to an ongoing investigation[8] - falls short of the probable cause standard required to obtain a search warrant). While such records are generated for commercial purposes and shared with a third-party (the service provider), the *Carpenter* Court declined to extend the third party doctrine set forth in *Smith*, 442 US at 735 and *Miller*, 425 US at 435 (discussed above) to CSLI, holding such information is more akin to GPS information as in *Jones*, 565 US at 400 (discussed above).[9]

Fingerprinting. "Fingerprinting an individual without probable cause, a warrant, or an applicable warrant exception violates an individual's Fourth Amendment rights." *Johnson v Vanderkooi*, 509 Mich 524, 529-530 (2022). In *Johnson*, the Court held that the "fingerprinting of each of the plaintiffs in these cases constituted a physical trespass onto a person's body, a constitutionally protected area." *Id*. at 537.

B. Seizures

"[A] seizure may be of a person, a thing, or even a place." *Bailey v United States*, 568 US 186, 189 (2013). "[I]n determining whether a seizure occurred, a court must consider the totality of the circumstances." *People v Anthony*, 327 Mich App 24, 33 (2019). "The 'seizure' of a 'person' plainly refers to an arrest," and "'the arrest of a person is quintessentially a seizure.'" *Torres v Madrid*, 592 US ___, ___ (2021), quoting *Payton v New York*, 445 US 573, 585 (1980).

A seizure of property within the context of the Fourth Amendment "occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v Jacobsen*, 466 US 109, 113 (1984); see also *United States v Place*, 462 US 696, 707-708 (1983) (holding that the temporary detention of luggage for purposes of a dog sniff is a seizure within the meaning of the Fourth Amendment).

A person is seized for purposes of the Fourth Amendment when there is an application of physical touching or force, or a nonphysical show of authority to which the person submits. *California v Hodari D*, 499 US 621, 626 (1991). Police conduct is not a seizure of the person subject to Fourth Amendment restrictions unless a reasonable person would not

[7] 18 USC 2701 *et seq*.

[8] 18 USC 2703(d).

[9] The *Carpenter* Court noted that while police must obtain a warrant when collecting CSLI to assist in a criminal investigation, the rule does not limit their ability to respond to an ongoing emergency. *Carpenter*, 585 US at ___.

feel free to leave or decline an officer's request, or otherwise terminate the encounter. See *Brendlin v California*, 551 US 249, 255 (2007); *Florida v Bostick*, 501 US 429, 437-438 (1991). "However, there are circumstances in which a person will not wish to leave, not because of actions by police but for the individual's own reasons; such a person is not 'seized.'" *Anthony*, 327 Mich App at 33. "Thus a more precise definition of a seizure is whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Id.* (quotation marks and citation omitted).

"[U]sing a marked police vehicle to block a civilian vehicle's ability to exit a single-lane driveway to facilitate questioning or an investigation is a show of force on behalf of the police that can give rise to a seizure within the meaning of the Fourth Amendment." *People v Lucynski*, 509 Mich 618, 643 (2022). The *Lucynski* Court held that "[u]nder the circumstances of this case, including the rural setting, the way the encounter was initiated by the officer swiftly following defendant down a private driveway, and the fact that the officer's police vehicle blocked defendant's car in the driveway, a reasonable person would not have felt free to leave the scene, even though the police officer did not activate emergency lights or a siren." *Id.* at 643. "The same facts would cause a reasonable person to feel compelled to answer questions posed by the officer who had followed him and blocked his path of egress from the driveway of a home he did not own." *Id.* at 643.

"Although an officer may approach a person in a public area, the encounter is only consensual if a reasonable person would feel free to terminate the encounter." *People v Armstrong*, ___ Mich App ___, ___ (2022) (quotation marks and citation omitted). "A person is seized whenever law-enforcement officers completely block a person's parked vehicle." *Id.* at ___ (cleaned up). In *Armstrong*, the defendant was in the front passenger seat of a Jeep Cherokee parked on the street when it "was surrounded on all sides and front and back by [law-enforcement officers]." *Id.* at ___. Although "camera footage [did] not unmistakably establish that the driver of the Jeep could not have driven forward without hitting an officer," the *Armstrong* Court concluded that "a reasonable person in defendant's position would not have felt free to terminate or leave the encounter." *Id.* at ___. Accordingly, the Court held that the defendant "was unlawfully seized when law-enforcement officers surrounded the Jeep without probable cause." *Id.* at ___. The Court further held that "any object such as a gun that was not immediately apparent as contraband to the officers before they surrounded the Jeep was not permissibly seized under the plain-view doctrine." *Id.* at ___. "Because the gun was not in plain view before defendant was unconstitutionally seized," the

Armstrong Court held that the "trial court properly granted defendant's motion to suppress." *Id*. at ___.

"[A]n officer seizes a person when he uses force to apprehend her," including "when an officer shoots someone who temporarily eludes capture after the shooting." *Torres*, 592 US at ___ (2021). "The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." *Id*. at ___. "A seizure requires the use of force *with intent to restrain*. Accidental force will not qualify. Nor will force intentionally applied for some other purpose satisfy this rule." *Id*. at ___ (citation omitted; noting it only considered force used to apprehend in its decision). "[T]he appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain[.]" *Id*. at ___. "While a mere touch can be enough for a seizure, the amount of force remains pertinent in assessing the objective intent to restrain. A tap on the shoulder to get one's attention will rarely exhibit such an intent. Nor does the seizure depend on the subjective perception of the seized person." *Id*. at ___ (citation omitted). In *Torres*, the officers' action of "ordering Torres to stop and then shooting to restrain her movement," satisfied "the objective test for a seizure, regardless of whether [she] comprehended the governmental character of [the officers'] actions." *Id*. at ___. The *Torres* Court noted that its ruling is "narrow," and that "[i]n addition to the requirement of intent to restrain, a seizure by force–absent submission–lasts only as long as the application of force." *Id*. at ___ (concluding "that the officers seized Torres for the instant that the bullets struck her"). "[T]he Fourth Amendment does not recognize any *continuing* arrest during the period of fugitivity." *Id*. at ___ (quotation marks and citation omitted).

"Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *Drayton v United States*, 536 US 194, 200 (2002). For this reason, the Fourth Amendment permits police officers to randomly approach individuals in airports, on buses, and in other public places "to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is free to refuse," even if the officers do not advise the individuals that they have the right not to cooperate. *Drayton*, 536 US at 197-199, 203-204 (holding that where officers boarded a bus, told passengers that they were looking for drugs and weapons, and obtained the respondents' consent to pat them down, resulting in the discovery of cocaine and other evidence, the respondents were not seized for Fourth Amendment purposes where "[t]he officers gave the passengers no reason to believe that they were

required to answer the officers' questions"); see also *Bostick*, 501 US at 431, 433-437; *Florida v Rodriguez*, 469 US 1, 4-6 (1984).

A passenger traveling in a vehicle that is stopped by the police is seized under the Fourth Amendment. *People v Mazzie*, 326 Mich App 279, 292 (2018). See also *People v Simmons*, 316 Mich App 322, 326 (2016).[10]

C. Constructive Entry

"[A]bsent exigent circumstances, the police may not enter a home to effect an arrest unless armed with a warrant." *People v Trapp*, 335 Mich App 141, 157 (2020). "[W]hen the police coerce the residents of a home to leave so that they are readily subject to arrest" they constructively enter the home in violation of the Fourth Amendment. *Id*. (adopting the constructive entry doctrine). "The constructive-entry doctrine hinges on the notion that the security promised by the Fourth Amendment is destroyed not only by a physical invasion of government actors, but also by official conduct calculated to compel the occupants of a home to submit to their own extraction." *Id*. at 162.

In *Trapp*, 335 Mich App at 144, officers responded to a call from a trailer park manager reporting a man with a gun on the premises. "When the police arrived at the trailer park, there were no signs of . . . unrest. It was after 10:30 p.m. and the park appeared dark and quiet." *Id*. at 168. After being informed by the manager that the man with the gun was inside a nearby trailer, officers knocked on the trailer door, and told the woman who answered the door to step out. *Id*. at 146-148. The officers then instructed the woman to tell the two males in the trailer to step out one at a time with their hands where the officers could see them. *Id*. at 147. Defendant complied and within minutes of exiting the trailer was spun around and handcuffed. *Id*. at 148-149. "Because they had no warrant and no exceptions to the warrant requirement appl[ied], the officers could not have entered [the] trailer . . . to seize any of its occupants for questioning, or to search for a weapon." *Id*. at 154. "Because the police lacked any reasonable suspicion that the woman had committed or was about to commit a crime, they had no authority to seize her by telling her to 'step outside.'" *Id*. at 155. Defendant's "exit pursuant to the officer's direction, filtered through the woman, [cannot be characterized] as 'voluntary,'" where "[a]t least four armed uniformed officers had surrounded the trailer at night, extracted the woman who lived there, and ordered the men to present themselves outside with their hands visible." *Id*. at 156. "[C]ombined with the language and tone of the involved officer's voice, a reasonable person in [defendant's] position

[10]See Section 11.6(B)(3) for more information on seizure of automobile occupants.

would not have felt free to ignore the officer's instruction and simply close the door." *Id*. at 156-157 (concluding the facts of the case fell within the constructive entry doctrine).

11.4 Standing[11] Generally (Expectation of Privacy)

"The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits." *Byrd v United States*, 584 US ___, ___ (2018) (stating that Fourth Amendment standing "need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim; accordingly, a court is not required to assess a defendant's reasonable expectation of privacy before addressing whether there was probable cause for the search if the probable cause argument has been preserved).

A defendant may claim the benefits of the exclusionary rule only if his or her own Fourth Amendment rights have in fact been violated; there is no "'automatic standing.'" *United States v Salvucci*, 448 US 83, 85 (1980). A defendant must demonstrate that he or she personally had an expectation of privacy in the object of the search or seizure, and that the expectation is one that society recognizes as reasonable. *People v Smith (Lee)*, 420 Mich 1, 28 (1984). "[T]he central legal question [is] whether, under Fourth Amendment jurisprudence, [the] defendant could assert a privacy right under the circumstances." *People v Antwine*, 293 Mich App 192, 195 n 1 (2011); see also *Rakas v Illinois*, 439 US 128, 138-139 (1978) (noting that although examining the issue purely as one of standing would produce the same results, "the better analysis forth-rightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing"). A defendant attacking the propriety of a search or seizure has the burden of establishing that his or her reasonable and personal expectation of privacy was infringed upon. *People v Nash*, 418 Mich 196, 204-205 (1983) (opinion by Brickley, J.); *People v Lombardo*, 216 Mich App 500, 505 (1996). In deciding the issue, the court should consider the totality of the circumstances. *People v Perlos*, 436 Mich 305, 317-318 (1990).

> **Note:** In recent years, the United States Supreme Court has emphasized that the "reasonable expectation of privacy" test is not applicable in the context of *physical* intrusions onto constitutionally protected property. See *United States v Jones*,

[11] See Section 11.7(A) for more information on standing as it relates to dwelling searches.

> 565 US 400, 407-408 (2012) (noting that Justice Harlan's concept of "reasonable expectation of privacy" as discussed in *Katz v United States*, 389 US 347, 360-361 (1967) (Harlan, J., concurring), and its progeny "did not narrow the Fourth Amendment's scope" or otherwise "erode the principle 'that, when the Government . . . engage[s] in *physical* intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment,'" irrespective of any inquiry into a person's reasonable expectation of privacy) (citation omitted; emphasis added); *Florida v Jardines*, 569 US 1, 11 (2013) (noting that "[t]he *Katz* reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas") (quoting *Jones*, 565 US at 409).

"'Factors relevant to the determination of standing include ownership, possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case.'" *People v Brown*, 279 Mich App 116, 130-131 (2008) (quoting *People v Powell*, 235 Mich App 557, 563 (1999), and holding that the defendant did not have standing to challenge the warrantless search of a computer he did not own but to which he was allowed access because he exercised no control over others' access to the computer and he did not own the residence in which the computer was located) (additional quotation marks omitted).

"The Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes." *People v Vaughn*, ___ Mich App ___, ___ (2022) (quotation marks and citation omitted). Indeed, "a business owner's expectation of privacy exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes." *Id*. at ___ (quotation marks and citation omitted). "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home." *Id*. at ___ (citation omitted).

"[C]itizens maintain a reasonable expectation of privacy in their cell-phone data and this reasonable expectation of privacy does not altogether dissipate merely because a phone is seized during a lawful arrest." *People v Hughes*, 506 Mich 512, 529 (2020). "The authority to seize an item does not necessarily eliminate one's expectation of privacy in that item and therefore allow the police to search that item without

limitation." *Id*. at 530. Additionally, "the seizure and search of cell-phone data pursuant to a warrant [does not] extinguish[] that otherwise reasonable expectation of privacy in the entirety of that seized data." *Id*. at 529. "[A] warrant authorizing the police to seize and search cell-phone data allows officers to examine the seized data only to the extent reasonably consistent with the warrant." *Id*. (though "it may [be] reasonable for officers to seize all of [a] defendant's cell-phone data pursuant to [a] warrant to prevent the destruction of evidence and to isolate incriminating material from nonincriminating material").

"The Fourth Amendment specifically guarantees the right of the people to be secure in their persons, houses, papers, and *effects*[.]" *People v Mead*, 503 Mich 205, 214 (2019) (cleaned up). Accordingly, where the record establishes that a defendant asserted a clear possessory interest in a personal effect, he or she may have standing to challenge the search. (defendant-passenger could challenge the warrantless search of his backpack that occurred subsequent to a valid stop because "although [he] had no . . . legitimate expectation of privacy in the interior of [the] vehicle, he had a legitimate expectation of privacy in his backpack," which he "asserted a clear possessory interest in . . . by clutching it in his lap" prior to being ordered to exit the vehicle) *Id*. at 214, 215.

A person who abandons property is entirely deprived of the ability to contest a search and seizure of that property. *People v Zahn*, 234 Mich App 438, 448 (1999). The search or seizure of property that has been abandoned "is presumptively reasonable because the owner no longer has an expectation of privacy in the property that [the person] has abandoned." *People v Rasmussen*, 191 Mich App 721, 725 (1991). "While abandonment in the property law context looks to whether the person relinquished . . . *ownership* interest in the property, abandonment under the Fourth Amendment inquires whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished . . . interest in the property in question so that [the person] could no longer retain a reasonable expectation of privacy [in it].'" *People v Henry*, 477 Mich 1123 (2007) (cleaned up). The defendant bears the burden of showing that the property searched was not abandoned. *Rasmussen*, 191 Mich App at 725. Whether an owner has abandoned property is an ultimate fact that turns on a combination of act and intent. *People v Shabaz*, 424 Mich 42, 65-66 (1985).

11.5 Scope of Search Warrant[12]

"[I]t is well established that a search warrant allows the state to examine property only to the extent authorized by the warrant." *People v Hughes*,

[12]See Chapter 3 for information on issuing a search warrant.

506 Mich 512, 534 (2020). When seized pursuant to a valid warrant, "a search of digital cell-phone data . . . must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in *that* warrant. Any search of digital cell-phone data that is not so directed, but instead is directed at uncovering evidence of criminal activity not identified in the warrant, is effectively a warrantless search that violates the Fourth Amendment absent some exception to the warrant requirement." *Id*. at 516-517 (2020). "[A] warrant to search a suspect's digital cell-phone data for evidence of one crime does not enable a search of that same data for evidence of another crime without obtaining a second warrant." *Id*. at 553-553. In *Hughes*, "the officer's review of defendant's cell-phone data for incriminating evidence relating to an armed robbery was not reasonably directed at obtaining evidence regarding drug trafficking – the criminal activity alleged in the warrant – and therefore the search for that evidence was outside the purview of the warrant and thus violative of the Fourth Amendment." *Id*. at 517.

The *Hughes* decision does not "hold or imply . . . that officers in the execution of a search of digital data must review only digital content that a suspect deigns to identify as pertaining to criminal activity." *Hughes*, 506 Mich at 541. "Nothing herein should be construed to restrict an officer's ability to conduct a reasonably thorough search of digital cell-phone data to uncover evidence of the criminal activity alleged in a warrant, and an officer is not require to discontinue a search when he or she discovers evidence of other criminal activity while reasonably searching for evidence of the criminal activity alleged in the warrant." *Id*. at 553. "However, at the same time, . . . it is [not] always reasonable for an officer to review the entirety of the digital data seized pursuant to a warrant on the basis of the mere possibility that evidence may conceivably be found anywhere on the device or that evidence might be concealed, mislabeled, or manipulated." *Id*. at 541. Officers must "reasonably limit the scope of their searches to evidence related to the criminal activity alleged in the warrant and not employ that authorization as a basis for seizing and searching digital data in the manner of a *general warrant* in search of evidence of any and all criminal activity." *Id*. at 553.

"Whether a search of seized digital data that uncovers evidence of criminal activity not identified in the warrant was reasonably directed at finding evidence relating to the criminal activity alleged in the warrant turns on a number of considerations, including:

> (a) the nature of the criminal activity alleged and the type of digital data likely to contain evidence relevant to the alleged activity;

> (b) the evidence provided in the warrant affidavit for establishing probable cause that the alleged criminal acts have occurred;
>
> (c) whether nonresponsive files are segregated from responsive files on the device;
>
> (d) the timing of the search in relation to the issuance of the warrant and the trial for the alleged criminal acts;
>
> (e) the technology available to allow officers to sort data likely to contain evidence related to the criminal activity alleged in the warrant from data not likely to contain such evidence without viewing the contents of the unresponsive data and the limitations of this technology;
>
> (f) the nature of the digital device being searched;
>
> (g) the type and breadth of the search protocol employed;
>
> (h) whether there are any indications that the data has been concealed, mislabeled, or manipulated to hide evidence relevant to the criminal activity alleged in the warrant, such as when metadata is deleted or when data is encrypted; and
>
> (i) whether, after reviewing a certain number of a particular type of data, it becomes clear that certain types of files are not likely to contain evidence related to the criminal activity alleged in the warrant." *Hughes*, 506 Mich at 543-546.

"[A] court will generally need to engage in . . . a 'totality-of-circumstances' analysis to determine whether a search of digital data was reasonably directed toward finding evidence of the criminal activities alleged in the warrant only if, while searching digital data pursuant to a warrant for one crime, officers discover evidence of a different crime without having obtained a second warrant and a prosecutor seeks to use that evidence at a subsequent criminal prosecution. Courts should also keep in mind that in the process of ferreting out incriminating digital data it is almost inevitable that officers will have to review *some* data that is unrelated to the criminal activity alleged in the authorizing warrant." *Hughes*, 506 Mich at 546-547. "The fact that some data reviewed turns out to be related to criminal activity not alleged in the authorizing warrant does not render that search per se outside the scope of the warrant. So long as it is reasonable under all of the circumstances for officers to believe that a particular piece of data will contain evidence relating to the criminal activity identified in the warrant, officers may review that data, even if that data ultimately provides evidence of criminal activity not identified in the warrant." *Id*. at 547.

"[T]he particularity requirement disallows the issuance of warrants authorizing police to search the entirety of a person's cell phone contents for evidence of a particular crime; the massive scale of the personal information people store on their mobile devices means that there must be some limits to the scope of the search." *People v Carson*, ___ Mich App ___, ___ (2024). "This is not to say that the police must be told precisely what they are looking for or where to find it, but there must be guardrails in place." *Id*. at ___. In *Carson*, the warrant at issue amounted to "a general warrant that gave the police license to search *everything* on defendant's cell phone in the hopes of finding anything, but nothing in particular, that could help with the investigation." *Id*. at ___. "The only hint of specificity was the opening reference to 'the investigation of Larceny in a Building and Safe Breaking,' but this small guardrail was negated by the ensuing instruction to search for such items by searching and seizing the entirety of the phone's contents." *Id*. at ___. Indeed, the "warrant that was actually issued placed no limitations on the scope of the search and authorized the police to search everything, specifically mentioning photographs and videos." *Id*. at ___ (noting the warrant "authorized the modern equivalent of the police combing through a person's entire home in search of any evidence that might somehow implicate the person in the crime for which they were a suspect.") Thus, the search warrant "was invalid because it failed to particularly describe what the police sought to search and seize." *Id*. at___.

A search warrant authorizing a search of the grounds or outbuildings within a residence's curtilage does not violate the Fourth Amendment or Const 1963, art 1, § 11, if the warrant authorized a search of the residence. See *People v McGhee*, 255 Mich App 623, 625 (2003) (upholding searches of detached garage and fenced-in dog run adjacent to the garage, where warrants were not restricted to a search of the residences only, but also included all "spaces" or "storage areas" accessible from the property addresses). However, where "the search warrant describes with great particularity the [only] residence [located on the property]" and "[does] not authorize—even indirectly—the search of other structures located on the property," "the search of those structures [is] a warrantless search." *People v DeRousse*, 341 Mich App 447, 462, 464 (2022).

"A warrant authorizing the search of a premises authorizes the search of containers within the premises that might contain the items named in the warrant." *People v Daughenbaugh*, 193 Mich App 506, 516 (1992), mod on other grounds 441 Mich 867 (1992).[13] See *People Coleman*, 436 Mich 124, 130-134 (1990) (defendant's purse in bedroom of defendant's home was properly searched as a container that fell within the scope of the warrant, and was not an extension of defendant's person). This rule applies to

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

locked and unlocked containers. *Daughenbaugh*, 193 Mich App at 516. "[A] search warrant for 'premises' authorizes the search of all automobiles found on the premises." *People v Jones*, 249 Mich App 131, 136 (2002).

11.6 Exceptions to the Warrant Requirement

Warrantless searches are permitted under specific circumstances.

A. Exigent Circumstances: Emergency Aid, Community Caretaking , and Hot Pursuit Exceptions

The exigent circumstances exception is a recognized exception to the Fourth Amendment warrant requirement. *People v Cartwright*, 454 Mich 550, 558-559 (1997). "Exigent circumstances exist when an emergency leaves law enforcement with insufficient time to obtain a warrant." *People v Hammerlund*, 504 Mich 442, 460 (2019). The warrantless entry of a dwelling may be justified by "hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to preclude a suspect's escape, and where there is a risk of danger to police or others inside or outside a dwelling." *Cartwright*, 454 Mich 558. Additionally, a police officer or firefighter may enter a dwelling without a warrant where it is reasonable to believe that a person inside the dwelling is in need of immediate medical assistance. *People v Slaughter*, 489 Mich 302, 316-317 (2011); *People v Davis*, 442 Mich 1, 14 (1993); *City of Troy v Ohlinger*, 438 Mich 477, 483-484 (1991); *People v Hill*, 299 Mich App 402, 404-410 (2013).

A police officer's conduct before the exigency must be reasonable to justify a warrantless search under exigent circumstances. *Kentucky v King*, 563 US 452, 462 (2011). In *King*, 563 US at 455-456, police officers pursued a suspect into an apartment building and, fearing the destruction of evidence because of sudden movement inside, eventually entered into one of two apartments where they thought the suspect was hiding. Inside, the officers found drugs and drug paraphernalia, but not the suspect, who was in the other apartment. *Id.* at 456-457. The United States Supreme Court concluded:

> "[T]he exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable[.] . . . Where . . . the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent destruction of the evidence is reasonable and thus allowed." *King*, 563 US at 462.

The *King* Court rejected other requirements used by some courts when examining whether exigent circumstances existed at the time of the search. *King*, 563 US at 463-469. Courts need not evaluate (1) an officer's motive; (2) whether it was reasonably foreseeable that the officer's tactics would create the exigent circumstances; (3) the officer's failure to seek a warrant after establishing sufficient probable cause to search the premises; (4) whether the course of an officer's investigation was contrary to standard or good law enforcement practices or policies; or (5) whether officers engaged in conduct that would cause a reasonable person to believe that entry was imminent and inevitable. *Id*.

Pursuant to the exigent circumstances exception, a police officer "may enter a dwelling without a warrant if the officer possesses probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime." *In re Forfeiture of $176,598*, 443 Mich 261, 271 (1993). "The police must further establish the existence of an actual emergency[—the exigent circumstances—]on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect." *Id*.

The presence of men's shoes on the floor near the bathroom "provided probable cause to believe that there was a male occupying the motel room, which was an exigent circumstance that justified a search of the room without a warrant to ensure the safety of the officers[,]" where the police received "a report of suspected prostitution activity in the room," conducted a "knock and talk" procedure, and received consent to enter the motel room from someone who reasonably appeared to have "common authority over the room." *People v Thurmond*, ___ Mich App ___, ___ (2023).

Where a police officer was dispatched to a domestic violence incident possibly involving weapons, a warrantless entry and search of the premises were permissible under both the exigent circumstances and emergency aid exceptions. *People v Beuschlein*, 245 Mich App 744, 746, 757-758 (2001).

Emergency aid. To justify the warrantless entry of a residence on the basis of an emergency, the officer must articulate specific and objective facts that reveal an actual emergency amounting to more than a mere possibility of an immediate risk of the destruction or removal of evidence. *People v Blasius*, 435 Mich 573, 593-594, 598 (1990).

A law enforcement officer's warrantless entry into a home is permitted when the officer has "an objectively reasonable basis for

believing that an occupant is seriously injured or imminently threatened with such injury." *Brigham City*, *Utah v Stuart*, 547 US 398, 400, 405-407 (2006) (holding that if an officer's action is justified under an objective view of the circumstances, the action is reasonable for Fourth Amendment purposes, regardless of the officer's state of mind, and concluding that where officers were confronted with ongoing violence occurring within a home during their investigation of a neighbor's early morning complaint about a loud party, exigent circumstances justified the officers' warrantless entry). See also *Michigan v Fisher*, 558 US 45, 48 (2009) (concluding that the emergency aid exception applied where police responding to reports of a disturbance encountered "a tumultuous situation in the house" and "signs of a recent injury, perhaps from a car accident, outside").

The emergency aid exception justified the warrantless entry of the defendant's parents' home, where officers, looking through a window in the front door to the house, saw a motionless person slumped over the kitchen table in close proximity to a rifle and ammunition. *People v Tierney*, 266 Mich App 687, 704-705 (2005). Based on these specific and articulable facts, officers had a reasonable belief that the person slumped over the table may have needed emergency medical assistance. *Id*.

Where a police officer was dispatched to a domestic violence incident possibly involving weapons, a warrantless entry and search of the premises were permissible under both the exigent circumstances and emergency aid exceptions. *Beuschlein*, 245 Mich App at 746, 757-758.

The emergency aid exception justified a warrantless entry where police were notified that the defendant's front door was open and blowing in the wind, and where "[n]o one came to the open door" when "[t]he officers knocked on the door, rang the doorbell, and repeatedly announced their presence[;]" because the officers suspected a home invasion rather than drug activity, they were justified in entering the home to secure the premises and locate any victims or suspects inside.[14] *People v Lemons*, 299 Mich App 541, 546-548 (2013) (noting that "[t]he emergency-aid exception is not an inquiry into hindsight" and that "there was a very real possibility that someone could have been inside who needed police assistance").[15]

Because a police officer "might reasonably have believed that he was confronted with an emergency" and that failure to take immediate

[14] "Alternatively, [the] police also could be exercising their community caretaking function when securing a house whose door was wide open and blowing in the wind." *Lemons*, 299 Mich App at 546 n 1, 549 n 2 (noting, however, that "'when the police are investigating a situation in which they reasonably believe someone is in need of immediate aid, their actions should be governed by the emergency aid doctrine, regardless of whether these actions can also be classified as community caretaking activities[]'") (quoting *Davis*, 442 Mich at 25).

action might have resulted in the destruction of evidence, the warrantless collection of blood from a defendant arrested for criminal drunk driving was upheld. *Schmerber v California*, 384 US 757, 770-771 (1966) (noting that "where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant").

However, "the natural metabolization of alcohol in the bloodstream [does not] present[] a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *Missouri v McNeely*, 569 US 141, 145 (2013). Whether the exigency exception applies to the nonconsensual collection of blood requires a case-by-case review of the totality of the circumstances as to whether there has been a "showing [of] exigent circumstances that make securing a warrant impractical in a particular case." *Id*. at 160. "[F]actors present in an ordinary traffic stop, such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search[; t]he relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case." *Id*. at 164. "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id*. at 152, 163 (noting the absence of "any . . . factors that would suggest [the arresting officer] faced an emergency or unusual delay in securing a warrant").

In a plurality opinion[16], the United States Supreme Court held that "in a narrow . . . category of cases . . . in which the driver is unconscious and therefore cannot be given a breath test, . . . the exigent circumstances rule almost always permits a blood test without a warrant." *Mitchell v Wisconsin*, 588 US ___, ___ (2019). "[E]xigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs

[15] The *Lemons* Court additionally held that "even if the officers' behavior fell short of satisfying the criteria set forth in the emergency-aid exception," the exclusionary rule did not apply to the drug evidence that was discovered following the warrantless entry because "[t]he police officers were acting in good faith" when they "entered the residence because they believed people could be inside and were in need of immediate aid." *Lemons*, 299 Mich App at 549-550.

[16] "A plurality opinion of the United States Supreme Court . . . is not binding precedent. *Texas v Brown*, 460 US 730, 737 (1983)." *People v Beasley*, 239 Mich App 548, 559 (2000).

that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious[.]" *Id*. at ___.

Community caretaking. While police officers "are often called to discharge noncriminal 'community care-taking functions,' such as responding to disabled vehicles or investigating accidents," those "'caretaking' duties [do not] create[] a standalone doctrine that justifies warrantless searches and seizures in the home." *Caniglia v Strom*, 593 US ___, ___ (2021), citing *Cady v Dombrowski*, 413 US 433, 441 (1973). Similar to *Caniglia*, *Cady* "involved a warrantless search for a firearm[,] [b]ut the location of [the *Cady*] search was an impounded vehicle–not a home–a constitutional difference that [*Cady*] repeatedly stressed." *Caniglia*, 593 US at ___ (quotation marks omitted). The recognition in *Cady* "that police officers perform many civic tasks in modern society was just that–a recognition that these tasks exists, and not an open-ended license to perform them anywhere." *Caniglia*, 593 US at ___ ("[w]hat is reasonable for vehicles is different from what is reasonable for homes").

As part of his or her "community caretaking" function, a police officer may enter a dwelling without a warrant where it is reasonably believed that a person inside is in need of medical assistance; the entry must be limited to the reason for its justification, and the officer must be motivated primarily by a perceived need to render assistance and may do no more than is reasonably necessary to determine whether assistance is required and render it. *Davis*, 442 Mich at 20-26 (1993).[17] See also *Hill*, 299 Mich App at 404-410 (applying the community caretaking exception to the warrantless entry of the defendant's home by police officers while performing a welfare check after the defendant's neighbor called police with concerns about the defendant's well-being, despite "a lack of direct evidence definitively showing that [he] was present and in actual need of aid or assistance," where it was reasonable, under all of the circumstances, for the officers "to conclude that [the] defendant was not only present but in need of attention, aid, or some kind of assistance").[18]

"[T]he community caretaking exception to the warrant requirement applies when a firefighter, responding to an emergency call involving a threat to life or property, reasonably enters a private residence in

[17] However, "when the police are investigating a situation in which they reasonably believe someone is in need of immediate aid, their actions should be governed by the emergency aid doctrine, regardless of whether these actions can also be classified as community caretaking activities." *Davis*, 442 Mich at 25.

[18] The *Hill* Court additionally held that, "even if a constitutional violation by the officers had occurred on the basis of a lack of criteria sufficient to justify invocation of the community-caretaker exception," exclusion of marijuana discovered in the house was inappropriate where "the police, having at least some indicia of need, enter[ed] a home in a good-faith effort to check on the welfare of a citizen"; suppression of the evidence, rather than deterring police misconduct, "would only deprive citizens of helpful and beneficial police action." *Hill*, 299 Mich App at 411, 414-415.

order to abate what is reasonably believed to be an imminent threat of fire inside." *Slaughter*, 489 Mich at 316-317. In *Slaughter*, 489 Mich at 306-308, a firefighter responded to a 911 call from a townhouse resident reporting that water was flowing over her electrical box and behind a wall that adjoined the defendant's townhouse; when the firefighter entered the defendant's basement "to shut off [his] water and to assess whether any additional measures needed to be taken to prevent a fire," the firefighter observed, in plain view, grow lights and marijuana plants, which were later seized pursuant to a search warrant. The Michigan Supreme Court held that warrantless entry is permissible where "a firefighter's entry into a private residence [is] an exercise of community caretaking functions, and not an exercise of investigative functions," and where the firefighter, "acting in good faith, . . . 'possess[es] specific and articulable facts' leading [him or her] to the conclusion that [his or her] actions [are] necessary to abate an imminent threat of fire inside the private residence." *Id*. at 317, 320, quoting *Davis*, 442 Mich at 25. Thus, because "the responding firefighter[] believed that there existed the imminent threat of an electrical fire in [the] defendant's residence, . . . reasonably believed that the danger posed an imminent threat to property or life, and . . . acted reasonably in abating that threat," the lower courts erred in suppressing the marijuana that was discovered in plain view during the entry. *Slaughter*, 489 Mich at 328-329.

Hot pursuit. "'Hot pursuit' of a fleeing felon is one recognized example of exigent circumstances." *Hammerlund*, 504 Mich at 460. In *People v Santana*, 427 US 38, 40 (1976), officers had probable cause to believe that the defendant had just been involved in the felony purchase of heroin when they observed defendant standing in the doorway of her home holding a brown paper bag. Officers pulled up within 15 feet of defendant, exited their vehicle shouting "police," and displayed their identification. *Id*. Defendant retreated into her home where officers followed and arrested her; they found drugs in the bag and marked money on her person. *Id*. at 40-41. Under these circumstances, the United States Supreme Court concluded the police were in hot pursuit when they entered the defendant's home because there was "a realistic expectation that any delay would result in destruction of evidence." *Id*. at 43 (also noting that the arrest was constitutional because it began in a public place[19]).

Contrast with *People v Hammerlund*, 504 Mich 442, 446 (2019), where "a police officer entered [defendant's] home to complete her arrest for a [90-day] misdemeanor offense," after "she reached out her doorway to retrieve her identification[.]" Before entering the home, the officer "stood on [defendant's] porch while she remained inside, approximately 15 to 20 feet away from the front door," and defendant

[19]See Section 3.15 for a discussion of warrantless arrests in a public place.

"passed [her identification] to [the officer] through a third party in the home." *Id*. at 447, 448. Defendant "consistently maintained her reasonable expectation of privacy throughout the encounter," thus, "the entry was not justified under the 'hot pursuit' exception to the warrant requirement" because "there was no evidence of [the] crime that she could destroy." *Id*. at 446, 461. Additionally, there was "no suggestion that any emergency existed that would have entitled the police to enter defendant's home throughout the conversation up to the point when defendant reached out to retrieve her identification." *Id*. at 461. "[T]he circumstances were insufficient to justify the hot-pursuit exception to the warrant requirement," and "[b]ecause the arrest was completed across the Fourth Amendment's 'firm line at the entrance of the home,' it was presumptively unreasonable." *Id*. at 463, quoting *Payton v New York*, 445 US 573, 586, 590 (1980).

The pursuit of a fleeing misdemeanor suspect does not categorically qualify as an exigent circumstance. *Lange v California*, 594 US ___, ___, ___ (2021). "Fourth Amendment precedents . . . point toward assessing case by case the exigencies arising from misdemeanants' flight." *Id*. at ___. "When the totality of circumstances shows an emergency–such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home–the police may act without waiting. And those circumstances . . . include the flight itself." *Id*. at ___. "When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home–which means that they must get a warrant." *Id*. at ___.

B. Search Incident to Arrest

Once there is a custodial arrest, a full search of the person requires no additional justification. *United States v Robinson*, 414 US 218, 235 (1973). The Fourth Amendment is not violated where the police make an arrest based on probable cause and conduct a search incident to the arrest, even if the arrest is prohibited by state law. *Virginia v Moore*, 553 US 164, 176 (2008). "[O]fficers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence." *Id*. at 176. This rule covers any "lawful arrest[,]" i.e., "an arrest based on probable cause[.]" *Id*. at 177. While some states have construed lawfulness as "compliance with state law[,]" the United States Supreme Court intends "'lawful'" to mean in "compliance with constitutional constraints." *Id*., citing *Robinson*, 414 US 218.

Presence in area known for illegal activity. "There was no probable cause to arrest [the] defendant for trespassing . . . under [a] city ordinance" where the defendant walked through a parking lot "that was open to the public, during business hours, for a very brief period

of time[, and d]uring that brief time, no indication was given that [the] defendant was told to leave or that he annoyed or disturbed anyone[;]" "[t]he fact that the officer knew the parking lot . . . was often used for illegal drug transactions and other illicit purposes [did] not change the analysis." *People v Maggit*, 319 Mich App 675, 684-686 (2017) (additionally holding that probable cause to arrest did not exist based on a no-trespassing sign in the parking lot or the police department's receipt of a letter from one of the establishments served by the parking lot indicating its intent to prosecute trespassers). Moreover, no "reasonable mistake of law[]" occurred within the meaning of *Heien v North Carolina*, 574 US 54 (2014), such that no Fourth Amendment violation occurred; "the [officer's] conclusion that [the] defendant violated the [trespassing] ordinance was not objectively reasonable[]" because "[t]he ordinance [unambiguously] prohibited remaining on property to the annoyance or disturbance of the lawful owner[,]" which "required knowledge on the part of [the] defendant that he was annoying or disturbing someone on the property[.]" *Maggit*, 319 Mich App at 687, 691.

Timing of search. Where law enforcement officers have "probable cause to arrest [a] defendant, the fact that [the] defendant was searched immediately *before* his [or her] arrest does not make the search incident to the arrest invalid." *People v Nguyen*, 305 Mich App 740, 757 (2014) (citing *People v Labelle*, 478 Mich 891, 891 (2007), and concluding that, "[b]ecause a search incident to an arrest may occur whenever there is probable cause to arrest, even if the arrest has not been made at the time the search is conducted, the police [are] not required to arrest [the] defendant before conducting the search incident to the arrest[]") (emphasis added).

Cell phones. A warrant is generally required in order to perform a search of information on a cell phone, even when the cell phone is seized incident to arrest. *Riley v California*, 573 US 373, 403 (2014). When a search is of digital data there are "no comparable risks" to the concerns that underlie the search incident to arrest exception to the warrant requirement—harm to officers and the destruction of evidence; moreover, cell phones "place vast quantities of personal information literally in the hands of individuals[, and a] search of [such information] bears little resemblance to the type of brief physical search" that was previously sanctioned by the Court. *Id.* at 386 (noting, however, that other case-specific exceptions, such as the exigent circumstances exception, "may still justify a warrantless search of a particular phone"). When seized pursuant to a valid warrant, "a search of digital cell-phone data . . . must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in *that* warrant. Any search of digital cell-phone data that is not so directed, but instead is directed at uncovering evidence of criminal activity not identified in the warrant, is effectively a warrantless

search that violates the Fourth Amendment absent some exception to the warrant requirement." *People v Hughes*, 506 Mich 512, 516-517 (2020). See Section 11.5 for further discussion of the *Hughes* case.

"[A]n arrestee has a reasonable expectation of privacy in his or her cell phone, and . . . the government's act of answering the phone without the arrestee's consent and without a warrant constitutes a search under the Fourth Amendment." *People v Abcumby-Blair*, 335 Mich App 210, 232 (2020). "[M]onitoring and answering a . . . [cell] phone . . . reveals not only the defendant's contacts but also information that a defendant might have added to his contacts, including a photograph, name, or other identifying information." *Id.* at 234. In *Abcumby-Blair*, the act of answering defendant's ringing cell phone "gave [the officer] access to more than the caller; it provided him with private information that he did not have before." *Id.*. Because "answering defendant's ringing cell phone constituted a search under the Fourth Amendment, . . . [the officer's] testimony regarding the phone call was inadmissible." *Id.*. "[I]nformation on a cell phone is not immune from a search, [but] a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id.* at 234 n 9 (quotation marks and citation omitted).

Breath and blood tests. "[T]he Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving[,]" and a state may criminally prosecute a driver for refusing a warrantless breath test;[20] "[t]he impact of breath tests on privacy is slight, and the need for [blood alcohol concentration (BAC)] testing is great." *Birchfield v North Dakota*, 579 US 438, 474 (2016). However, "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, . . . a blood test[] may [not] be administered as a search incident to a lawful arrest for drunk driving[,]" and "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 476-478 (concluding that one of the three petitioners in the case "was threatened with an unlawful search" under a state law making it a crime to refuse a warrantless blood draw, and that "the search he refused [could not] be justified as a search incident to his arrest or on the basis of implied consent[]") (emphasis added).[21]

The defendant could not prevent analysis of a blood sample taken with her consent by withdrawing consent after the collection of the sample was completed. *People v Woodard*, 321 Mich App 377, 395, 396 (2017). "[B]lood [that] has been lawfully collected for analysis may be analyzed without infringing on additional privacy interests or raising

[20] Note that Michigan does not currently criminalize an individual's refusal to submit to a preliminary chemical breath analysis (PBT); refusal to submit is a civil infraction. See MCL 257.625a(2)(d).

separate Fourth Amendment concerns." *Id*. at 390-391. "[O]nce police procured a sample of [the] defendant's blood pursuant to her consent, she had no reasonable expectation of privacy in the blood alcohol content of that sample and it could be examined for that purpose without her consent[;]" "the subsequent analysis of the blood did not constitute a separate search and [the] defendant simply had no Fourth Amendment basis on which to object to the analysis of the blood for the purpose for which it was drawn." *Id*. at 396. "[W]ithdrawal of consent after the search has been completed does not entitle a defendant to the return of evidence seized during the course of a consent search because those items are lawfully in the possession of the police; and, by the same token, a defendant who consents to the search in which evidence is seized cannot, by revoking consent, prevent the police from examining the lawfully obtained evidence." *Id*. at 394, 395.

C. Automobile Exception[22]

An automobile may be searched without a warrant. *Carroll v United States*, 267 US 132 (1925). Two justifications support the automobile exception: (1) the ready mobility of vehicles, and (2) the pervasive regulation of vehicles capable of traveling on public highways. See *Collins v Virginia*, 584 US ___, ___ (2018). However, "the automobile exception does not permit an officer without a warrant to enter a home or its curtilage[23] in order to search a vehicle therein." *Id*. at ___ ("the scope of the automobile exception extends no further than the automobile itself").

While "[t]he law recognizes that expectations of privacy are diminished in an automobile when compared, for example, to a home, [o]nce a court has determined that the defendant had a legitimate expectation of privacy in the place searched, . . . there is no 'automobile exception' to the requirements for a consent search." *People v Mead*, 503 Mich 205, 216 n 3 (2019) (citation omitted).[24]

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[21] However, although "the natural metabolization of alcohol in the bloodstream [does not] present[] a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases[,]" *Missouri v McNeely*, 569 US 141, 145 (2013), "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not[,]" *Birchfield*, 579 US at 474-475, citing *McNeely*, 569 US at 165. See MCL 257.625d(1). "[C]onsistent with general Fourth Amendment principles . . . exigency in this context must be determined case by case based on the totality of the circumstances." *McNeely*, 569 US at 145.See Section 11.6(A) for discussion of the exigent circumstances exception to the warrant requirement. See Section 3.32 for discussion of implied consent laws.

[22] For more detailed information regarding the search of automobiles, including probable cause and specific types of searches/seizures, see Section 11.7(B).

[23] See Section 11.7(A) for more information on what constitutes curtilage.

[24] See Section 11.6(F) for information regarding consent to search.

Although "a police officer enforcing [MCL 257.602b, holding or using a mobile electronic device,] may treat a violation of [MCL 257.602b] as the primary or sole reason for issuing a citation to a driver," a police officer is prohibited from searching "a motor vehicle or the driver or passenger in the motor vehicle solely because of a violation of [MCL 257.602b]." MCL 257.602b(9).

D. Inventory Search

After a custodial arrest, the police may, according to established procedure, search any property belonging to the suspect that is impounded at the time of arrest; this is commonly referred to as an inventory search. See *Slaughter*, 489 Mich at 311-312; *Hill*, 299 Mich App at 418.

In order for a vehicle inventory search to be valid, it must be shown that it was conducted in accordance with reasonable procedures established to safeguard impounded vehicles and their contents. *People v Long (On Remand)*, 419 Mich 636, 650 (1984). Where no such procedures are present or where a police officer acts in a manner contrary to established procedures, the inventory search is unlawful. *Id.* at 648.

The decision to impound a car must be based on an established set of departmental procedures followed by all officers. *People v Toohey*, 438 Mich 265, 267, 291 (1991). An impoundment and subsequent inventory search is undertaken as part of the caretaking functions performed by the police. *Id.* at 284-285. Impoundment must not be used as a pretext for conducting a criminal investigation. *Id.* at 285.

Police officers may open closed containers pursuant to an inventory search only if established departmental policies authorize such an action. See *Florida v Wells*, 495 US 1, 4-5 (1990) (holding that, absent a policy with respect to the opening of closed containers encountered during an inventory search, such a search is not sufficiently regulated to satisfy the Fourth Amendment).

E. Investigatory Stop—*Terry*[25] Stop[26]

A police officer may make a brief investigatory stop (a *Terry* stop) of an individual if the officer has reasonable suspicion that crime is afoot. *Terry v Ohio*, 392 US 1, 27 (1968); *People v Champion*, 452 Mich 92, 98 (1996). A *Terry* stop need not be based upon probable cause; rather, an officer may "stop and frisk" a defendant based upon a reasonable

[25] *Terry v Ohio*, 392 US 1 (1968).

[26] See Section 11.7(B) for related discussion of automobile stops.

suspicion supported by articulable facts that criminal activity might be afoot. *Terry*, 392 US at 30. Reasonable suspicion is more than a hunch, but less than the level of suspicion required for probable cause, *Champion*, 452 Mich at 98, and must be based on commonsense judgments and inferences about human behavior, *Illinois v Wardlow*, 528 US 119, 125 (2000). "[A]n officer 'must have had a particularized and objective basis for the suspicion of criminal activity.'" *People v Pagano*, 507 Mich 26, 32 (2021), quoting *Champion*, 452 Mich at 98-99.

During an investigatory stop, "[a] police officer may perform a limited patdown search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons." *People v Custer*, 465 Mich 319, 328 (2001) (opinion by Markman, J.); see *Terry*, 392 US at 27. "*Terry* strictly limits the permissible scope of a patdown search to that reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be used to assault an officer." *Champion*, 452 Mich at 99. The officer may seize any contraband that is immediately apparent if he or she has probable cause to believe the object is contraband. *Id*. at 100-101. "It is the totality of the circumstances in a given case that determine whether a patdown search is constitutional." *Custer*, 465 Mich at 328.

"Fingerprinting pursuant to the [city of Grand Rapids Police Department's (GRPD) photographing and printing (P & P) policy[27]] exceeded the permissible scope of a *Terry*[28] stop because it was not reasonably related in scope to the circumstances that justified the stop. Having held that fingerprinting constitutes a search, it is clear that fingerprinting does not fall within the limited weapons search that is justified under certain circumstances during a *Terry* stop; fingerprinting is simply not related to an officer's immediate safety concerns." *Johnson v Vanderkooi*, 509 Mich 524, 540-541 (2022). While "questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops, . . . the Fourth Amendment does not require an individual to answer such questions, and to the extent that a state statute can require an individual to disclose their name in the course of a *Terry* stop, a request for identification must still be reasonably related in scope to the circumstances that justified the stop[.]" *Id*. at 541 (cleaned up). "*Terry* caselaw does not justify stops merely for the general purpose of crime-solving, especially for those crimes that have yet to occur." *Id*. at 542. The *Johnson* Court held that "fingerprinting of each plaintiff also exceeded the permissible duration of a *Terry* stop" because "fingerprinting . . . after concluding that no crime had occurred impermissibly extended the duration of

[27]Plaintiffs effectively abandoned their challenge to the constitutionality of the photograph component and the Court did not address this aspect of the policy. *Johnson*, 509 Mich at 529.

[28] *Terry v Ohio*, 392 US 1 (1968).

the *Terry* stop." *Id*. at 542, 543. Moreover, "[b]ecause the P&P policy impermissibly exceed[ed] both the scope and duration of a *Terry* stop, neither of the searches conducted here [fell] within the stop-and-frisk exception to the warrant requirement." *Id*. at 543. Thus, the "fingerprinting . . . violated the Fourth Amendment prohibition against unreasonable searches." *Id*. at 543. Finally, the Court held that "fingerprinting constitutes a search under the trespass doctrine and that the P&P policy is facially unconstitutional because it authorizes the GRPD to engage in unreasonable searches contrary to the Fourth Amendment." *Id*. at 547.

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. *People v Jenkins*, 472 Mich 26, 32-33 (2005). "When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized." *Id*. at 33. "A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he [or she] was not free to leave." *Id*. at 32. An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. *Id*. at 35. Evidence discovered as a result of these legal detentions is properly seized at the time the individual citizen is seized. *Id*. at 34-35.

"'[A]n anonymous tip *alone* seldom demonstrates [an] informant's basis of knowledge or veracity.'" *Navarette v California*, 572 US 393, 397 (2014), quoting *Alabama v White*, 496 US 325, 329 (1990) (emphasis added). However, where, under the totality of the circumstances, an anonymous tip bears "adequate indicia of reliability" and "creates reasonable suspicion that 'criminal activity may be afoot,'" an investigative stop may be justified. *Navarette*, 572 US at 398, 401, quoting *Terry*, 392 US at 30. See also *People v Horton*, 283 Mich App 105, 113 (2009) (reasonable suspicion that a person has engaged or is engaging in criminal activity may properly be based on an in-person tip from a citizen who declines to identify him- or herself, where the tipster provides the police with sufficiently detailed information).[29]

Under the totality of the circumstances, an "anonymous tip did not give rise to a reasonable and articulable suspicion that defendant was engaged in a traffic violation, must less criminal activity" where the

[29] In *Horton*, 283 Mich App at 107, police properly detained the defendant where the police received in-person information from a citizen, who declined to identify himself, that a black male, approximately 30 years of age and who "'seemed to be pretty nervous and upset[,]" was driving a burgundy Chevrolet Caprice at a gas station one mile away, and was waving an "'[U]zi type weapon' with a long clip." (Second alteration in original.)

caller reported that they believed defendant might be intoxicated after observing her outside her vehicle yelling at her children and appearing to be obnoxious. *Pagano*, 507 Mich at 29-30, 33-34 (holding that a stop based solely on this information violated the Fourth Amendment because "there was no report of even a minor traffic infraction"). The caller "relayed the vehicle's license plate number and the direction in which it was traveling, as well as the vehicle's make, model, and color," and within 30 minutes the officer was able to locate and "corroborate information regarding the identification of the vehicle." *Id*. at 30, 33. "However, that a tipster has reliably identified a particular individual does not necessarily mean that information contained in a tip gives rise to anything more than an inchoate or unparticularized suspicion of criminal activity." *Id*. at 30, 32-33 (noting that after locating defendant's vehicle and following it for a short time, "the officer did not see defendant commit any traffic violations," and the "officer testified that defendant was detained solely on the basis of the information presented in that anonymous 911 call"). While "certain driving behaviors[30] are so strongly correlated with drunk driving that, when reported to the police by anonymous callers, the totality of the circumstances may give rise to a reasonable and articulable suspicion of criminal activity," "not all traffic violations imply intoxication and . . . unconfirmed reports of driving without a seatbelt or slightly over the speed limit, for example, are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect." *Id*. at 34 (quotation marks, alteration, and citation omitted).

"[A] tribal police officer has authority to detain temporarily and to search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law." *United States v Cooley*, 593 US ___, ___ (2021). Such a "search and detention, however, [does] not subsequently subject [the non-Indian detainee] to tribal law, but rather only to state and federal laws that apply whether an individual is outside a reservation or on a state or federal highway within it." *Id*. at ___.

F. Consent

"[A]n officer must obtain consent [to search] from someone with the actual or apparent authority to give it." *People v Mead*, 503 Mich 205, 219 (2019). "[T]he scope of any consent search is defined by the consenting party, and . . . '[t]he standard for measuring the scope of . . . consent under the Fourth Amendment is that of 'objective reasonableness[.]'" *Id*. at 219, quoting *Illinois v Rodriguez*, 497 US 177,

[30]Such as weaving, crossing the center line, almost causing head-on collisions, driving all over the road, and driving in the median. *Pagano*, 507 Mich at 34. See also *Navarette*, 572 US at 402.

188-189 (1990) (second alteration in the original). In addition, while "[t]he law recognizes that expectations of privacy are diminished in an automobile when compared, for example, to a home, [o]nce a court has determined that the defendant had a legitimate expectation of privacy in the place searched . . . there is no 'automobile exception' to the requirements for a consent search." *People v Mead*, 503 Mich 205, 216 n 3 (2019) (citation omitted).

- **Consent by defendant:**

When a defendant voluntarily consents to a warrantless search or seizure, there is no Fourth Amendment violation. *People v Chism*, 390 Mich 104, 123 (1973). To justify a warrantless search or seizure on the basis of consent, the prosecution must show by clear and positive evidence that the defendant consented to the search and seizure. *People v Kaigler*, 368 Mich 281, 294 (1962). Whether consent was in fact voluntary in a particular case or was given in submission to an express or implied assertion of authority is a question of fact to be determined in light of all the circumstances. *Schneckloth v Bustamonte*, 412 US 218, 227 (1973).

There are "basic principles governing the scope of searches authorized by consent." *People v Dagwan*, 269 Mich App 338, 343 (2005). "First, the party granting consent to a search may limit its scope or may revoke consent after granting it." *Id.* "Thus, because consent flows from its grantor, '[a] suspect may of course delimit as he [or she] chooses the scope of the search to which he [or she] consents.'" *Id.*, quoting *Florida v Jimeno*, 500 US 248, 252 (1991) (first alteration in original). "Second, the constitutional standard for determining the scope of a consent to search 'is that of "objective reasonableness"—what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *Dagwan*, 269 Mich App at 343, quoting *Jimeno*, 500 US at 251. "The *Jimeno* Court also observed, '[t]he scope of a search is generally defined by its expressed object.'" *Dagwan*, 269 Mich App at 343, quoting *Jimeno*, 500 US at 251.

The defendant could not prevent analysis of a blood sample taken with her consent by withdrawing consent after the collection of the sample was completed. *People v Woodard*, 321 Mich App 377, 395, 396 (2017). "[B]lood [that] has been lawfully collected for analysis may be analyzed without infringing on additional privacy interests or raising separate Fourth Amendment concerns." *Id.* at 390-391. "[O]nce police procured a sample of [the] defendant's blood pursuant to her consent, she had no reasonable expectation of privacy in the blood alcohol content of that sample and it could be examined for that purpose without her consent[;]" "the subsequent analysis of the blood did not constitute a separate search and [the] defendant simply had no Fourth Amendment basis on which to object to the analysis of the blood for

the purpose for which it was drawn." *Id.* at 396. "[W]ithdrawal of consent after the search has been completed does not entitle a defendant to the return of evidence seized during the course of a consent search because those items are lawfully in the possession of the police; and, by the same token, a defendant who consents to the search in which evidence is seized cannot, by revoking consent, prevent the police from examining the lawfully obtained evidence." *Id.* at 394-395.

The "defendant's stated fear of the economic consequences that would stem from the suspension of his license under the implied-consent law" did not render his consent to submit to a blood draw invalid where he "admitted during [an] evidentiary hearing that he fully understood his choices under the implied-consent law and made an informed, reasoned decision." *People v Stricklin*, 327 Mich App 592, 599, 603 (2019) (defendant did not challenge the constitutionality of Michigan's implied consent law, but instead argued that "the threat of [licensing] sanctions affected the voluntariness of his . . . consent" "because he drove for a living and feared the impact that losing his license would have on his economic livelihood"). "Having to make a choice between two undesirable options does not render defendant's express consent to the blood draw coercive and involuntary." *Id.* at 603.

Consent given by a suspect who is not in custody may be valid even if given after a request to speak to an attorney. *People v Marsack*, 231 Mich App 364, 376 (1998).

"[T]he trial court did not err when it determined that defendant's consent [to search his apartment] was valid" where defendant's argument that he did not consent was "based solely on acceptance of his version of facts, which the trial court did not accept." *People v Rodriguez*, 327 Mich App 573, 584 (2019) (noting that a reviewing court is required to "defer to the trial court's credibility determinations").

- **Consent by third person:**

"[A]n officer must obtain consent [to search] from someone with the actual or apparent authority to give it." *People v Mead*, 503 Mich 205, 219 (2019). In conducting a traffic stop, "[a]n objectively reasonable police officer would not have believed that [the driver] had actual or apparent authority over" defendant-passenger's backpack where: (1) the "defendant asserted a clear possessory interest in his backpack by clutching it in his lap" before being ordered to exit the vehicle; (2) there was "[n]o evidence suggest[ing] that [the driver] had mutual use of the backpack"; (3) the officer "testified that he believed the backpack belonged to the defendant"; and (4) the officer "knew at the time of the search that [the driver] and the defendant were near

strangers." *Id*. at 214, 219 ("the warrantless search of the defendant's backpack was unreasonable because the driver lacked apparent common authority to consent to the search"). The scope of the driver's consent was "irrelevant" because "[b]y definition, the scope of a person's consent cannot exceed her apparent authority to give that consent." *Id*. at 219.

"[P]olice officers may search jointly occupied premises if one of the occupants[31] consents." *Fernandez v California*, 571 US 292, 294 (2014), citing *United States v Matlock*, 415 US 164 (1974). "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Matlock*, 415 US at 171. See also *Illinois v Rodriguez*, 497 US 177, 181 (1990) (addressing "common authority" and holding that a person who has equal possession or control of the premises searched may also consent to a search). "[P]olice officers' belief in a third party's ability to consent to a search must be reasonable under the circumstances; a good-faith belief is not the controlling criterion." *People v Goforth*, 222 Mich App 306, 312 (1997). Police need not "make a further inquiry regarding a third party's ability to validly consent to a search unless the circumstances are such as to cause a reasonable person to question the consenting party's power or control over the premises or property." *Id*.

In *Georgia v Randolph*, 547 US 103 (2006), the United States Supreme Court "recognized a narrow exception" to the rule of *Matlock*, 415 US 164, that "consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search." *Fernandez*, 571 US at 294, 300. In *Randolph*, 547 US at 122-123, the Court held that a warrantless search of a shared dwelling, conducted pursuant to the consent of one co-occupant when a second co-occupant is present and expressly refuses to consent to the search, is unreasonable and invalid as to the co-occupant who refused consent. Stated another way, "[a] co-occupant[] . . . can invalidate the consent given by another occupant if he is present on the premises and expressly objects to the search." *City of Westland v Kodlowski*, 298 Mich App 647, 667 (2012), vacated in part and reversed in part on other grounds 495 Mich 871 (2013).[32]

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[31] The United States Supreme Court "use[s] the terms 'occupant,' 'resident,' and 'tenant' interchangeably to refer to persons having 'common authority' over premises within the meaning of [*United States v Matlock*, 415 US 164, 171, 172 n 7 (1974)]." *Fernandez v California*, 571 US 292, 294 n 1 (2014).

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

However, the holding of *Randolph*, 547 US 103, is "limited to situations in which the objecting occupant is physically present," and it does not apply "if the objecting occupant is absent when another occupant consents." *Fernandez*, 571 US at 294. Moreover, "an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason," even if the absent occupant "objected to the search while he was still present." *Id.* at 303 (holding that "consent . . . provided by an abused woman well after [the petitioner] had been removed [by police officers] from the apartment they shared" was sufficient to justify a warrantless search of the apartment, even though the petitioner had "appeared at the door" and objected to the officers' entry before he was placed under arrest and taken to the police station).

A third-party's consent that is the product of coercion and duress is invalid. See *Rodriguez*, 327 Mich App at 584-585, citing *People v Bolduc (On Remand)*, 263 Mich App 430, 440 (2004). However, in *Rodriguez*, an officer's statement to a co-defendant who resided with defendant that the co-defendant would "need[] to call a family member to come to the apartment to look after her children, otherwise he would have to call [Child Protective Services]," "was not a coercive tactic to obtain [co-defendant's] consent to the search," but rather was "a statement of what would inevitably happen if [co-defendant] did not call a family member to watch her children." *Rodriguez*, 327 Mich App at 584-585 n 6 (the *Rodriguez* court acknowledged it was unclear whether defendant had standing to challenge co-defendant's consent, but standing was assumed for purposes of its decision since the parties did not raise the issue).

The seizure of a wallet, keys, and a cell phone from the defendant's mother's apartment "fell outside the scope of [the mother's] consent" where "[t]he testimony establishe[d] that a reasonable person would have believed that the scope of the search pertained [only] to illegal drugs hidden in the apartment." *People v Mahdi*, 317 Mich App 446, 461, 474 (2016). "'[T]he scope of a search is generally defined by its expressed object,'" and the mother's "consent to search her apartment for the limited purpose of uncovering illegal drugs did not constitute consent to seize *any* item." *Id.* at 461-462, quoting *Dagwan*, 269 Mich App at 343 (internal quotation marks omitted).

"While a co-occupant may invalidate another co-occupant's consent in cases where the police are entering to search for evidence, a co-occupant's withdrawal of his consent to the presence of the police does not preclude officers from continuing to investigate cases of potential domestic violence." *Kodlowski*, 298 Mich App at 667-669 (holding that "defendant's decision to revoke his consent [to search] did not render the officers' presence unlawful," since "the officers

were present to respond to a domestic dispute" and therefore "had an obligation to investigate potential domestic violence").

When a defendant is arrested and a cotenant consents to an officer's entry into the home the cotenant shares with the defendant, the defendant's invocation of his right to counsel and his right to remain silent did not constitute an objection to the officer's entry for purposes of suppressing incriminating evidence against the defendant observed by the officer while in the home. *People v Lapworth*, 273 Mich App 424, 425 (2006).

"Consent to search a motel or hotel room may be obtained from the person whose property is searched or from a third party who possess common authority over the premises." *People v Thurmond*, ___ Mich App ___, ___ (2023). In *Thurmond*, the police "had a reasonable basis for believing" the woman who answered the door and allowed the police to enter the motel room "had common authority over the room" because she "clearly occupied the room" and "matched the description of the woman who [a witness] met for the purpose of engaging in sex in the room in exchange for money[.]" *Id*. at ___.

Where the defendant was permitted to use a third-party's personal computer, which was located in a residence separate from the defendant's, the third-party's consent to search the computer was valid, even though the defendant's e-mail account was password protected. *People v Brown*, 279 Mich App 116, 132-134 (2008).

- **Consent obtained by reference to search warrant:**

There is no consent if police say or suggest that they have a search warrant if they do not, in fact, have one.

> "In *Bumper v North Carolina*, [391 US 543 (1968)], the United States Supreme Court made clear that where a person 'permits' a search in the face of an assertion by the police that they have a warrant, there is no consent that can support the validity of the search.
>
> * * *
>
> "[T]he defendant testified that [the police officer] displayed a search warrant form in his folder when he confronted the defendant. The defendant also testified that he believed the officers had a warrant and allowed them to enter for that reason. The circuit judge ultimately found that testimony believable, relying particularly on the specificity of the defendant's testimony by contrast to that of the officers. Such factual determinations by trial judges are to be sustained unless

clearly erroneous." *People v Farrow*, 461 Mich 202, 207-208 (1999).

G. Special Needs, Inspections, Border Searches, and Regulatory Searches

Certain searches do not have to be accompanied by a warrant so long as the need to search outweighs the invasion that the search entails. A warrant is not required under the governmental "special needs" or regulatory exception to the warrant requirement as long as the search satisfies reasonable legislative or administrative standards. *People v Chowdhury*, 285 Mich App 509, 517, 522 (2009) (ordinance permitting police to conduct warrantless preliminary breath tests (PBTs) on minors found unconstitutional; the special needs exception was inapplicable because the police were merely attempting to detect evidence of ordinary criminal wrongdoing). Likewise, inspections, border searches, and regulatory searches must be based upon reasonable standards. See *United States v Brignoni-Ponce*, 422 US 873, 884 (1975) ("[e]xcept at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country[]"). See also *Camara v Municipal Court*, 387 US 523, 528-539 (1967) (administrative searches by municipal health and safety inspectors constitute significant intrusions upon protected Fourth Amendment interests, and lack traditional safeguards when conducted without warrant procedure; "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant"); *People v Beydoun*, 283 Mich App 314, 316, 323-324 (2009) (exemption from the warrant requirement applies to properly conducted administrative inspections of pervasively regulated industries, e.g., tobacco products).

H. Pervasively Regulated Industry

"The exception to the warrant requirement that has been carved out for pervasively regulated industries has been denoted as either the '*Colonnade-Biswell* doctrine'[33] or the 'pervasively regulated industry' exception to the warrant requirement[.]" *People v Vaughn*, ___ Mich App ___, ___ (2022). The pervasively regulated industry "exception is founded upon the legal recognition that owners of pervasively regulated businesses have a reduced expectation of privacy." *Id.* at ___. "To assist in determining whether a particular business is so

[33]See *Colomade Corp v United States*, 397 US 72 (1970); *United States v Biswell*, 406 US 311 (1972).

pervasively regulated that administrative warrantless searches" are permissible, courts consider seven factors:

> "(1) the existence of express statutory authorization for search or seizure;
>
> (2) the importance of the governmental interest at stake;
>
> (3) the pervasiveness and longevity of industry regulation;
>
> (4) the inclusion of reasonable limitations on searches in statutes and regulations;
>
> (5) the government's need for flexibility in the time, scope and frequency of inspections in order to achieve reasonable levels of compliance;
>
> (6) the degree of intrusion occasioned by a particular regulatory search; and
>
> (7) the degree to which a business person may be said to have impliedly consented to warrantless searches as a condition of doing business, so that the search does not infringe upon reasonable expectations of privacy." *Id*. at ___.

The United States "Supreme Court has to date held that this narrow warrant exception applies to four closely regulated industries: (1) liquor sales," "(2) gun sales," "(3) mining," and "(4) automobile junkyards." *Vaughn*, ___ Mich App at ___. Michigan "courts have likewise recognized several additional businesses as pervasively regulated industries," including "commercial fishing," "massage parlors," "salvage yards," "liquor establishments," and "tobacco dealers." *Id*. at ___. In *Vaughn*, the Michigan Supreme Court added "vehicle repair shops to that list" *Id*. at ___ (noting that "there is express statutory authorization to conduct unannounced searches of the premises, parts records and parts inventories of vehicle repair shops"). Accordingly, the Court held "that police could perform a warrantless search of [a vehicle repair shop], a business that is pervasively regulated by the state, without offending either the state or federal constitutions." *Id*. at ___. Although "a warrantless search was permitted as an exception to the warrant requirement for pervasively regulated businesses, the search actually engaged in must still have been reasonable." *Id*. at ___. The *Vaughn* Court concluded that "it is not constitutionally unreasonable for officers to inspect the VINs of vehicles on the premises when conducting a search of a vehicle repair shop that admittedly has no complying documents for the officers to review." *Id*. at ___. Therefore, "the trial court erred in interpreting MCL 257.1317(1) to limit inspections to only those

locations where paper records and documents would reasonably be located, which the trial court ruled did not include the gated lot." *Vaughn*, ___ Mich App at ___.

11.7 Location of the Search

The particular rules pertaining to search and seizure vary depending upon the location of the search. Courts have justified the different levels of protection by examining the expectation of privacy a person might have in a particular location or object and balancing the level of intrusiveness of the search and any overriding societal interests.

A. Dwelling Searches

1. Curtilage

An individual's expectation of privacy in his or her residence extends to the curtilage, i.e., the area immediately surrounding the dwelling. *United States v Dunn*, 480 US 294, 300 (1987); see also *Florida v Jardines*, 569 US 1, 6 (2013) (police officers may not physically enter the curtilage of a home "to engage in conduct not explicitly or implicitly permitted by the homeowner[]"). In evaluating whether an area is included in the curtilage of a dwelling, the court should examine four factors (the "*Dunn* factors"):

> (1) the proximity of the area claimed to be curtilage to the home;
>
> (2) whether the area is included within an enclosure surrounding the home;
>
> (3) the nature of the uses to which the area is put;
>
> (4) and the steps taken by the resident to protect the area from observation by people passing by. *Dunn*, 480 US at 301.

"The front porch is the classic exemplar" of an area included within the curtilage of a home. *Jardines*, 569 US at 7. Depending on the circumstances, an individual may not have a reasonable expectation of privacy in an enclosed porch through which a person must pass in order to get to the dwelling's front door. *People v Tierney*, 266 Mich App 687, 691, 697, 701-704 (2005) (holding that police officers did not violate the Fourth Amendment when they opened the unlocked door to an unheated porch, which was used as a storage area, and crossed

the porch to knock on the inner residence door, where the police did not attempt to search the porch).

However, officers may not physically intrude on a homeowner's property, including a front porch, for the purpose of gathering evidence. *Jardines*, 569 US at 3 (holding that "[the use of] a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment[]").

"Just like the front porch, side garden, or area 'outside the front window,'" a "partially enclosed portion of [a] driveway that abuts the house" is "'an area adjacent to the home and "to which the activity of home life extends,"' and so is properly considered curtilage[.]" *Collins v Virgina*, 584 US ___, ___ (2018) (citations omitted). Accordingly, an officer's search of a motorcycle parked in a portion of the driveway that was partially enclosed "not only invaded [the defendant's] Fourth Amendment interest in . . . the motorcycle, but also . . . in the curtilage of [the defendant's] home." *Id*. at ___ "[T]he automobile exception[34] does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein." *Id*. at ___ ("the scope of the automobile exception extends no further than the automobile itself").

2. Standing (Expectation of Privacy)

An individual who takes "normal precautions to maintain her privacy" has "a legitimate expectation of privacy in the interior of her barns." *People v DeRousse*, 341 Mich App 447, 456 (2022). In *DeRousse*, the prosecution argued that a warrant was not required to search two pole barns because "the barns were located outside the curtilage of [her] home and [she] did not have a reasonable expectation of privacy in either barn," noting that "there was not a separate fence around either barn, both barns could be seen from the road, and they were both easily accessible from the road." *Id*. at 454, 455. However, the Court of Appeals deemed "[s]uch facts" "pertinent to whether [the defendant] had a reasonable expectation of privacy in the exteriors of the barns" — "not the interiors." *Id*. at 455. The Court observed that "the secured nature of the west pole barn reflects that [the defendant] took normal precautions to maintain her privacy." *Id*. at 456. "[A]lthough the door to the east pole barn was partially open when Lutz was first on the property, given that nothing incriminating was observed through the entry," the Court was "not persuaded that [the defendant] lacked any

[34]See Section 11.6(B)(4) for more information on the automobile exception.

reasonable expectation of privacy in the interior of the barn." *Id*. at 456. Accordingly, a "warrant was required to search the barns, notwithstanding that they were located outside the curtilage of [the defendant's] home." *Id*. at 460.

Where evidence demonstrates that a defendant resides in a dwelling owned or rented by someone else, the defendant may have standing to challenge a search of the residence. See *People v Mahdi*, 317 Mich App 446 (2016). In *Mahdi*, "[the] defendant had a legitimate expectation of privacy in his mother's apartment that society recognizes as reasonable[,]" and he therefore "had standing to challenge the search of [the apartment] and the seizure of" incriminating evidence from the apartment. *Mahdi*, 317 Mich App at 459-460. "[P]olice officers recovered . . . several items indicating that [the] defendant resided [in the apartment] with his mother, including tax paperwork listing [the] defendant's name and the address of [the apartment,] . . . a collections notice for [the] defendant at [the apartment], . . . Friend of the Court paperwork for [the] defendant[] . . . list[ing] [the apartment] as his address[, and] . . . a land sale registration form signed by [the] defendant listing [the apartment] as his address[,]" and "the officers found [the] defendant's personal belongings in [the apartment] after arresting [him;]" furthermore, he "answered the door when the police officers arrived at [the apartment], indicating that he had control over the apartment and the ability to regulate its access." *Id*.

An individual may lack a reasonable expectation of privacy with respect to a search of a dwelling that he or she owns but illegally occupies. *People v Antwine*, 293 Mich App 192, 195-196, 198 (2011). "[A]n overall reasonable expectation of privacy—not the existence (or the lack) of a property right—controls the analysis[,] and[] . . . wrongful presence [on the property] weighs against a reasonable expectation of privacy." *Id*. at 200 (holding that once police officers determined that the defendant was residing in a condemned house illegally, "it was reasonable for them to secure the home and look for other illegal residents[]").

An individual who is an overnight guest in a dwelling may establish that he or she has a reasonable expectation of privacy recognized by the Fourth Amendment in the home of his or her host. *Minnesota v Olson*, 495 US 91, 96-97 (1990). Conversely, a person who is briefly present in a dwelling, with the owner's consent, may not claim the protections intended by the Fourth Amendment. *Minnesota v Carter*, 525 US 83, 90 (1998).

3. Factors Involved in Dwelling Searches

a. Search Warrant and Knock-and-Announce Statute

The knock-and-announce statute, MCL 780.656, requires that police executing a search warrant give notice of their authority and purpose and be refused entry before forcing their way in. *People v Fetterley*, 229 Mich App 511, 521 (1998). MCL 780.656 provides:

> "The officer to whom a warrant is directed, or any person assisting him[or her], may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his [or her] authority and purpose, he [or she] is refused admittance, or when necessary to liberate himself [or herself] or any person assisting him [or her] in execution of the warrant."

The interests protected by the knock-and-announce rule include:

- protection of human life and limb (because an unannounced entry may provoke violence when a surprised resident acts in self-defense);
- protection of property; and
- protection of those elements of privacy and dignity that can be destroyed by a sudden entrance. *Hudson v Michigan*, 547 US 586, 593-594 (2006).

Evidence seized pursuant to a violation of the knock-and-announce rule need not always be suppressed. *People v Howard (Troy)*, 233 Mich App 52, 60-61 (1998). Suppression is appropriate for violations of the knock-and-announce statute only where the police conduct is unreasonable by Fourth Amendment standards. *Id*. Further, where an interest that is violated is not an interest protected by the knock-and-announce rule, the exclusionary rule is inapplicable. *Hudson*, 547 US at 594. The knock-and-announce rule does not protect an individual's interest in preventing the police from seeing or taking evidence described in a warrant. *Id*.

b. Search Warrant and "No Knock" Entry

"In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by[] . . . allowing the destruction of evidence. This standard[] . . . strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. . . . This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged." *Richards v Wisconsin*, 520 US 385, 394-395 (1997).

c. Knock-and-Talk

"[T]he knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items." *People v Frohriep*, 247 Mich App 692, 697 (2001). The knock-and-talk procedure is constitutional, but it is subject to judicial review to ensure compliance with general constitutional protections. *Id*. at 698. "Whenever the knock and talk procedure is utilized, the ordinary rules that govern police conduct must be applied to the circumstances of the particular case." *People v Galloway*, 259 Mich App 634, 639 (2003).

Police officer's purpose. Officers may not "physically intrud[e] on [a homeowner's] property," including a front porch, for the purpose of gathering evidence, and "[the use of] a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment" because it constitutes "an unlicensed physical intrusion" into an area that is protected under the Fourth Amendment. *Florida v Jardines*, 569 US 1, 3, 7, 11 (2013) (holding that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" went beyond the "implicit license [that]

typically permits [a] visitor to approach [a] home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave"). See also *People v Towne*, 505 Mich 865, 866 (2019) (holding "police officers . . . exceeded the proper scope of a knock and talk by approaching and securing the defendant's home without sufficient reason to believe that the subject of the arrest warrant was inside the home").

A trespass alone does not violate the Fourth Amendment. *People v Frederick*, 500 Mich 228, 236 (2017), rev'g 313 Mich App 457 (2015). "A police officer walking through a neighborhood who takes a shortcut across the corner of a homeowner's lawn has trespassed. Yet that officer has not violated the Fourth Amendment because, without some information-gathering, no search has occurred." *Id.* at 240 (concluding that because the officers visited the respective homes for the express purpose of obtaining information about marijuana butter they suspected each defendant possessed, they were gathering information and their conduct violated the Fourth Amendment). "[A]pproaching a home with the purpose of gathering information is not, standing alone, a Fourth Amendment search"; however, "when 'conjoined' with a trespass, information-gathering—which need not qualify as a search, standing alone—is all that is required to turn the trespass into a Fourth Amendment search." *Id.* at 241, citing *United States v Jones*, 565 US 400, 408 n 5 (2012).

Time of day. "[T]he scope of the implied license to approach a house and knock is time-sensitive. *Frederick*, 500 Mich at 238. "When the officers stray beyond what any private citizen might do, they have strayed beyond the bounds of a permissible knock and talk; in other words, the officers are trespassing." *Id.* at 239. "[T]here is generally no implied license to knock on someone's door in the middle of the night." *Id.* at 238, 239 n 6 (declining to "decide precisely what time the implied license to approach begins and ends," and noting that the instant case was clearly outside of the implied license because "there were no circumstances that would lead a reasonable member of the public to believe that the occupants of the respective homes welcomed visitors at 4:00 a.m. or 5:30 a.m."). "[B]ecause the officers trespassed while seeking information, they performed illegal searches." *Id.* at 244 (remanding to the circuit court "to determine whether the defendants' consent to search was attenuated from the officers' illegal search").

d. Warrantless Entry

The warrantless entry of a dwelling may be justified by "hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to preclude a suspect's escape, and where there is a risk of danger to police or others inside or outside a dwelling." *People v Cartwright*, 454 Mich 550, 558 (1997). Additionally, a police officer may enter a dwelling without a warrant where it is reasonable to believe that a person inside the dwelling is in need of immediate medical assistance. *People v Davis*, 442 Mich 1, 14 (1993); *City of Troy v Ohlinger*, 438 Mich 477, 483-484 (1991); *People v Hill*, 299 Mich App 402, 404-410 (2013).[35]

"The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter–to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so–even though the misdemeanant fled." *Lange v California*, 594 US ___, ___ (2021).

With respect to abandoned or vacant structures, several factors must be evaluated on a case-by-case basis to determine whether police officers may enter a dwelling without securing a warrant:

> "(1) the outward appearance, (2) the overall condition, (3) the state of the vegetation on the premises, (4) barriers erected and securely fastened in all openings, (5) indications that the home is not being independently serviced with gas or electricity, (6) the lack of appliances, furniture, or other furnishings typically found in a dwelling house, (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows, (8) the history surrounding the premises and prior use, and (9) complaints of illicit activity occurring in the structure." *People v Taylor*, 253 Mich App 399, 407 (2002).

[35] See Section 11.6(A) for discussion of exigent circumstances.

e. Detention Incident to Execution of Search Warrant

Officers executing a valid search warrant may "detain the occupants of the premises while a proper search is conducted." *Michigan v Summers*, 452 US 692, 704-705 (1981) (noting that "[i]f the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his [or her] home[,]" and concluding that "[b]ecause it was lawful to require [the] respondent to re-enter and to remain in the house until evidence establishing probable cause to arrest him was found, his arrest and the search incident thereto were constitutionally permissible[]"). However, "[t]he categorical authority to detain [an occupant] incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched[,]" and "the decision to detain must be acted upon at the scene of the search and not at a later time in a more remote place." *Bailey v United States*, 568 US 186, 197, 201-202 (2013). *Summers*, 452 US 692, does not justify "the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant." *Bailey*, 568 US at 192.

Detention of a person in the immediate vicinity of premises on which a search warrant is being executed "does not require law enforcement to have particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers[;] . . . [rather, t]he rule announced in *Summers*[, 452 US 692,] allows detention incident to the execution of a search warrant 'because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial.'" *Bailey*, 568 US at 193 (quoting *Muehler v Mena*, 544 US 93, 98 (2005), and holding that where the defendant was observed leaving a residence as a search unit prepared to execute a search warrant there, *Summers*, 452 US 692, did not permit officers to stop and detain the defendant approximately one mile away "from the premises to be searched when the only justification for the detention was to ensure the safety and efficacy of the search[;]" in such a situation, "[i]f officers elect to defer [a] detention until the suspect or departing occupant leaves the immediate vicinity[of the premises to be searched], the lawfulness of detention

> is controlled by other standards, including[] . . . a brief stop for questioning based on reasonable suspicion under *Terry* [*v Ohio*, 392 US 1 (1968),] or an arrest based on probable cause").

B. Automobile Searches/Seizures

1. Generally

"A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment." *Heien v North Carolina*, 574 US 54, 60 (2014) (citation omitted). "'A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road.'" *People v Anthony*, 327 Mich App 24, 37 (2019), quoting *Brendlin v California*, 551 US 249, 257 (2007).

"[A] vehicle is an 'effect' as that term is used in the [Fourth] Amendment. *United States v Jones*, 565 US 400, 402, 404 (2012) (citing *United States v Chadwick*, 433 US 1, 12 (1977), and holding that "the Government's installation of a [Global-Positioning-System (GPS)] device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'").

2. Reasonableness of Traffic Stop

"A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment." *Heien*, 574 US at 60 (citation omitted). Generally, an officer's decision to stop an automobile is reasonable when there is probable cause to believe that the driver violated a traffic law. *Whren v United States*, 517 US 806, 810 (1996). The constitutional reasonableness of traffic stops does not depend on the actual motivations of the police officers involved. *Id.* at 813. A traffic stop is permissible when an officer has "'reasonable suspicion,'" meaning that the officer has "'a particularized and objective basis for suspecting the particular person stopped' of breaking the law." *Heien*, 574 US at 60, quoting *Navarette v California*, 572 US 393, 396 (2014). "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Heien*, 574 US at 60, quoting *Riley v California*, 573 US 373, 381 (2014) (quotation marks omitted).

"To be reasonable is not to be perfect," and "searches and seizures based on mistakes of fact can be reasonable" if the mistake of fact itself is reasonable. *Heien*, 574 US at 60-61

(citations omitted). Further, "reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition" so long as the mistake of law is "objectively reasonable." *Id*. at 57, 60, 66, 68 (holding that because it was "objectively reasonable for an officer . . . to think that [the petitioner's] faulty right brake light was a violation of [state] law, . . . there was reasonable suspicion justifying [a traffic] stop," even though "a court later determined that a single working brake light was all the law required").

A "misunderstanding of an unambiguous statute is not an objectively reasonable mistake of law." *People v Lucynski*, 509 Mich 618, 652 (2022). "[O]bjectively reasonable mistakes of law occur in exceedingly rare circumstances in which an officer must interpret an ambiguous statute." *Id*. at 652. A police officer did not have a "legally sufficient suspicion of criminal activity" at the time of the seizure where "[t]he stated justification for [the officer's] encounter with defendant was an alleged violation of [the impeding traffic] statute," but that statute "is only violated if the normal flow of traffic is actually disrupted," and "there [was] no evidence in the record to sustain the accusation that defendant violated [the statute]." *Id*. at 626, 646, 647, 650. "[T]he officer's mistaken reading of this unambiguous statute was not objectively reasonable, and thus no reasonable mistake of law occurred." *Id*. at 626-627. In sum, the Michigan Supreme Court held that there was no "lawful justification for the seizure, and the district court did not err by holding that the seizure violated defendant's constitutional rights." *Id*. at 657.

"Nothing in [the United States Supreme Court's] Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience." *Kansas v Glover*, 589 US ___, ___ (2020). "The inference that the driver of a car is its registered owner does not require any specialized training" and "is a reasonable inference made by ordinary people on a daily basis." Accordingly, a traffic stop conducted "after running a vehicle's license plate and learning that the registered owner has a revoked driver's license," is reasonable "when the officer lacks information negating an inference that the owner is the driver of the vehicle[.]" *Id*. at ___. "The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of [the officer's] inference." *Id*. at ___. However, "the presence of additional facts might dispel reasonable suspicion," such as "if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the

circumstances would not raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id*. at ___ (quotation marks and citation omitted). In *Glover*, the officer "drew the commonsense inference that [defendant] was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop," where he "knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle," and he "possessed no exculpatory information[.]" *Id*. at ___, ___.

"[F]ewer foundational facts are necessary to justify an investigative stop of a moving vehicle based on a citizen's tip about erratic driving." *People v Barbarich*, 291 Mich App 468, 479 (2011). "[W]hile the quantity of the tip's information must be sufficient to identify the vehicle and to support an inference of a traffic violation, less is required with regard to a tip's reliability; as to the latter, it will suffice if law enforcement corroborates the tip's innocent details." *Id.* at 479-480.

"[A] reliable tip alleging [certain] dangerous [driving] behaviors . . . generally [will] justify a traffic stop on suspicion of drunk driving." *Navarette v California*, 572 US 393, 402 (2014) (such behaviors include weaving, crossing the center line and nearly causing head-on collisions, and driving in the median) (citations omitted). "Under the totality of the circumstances, . . . [a 911 call bore] indicia of reliability . . . sufficient to provide [an] officer with reasonable suspicion that the driver of [a] reported vehicle had run another vehicle off the road[, making] it reasonable under the circumstances for the officer to execute a traffic stop" on the basis of suspected intoxication. *Navarette*, 572 US at 395, 404. In *Navarette*, 572 US at 395, "[a]fter a 911 caller reported that a [truck] had run her off the road, a police officer located the vehicle she identified during the call and executed a traffic stop." Turning first to "[t]he initial question . . . whether the 911 call was sufficiently reliable," the Court held that the caller's apparent "eyewitness knowledge of the alleged dangerous driving" based on her specific description of the truck and license plate number, together with the facts that she used the 911 system and that the tip was "contemporaneous with the observation of criminal activity," provided "adequate indicia of reliability for the officer to credit the caller's account" and to "[proceed] from the premise that the truck had, in fact, caused the caller's car to be dangerously diverted from the highway." *Id.* at 400. Furthermore, the caller's "report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving" because the reported conduct, unlike "a minor traffic infraction . . . [or] a conclusory allegation of drunk or reckless driving, . . . [bore] too great a resemblance to

paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness." *Id*. at 401, 403 (quoting *United States v Sokolow*, 490 US 1, 11 (1989), and further concluding that "the absence of additional suspicious conduct, [during the five-minute period] after the vehicle was first spotted by [the] officer, [did not] dispel the reasonable suspicion of drunk driving;" rather, "[o]nce reasonable suspicion of drunk driving arises, '[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques'").

"[A] computer check is a routine and generally accepted practice by the police during a traffic stop." *People v Simmons*, 316 Mich App 322, 327-328 (2016), citing *People v Davis*, 250 Mich App 357, 366 (2002). "[A] review of Michigan cases demonstrates a recognition that the running of [Law Enforcement Information Network (LEIN)] checks of vehicle drivers is a routine and accepted practice by the police in this state." *Davis (Marcus)*, 250 Mich App at 366-368 (holding that the amount of time it took for an officer to run a LEIN check during a traffic stop was "a minimal invasion in light of the substantial governmental interest in arresting citizens wanted on outstanding warrants" and did not unreasonably extend the stop) (citations omitted); see also *Simmons (Michael)*, 316 Mich App at 328.

"[B]ecause driving without insurance is an 'on-going' infraction, there is less of a concern for 'staleness' than there would be for a crime that has already occurred," and "[t]o justify a stop for Fourth Amendment purposes, police must only have a reasonable *suspicion*, not probable cause or some other heightened burden, that a traffic violation has occurred or is occurring." *People v Mazzie*, 326 Mich App 279, 296 (2018). Accordingly, "the twice-a-month updating of the insurance information [provided by the Secretary of State to the police] was . . . frequent enough to provide officers with reasonable suspicion that a motor vehicle code violation existed"; "the at most 16-day lapse in up-to-date information made available through the LEIN did not render the information so late or unreliable that it could not provide the officers with reasonable suspicion that the vehicle was uninsured," and "[t]he officers' unrefuted testimony was that the insurance information was extraordinarily *accurate*, and even without that testimony, nothing in the record suggests that the information was not sufficiently reliable to provide reasonable suspicion that the driver was operating the vehicle contrary to MCL 500.3101." *Mazzie*, 326 Mich App at 291, 297 (reversing the trial court's order suppressing the evidence, and holding that "in light of the LEIN information and [the police officer's] knowledge, experience,

and training," the police officer "had at least a reasonable suspicion that the motorist was operating his vehicle without insurance and, therefore, the stop and detention to check for valid insurance was reasonable under the Fourth Amendment").

3. Detention (Seizure) of Automobile Occupants and Length of Stop

As long as the initial stop was lawful and police conduct did not prolong the seizure beyond the time reasonably required to process the traffic stop information, an individual's constitutional protection from unreasonable searches and seizures is not implicated. *Illinois v Caballes*, 543 US 405, 407 (2005). However, "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez v United States*, 575 US 348, 350 (2015). "[A]lthough police officers 'may conduct certain unrelated checks during an otherwise lawful traffic stop,' they 'may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.'" *People v Kavanaugh*, 320 Mich App 293, 300-301 (2017), quoting *Rodriguez*, 575 US at 355.

"[A] police officer is free to question a lawfully detained person about the presence of weapons in his or her vehicle because such an inquiry relates to the officer's ability to conduct the traffic stop in a safe manner." *People v Campbell (Jason)*, 329 Mich App 185, 199 (2019) ("[t]he concern for officer safety in an inherently dangerous situation provides a compelling reason to permit police officers to take preventative action designed to ensure they are able to complete the traffic stop safely"). The officer's initial "question concerning the presence of weapons in the vehicle was designed to ensure that he could complete the traffic stop safely and was, therefore, related to the purpose of the stop." *Id*. at 200. The officer's subsequent question "regarding whether [defendant] possessed a CPL was not strictly related to the purpose of the stop[.]" However, because "the question itself did not unreasonably prolong the duration of the stop, . . . it did not render the otherwise lawful stop unconstitutional." *Id*. "[I]n light of [defendant's] early admissions [that he was carrying a firearm and did not possess a CPL], there was probable cause to believe that [he] had committed the felony of carrying a concealed weapon, and the [officer] could lawfully extend the stop to investigate the matter." *Id*.

"Detaining [the] defendant [following a traffic stop] to wait for a drug sniffing dog and its handler to arrive and perform their work was an unconstitutional seizure of his person" under

Rodriguez; "the traffic stop was completed when the officer determined that the vehicle was owned by [the] defendant, gave him a warning about the traffic violations, and told him there would not be a ticket issued." *Kavanaugh*, 320 Mich App at 299-300, 308-309. "[T]he relevant testimony as well as the complete video/audio recording of the encounter from [the officer's] first observation of [the] defendant's car through the arrest" demonstrated that the officer "did not have a reasonable suspicion of any criminal activity sufficient to justify his extension of the traffic stop to allow for a dog sniff." *Id.* at 302, 302 n 8 (noting that "whenever practicable, such videotapes should be provided to the court, the court should review them, and they should be made part of the record on appeal").

"A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period." *People v Williams (John Lavell)*, 472 Mich 308, 315 (2005); see also *Simmons (Michael)*, 316 Mich App at 326. "The determination whether a traffic stop is reasonable must necessarily take into account the evolving circumstances with which the officer is faced[,]" and "when a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised." *Williams (John Lavell)*, 472 Mich at 315.

Furthermore, where the initial traffic stop is justified and the officer's questions do not exceed the scope of the stop and do not unreasonably extend the time of the detention, a defendant's consent to search a vehicle is valid. *Williams (John Lavell)*, 472 Mich at 310. Under those circumstances, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id.* at 318.

"A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Arizona v Johnson*, 555 US 323, 333 (2009). "An officer's inquiries into matters unrelated to the justification for the traffic stop[] . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Id.* at 333-334 (holding that a police officer "was not constitutionally required to give [the defendant, who was a backseat passenger,] an

opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her").

See also *People v Corr*, 287 Mich App 499, 507 (2010), in which the Court of Appeals concluded that "it was reasonable, for the officer[s'] safety as well as for defendant[-passenger]'s safety, for the officers to command defendant to remain in the vehicle while they completed their noninvestigatory duties at the traffic stop, particularly considering that [the] defendant was intoxicated and aggressive toward the officers during the stop, bystanders had arrived on the scene, and the weather conditions were dangerous." The Court noted that under the circumstances, the officers needed to maintain control over the scene even though the driver of the car—the defendant's son—had been arrested and secured in the police car. *Id.* at 507, citing *Johnson*, 555 US 323.

If there is probable cause to believe that contraband is present in the vehicle, an occupant may be temporarily detained during the search of the vehicle. *Summers*, 452 US at 702-703.

4. Police Conduct not Constituting a Seizure

A police officer's "decision to drive down [a] street [does] not implicate the Fourth Amendment." *People v Anthony*, 327 Mich App 24, 35 (2019) (doing so is "the consensual approach of officers to an individual in a public place," and "[a]n officer does not need any level of justification to approach an individual on a public street"). Similarly, pulling along side a parked vehicle, without more, does not constitute a "traffic stop" because the vehicle is not moving. *Id.* at 37 (finding that the characterization of such action as a "traffic stop" precludes "the possibility that the encounter was consensual as every traffic stop constitutes a 'seizure'"). Notwithstanding, a seizure does occur if the police vehicle is positioned in a manner that blocks the parked vehicle's egress. *Id.* at 38.

5. Warrantless Search (Automobile Exception) Generally

A warrantless search of a vehicle is permissible under certain circumstances if the search is based on facts that would have justified the issuance of a warrant; that is, if there is probable cause to believe that the vehicle contains evidence of a crime. *United States v Ross*, 456 US 798, 799 (1982); *People v Levine (Brian)*, 461 Mich 172, 178-179 (1999). Courts have justified the automobile exception to the warrant requirement in two ways.

Some courts have found that a defendant has a lower expectation of privacy with regard to an automobile than he or she has in a dwelling. See *Chambers v Maroney*, 399 US 42, 48 (1970). Other courts have used the justification that the mobility of an automobile requires that the police have the flexibility to search the vehicle without a warrant. See *Carroll v United States*, 267 US 132, 153 (1925). However, "the automobile exception does not permit an officer without a warrant to enter a home or its curtilage[36] in order to search a vehicle therein." *Collins v Virginia*, 584 US ___, ___, ___ (2018) ("the scope of the automobile exception extends no further than the automobile itself").

6. Probable Cause to Search an Automobile Generally

The police may search a vehicle without a warrant if they have probable cause to believe that the vehicle contains contraband. *Pennsylvania v Labron*, 518 US 938, 940 (1996). When police have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle even after it has been impounded and is in police custody. *People v Carter*, 250 Mich App 510, 516 (2002).

"Passage of the [Michigan Regulation and Taxation of Marihuana Act, MCL 333.27951 *et seq.*, (MRTMA)] decriminalized possession and use of marijuana," "superseding otherwise-binding decisions that the smell of marijuana, without more, provides probable cause to search for marijuana. *People v Armstrong*, ___ Mich App ___, ___ (2022) (concluding that *People v Kazmierczak*, 461 Mich 411 (2000), no longer governs analysis). In *Armstrong*, the Court of Appeals held that "the smell of marijuana may be a factor, but not a stand-alone one, in determining whether the totality of the circumstances established probable cause to permit a police officer to conduct a warrantless search of a vehicle or to seize a driver or passenger found in the vehicle." *Id.* at ___ (adopting "middle-ground approach as the most compatible with Michigan law in the wake of the passage of the MRTMA"; quotation marks and citation omitted).

To "determine if the 'alert' of a drug-detection dog during a traffic stop provides probable cause to search a vehicle," "[t]he court should allow the parties to make their best case, consistent with the usual rules of criminal procedure, . . . [a]nd . . . should then evaluate the proffered evidence to decide what all the circumstances demonstrate." *Florida v Harris*, 568 US 237, 240,

[36] See Section 11.7(A) for more information on what constitutes curtilage.

247-248 (2013). "If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause." *Id.* at 248.[37] "If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence." *Id.* "The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Id.* "A sniff is up to snuff when it meets that test." *Id.*

7. Warrantless Search of Passengers

A passenger in a vehicle stopped by the police is seized for purposes of the Fourth Amendment and may properly challenge the constitutionality of the traffic stop. *Brendlin v California*, 551 US 249, 251 (2007). The passenger of a vehicle does not "lack[] standing to challenge the subsequent search of [a] vehicle" merely "because the stop of the vehicle was legal." *People v Mead (Larry)*, 503 Mich 205, 214 (2019) (quotation marks, alteration, and citation omitted).

Police officers "may order out of a vehicle both the driver . . . and any passengers; perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous; conduct a '*Terry*[38] patdown' of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon, including any containers therein, pursuant to a custodial arrest." *Knowles v Iowa*, 525 US 113, 117-118 (1998) (citations omitted). The search for a weapon is limited to the area where the weapon may be placed or hidden. *Michigan v Long*, 463 US 1032, 1049 (1983). "To justify a patdown of the driver or a passenger during a traffic stop, . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v Johnson*, 555 US 323, 327 (2009).

Generally, "a passenger will not have a legitimate expectation of privacy in someone else's car." *Mead (Larry)*, 503 Mich at 213. However, the *Mead* Court concluded that defendant passenger could challenge the warrantless search of his backpack because

[37] "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to . . . presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search." *Harris*, 568 US at 246-247 (2013).

[38] *Terry v Ohio*, 392 US 1 (1968).

"although the defendant had no . . . legitimate expectation of privacy in the interior of [the] vehicle, he had a legitimate expectation of privacy in his backpack," that was located in the vehicle and which he "asserted a clear possessory interest in . . . by clutching it in his lap" prior to being ordered to exit the vehicle, and that expectation of privacy is one "that society is willing to recognize as reasonable." *Id*. at 214, 215.

Additionally, the driver's consent to search defendant's backpack was not sufficient to support a warrantless search because "[a]n objectively reasonable police officer would not have believed that [the driver] had actual or apparent authority over" defendant-passenger's backpack where: (1) the "defendant asserted a clear possessory interest in his backpack by clutching it in his lap" before being ordered to exit the vehicle; (2) there was "[n]o evidence suggest[ing] that [the driver] had mutual use of the backpack"; (3) the officer "testified that he believed the backpack belonged to the defendant"; and (4) the officer "knew at the time of the search that [the driver] and the defendant were near strangers." *Mead (Larry)*, 503 Mich at 214, 219. While "[t]he law recognizes that expectations of privacy are diminished in an automobile when compared, for example, to a home, [o]nce a court has determined that the defendant had a legitimate expectation of privacy in the place searched . . . there is no 'automobile exception' to the requirements for a consent search." *Id*. at 216 n 3 (2019) (citation omitted).

The police may properly search a passenger's personal belongings inside an automobile when they have probable cause to believe the belongings contain contraband. *Wyoming v Houghton*, 526 US 295, 302 (1999).

8. Warrantless Search of a Container Located in an Automobile

"If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *United States v Ross*, 456 US 798, 825 (1982). That is, "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *California v Acevedo*, 500 US 565, 580 (1991). See also *People v Kazmierczak*, 461 Mich 411, 422 (2000) (noting that if probable cause exists to believe that a vehicle contains contraband, the ability to conduct a warrantless search extends to closed containers that might conceal the object of the search).

Further, the "police may open and search any container placed or found in an automobile, as long as they have the requisite probable cause with regard to such a container, even if such probable cause focuses specifically on the container and arises before the container is placed in the automobile." *People v Bullock*, 440 Mich 15, 24 (1992). Thus, all containers large enough to hold the object of the search may be opened without a warrant during an automobile search. *United States v Johns*, 469 US 478, 484 (1985). Additionally, if the container may be searched at the scene, it may also be seized and searched without a warrant shortly thereafter, at the police station. *Id.* at 485.

Absent probable cause, the driver's consent to search defendant-passenger's backpack was not sufficient to support a warrantless search because "[a]n objectively reasonable police officer would not have believed that [the driver] had actual or apparent authority over" defendant's backpack where: (1) the "defendant asserted a clear possessory interest in his backpack by clutching it in his lap" before being ordered to exit the vehicle; (2) there was "[n]o evidence suggest[ing] that [the driver] had mutual use of the backpack"; (3) the officer "testified that he believed the backpack belonged to the defendant"; and (4) the officer "knew at the time of the search that [the driver] and the defendant were near strangers." *People v Mead (Larry)*, 503 Mich 205, 214, 219 (2019). While "[t]he law recognizes that expectations of privacy are diminished in an automobile when compared, for example, to a home, [o]nce a court has determined that the defendant had a legitimate expectation of privacy in the place searched . . . there is no 'automobile exception' to the requirements for a consent search." *Id.* at 216, n 3 (2019) (citation omitted).

9. Warrantless Search of an Automobile Incident to Arrest

While "[t]he law recognizes that expectations of privacy are diminished in an automobile when compared, for example, to a home, [o]nce a court has determined that the defendant had a legitimate expectation of privacy in the place searched . . . there is no 'automobile exception' to the requirements for a consent search." *People v Mead (Larry)*, 503 Mich 205, 216, n 3 (2019) (citation omitted).

"Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v Gant*, 556 US 332, 351 (2009). "When these justifications are absent, a search of an arrestee's vehicle will be

unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Id*. In *Gant*, 556 US at 335-336, the defendant was arrested for driving with a suspended license. After the police handcuffed the defendant and locked him in the back of a patrol car, they searched his car and found drugs in a jacket on the backseat. The United States Supreme Court held that the search was improper because *Belton*, 453 US 454, "does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." *Gant*, 556 US at 335. Further, "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Id*. "Because [the] police could not reasonably have believed either that [the defendant] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search . . . was unreasonable." *Id*. at 344.

Where an officer received information that the defendant was driving erratically, was confused, and was taking OxyContin for pain following surgery, "it was reasonable to believe that [his] vehicle might contain evidence of . . . 'the offense of arrest'" within the meaning of *Gant*, 556 US at 351, and the officer therefore lawfully searched the defendant's vehicle for evidence of narcotics or other drugs after arresting him for drunk driving and placing him in a police car. *People v Tavernier*, 295 Mich App 582, 586-587 (2012).

See Section 11.9(B) for discussion of the good faith doctrine as applied to the exclusionary rule.

10. Rental Vehicles

"[A]s a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." *Byrd v United States*, 584 US ___, ___ (2018). Stated another way, "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." *Id*. at ___ (reversing the lower courts' denial of the petitioner's motion to suppress evidence as the fruit of an unlawful search, i.e., body armor and a large quantity of drugs, found in the trunk of a vehicle rented by another individual, and "leav[ing] for remand two of the Government's arguments: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of

committing a crime is no better situated than a car thief; and that probable cause justified the search in any event").

C. School Searches

Searches that take place in schools may be properly conducted based on a level of suspicion less than probable cause. Courts have justified searches of students based on reasonable suspicion. The child's interest in privacy is balanced against the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. *New Jersey v TLO*, 469 US 325, 341-343 (1985).

"[A] school search 'will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction[.]'" *Safford Unified School Dist #1 v Redding*, 557 US 364, 370 (2009), quoting *TLO*, 469 US at 342. In *Safford*, 557 US at 368, "a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school . . . [b]ecause there were no reasons to suspect the drugs presented a danger or were concealed in her underwear[.]" That is, "the content of the suspicion failed to match the degree of intrusion." *Id*. at 375.

D. Prison or Jail Searches

In *Hudson v Palmer*, 468 US 517, 525-526 (1984), the United States Supreme Court held that Fourth Amendment protections do not apply to a prison cell. The correctional facility's interest in security outweighs a prisoner's already lowered expectation of privacy. *People v Herndon*, 246 Mich App 371, 397 (2001).

The Fourth Amendment is not violated when correctional officials require a detainee, "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history[,]" to undergo a visual strip search before being admitted to a jail's general population. *Florence v Board of Chosen Freeholders of County of Burlington*, 566 US 318, 322, 324, 339 (2012).

The collection and analysis of an arrestee's DNA according to Combined DNA Index System (CODIS) procedures "[a]s part of a routine booking procedure for serious offenses[]" did not violate the Fourth Amendment where the DNA sample was used to identify the arrestee as the perpetrator of an earlier unsolved rape. *Maryland v King*, 569 US 435, 439, 465-466 (2013). "When officers make an arrest supported by probable cause to hold for a serious offense and they

bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *Id*. at 461, 463, 465-466 (noting that "a detainee has a reduced expectation of privacy[]" and that "[b]y comparison to [the] substantial government interest [in identifying arrestees] and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one[]").

E. The Use of Roadblocks/Checkpoints

The United States Supreme Court has held that the use of roadblocks to enforce regulations concerning the use of vehicles, including the use of checkpoints to check driver's licenses and vehicle registrations, to make safety inspections of vehicles, to check sobriety, or to inspect cargo trucks or similar containers is permissible. *Michigan Dep't of State Police v Sitz*, 496 US 444, 455 (1990). However, the Michigan Supreme Court has held that the Michigan Constitution provides greater protection against warrantless seizures than does the federal constitution, and that the use of sobriety checkpoints violates Const 1963, art 1, § 11. *Sitz v Dep't of State Police*, 443 Mich 744, 746-747 (1993).

11.8 Searching a Parolee or Probationer

The search of a parolee or probationer may be justified on a showing of less than probable cause. The justification for this has often been that the state's interest in administering the criminal justice system requires that the state have greater flexibility in monitoring the activities of those persons on parole or probation. *Griffin v Wisconsin*, 483 US 868, 873-875 (1987) (authorizing probation officers to search probationers when they are suspected of criminal activity). See also *United States v Knights*, 534 US 112, 122 (2001) (permitting a search based on a probation condition and reasonable suspicion).

The United States Supreme Court has held that a suspicionless search or seizure conducted solely on the basis of an individual's status as a probationer or parolee does not violate the Fourth Amendment's protection against unreasonable searches and seizures. *Samson v California*, 547 US 843, 849-850, 857 (2006). The *Samson* case involved a California statute authorizing law enforcement officers to search a parolee—without a warrant and without suspicion of criminal conduct—solely on the basis of the person's status as a parolee. *Id*. The question to be decided by the *Samson* Court was "[w]hether a condition of [a parolee's] release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law

enforcement officer would not offend the Fourth Amendment." *Id*. at 847. The Court concluded that under the totality of the circumstances and in light of the legitimate government interests furthered by monitoring parolee activity, the suspicionless search of a parolee does not impermissibly intrude on the parolee's already diminished expectation of privacy. *Id*. at 852, 857.[39]

The defendant's probationer status at the time of a warrantless search of his mother's apartment and the seizure of incriminating evidence therefrom did not permit officers to conduct the search based only on reasonable suspicion that criminal activity was occurring; *Knights*, 534 US 112, was distinguishable "because the prosecution did not submit evidence regarding the conditions of defendant's probation in the trial court." *People v Mahdi*, 317 Mich App 446, 465 (2016) (holding that "[w]ithout the probation conditions, there [was] insufficient evidence in the record to conclude that the officers had reasonable suspicion that a probationer *subject to a search condition* was engaged in criminal activity").

Where the defendant's "term of probation had already expired" and the circuit court improperly extended it, the "defendant was not on probation, [and the] officers had no authority to enter his home and conduct a warrantless search under the probation exception to the Fourth Amendment." *People v Vanderpool*, 505 Mich 391, 394-395, 409 (2020). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for information on probation.

11.9 Exclusionary Rule

"Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings." *In re Forfeiture of $176,598*, 443 Mich 261, 265 (1993); see *Mapp v Ohio*, 367 US 643 (1961). The exclusionary rule "is a cornerstone of American jurisprudence that affords individuals the most basic protection against arbitrary police conduct." *In re Forfeiture of $176,598*, 443 Mich at 265. However, there are exceptions to the exclusionary rule and situations in which the exclusionary rule does not apply. *People v Hellstrom*, 264 Mich App 187, 193-194 n 3 (2004).

A. Exceptions Involving the Causal Relationship Between the Unconstitutional Act and the Discovery of the Evidence

"Three of [the] exceptions [to the exclusionary rule] involve the causal relationship between the unconstitutional act and the discovery of

[39] See also MCL 791.236(19), providing that a parole order must "require the parolee to provide written consent to submit to a search of his or her person or property upon demand by a peace officer or parole officer."

evidence." *Utah v Strieff*, 579 US 232, 238 (2016). These exceptions are the inevitable discovery doctrine, the independent source doctrine, and the attenuation doctrine. *Id*.

1. Inevitable Discovery Doctrine

"[T]he inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source." *Strieff*, 579 US at 238, citing *Nix v Williams (Robert)*, 467 US 431, 443-444 (1984). "The inevitable discovery exception generally permits the admission of tainted evidence when the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been revealed in the absence of police misconduct." *People v Stevens (Eugene) (After Remand)*, 460 Mich 626, 637 (1999). Whether the inevitable discovery doctrine applies requires an analysis of three basic questions:

- Are the legal means of discovery truly independent of the unlawful conduct that first led to the evidence's discovery?

- Are both the use of the legal means and the discovery of the evidence at issue by that means truly inevitable?

- Does application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken Fourth Amendment protection? *Stevens (Eugene) (After Remand)*, 460 Mich at 638 (citation omitted).

In *Stevens (Eugene) (After Remand)*, 460 Mich at 642-643, 647, the Supreme Court held that the inevitable discovery exception to the exclusionary rule was applicable where "the police were acting under a valid search warrant and within the scope of that warrant[,]" "[e]ven though the method of entry into the dwelling violated . . . knock-and-announce principles[.]" The Court also noted that "[t]here are both state and federal sanctions for such violations that serve as deterrents for police misconduct that are less severe than the exclusion of the evidence[,]" and that "exclusion of the evidence w[ould] put the prosecution in a worse position than if the police misconduct had not occurred." *Id.* at 647.

See also *People v Vasquez (After Remand)*, 461 Mich 235, 241-242 (1999) (holding that evidence was admissible pursuant to the inevitable discovery doctrine because it would have been discovered during the execution of a valid search warrant

without regard to whether police violated the knock and announce statute).

The inevitable discovery doctrine cannot be used as an exception to the warrant requirement merely because probable cause existed to obtain a search warrant even though one was not obtained before the search took place. *People v Hyde*, 285 Mich App 428, 442, 445 (2009). In *Hyde*, 285 Mich App at 433, the defendant gave a blood sample following a traffic stop, and the blood test revealed that his blood alcohol content exceeded the legal limit. The defendant moved to suppress his blood sample and the blood test results on the basis that his consent was coerced because the police incorrectly informed him that he was required to provide his blood under the informed consent statute, MCL 257.625c, even though he fell under an exception and was considered not to have given consent to a blood test because he had diabetes. *Hyde*, 285 Mich App at 435, 440-441. The trial court denied the defendant's motion to suppress, holding that his bodily alcohol content would have been inevitably discovered by the police had they obtained a warrant, or by the defendant had he consented to a breath or urine test. *Id*. at 435, 442. The Court of Appeals rejected the trial court's rationale that the evidence would have been inevitably discovered through a search warrant:

> "To allow a warrantless search merely because probable cause exists would allow the inevitable discovery doctrine to act as a warrant exception that engulfs the warrant requirement. Even in the context of a good-faith error, we reject the notion that a post hoc probable cause analysis can preclude the constitutional requirement that a neutral and detached magistrate issue the warrant. Such an approach diminishes the Fourth Amendment and is an incentive for improper or careless police practices." *Id*. at 445-446.

See also *People v Mahdi*, 317 Mich App 446, 470 (2016) ("the inevitable-discovery doctrine [did] not apply to the seizure of [a] cell phone, wallet, and set of keys[]" from the defendant's mother's apartment where, "[e]ven assuming that the officers had probable cause to obtain a warrant for [these items], the officers were not in the process of obtaining a warrant when they seized the items[]").

2. Independent Source Doctrine

"[T]he independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers

independently acquired it from a separate, independent source." *Strieff*, 579 US at 238, citing *Murray v United States*, 487 US 533, 537 (1988). See also *Nix*, 467 US at 443 ("[t]he independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation[]").

"The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Nix*, 467 US at 443 (internal citations omitted).

Evidence seized from a dwelling pursuant to a valid search warrant issued after an officer's unlawful entry into that dwelling is admissible when probable cause for the warrant's issuance is based on information independent of the illegal entry. *People v Smith (Steven)*, 191 Mich App 644, 646 (1991).

3. Attenuation Doctrine

"In some cases, . . . the link between the unconstitutional [police] conduct and the discovery of the evidence is too attenuated to justify suppression." *Strieff*, 579 US at 235. "Evidence is admissible [under the attenuation doctrine] when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Id*. at 238, quoting *Hudson*, 547 US at 593.

In determining whether there "was a sufficient intervening event to break the causal chain between the" unconstitutional police conduct and the discovery of the evidence, "[t]he three factors articulated in *Brown v Illinois*, 422 US 590 (1975), guide [the] analysis." *Strieff*, 579 US at 239.

> "First, [the court should] look to the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. . . . Second, [the court should] consider 'the presence of intervening

> circumstances.' . . . Third, and 'particularly' significant, [the court should] examine 'the purpose and flagrancy of the official misconduct.'" *Strieff*, 579 US at 239, quoting *Brown*, 422 US at 603-604; see also *People v Reese (Richard)*, 281 Mich App 290, 299 (2008).

"The first factor, temporal proximity[,] . . . [does not] favor[] attenuation unless 'substantial time' elapses between an unlawful act and when the evidence is obtained." *Strieff*, 579 US at 239 (citation omitted). The third factor, on the other hand, "favor[s] exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Id*. at 241.

"The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions[, a]nd . . . [application of the doctrine] is not limited to independent acts by the defendant." *Strieff*, 579 US at 238-239 (rejecting the Utah Supreme Court's conclusion that the doctrine applied "only 'to circumstances involving an independent act of a defendant's "free will" in confessing to a crime or consenting to a search[,]'" and holding that the doctrine was applicable in a case in which "the intervening circumstance that the State relie[d] on [was] the discovery of a valid, pre-existing, and untainted arrest warrant[]").

In *Strieff*, 579 US at 235, the United States Supreme Court held that the attenuation doctrine applied "when an officer [made] an unconstitutional investigatory stop; learn[ed] during that stop that the suspect [was] subject to a valid arrest warrant; and proceed[ed] to arrest the suspect and seize incriminating evidence during a search incident to that arrest." Applying the three factors set out in *Brown*, 422 US at 603-604, the Court explained:

> "[T]he evidence discovered on [the defendant's] person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to [the defendant's] arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for [the defendant's] arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of

> evidence by compelling [the officer] to arrest [the defendant]. And, it is especially significant that there is no evidence that [the officer's] illegal stop reflected flagrantly unlawful police misconduct." *Strieff*, 579 US at 240-242 (noting that the warrant "was entirely unconnected with the stop[,]" that the officer "was at most negligent[]" in stopping the defendant, and that "there [was] no indication that [the] unlawful stop was part of any systemic or recurrent police misconduct[]").

In a case that predated *Strieff*, 579 US 232, the Michigan Court of Appeals similarly held that, barring any egregious conduct on the part of the officers making the arrest, "discovery of an outstanding arrest warrant can dissipate or attenuate the taint of an initial illegal stop or arrest." *Reese (Richard)*, 281 Mich App at 303, 305. The Court noted that "whether the discovery of a preexisting warrant dissipates or attenuates the illegality of the initial stop or arrest will usually depend on two main points: '(1) what evidence did the police obtain from the initial illegal stop *before* they discovered the outstanding arrest warrant, and (2) whether that initial illegal stop was a manifestation of flagrant police misconduct—i.e., conduct that was obviously illegal, or that was particularly egregious, or that was done for the purpose of abridging the defendant's rights.'" *Id*. at 303-304 (citation omitted).

"Purposeful and flagrant misconduct exists where: '(1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his [or her] conduct was likely unconstitutional' but engaged in it anyway, or where '(2) the misconduct was investigatory in design and purpose and executed "in the hope that something might turn up."'" *Reese (Richard)*, 281 Mich App at 304 (citations omitted). "But where the police only discover the defendant's identity as a result of the initial illegal stop or arrest, and the police misconduct was not particularly egregious or the result of bad faith, the discovery of a preexisting arrest warrant will constitute an intervening circumstance that dissipates the taint of the initial illegal stop or arrest." *Reese (Richard)*, 281 Mich App at 304. Accordingly, "evidence that is discovered in a subsequent search incident to the lawful arrest need not be suppressed." *Id*.

"[T]he attenuation doctrine [did] not operate to bar the exclusion of . . . evidence[]" where the fact pattern was "(1) an invalid seizure, (2) the search and discovery of contraband, and (3) the discovery of a valid arrest warrant[;]" "the discovery of the valid warrant for [the] defendant's arrest was not an intervening act that 'broke' the causal chain between the initial, unlawful

> detention and the discovery of the evidence[]" where "the warrant had no effect on the actions taken by police . . . [or] on the evidence that was recovered from [the] defendant." *People v Maggit*, 319 Mich App 675, 700 (2017) (citation omitted). "[A]pplication of the exclusionary rule [was] appropriate" where "the time between the illegal detention and the discovery of the evidence was relatively short[]" and "the case for suppression—and deterrence—[was] strong[][,]" because "[a]lthough there [was] no suggestion from the record that the police officer acted with ill intent, and every indication that the . . . police [were] attempting to remedy a real problem, the case nevertheless involve[d] an arrest—or attempted arrest—for simply walking into and out of a busy parking lot that was open to the public." *Id.* at 700-703 (additionally noting that the "case present[ed] a case for deterrence[]" because the police department's "pattern of behavior suggest[ed] that the seizure [at issue] could have been part of the 'systemic or recurrent police misconduct' about which the Court in [*Strieff*, 579 US 242] was concerned[]").

B. Good Faith Doctrine

"Relying on federal precedent, our Supreme Court adopted the good-faith exception to the exclusionary rule in [*People v Goldston*, 470 Mich 523, 529 (2004).]" *People v DeRousse*, 341 Mich App 447, 465 (2022). "Under the good-faith exception, evidence obtained through a defective search warrant is admissible when the executing officer relied upon the validity of the warrant in objective good faith." *Id.* at 465. "[T]he primary purpose of the exclusionary rule is to deter official misconduct by removing incentives to engage in unreasonable searches and seizures." *Id.* at 465 (quotation marks and citation omitted). "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'" *Herring v United States*, 555 US 135, 141 (2009), quoting *United States v Leon*, 468 US 897, 908 (1984). "[S]uppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated warrant produces marginal or nonexistent benefits and cannot justify the substantial costs of exclusion." *DeRousse*, 341 Mich App at 465 (punctuation and citation omitted). Accordingly, a "good faith exception" to the exclusionary rule has evolved. *Goldston*, 470 Mich at 528-537.

"When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' [(i.e., 'good faith')] on the subsequently invalidated search warrant." *Herring*, 555 US at 142, quoting *Leon*, 468 US at 922 n 23 (1984). The "'good-faith inquiry is confined to the objectively ascertainable question whether a

reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Herring*, 555 US at 145, quoting *Leon*, 468 US at 922 n 23.

In *Herring*, 555 US 135, the United States Supreme Court reviewed several cases in which it held that the exclusionary rule did not apply under the circumstances present in those cases:

- "[T]he exclusionary rule did not apply when a warrant was invalid because a judge forgot to make 'clerical corrections' to it." *Herring*, 555 US at 142, quoting *Massachusetts v Sheppard*, 468 US 981, 991 (1984).

- The exclusionary rule did not apply "to warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional." *Herring*, 555 US at 142, citing *Illinois v Krull*, 480 US 340, 349-350 (1987).

- The exclusionary rule did not apply "to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding." *Herring*, 555 US at 142, citing *Arizona v Evans*, 514 US 1 (1995).

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 US at 144. In *Herring*, 555 US at 135, the police arrested the defendant on a warrant listed in the database of a neighboring county. A search incident to arrest yielded drugs and a gun. *Id*. It was subsequently discovered that the warrant had been recalled but that the recall information was never entered into the database. *Id*. The defendant moved to suppress the evidence on the basis that his initial arrest was illegal. *Id*. The United States Supreme Court held that the exclusionary rule was not applicable to bar the admission of the evidence, because the police error arose "from nonrecurring and attenuated negligence . . . far removed from the core concerns that led [the Court] to adopt the [exclusionary] rule in the first place." *Id*. at 144.

In *Goldston*, 470 Mich at 526, the police observed the defendant dressed as a fireman collecting money on a street corner, allegedly to donate to firefighters in New York following the September 11, 2001, terrorist attacks. The police confiscated the donations from the defendant and obtained a search warrant for his house that authorized, among other things, the seizure of any police and fire equipment. *Id*. at 526-527. The search yielded additional firefighter paraphernalia, a firearm, and drugs. *Id*. at 527. The trial court granted the defendant's motion to suppress the evidence on the basis that the

affidavit did not establish probable cause for the issuance of the warrant because the search warrant affidavit did not connect the place to be searched with the defendant, and did not state the date that the police observed the defendant soliciting money. *Id*. The Supreme Court applied the good faith exception to the exclusionary rule and concluded that although the warrant was later determined to be deficient, excluding the evidence obtained in good faith reliance on the warrant would not further the purpose of the exclusionary rule. *Id*. at 542-543.

"[E]ven if a constitutional violation by [police] officers had occurred on the basis of a lack of criteria sufficient to justify invocation of the community-caretaker exception[to the warrant requirement]," the exclusion of marijuana evidence discovered after a warrantless entry into the defendant's home was inappropriate where "the police, having at least some indicia of need, enter[ed] [the] home in a good-faith effort to check on the welfare of a citizen"; suppression of the evidence, rather than deterring police misconduct, "would only deprive citizens of helpful and beneficial police action." *People v Hill*, 299 Mich App 402, 411, 414-415 (2013). See also *People v Lemons*, 299 Mich App 541, 549-550 (2013) ("even if [police] officers' behavior fell short of satisfying the criteria set forth in the emergency-aid exception[to the warrant requirement]," the exclusionary rule did not apply to drug evidence that was discovered following their warrantless entry into the defendant's home; the officers, who were responding to a report that the front door of the home was open and blowing in the wind, "were acting in good faith" when they "entered the residence because they believed people could be inside and were in need of immediate aid").

"[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." *Davis v United States*, 564 US 229, 249-250 (2011). In *Davis*, 564 US at 235-236, officers conducted a search that was legal under then-current case law, and before appeal, the United States Supreme Court distinguished that precedent, making the *Davis* search unlawful. The *Davis* Court stated that the exclusionary rule is not meant to deter a police officer from acting in good faith or from following existing law; thus, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id*. at 241.[40] See also *People v Mungo (On Second Remand)*, 295 Mich App 537, 552-553, 556 (2012) (applying *Davis*, 564 US 229, and holding that because police acted in good-faith reliance on then-current United States Supreme Court precedent in conducting a search of the defendant's car incident to a passenger's arrest, the exclusionary rule did not apply to evidence discovered in that search, even though the

[40] See Section 11.5(B)(7) for additional discussion of *Davis*, 564 US 229.

search was rendered unconstitutional under a subsequently-issued United States Supreme Court decision); *People v Short*, 289 Mich App 538, 540 (2010) (holding that the trial court correctly denied the defendant's motion to suppress evidence of weapons found in his car following a search incident to arrest, where even though the search was unconstitutional under the retroactive application of a new United States Supreme Court decision,[41] the police officers conducting the search acted reasonably and in good faith based on a long-standing line of case law under which the search was constitutional[42]).

"[T]he good-faith exception to an improperly issued search warrant . . . [may] apply . . . [even when] the police officer who supplied the underlying affidavit for the search warrant also executed the warrant." *People v Adams*, 485 Mich 1039, 1039 (2010). In *Adams*, 485 Mich at 1039, there was "no evidence that the officer provided an affidavit so lacking in indicia of probable cause as to render his subsequent official belief in its existence entirely unreasonable." The Supreme Court held that because "[t]he evidence show[ed] that the officer executed the warrant with a good-faith belief that it was properly issued," the Court of Appeals erred in relying on *Leon*, 468 US 897, to rule that the good-faith exception was inapplicable. *Adams*, 485 Mich at 1039.

The "good-faith exception to the exclusionary rule" did not apply where a search warrant was issued but "did not authorize a search of the barns located outside the curtilage of [the defendant's] residence." *DeRousse*, ___ Mich App at ___. While "the good-faith exception has been extended to cases where a search is conducted without a warrant," "the record [did] not indicate that [the officer] conducted his search in objectively reasonable reliance on any statute or clerical error." *Id*. at ___. Although the officer testified "that he believed the warrant authorized the search of the barns," which "is sufficient to show his subjective good faith, the good-faith exception requires that the officer conducting the search [do] so while acting in objective, good-faith reliance on a search warrant." *Id*. at ___ n 9. Thus, considering that the prosecution failed to offer any "analysis as to why, under the specific facts of [the] case, [the officer's] actions were objectively reasonable," the *DeRousse* Court held that "suppression of the evidence seized during the warrantless search of the barns was not barred by the good-faith exception to the exclusionary rule." *Id*. at ___ n 9.

"[T]he rationale underlying the good-faith exception [did] not apply" where "the unlawful search was not attributable to an error made by

[41] *Arizona v Gant*, 556 US 332 (2009). See Section 11.5(B)(7) for discussion of *Gant*.

[42] See *New York v Belton*, 453 US 454 (1981), and its progeny. See Section 11.5(B)(7).

a neutral and detached magistrate[.]" *People v Hughes (On Remand)*, 339 Mich App 99, 112 (2021). In *Hughes*, "the search of . . . cell-phone data for evidence of armed robbery was not authorized by the warrant and therefore the officer was not relying on the magistrate's finding of probable cause. Instead, the search was conducted at the request of the prosecutor, who erroneously determined that a second search warrant was not necessary. But unlike a magistrate, the prosecutor is not a neutral and detached decision maker but rather is part of the 'law enforcement team.'" *Id*. at 112.

"The good faith exception to the exclusionary rule does not apply [to] a facially invalid general warrant upon which no reasonable officer could have relied in objective good faith." *People v Carson*, ___ Mich App ___, ___ (2024). In *Carson*, the warrant "was so facially deficient by virtue of its failure to particularize the places to be searched and things to be seized that the executing officers could not have reasonably presumed it to be valid." *Id*. at ___ (concluding the search warrant constituted "a general warrant authorizing a search of the phone's entire contents for any incriminating evidence.") The Court of Appeals observed that "[i]t is common knowledge that people store an incredible amount of personal data on their phones, and the prohibition against general warrants is long-established." *Id*. at ___. "No officer could reasonably have believed that such a far-reaching search complied with the constitutional demand for particularity." *Id*. at ___. "Lack of good-faith [was] further evidenced by the affidavit submitted by the police when they sought the search warrant because the police made no secret of their intent to engage in a fishing expedition." *Id*. at ___ (noting the "preparing officer essentially admitted knowledge of the breadth of personal information available on modern cell phones . . . and stated his intent to comb through all of it.") Notably, the *Carson* Court did "*not* hold that searches executed pursuant to a warrant that is defective by virtue of allowing an overly broad search of a person's cell phone can *never* be saved by the good-faith exception"; "[h]owever, given the particularly egregious facts of th[e] case," "the good faith exception [did] not apply, and the contents of defendant's cell phone should not have been admitted at his trial." *Id*. at ___.

"The mere fact of an illegal arrest does not per se require the suppression of evidence." *People v Corr*, 287 Mich App 499, 508 (2010). "'It is only when an "unlawful detention has been employed as a tool to procure *any* type of evidence from a detainee" that the evidence is suppressed under the exclusionary rule.'" *Id*. at 508-509 (citations omitted).

C. Statutory Violations

"[W]hen addressing the appropriate remedy for a *statutory* violation, the exclusion of evidence is not the go-to, or default, remedy. Instead, the drastic remedy of excluding evidence can only come into play if the legislative intent, gleaned from the words of the statute, permits its use." *People v Mazzie*, 326 Mich App 279, 290 (2018). Accordingly, where the Secretary of State provided insurance information to the police, "even if . . . the Secretary of State violated [the confidentiality requirements of] MCL 257.227(4) [concerning vehicle registration] and [MCL 500.3101a(3)[43] concerning certificates of insurance], those statutes provide no remedy for a violation of the confidentiality requirements, the Secretary of State is not a party to this action, and application of the exclusionary rule was improper based on this perceived statutory violation." *Mazzie*, 326 Mich App at 289. Specifically, because "[n]othing within MCL 257.227 and MCL 500.3101a indicates a legislative intent that the drastic remedy of the exclusion of evidence should be applied for violations of these statutes," and "[n]either statute indicates that, should the confidential information be shared in a manner other than specifically permitted, the exclusionary rule is applicable"; "even if the provision of the insurance information to the LEIN system was in violation of the statutes, the trial court erred in invoking the exclusionary rule to exclude evidence obtained from the vehicle." *Mazzie*, 326 Mich App at 290, 291.

The exclusionary rule does not apply to violations of Michigan's knock-and-announce statute, MCL 780.656. *Hudson v Michigan*, 547 US 586, 599-600 (2006).[44]

D. Exclusion as a Deterrent of Fourth Amendment Violations

"The Fourth Amendment says nothing about excluding evidence at trial when its commands are violated; rather, the exclusionary rule is a prudential doctrine created by the United States Supreme Court to compel respect for the prohibition against unreasonable searches and seizures. The sole purpose of the exclusionary rule is to deter future Fourth Amendment violations. Where suppression would fail to yield any appreciable deterrence, exclusion of the evidence is unwarranted. The deterrence benefits of exclusion vary with the culpability of a police officer's conduct. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs to society in excluding evidence of criminal

[43] Formerly MCL 500.3101a(3). See 2019 PA 21, effective June 11, 2019.

[44] See Section 11.5(A)(3)(a) for discussion of the knock-and-announce statute.

wrongdoing. When, however, the police act with an objectively reasonable good-faith belief that their conduct falls within the confines of the law or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force and exclusion serves no valid purpose." *People v Hammerlund*, 337 Mich App 598, 607 (2021) (citations omitted).

"[E]vidence obtained or gathered inside a house is subject to the exclusionary rule when there has been an unlawful governmental intrusion under the Fourth Amendment. But if the evidence were subsequently obtained or gathered outside the house, exclusion is not appropriate if there existed probable cause to arrest the defendant or if the defendant was not illegally or wrongfully detained, as assessed by information known to the police when arriving at a home. On the other hand, if probable cause is lacking or if a detention is otherwise unlawful or wrongful, the fruits of the search or arrest must be suppressed when they bear a sufficiently close relationship to the underlying illegality." *Hammerlund*, 337 Mich App at 612-613.

In *Hammerlund*, the "defendant never stepped outside or beyond the entrance of her house and was arrested inside of her home. Although, ostensibly, [the officer] did not intentionally or deliberately enter the home, it is quite clear that he intended to arrest defendant at her home without a warrant by engaging in a deliberate effort to draw her near the door where he could physically grab her and pull her out of the house. And it was [the officer's] actions that set into motion the events that led to defendant's arrest inside the home. Under these circumstances, . . . [the officer] exhibited deliberate disregard for defendant's Fourth Amendment rights," and "the deterrent value of exclusion [was] strong and outweigh[ed] the resulting cost to society" related to excluding evidence of criminal wrongdoing. *Hammerlund*, 337 Mich App at 609, 614-615 (concluding that the officer did not have probable cause to arrest defendant, thus the arrest violated the Fourth Amendment, further concluding that the evidence obtained following the illegal arrest must be suppressed under the exclusionary rule because the "detention was otherwise unlawful or wrongful").

"The good-faith exception as it exists encourages officers to seek approval from magistrates, who have the responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *People v Hughes (On Remand)*, 339 Mich App 99, 115 (2021) (quotation marks and citation omitted). "Allowing admission of the illegally obtained evidence in this case [cell-phone data evidence of an armed robbery that was not authorized by the warrant but rather obtained following a search that was conducted at the request of the prosecutor] would upend this framework . . . because officers would have no incentive to seek a warrant.

Suppressing the evidence, on the other hand, will encourage officers to seek review of the legality of a search by a neutral magistrate *before* the search is conducted and will therefore deter future Fourth Amendment violations in cases where the law is unsettled." *Id*. at 115.

The exclusionary rule does not apply to a civil action for violation of a zoning ordinance. *Long Lake Twp v Maxon (On Remand)*, ___ Mich App ___, ___ (2022). In *Maxon*, the township violated the Fourth Amendment by using a drone to obtain photographs of the defendants' property without obtaining permission, a warrant, or any other legal authorization. *Id*. at ___. After noting that "the purpose of the exclusionary rule is twofold: to deter police misconduct, and to provide a remedy where no other remedy is available," the Court of Appeals concluded that "suppression of the drone evidence does not serve these goals." *Id*. at ___. The United States Supreme Court has only applied the exclusionary rule in civil cases "in forfeiture actions when the thing being forfeited as a result of a criminal prosecution is worth more than the criminal fine that might be assessed." *Id*. at ___. "Michigan law tracks this restrained approach." *Id*. at ___. The "unlikelihood of any penalty being exacted, and the fact that [the] zoning action [was] not coupled with a criminal prosecution of any sort, remove[d] it from the realm of 'quasi-criminal' matters." *Id*. at ___. "Assuming that the drone search was illegal, it was performed by a private party. True, that person acted at the behest of a township official. But the exclusionary rule is intended to deter police misconduct, not that of lower-level bureaucrats who have little or no training in the Fourth Amendment. There is no likelihood that exclusion of the drone evidence in this zoning infraction matter will discourage the police from engaging in future misconduct, since the police were never involved in the first place." *Id*. at ___. "[T]he object of the state officials who allegedly violated the [defendant's] rights was not to penalize the [defendants], but to abate a nuisance through the operation of equitable remedies. The proceedings are remedial, not punitive. The exclusionary rule was not intended to operate in this arena, and serves no valuable function." *Id*. at ___.

11.10 Standard of Review

The application of the exclusionary rule to a Fourth Amendment violation is a question of law that is reviewed de novo. *People v Custer*, 465 Mich 319, 326 (2001). A trial court's findings of fact regarding a motion to suppress are reviewed for clear error, and questions of law relevant to the issue of suppression are reviewed de novo. *People v Sobczak-Obetts*, 463 Mich 687, 694 (2001).

In warrantless search and seizure cases, appellate courts should apply a de novo standard of judicial review concerning reasonable suspicion to

stop and probable cause to search. *Ornelas v United States,* 517 US 690, 699 (1996).

Chapter 12: Trial

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12.1 Overview of Trial Rights

Const 1963, art 1, § 20 provides:

> "In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal."

12.2 Jury Trial or Jury Waiver[1]

A. Right to a Jury Trial

In all criminal prosecutions, the accused has the right to a speedy and public trial by an impartial jury. US Const, Am VI; Const 1963, art 1, § 14; Const 1963, art 1, § 20; see also MCL 763.2.[2] "Issues of fact shall be tried by a jury drawn, returned, examined on voir dire, and empaneled in the manner provided by law for the trial of issues of fact in civil cases." MCL 768.8.

B. Waiver of a Jury Trial

With the consent of the prosecutor and the court's approval, the defendant may waive the right to a jury trial. MCL 763.3; MCL 768.8; MCR 6.401; MCR 6.402. Before accepting a defendant's waiver, the defendant must have been arraigned on the information (or have waived arraignment), have been properly advised of the right to a jury trial, and have been offered the opportunity to consult with an attorney. MCR 6.402(A); MCR 6.402(B). In a court where arraignments have been eliminated under MCR 6.113(E),[3] the court may not accept a defendant's waiver of trial by jury until the defendant has been

[1] See the Michigan Judicial Institute's checklist for waiver of jury trial and conducting a bench trial and checklist for conducting a jury trial.

[2] See Section 9.11 for discussion of the right to a speedy trial.

provided with a copy of the information and offered an opportunity to consult with an attorney. MCR 6.402(A).

Committee Tip:

Before proceeding to trial (or before taking a plea), it is imperative to confirm, on the record, that the defendant has been given a copy of the information.

Before accepting a waiver of the right to a jury trial, the court must:

- Advise the defendant in open court of the constitutional right to a jury trial.
- Address the defendant personally to determine whether the defendant understands the right to a jury trial and is voluntarily choosing to give up that right and to be tried by the court.

MCR 6.402(B). A verbatim record must be made of the waiver proceeding. *Id*.

Although MCL 763.3(1) provides that, except in cases of minor offenses, a defendant's waiver of jury trial must be in writing, MCR 6.402 does *not* require the defendant to sign a written waiver form; instead, the court rule "eliminates the written waiver requirement and replaces it with an oral waiver procedure consistent with the waiver procedure applicable at plea proceedings." 1989 Staff Comment to MCR 6.402. Because "[t]he statutory procedure is superseded by the court rule procedure[,]"[4] a defendant does not have to sign a written waiver form to effect a valid waiver of a jury trial. 1989 Staff Comment to MCR 6.402.

"In order for a jury trial waiver to be valid, . . . it must be both knowingly and voluntarily made." *People v Cook (Robert)*, 285 Mich App 420, 422 (2009). Compliance with the procedures set out in MCR 6.402(B) creates a presumption that the waiver was knowing, voluntary, and intelligent. *Cook (Robert)*, 285 Mich App at 422-423; *People v Mosly*, 259 Mich App 90, 96 (2003). On the other hand, "the

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[3] A circuit court may eliminate arraignments for defendants represented by counsel, subject to the requirements in MCR 6.113(E). See SCAO Model Local Administrative Order 26—Elimination of Circuit Court Arraignments.

[4] See MCR 6.001(E) (providing that the rules in Chapter 6 of the Michigan Court Rules supersede "any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in [Chapter 6]").

trial court [is] without authority to proceed with a bench trial[]" where there is no record evidence that "[the] defendant was fully informed about his [or her] right to a jury trial and voluntarily waived that right[.]" *Cook (Robert)*, 285 Mich App at 422-424 (holding that defense counsel's "statement that [the] defendant agreed to waive his jury trial and [a] written waiver signed only by counsel [did] not constitute a valid waiver[]" in the absence of record evidence that the trial court informed the defendant of the right to a jury trial or that the defendant voluntarily waived that right).

"A defendant has no right to withdraw a waiver of jury trial once it is validly made[.]" *Cook (Robert)*, 285 Mich App at 423. See also *People v Wagner (Charles)*, 114 Mich App 541, 558-559 (1982) (noting that the trial court has discretion to permit a defendant to withdraw a waiver of jury trial for good cause, but holding that "the trial court did not abuse its discretion in denying the defendant's motion to withdraw[]" where the request was made for the purpose of delay and judge-shopping).

It is improper and unethical for a trial court to give a defendant a "waiver break" by dismissing charges in exchange for the defendant's waiver of a jury trial; "it is not within the power of the judicial branch to dismiss charges or acquit a defendant on charges that are supported by the case presented by the prosecutor." *People v Ellis (Tyrone)*, 468 Mich 25, 26-28 (2003).

C. Standard of Review

The trial court's determination that a defendant validly waived the right to a jury trial is reviewed for clear error. *People v Taylor (Willie)*, 245 Mich App 293, 305 n 2 (2001). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Michigan v McQueen*, 493 Mich 135, 147 (2013).

A trial court's failure to comply with the procedural mandates of MCR 6.402(B) does not require automatic reversal "if the record establishes that [the] defendant nonetheless understood that he [or she] had a right to a trial by jury and voluntarily chose to waive that right." *Mosly*, 259 Mich App at 96. However, "a constitutionally invalid jury waiver is a structural error that requires [automatic] reversal." *Cook (Robert)*, 285 Mich App at 427.

12.3 Bench Trial[5]

A. Is Disqualification An Issue?

"Disqualification is appropriate when a judge cannot impartially hear a case, including when the judge is personally biased or prejudiced for or against a party or attorney." *People v Coones*, 216 Mich App 721, 726 (1996) (opinion by Bandstra, J.); see MCR 2.003(C).

Committee Tip:

When a defendant opts for a bench trial, the trial judge's prior involvement with the case may call for consideration of reassignment if the judge is too familiar with the file. See MCR 2.003. Consider obtaining express approval of the parties to proceed if the court has had prior involvement with the case.

A trial court may consider disqualification when it has heard the factual basis for an aborted guilty plea. See *People v Cocuzza*, 413 Mich 78 (1982). However, where the defendant, "[w]ith full knowledge of the trial judge's prior involvement[,] . . . elected to proceed with a bench trial" notwithstanding that the "judge had previously heard the defendant proffer a factual basis for the charge of which he was ultimately convicted[,]" the judge was not required to sua sponte raise the issue of disqualification. *Id*. at 79, 83-84.

For discussion of judicial disqualification, see the Michigan Judicial Institute's *Judicial Disqualification in Michigan*.

B. Pretrial Motions in a Bench Trial

Unless required to do so by a particular court rule, the trial court is not required to explain its reasoning and state its findings of fact on pretrial motions, but doing so is preferable for purposes of appellate review. MCR 2.517(A)(4); *People v Shields*, 200 Mich App 554, 558 (1993).

[5] See the Michigan Judicial Institute's checklist for waiver of jury trial and conducting a bench trial.

C. Evidentiary Issues in a Bench Trial

"Bench trials stand in sharp contrast to jury trials. A jury is required to consider all the evidence and to render a unanimous verdict, without the need for explanation. In a bench trial, however, the trial court is obligated to 'find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." *People v Wang*, 505 Mich 239, 250 (2020); MCR 6.403; MCR 6.410(B). "Because of this, reviewing courts are provided greater insight into the specific evidence found by the trial court to support verdicts in bench trials." *Wang*, 505 Mich at 250.

"[A] judge in a bench trial must arrive at his or her decision based upon the evidence in the case[and] . . . may not go outside the record in determining guilt." *People v Simon*, 189 Mich App 565, 568 (1991). "When the factfinder relies on extraneous evidence, the defendant is denied his [or her] constitutional right to confront all the witnesses against him [or her] and to get all the evidence on the record." *Id*. Although a factfinder may rely on generalized knowledge, common sense, and everyday experience, during a bench trial the judge may not rely on his or her own *specialized* knowledge in reaching a verdict. *Id*. at 567-568 (holding that the trial judge erred in convicting the defendant "based in part on . . . what he had learned about drug raids while a prosecutor").

Except as provided by MCL 768.26, which authorizes the prosecution's use of a preliminary examination transcript when a witness is unavailable at trial, it is error requiring reversal for the trial judge during a bench trial to refer to the preliminary examination transcript. *People v Ramsey*, 385 Mich 221, 225 (1971). Cf. *People v Pennington*, 323 Mich App 452, 459 (2018), where, in a bench trial, "the trial court was merely using the preliminary examination transcript to follow along as the prosecution used that testimony to impeach the witness" and "[b]ecause the trial court only reviewed the portion of the transcript properly read into the record, it did not consider any testimony that was not admitted at trial." "[T]he record indicate[d] that the judge understood that the portion of the preliminary examination read to the witness was admissible only for impeachment and that she was using the transcript only to assist her with following the prosecutor's recitation of the testimony when impeaching the witness." *Id*. at 459. "Unlike the situation in *Ramsey*, the trial court did not consider testimony not admitted at trial and so there [was] no Confrontation Clause violation." *Pennington*, 323 Mich App at 459.

D. Court View

"On application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred." MCR 2.507(D).[6]

E. Motion for Acquittal

MCR 6.419(D) provides:

> "In an action tried without a jury, after the prosecutor has rested the prosecution's case-in-chief, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact."

The motion "is in the nature of a jury trial motion for a directed verdict and in both jury and nonjury trials is governed by the rule that the prosecutor has the burden of producing in [the] case in chief some evidence as to each element of the crime charged[.]" *People v DeClerk*, 400 Mich 10, 17 (1977).

F. Findings and Judgment

At the conclusion of the case, the trial court "must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 6.403. The trial court must also "state its findings and conclusions on the record or in a written opinion made a part of the record." *Id*. A trial court's articulation of the law it applied to the facts of the case is designed to aid appellate review. *People v Johnson (Gary) (On Rehearing)*, 208 Mich App 137, 141 (1994). Findings are sufficient if it appears that the court was aware of the relevant issues and correctly applied the law. *People v Smith (Kerry)*, 211 Mich App 233, 235 (1995).

Although a *jury* may return inconsistent verdicts, "a trial judge sitting as the trier of fact may *not* enter an inconsistent verdict." *People v Walker (Alonzo)*, 461 Mich 908, 908 (1999) (holding that where the trial court convicted the defendant of malicious destruction of property

[6] "The provisions of the rules of civil procedure apply to [criminal] cases[,] . . . except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, (3) when a statute or court rule provides a like or different procedure, or (4) with regard to limited appearances and notices of limited appearance." MCR 6.001(D).

resulting from the discharge of a firearm, yet dismissed a charge of felony-firearm, the verdict was "patently inconsistent[]" and improper); see also *People v Vaughn (Marcus)*, 409 Mich 463, 465-466 (1980).

Committee Tip:

When rendering a decision after a bench trial, it is recommended that the trial court include the following in its statement of findings and conclusions and/or in its written opinion:

- *applicable statutes, if any;*
- *applicable jury instructions (including elements of the offense and any lesser offenses);*
- *the burden of proof;*
- *any presumptions that may apply;*
- *findings of fact sufficient to show an appellate court that the trial judge was aware of the issues and correctly applied the appropriate law;*
- *conclusions of law; and*
- *entry of the appropriate judgment.*

See the Michigan Judicial Institute's checklist on bench trial decisions.

G. Standard of Review

A trial court's findings of fact are reviewed for clear error by the appellate court. MCR 2.613(C). "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 who appeared before it." *Id*. Questions of law and of statutory interpretation are reviewed de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473-474 (2006).

When reviewing a challenge to the sufficiency of the evidence in a bench trial, the appellate court reviews the record de novo. *Lanzo Constr Co*, 272 Mich App at 473-474. "The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id*. at 474. The trier of fact may make reasonable inferences from evidence in the record but may not make

inferences completely unsupported by any direct or circumstantial evidence. *People v Petrella*, 424 Mich 221, 275 (1985).

12.4 Open or Closed Trial

Defendants are entitled to a public trial. US Const, Am VI; Const 1963, art 1, § 20; MCL 600.1420. A criminal trial must be open to the public, unless the court finds that no alternative short of closure will adequately assure a fair trial for the accused. *Richmond Newspapers, Inc v Virginia*, 448 US 555, 580-581 (1980). See **Section 1.1** for more information on open or closed proceedings.

12.5 Jury Selection

A defendant is entitled to a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *Duncan v Louisiana*, 391 US 145, 154 (1968). The process by which potential jurors are selected and brought to court is governed by MCL 600.1301 *et seq*. Generally, the process should be random and result in potential juries that reflect a cross-section of the community. See MCR 2.511(A).[7]

A. Representative Cross-Section

The defendant is entitled to a jury which contains a representative cross-section of the community. *Taylor v Louisiana*, 419 US 522, 528 (1975).

"A fair-cross-section claim under the Sixth Amendment requires a defendant to make a prima facie case as set forth by the United States Supreme Court in *Duren v Missouri*[, 439 US 357 (1979)]. Namely, a defendant must show:

> "'(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.'" *People v Bryant (Ramon)*, 491 Mich 575, 581-582 (2012), quoting *Duren*, 439 US at 364.

[7] "Except as otherwise provided by the rules in [Subchapter 6.400 of the Michigan Court Rules], MCR 2.510 and [MCR] 2.511 govern the procedure for selecting and impaneling the jury." MCR 6.412(A).

The first prong requires a showing of the exclusion of a constitutionally cognizable group. *People v Smith (Diapolis)*, 463 Mich 199, 215 (2000) (opinion by Cavanagh, J.). "Black Americans are a constitutionally cognizable group because they are capable of being singled out for discriminatory treatment, and have been held a distinctive group for jury composition challenges." *Id*. (citation omitted). See also *People v Jackson (Kevin) (On Reconsideration)*, 313 Mich App 409, 429-430 (2015) (holding that the defendant "failed to establish a prima facie case for violation of the Sixth Amendment's fair-cross-section requirement with regard to education level or ties to law enforcement[]" where he "provide[d] no evidence that persons possessing a certain degree of education or ties to law enforcement, or lacking the same, [were] members of a 'distinctive' group in the . . . community[]").

The second prong requires a showing that the number of members of the cognizable group is not fair and reasonable in relation to the number of group members in the relevant community. *Smith (Diapolis)*, 463 Mich at 215. The United States Supreme Court has not specified a preferred method of measuring underrepresentation. *Id*. at 203 (opinion of the Court), aff'd sub nom *Berghuis v Smith*, 559 US 314 (2010). The lower federal courts have applied three different methods known as (1) the absolute disparity test, (2) the comparative disparity test, and (3) the standard deviation test. *Smith (Diapolis)*, 463 Mich at 203. The Court in *Smith* (*Diapolis)* indicated that all three approaches should be considered and that no individual method should be used to the exclusion of the others. *Id*. at 204. See *Bryant (Ramon)*, 491 Mich at 603-615, for a detailed analysis of all three methods of determining whether representation of a distinctive group in the jury venire is fair and reasonable.

"[W]hen applying all the relevant tests for evaluating the representation data, a court must examine the composition of jury pools or venires over time using the most reliable data available to determine whether representation of a distinct group is fair and reasonable." *Bryant (Ramon)*, 491 Mich at 583. In *Bryant (Ramon)*, 491 Mich at 587-588, an erroneous setting in the computer program used by Kent County for summoning jurors resulted, over a 15-month period, in jury questionnaires being sent disproportionately to zip codes with smaller African-American populations. The defendant, who was convicted by a jury during this period, raised a fair-cross-section claim, arguing that the jury-selection method had resulted in the underrepresentation of African-Americans appearing for jury duty. *Id*. at 585. The Court of Appeals agreed and granted the defendant a new trial. *People v Bryant (Ramon)*, 289 Mich App 260, 275-276 (2010). The Michigan Supreme Court reversed, holding that "[the] defendant did not establish that the representation of African-Americans was not fair and reasonable under the second prong of the

Duren[, 439 US at 364,] test[.]" *Bryant (Ramon)*, 491 Mich at 619. Noting that "*Duren* explicitly requires courts to consider the representation of a distinct group in *venires*[,]" the Court held that "the Court of Appeals wrongly relied on misleading representation data by considering the representation of African–Americans *only* in [the] defendant's venire[,]" and that "[t]he use of [an] inadequate sample from only [the] defendant's venire caused the tests evaluating the degree of any underrepresentation to produce skewed and exaggerated results." *Id.* at 582.

Additionally, the *Bryant (Ramon)* Court concluded that "the Court of Appeals misapplied" the holding in *Smith (Diapolis)*, 463 Mich 199, "that an evaluation of the second [*Duren*] prong requires courts to employ a case-by-case approach that considers *all* the relevant statistical tests for evaluating the data regarding representation of a distinct group without using any one individual method *exclusive* of the others." *Bryant (Ramon)*, 491 Mich at 582. Instead, "the Court of Appeals, using a skewed result from the comparative-disparity test, elevated this test above the others in precisely the situation in which its use is most criticized—distorting the degree of underrepresentation when the population of the distinct group is small." *Id.* at 583. After "consider[ing] the results of these tests using the most reliable data set, which included the composition of jury pools or venires over a three-month period," the Court concluded that the defendant "failed to show that the representation of African-Americans in the venires at issue was not fair and reasonable." *Id.* at 583, 615.[8]

The third prong requires a showing that the underrepresentation of the cognizable group is systematic, meaning that it results from some circumstances inherent in the particular selection process. *Duren*, 439 US at 366; *Bryant (Ramon)*, 491 Mich at 615-616. The defendant "has the burden of demonstrating a problem inherent within the selection process that results in systematic exclusion." *People v Williams (S.L.)*, 241 Mich App 519, 527 (2000). It is irrelevant whether the circumstances resulting in underrepresentation were intentional or whether the problem was corrected upon discovery. *Bryant (Ramon)*, 491 Mich at 616. "[A] 'bald assertion' that systematic exclusion must have occurred is insufficient to make out a claim of systematic exclusion[;]" furthermore, a showing of one or two incidences of disproportionate panels is not sufficient to show a systematic

[8] However, see *Ambrose v Booker*, 684 F3d 638, 641, 645-649 (CA 6, 2012) (holding that three federal habeas petitioners, who were convicted by jury in Kent County during the period in which the computer program for summoning jurors contained an error, had established cause to excuse their procedural defaults, because "the factual basis for the claim—the computer glitch—was not reasonably available to counsel, and [the] petitioners could not have known that minorities were underrepresented in the *jury pool* by looking at the *venire panel*[]").

exclusion of group members. *Williams (SL)*, 241 Mich App at 526-527 (citation omitted).

B. Number of Jurors

The required number of jurors is set by Michigan's Constitution (Const 1963, art 1, § 20), by statute (MCL 600.8355 and MCL 768.18), and by court rule (MCR 6.410(A) and MCR 6.620(A)).

A jury that decides a felony case generally must consist of 12 jurors. See MCR 6.410(A); MCL 768.18. MCR 6.410(A) allows the parties to stipulate, with the court's consent, to have the case decided by fewer than 12 jurors. MCR 6.410(A) provides:

> "Except as provided in this rule, a jury that decides a case must consist of 12 jurors. At any time before a verdict is returned, the parties may stipulate with the court's consent to have the case decided by a jury consisting of a specified number of jurors less than 12. On being informed of the parties' willingness to stipulate, the court must personally advise the defendant of the right to have the case decided by a jury consisting of 12 jurors. By addressing the defendant personally, the court must ascertain that the defendant understands the right and that the defendant voluntarily chooses to give up that right as provided in the stipulation. If the court finds that the requirements for a valid waiver have been satisfied, the court may accept the stipulation. Even if the requirements for a valid waiver have been satisfied, the court may, in the interest of justice, refuse to accept a stipulation, but it must state its reasons for doing so on the record. The stipulation and procedure described in this subrule must take place in open court and a verbatim record must be made."

MCR 6.411 and MCL 768.18 authorize a trial judge in a felony case to impanel a jury of more than 12 members. The number of jurors may be reduced to no fewer than 12 if it becomes necessary to excuse any juror during trial. MCL 768.18. In the event that more than 12 jurors remain when deliberations are to begin, jurors must be randomly excused "to reduce the number of jurors to the number required to decide the case." MCR 6.411; see also MCL 768.18. Any alternate jurors may be retained during deliberations; the court must "instruct the alternate jurors not to discuss the case with any other person until the jury completes its deliberations and is discharged." MCR 6.411. "If an alternate juror replaces a juror after the jury retires to consider its

verdict, the court shall instruct the jury to begin its deliberations anew."

In misdemeanor cases, the jury must consist of six people. MCL 600.8355; MCR 6.620(A). However, the judge may impanel seven or more potential jurors, excusing any additional jurors randomly in order to reduce the jury to six members for deliberations. MCR 6.620(A). Any alternate jurors may be retained during deliberations; the court must "instruct the alternate jurors not to discuss the case with any other person until the jury completes its deliberations and is discharged." *Id*. "If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew." *Id*.

C. Identity of Jurors

Jurors drawn for jury service are required to complete a juror personal history questionnaire as adopted by the State Court Administrator. MCR 2.510(A)-(B).[9] Access to juror personal history questionnaires is governed by MCR 2.510(C)(2). Juror qualifications questionnaires are confidential except as ordered by the chief circuit judge. MCL 600.1315. The attorneys must be given a reasonable opportunity to examine the jurors' questionnaires before being called on to challenge for cause. MCR 2.510(C)(2).

It is permissible to use juror numbers instead of names at trial. *Williams (SL)*, 241 Mich App at 522, 525. However, the use of an anonymous jury is potentially prejudicial, and should only be employed when jurors' safety or freedom from undue harassment is an issue. *Id*. at 525. In the case of an anonymous jury, appropriate safeguards should be followed to ensure a fair trial. *Id*. "[T]o successfully challenge the use of an 'anonymous jury,' the record must reflect that the parties have had information withheld from them, thus preventing meaningful voir dire, or that the presumption of innocence has been compromised." *Id*. at 523.

"[T]he press has a qualified right of postverdict access to juror names and addresses, subject to the trial court's discretion to fashion an order that takes into account the competing interest of juror safety and any other interests that may be implicated by the court's order." *In re Disclosure of Juror Names and Addresses*, 233 Mich App 604, 630 (1999). "For example, a trial court might act to protect juror privacy by precluding jurors from revealing the statements other jurors made during deliberation." *Id*. at 630 n 9.

[9] "Except as otherwise provided by the rules in [Subchapter 6.400 of the Michigan Court Rules], MCR 2.510 and [MCR] 2.511 govern the procedure for selecting and impaneling the jury." MCR 6.412(A).

D. Voir Dire

Voir dire is the process by which litigants may question prospective jurors so that challenges may be intelligently exercised. *People v Harrell*, 398 Mich 384, 388 (1976). The court has broad discretion to limit or preclude voir dire by the attorneys. *Id*. "The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." *People v Sawyer*, 215 Mich App 183, 186 (1996).

MCR 6.412(C) states:

> "(1) *Scope and Purpose*. The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process.
>
> (2) *Conduct of the Examination*. The court may examine prospective jurors or permit the attorneys for the parties to do so. If the court examines the prospective jurors, it must permit the attorneys for the parties to
>
> > (a) ask further questions that the court considers proper, or
> >
> > (b) submit further questions that the court may ask if it considers them proper.
> >
> > On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors."

Generally, closing the courtroom during the jury selection process is a violation of the right to a public trial and constitutes a structural error. *Weaver v Massachusetts*, 582 US 286, 298 (2017) (noting that there are exceptions, and "[t]hough these cases should be rare, a judge may deprive a defendant of his right to an open courtroom by making proper factual findings in support of the decision to do so").

"[T]here is no right to any specific procedure for engaging in voir dire." *Sawyer*, 215 Mich App at 191. "There is no right to have counsel conduct voir dire or to individual, sequestered voir dire[,]" and the trial court may refuse to ask prospective jurors specific questions submitted by counsel as long as the voir dire conducted by the court

is sufficient to seat an impartial jury. *Id.* However, the trial court's discretion over the voir dire process is not unlimited. For example, a trial court may not restrict the scope of voir dire to the degree that the parties are unable to develop a factual basis for the intelligent exercise of their peremptory challenges. *People v Tyburski*, 196 Mich App 576, 581 (1992), aff'd 445 Mich 606 (1994). In *Tyburski*, the defendant was denied a fair trial because "the trial court's voir dire of the prospective jurors was a perfunctory exercise rather than a probing inquiry that would be necessary in a highly publicized case to enable counsel to obtain sufficient information necessary to make an informed decision to exercise a challenge to a juror, either for cause or peremptorily." *Id.* at 591.

"[P]rospective jurors' answers to questions [during voir dire] about their personal beliefs [did not constitute] extraneous evidence" that had "a real and substantial possibility that . . . could have affected the jury's verdict." *People v Haynes*, 338 Mich App 392, 415 (2021) (quotation marks and citation omitted). See Section 12.13(C) for more information on extraneous evidence.

When information potentially affecting a juror's ability to act impartially is discovered after the jury has been sworn and the juror is allowed to remain on the jury, the defendant *may be* entitled to relief on appeal if the defendant can establish that the juror's presence on the jury resulted in actual prejudice. *People v Miller*, 482 Mich 540, 561 (2008). "[T]he proper inquiry is whether the defendant was denied his [or her] right to an impartial jury. If he [or she] was not, there is no need for a new trial." *Id.*

1. Challenges for Cause

A prospective juror is subject to challenge for cause on any ground set out in MCR 2.511(E),[10] or for any other reason recognized by law. MCR 6.412(E). "The parties may challenge jurors for cause, and the court shall rule on each challenge." MCR 2.511(E).

MCR 2.511(E) provides, in relevant part:

> "It is grounds for a challenge for cause that the person:
>
> (1) is not qualified to be a juror;[11]
>
> (2) is biased for or against a party or attorney;

[10] "Except as otherwise provided by the rules in [Subchapter 6.400 of the Michigan Court Rules], MCR 2.510 and [MCR] 2.511 govern the procedure for selecting and impaneling the jury." MCR 6.412(A).

(3) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;

(4) has opinions or conscientious scruples that would improperly influence the person's verdict;

(5) has been subpoenaed as a witness in the action;

(6) has already sat on a trial of the same issue;

(7) has served as a grand or petit juror in a criminal case based on the same transaction;

(8) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;

(9) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;

(10) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution;

(11) has a financial interest other than that of a taxpayer in the outcome of the action;

(12) is interested in a question like the issue to be tried.

Exemption from jury service is the privilege of the person exempt, not a ground for challenge."[12]

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[11] MCL 600.1307a(1) provides:

"To qualify as a juror, an individual must meet all of the following criteria:

(a) Be a citizen of the United States, 18 years of age or older, and a resident in the county for which the individual is selected, and in the case of a district court in districts of the second and third class, be a resident of the district.

(b) Be able to communicate in the English language.

(c) Be physically and mentally able to carry out the functions of a juror. Temporary inability must not be considered a disqualification.

(d) Not have served as a petit or grand juror in a court of record during the preceding 12 months.

(e) Not have been convicted of a felony."

Jurors are presumed to be qualified, competent, and impartial, and the burden of proving the existence of a disqualification is on the party alleging it. See *People v Miller*, 482 Mich 540, 550 (2008); *People v Collins*, 166 Mich 4, 9 (1911); see also *People v Lee*, 212 Mich App 228, 250 (1995); *People v Walker*, 162 Mich App 60, 63 (1987). If, however, "after the examination of any juror, the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel." MCR 6.412(D)(2). See also MCR 2.511(D); MCL 600.1337; *Walker*, 162 Mich App at 64.

A defendant is not entitled to relief where, even if the trial court erred in denying the defendant's challenge to a prospective juror for cause, the defendant failed to exhaust his or her peremptory challenges. *People v Legrone*, 205 Mich App 77, 81-82 (1994).

"A juror who expresses an opinion referring to some circumstance of the case which is not positive in character, but swears he [or she] can render an impartial verdict, may not be challenged for cause." *People v Roupe*, 150 Mich App 469, 474 (1986); see MCL 768.10. See also *People v Jendrzejewski*, 455 Mich 495, 515-519 (1997) (holding that the defendant was not deprived of a fair trial where two jurors who were actually seated had formed an earlier opinion, but "were adamant [during voir dire] that any previous opinion that they might have had was completely set aside and that they could definitely be fair and impartial").

"A four-part test is used to determine whether an error in refusing a challenge for cause merits reversal[:]

> "There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable." *Lee*, 212 Mich App at 248-249.

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[12]"An individual who is a participant in the address confidentiality program created under the address confidentiality program act . . . may claim exemption from jury service for the period during which the individual is a program participant." MCL 600.1307a(4). To obtain an exemption, "the individual must provide the participation card issued by the department of attorney general upon the individual's certification as a program participant to the court as evidence that the individual is a current participant in the address confidentiality program." *Id*.

2. Peremptory Challenges

A juror who is peremptorily challenged is excused without cause. MCR 2.511(F)(1).[13] In a criminal case in which the offense is not punishable by life imprisonment, a defendant tried alone is entitled to five peremptory challenges. MCR 6.412(F)(1); MCL 768.12(1). Similarly, if two or more defendants are being jointly tried for an offense not punishable by life imprisonment, each defendant is entitled to five peremptory challenges. MCR 6.412(F)(1); MCL 768.12(1). The prosecutor is entitled to five peremptory challenges when a defendant is tried alone, and when two or more defendants are tried together, the prosecutor is entitled to the total number of challenges to which all the defendants are entitled. MCR 6.412(F)(1); MCL 768.12(1). On motion and a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges; it is unnecessary for the additional challenges granted by the court to be equal for each party. MCR 6.412(F)(2); MCL 768.12(2).

If the offense charged is punishable by life imprisonment, a defendant being tried alone is entitled to 12 peremptory challenges. MCR 6.412(F)(1); MCL 768.13(1). In cases in which two or more defendants are being tried jointly for offenses punishable by life imprisonment, the number of peremptory challenges varies with the number of defendants being tried. See MCR 6.412(F)(1) and MCL 768.13(1)(a)-(d). A defendant may be granted an increased number of peremptory challenges for good cause, and where more than one defendant is being tried, the number of additional challenges granted by the court may result in an unequal number of challenges allowed each defendant. MCR 6.412(F)(2); MCL 768.13(3). The prosecutor is permitted 12 peremptory challenges in cases involving a single defendant and an offense punishable by life imprisonment; if multiple defendants are being tried jointly for an offense punishable by life imprisonment, the prosecutor is entitled to the total number of challenges allowed all defendants being tried. MCR 6.412(F)(1); MCL 768.13(2).

Peremptory challenges must be exercised as follows:

> "(a) First the plaintiff and then the defendant may exercise one or more peremptory challenges until each party successively waives further peremptory

[13] "Except as otherwise provided by the rules in [Subchapter 6.400 of the Michigan Court Rules], MCR 2.510 and [MCR] 2.511 govern the procedure for selecting and impaneling the jury." MCR 6.412(A).

> challenges or all the challenges have been exercised, at which point jury selection is complete.
>
> (b) A 'pass' is not counted as a challenge but is a waiver of further challenge to the panel as constituted at that time.
>
> (c) If a party has exhausted all peremptory challenges and another party has remaining challenges, that party may continue to exercise their remaining peremptory challenges until such challenges are exhausted." MCR 2.511(F)(3).

In a case cognizable by the district court, "[e]ach defendant is entitled to three peremptory challenges. The prosecutor is entitled to the same number of peremptory challenges as a defendant being tried alone, or, in the case of jointly tried defendants, the total number of peremptory challenges to which all the defendants are entitled." MCR 6.620(B). A party may be granted an increased number of peremptory challenges upon a showing of good cause, and the additional challenges need not be equal for each party. *Id.*

"The right to exercise peremptory challenges in state court is determined by state law," and "the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution." *Rivera v Illinois*, 556 US 148, 152, 158 (2009) (holding that the trial court's erroneous denial of the defendant's peremptory challenge did not require automatic reversal of the defendant's first-degree murder conviction where all of the jurors ultimately seated were qualified and unbiased). "If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." *Id.* at 157.

The "erroneous denial of a defendant's peremptory challenge is subject to automatic reversal when the error is preserved and no curative action is taken." *People v Yarbrough*, ___ Mich ___, ___ (2023). In *Yarbrough*, "it [was] readily apparent that the trial court's practice of restricting peremptory challenges to newly seated prospective jurors ran afoul of [MCL 768.13, MCR 2.511(H), and MCR 6.412]." *Yabrough*, ___ Mich at ___ (noting "there is no dispute that the trial court erred").

3. Discrimination During Voir Dire: *Batson* Challenges

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination during voir dire. *Batson v Kentucky*, 476

US 79 (1986). The Sixth Amendment also requires that a jury venire be drawn from a fair cross-section of the community. *Smith*, 559 US at 319. Additionally, MCR 2.511(G)[14] provides:

> "(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.
>
> (2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection."

In *Batson*, 476 US at 96-98, the United States Supreme Court set out a three-step process for determining the constitutional propriety of a peremptory challenge. The Michigan Supreme Court explained the process in *People v Knight*, 473 Mich 324, 336 (2005), habeas corpus gtd *Rice v White*, 660 F3d 242 (CA 6, 2011)[15]:

> "First, the opponent of the peremptory challenge must make a prima facie showing of discrimination.[16] To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he [or she] is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant considerations raise an inference that the proponent of the challenge

[14] "Except as otherwise provided by the rules in [Subchapter 6.400 of the Michigan Court Rules], MCR 2.510 and 2.511 govern the procedure for selecting and impaneling the jury." MCR 6.412(A).

[15] In *Knight*, 473 Mich at 352, the Michigan Supreme Court held that *Batson*, 476 US 79, was not violated in the jury selection at the joint trial of the two defendants, Jerome Knight and Gregory Rice. In *Rice*, 660 F3d at 253, 257-260, the Sixth Circuit Court of Appeals affirmed the federal district court's grant of a conditional writ of habeas corpus to codefendant Rice and vacated his conviction under 28 USC 2254(d)(2), holding that "the Michigan Supreme Court's adjudication of [Rice's] *Batson* claim was based on the court's unreasonable factual determination that the trial judge did not discredit the prosecutor's proffered race-neutral reasons for the exercise of her peremptory strikes." However, the legal principles cited by *Knight*, 473 Mich at 335-348, were not implicated by the Sixth Circuit's decision in *Rice*, 660 F3d 242, and they remain good law. See *Rice*, 660 F3d at 253-254 (reiterating the *Batson* process detailed in *Knight*, 473 Mich at 335-338).

[16] In the first *Batson* step, the opponent of the challenge is not required to actually prove discrimination. *Knight*, 473 Mich at 336. As long as the sum of the proffered facts gives rise to an *inference* of discriminatory purpose, the first *Batson* step is satisfied. *Knight*, 473 Mich at 336-337.

> excluded the prospective juror on the basis of race. . . .
>
> Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike. *Batson's* second step 'does not demand an explanation that is persuasive, or even plausible.' Rather, the issue is whether the proponent's explanation is facially valid as a matter of law. 'A neutral explanation in [this] context . . . means an explanation based on something other than the race of the juror. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'
>
> Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination. It must be noted, however, that if the proponent of the challenge offers a race-neutral explanation and the trial court rules on the ultimate question of purposeful discrimination, the first *Batson* step (whether the opponent of the challenge made a prima facie showing) becomes moot." *Knight*, 473 Mich at 336-338 (internal citations omitted).

"[T]rial courts must meticulously follow *Batson's* three-step test," and the Michigan Supreme Court "*strongly* urge[s] [trial] courts to *clearly* articulate their findings and conclusions on the record." *Knight*, 473 Mich at 339.

For the first *Batson* step (prima facie showing of discrimination), the trial court "must first find the facts and then must decide whether those facts constitute a prima facie case of discrimination under *Batson* and its progeny." *Knight*, 473 Mich at 342. This step presents "a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review" on appeal. *Id*.

For the second *Batson* step (race-neutral explanation), the trial court must only be "concerned with whether the proffered reason violates the Equal Protection Clause as a matter of law." *Knight*, 473 Mich at 343-344. "*Batson*'s second step does not demand articulation of a persuasive reason, or even a plausible

one; 'so long as the reason is not inherently discriminatory, it suffices.'" *People v Tennille*, 315 Mich App 51, 63 (2016) (citation omitted). On appeal, the second *Batson* step is subject to de novo review. *Knight*, 473 Mich at 343-344.

For the third *Batson* step (pretext/purposeful discrimination), the trial court must determine whether the opponent of the peremptory challenge has satisfied the ultimate burden of proving purposeful discrimination, which largely turns on factual findings involving credibility; this step is therefore subject to appellate review for clear error. *Knight*, 473 Mich at 344-345. "In making a finding at step three, the trial court is required to assess the plausibility of the race-neutral explanation 'in light of *all* evidence with a bearing on it.'" *Tennille*, 315 Mich App at 64 (citation omitted). "Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility," and "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention)[;] . . . [i]n this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Snyder v Louisiana*, 552 US 472, 477 (2008). A pretextual explanation by the prosecution gives rise to an inference of discriminatory intent. *Id*. at 484-485.

In *Snyder*, the trial court allowed the prosecutor to strike a black juror for the proffered race-neutral reasons that the juror looked nervous and that, because of a student-teaching obligation, the juror might return a lesser guilty verdict (which would obviate the need for a penalty phase) in order to fulfill his jury duty more quickly. *Snyder*, 552 US at 478. The United States Supreme Court noted that the record did not support a conclusion that the trial judge made any determination regarding the juror's demeanor, and that the prosecution's second proffered reason was implausible and, therefore, pretextual. *Id*. at 479-485. The Court held that the trial court clearly erred in overruling the defendant's *Batson* objection to the prosecutor's strike of the juror:

> "In other circumstances, . . . once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. . . . We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. For present purposes, it is enough to recognize that

> a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution." *Snyder*, 552 US at 485.

There is no requirement that a trial judge, in ruling on an objection to a peremptory challenge under *Batson*, 476 US 79, reject a demeanor-based explanation for the challenge unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based. *Thaler v Haynes*, 559 US 43, 44, 47-49 (2010). However, "[e]ven if the trial court did not personally observe [the demeanor of a stricken juror], the court 'has a pivotal role' in evaluating whether the prosecutor's demeanor, and any pertinent surrounding circumstances, belie that a strike was race neutral[;]" the trial court must make a factual determination regarding a stricken juror's demeanor, and, in the absence of such findings, it cannot be presumed "'that the trial judge credited the prosecutor's assertion' that the juror[] reacted in a certain fashion." *Tennille*, 315 Mich App at 70-71 (quoting *Snyder*, 552 US at 477, 479, and distinguishing *Haynes*, 559 US 43).

"[T]he trial court committed two serious *Batson* errors" when it "failed to afford defense counsel an opportunity to rebut the prosecutor's stated reason for dismissing [two African-American] jurors" and failed to make any "findings of fact regarding whether the prosecutor's justification for the strikes[, i.e., the jurors' show of disgust in reaction to another juror's assertions that he would give a police officer's testimony more credence than that of another witness,] seem[ed] credible under all of the relevant circumstances, including whether the jurors actually exhibited the expressions claimed and whether the averred reactions were the real reasons for the strikes." *Tennille*, 315 Mich App at 62. "The court made no effort to entertain argument from defense counsel regarding whether the [peremptory strikes were] racially motivated despite the prosecutor's articulation of a race-neutral ground," but instead perfunctorily "stated that it 'accepted' the prosecutor's explanation as 'a valid race neutral reason' and denied the challenge[; t]his premature conclusion of the *Batson* inquiry reflects that the trial court misapprehended defense counsel's role in the *Batson* process and overlooked the inalterable need for factual findings." *Tennille*, 315 Mich App at 68. Because "[the] record [did] not permit a conclusion that the prosecutor's stated reason for the strikes was nondiscriminatory," it was necessary to "remand to the trial court for an evidentiary hearing during which the trial court [was required to] conduct the third-step

[*Batson*] analysis it omitted at [the] defendant's trial." *Tennille*, 315 Mich App at 71, 73.

Defense counsel's use of "a peremptory challenge to exclude . . . a pregnant, African-American woman" "was not inherently discriminatory, [and survived] plaintiff's *Batson* challenge" where the "case involved the tragic death of a seven-month-old baby," and "[t]he questions that defense counsel asked during voir dire show[ed] that he was trying to impanel a jury that would put aside emotions when deciding the case." *Carlsen Estate v Southwestern Mich Emergency Servs*, *PC*, 338 Mich App 678, 690, 691, 692 (2021) (defense counsel "asked at least seven potential jurors—male and female—whether they made decisions based more on emotion or on logic"). "Furthermore, defense counsel exercised only two peremptory challenges, both of which were used on jurors who admitted to varying degrees that emotions might affect their deliberations" and "[d]efense counsel's exercise of peremptory strikes [did] not show a pattern of striking jurors on the basis of their gender . . . but on counsel's estimation of whether there were any indications that a juror, for whatever reason, might not view the facts of the case with the level of dispassion desired by the defense." *Id*. at 692.

A prosecutor's use of a peremptory challenge to excuse the only black juror in a jury pool does not automatically constitute a prima facie showing of discrimination or discrimination as a matter of law; rather, "[t]he defendant must offer facts that *at least* give rise to an inference that the prosecutor had a discriminatory purpose for excluding the prospective juror." *People v Armstrong*, 305 Mich App 230, 238-239 (2014) (citing *Johnson v California*, 545 US 162, 168 (2005), and *Knight*, 473 Mich at 336-337, and holding that no constitutional violation occurred where the excused juror had childcare issues which were detailed on the record, and, although no other prospective jurors were excused, none of them "expressed similar issues").

In order to ensure the equal protection rights of individual jurors, a trial court may sua sponte raise a *Batson* issue after observing a prima facie case of purposeful discrimination through the use of peremptory challenges. *People v Bell*, 473 Mich 275, 285-287 (2005).

It is important to note the distinction between a *Batson* error and a denial of a peremptory challenge: a *Batson* error occurs when a juror is actually dismissed on the basis of race or gender, whereas a denial of a peremptory challenge on other grounds amounts to the denial of a statutory or court-rule-based right to exclude a certain number of jurors. *Bell*, 473 Mich at 293. A *Batson* error is of constitutional dimension, and is subject to

automatic reversal, whereas an improper denial of a peremptory challenge is not of constitutional dimension, and is reviewed for a miscarriage of justice if it is preserved, or for plain error affecting substantial rights if it is unpreserved. *Bell*, 473 Mich at 293-295.

E. Removal or Substitution of a Juror at Trial

A trial court has discretion to replace a deliberating juror with an alternate juror. MCR 6.411; *People v Mahone*, 294 Mich App 208, 215-218 (2011) (holding that the trial court did not abuse its discretion in removing a juror during deliberations, and the defendant was not denied a fair trial by the juror's replacement with an alternate juror rather than the granting of a mistrial; the record showed that the removed juror was unable to continue deliberations due to physical and emotional stress, that the alternate juror complied with instructions not to discuss the case or review any media about the case, and that the jury was properly instructed to begin deliberations anew as required by MCR 6.411); *People v Tate*, 244 Mich App 553, 559-560 (2001) (the trial court properly excused a juror who developed a medical condition after deliberations had begun and replaced that juror with a dismissed alternate juror who had not acquired any extraneous information about the case). See also MCL 768.18 ("[s]hould any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors . . . from further service, [the court] may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12").

"[W]hile a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he [or she] has an equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate, a right that is protected by removing a juror unable or unwilling to cooperate." *Tate*, 244 Mich App at 562. "Removal of a juror under Michigan law is therefore at the discretion of the trial court, weighing a defendant's fundamental right to a fair and impartial jury with [the] right to retain the jury originally chosen to decide his [or her] fate." *Id*. Once a juror is replaced, the judge must instruct the reconstituted jury to begin deliberations anew. *Id*. at 567; MCR 6.411.

"[T]o establish good cause for the removal of a juror under MCR 6.411, it must be established that one of the reasons in MCR 2.511(E) exists or that another 'reason recognized by law' exists." *People v Caddell*, 332 Mich App 27, 42 (2020). The reasons set forth in MCR 2.511(E)(2)-(3) are "essentially unrelated to the jury's deliberative process"; "[t]herefore, in order to determine their applicability, a court need not discover the extent of a juror's participation in

deliberations." *Caddell*, 332 Mich App at 42. A trial court "should be more cautious in investigating juror misconduct during deliberations than during trial, and should be exceedingly careful to avoid any disclosure of the content of deliberations. *Id*. at 46 (quotation marks and citation omitted). "Such an investigation may be conducted via careful juror questioning or any other appropriate means." *Id*. "This investigation must be carefully circumscribed to protect the secrecy of deliberations, and to protect the defendant's state constitutional right to a unanimous verdict, but not so limited that it would preclude a fair determination of whether a juror is deliberating as required by law." *Id*. at 47.

See Section 12.14(C) for information on the removal of a juror for refusing to deliberate.

F. Substitution of Judges After Voir Dire

"It is far preferable that a single judge preside over all aspects of a trial." *People v McCline*, 442 Mich 127, 134 (1993). However, if a judge is substituted after voir dire, but before opening statements and the introduction of proofs, automatic reversal is not required; rather, prejudice must be shown to justify reversal. *Id*.

12.6 Oaths or Affirmations

A. Juror Oath Before Voir Dire

M Crim JI 1.4 ("Juror Oath before *Voir Dire*") provides:

> "(1) I will now ask you to stand and swear to answer truthfully, fully, and honestly all the questions that you will be asked about your qualifications to serve as a juror in this case. If you have religious beliefs against taking an oath, you may affirm that you will answer all the questions truthfully, fully, and honestly.
>
> (2) Here is your oath: 'Do you solemnly swear (or affirm) that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case?'"

B. Juror Oath Following Selection

"The following oath shall be administered to the jurors for the trial of all criminal cases: 'You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of

this state; so help you God.'" MCL 768.14. However, "[a]ny juror shall be allowed to make affirmation, substituting the words 'This you do under the pains and penalties of perjury' instead of the words 'so help you God.'" MCL 768.15.

"The word 'oath' shall be construed to include the word 'affirmation' in all cases where by law an affirmation may be substituted for an oath; and in like cases the word 'sworn' shall be construed to include the word 'affirmed.'" MCL 8.3k.

MCR 2.511(I)(1)[17] states:

> "The jury must be sworn by the clerk substantially as follows:
>
> > 'Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.'"

M Crim JI 2.1 ("Juror Oath Following Selection") states:

> "(1) Ladies and gentlemen of the jury, you have been chosen to decide a criminal charge made by the State of Michigan against one of your fellow citizens.
>
> (2) I will now ask you to stand and swear to perform your duty to try the case justly and to reach a true verdict. If your religious beliefs do not permit you to take an oath, you may instead affirm to try the case justly and reach a true verdict.
>
> (3) Here is your oath: 'Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.'"

[17] "Except as otherwise provided by the rules in [Subchapter 6.400 of the Michigan Court Rules], MCR 2.510 and [MCR] 2.511 govern the procedure for selecting and impaneling the jury." MCR 6.412(A).

"[T]he oath is more than a mere laundry list of juratorial duties." *People v Cain*, 498 Mich 108, 121 (2015). "The juror's oath involves a conscious promise to adopt a particular mindset—to approach matters fairly and impartially—and its great virtue is the powerful symbolism and sense of duty it imbues the oath-taker with and casts on the proceedings." *Id*. at 123.

In *Cain*, 498 Mich at 113, the court clerk "mistakenly read [to the empaneled jury] the oath given to prospective jurors before voir dire[]" rather than the oath required by MCR 2.511(I)(1) and MCL 768.14. The Michigan Supreme Court held that the defendant was not entitled to relief on the basis of his unpreserved claim that the trial court administered the wrong juror's oath where, under the particular circumstances of the case, "the trial court's failure to properly swear the jury [did not] seriously affect[] the fairness, integrity, or public reputation of the judicial proceedings[.]" *Cain*, 498 Mich at 112, citing *People v Carines*, 460 Mich 750, 763 (1999). Noting that "the fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis[,]" the Michigan Supreme Court concluded that "the record reveal[ed] that the jurors were conscious of the gravity of the task before them and the manner in which that task was to be carried out, the two primary purposes served by the juror's oath." *Cain*, 498 Mich at 112, 121 (citations omitted). The jurors "stated under oath that they could be fair and impartial, and the trial court thoroughly instructed them on the particulars of their duties[;]" although the oath that was administered "was not a perfect substitute for the oath required by MCR 2.511(I)(1)," the defendant was not entitled to relief based on this unpreserved error because he "was actually ensured a fair and impartial jury[.]" *Cain*, 498 Mich at 123, 126, 128-129 (cautioning courts "to take particular care that the error that occurred in this case be avoided in the future[]").[18]

C. Oath for Bailiff Before Deliberation

MCL 768.16 provides, in relevant part:

[18] In *People v Allan*, 299 Mich App 205, 207, 210-211, 218-219 (2013), overruled in part by *Cain*, 498 Mich at 127-128, the Court of Appeals held that a trial court's failure to comply with its obligation to swear in the jury, as "clearly established" under MCL 768.14, MCR 2.511(I)(1), and MCR 6.412(F), constitutes a plain, structural error that "render[s a] defendant's trial fundamentally unfair[.]"It is unclear whether the remaining portions of *Allan* are binding precedent. For more information on the precedential value of an opinion with negative subsequent history, see our note. The *Cain* Court, however, noted that the Court of Appeals in *Allan* "should have engaged 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 117 n 4, 127 n 7, 128 (declining to decide whether a court's failure to properly swear the jury constitutes "a structural constitutional error," and noting that under *People v Vaughn*, 491 Mich 642, 654 (2012), "*even with regards to a structural error* 'a defendant is not entitled to relief unless he [or she] can establish . . . that the error . . . seriously affected the fairness, integrity, or public reputation of judicial proceedings[]'") (additional citations omitted).

> "When an order shall have been entered by the court in which such action is being tried, directing said jurors to be kept in charge of such officers, the following oath shall be administered by the clerk of the court to said officers: 'You do solemnly swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial from separating from each other; that you will not suffer any communication to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them, orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God.' And thereafter it shall be the duty of the officer so sworn to keep the jury from separating, or from receiving any communication of any character, until they shall have rendered their verdict, except under a special instruction in writing from the trial judge."

D. Oath for Witnesses

"Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience." MRE 603.

MCL 600.1432 governs the mode of administering oaths and makes reference to "[t]he usual mode of administering oaths . . . by the person who swears holding up the right hand[.]" If a witness is opposed to swearing under oath, MCL 600.1434 permits an affirmation of truthful testimony. *Donkers v Kovach*, 277 Mich App 366, 374 (2007). However, neither MCL 600.1434 nor MRE 603 *requires* a witness to raise his or her right hand when swearing or affirming to testify truthfully. *Donkers*, 277 Mich App at 373-374.

"Because the administrations of oaths and affirmations is a purely procedural matter, to the extent MRE 603 conflicts with MCL 600.1432 and MCL 600.1434, MRE 603 prevails over the statutory provisions, meaning that no specific formalities are required of an oath or affirmation[] . . . [and that] oaths need not be prefaced with any particular formal words." *People v Putman*, 309 Mich App 240, 244 (2015) (citing *Donkers*, 277 Mich App at 372-373, and holding that where the trial court asked each witness, including the defendant's own witnesses, if they promised to testify truthfully or some similar variation of that question, and each witness answered in the affirmative, this oath was sufficient to satisfy MRE 603).

E. Oath for Interpreter

An interpreter must be administered an oath or affirmation "to make a true translation." MRE 604. MCL 393.506(1) requires a qualified interpreter for a deaf or deaf-blind person to make an oath or affirmation to make a true interpretation in an understandable manner in the English language to the best of the interpreter's ability. MCR 1.111(G) provides that the court must "administer an oath or affirmation to a foreign language interpreter substantially conforming to the following:

> 'Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God?'" MCR 1.111(G).

Committee Tip:

The above language from MCR 1.111(G) may be used for both foreign language and sign language interpreters.

F. Child Witness

"For a witness who is a [young] child, a promise to tell the truth takes the place of an oath to tell the truth." M Crim JI 5.9 (brackets in original).[19]

12.7 Subpoenas

A. In General

MCL 600.1455(1) authorizes courts of record to issue subpoenas requiring the testimony of witnesses, and MCR 2.506[20] regulates that process. The trial court "may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a

[19] "Every person is competent to be a witness unless: (a)the court finds, after questioning, that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully or understandably; or (b) [the Michigan Court Rules] provide otherwise." MRE 601.

[20] "The provisions of the rules of civil procedure apply to [criminal] cases[,] . . . except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, (3) when a statute or court rule provides a like or different procedure, or (4) with regard to limited appearances and notices of limited appearance." MCR 6.001(D).

date and time certain and from time to time and day to day thereafter until excused by the court, and/or to produce documents, or other portable tangible things." MCR 2.506(A)(1). Subpoenas may be signed by an attorney of record in the action or by the clerk of the court. MCR 2.506(B)(1). The court may enforce its subpoenas using its contempt power, MCR 2.506(E), and is provided other enforcement options by MCR 2.506(F).[21]

"Notwithstanding any other provision of [MCR 2.305], a subpoena issued under [MCR 2.305] may require a party or witness to appear by telephone or by videoconferencing technology. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407." MCR 2.305(F).

An accused in a criminal prosecution has the right "to have compulsory process for obtaining witnesses in his or her favor." Const 1963, art 1, § 20. See also MCL 767.32 and MCL 775.15. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense," which "is a fundamental element of due process of law." *Washington v Texas*, 388 US 14, 19 (1967); see also *People v McFall*, 224 Mich App 403, 407 (1997). A criminal defendant's right to compulsory process, though fundamental, is not absolute. *Id*. at 408. It requires a showing that the witness's testimony would be both material and favorable to the defense. *Id*. Matters of compulsory process, as well as trial continuances to obtain a witness, are decided at the discretion of the trial court. *Id*. at 411.

There are a number of specialized statutes providing for subpoenas in particular situations. See, e.g., the Uniform Interstate Depositions and Discovery Act, MCL 600.2201 *et seq*., permitting a party to "submit a foreign subpoena to the clerk of the circuit court in the county in which discovery is sought to be conducted" in order "[t]o request issuance of a subpoena" in Michigan. MCL 600.2203(1).[22]

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[21] See the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 5, for more information.

[22] See also MCR 2.305(E), providing that "[a] person may request issuance of a subpoena in this state for an action pending in another state or territory under the Uniform Interstate Depositions and Discovery Act, MCL 600.2201 *et seq*., to require a person to attend a deposition, to produce and permit inspection and copying of materials, or to permit inspection of premises under the control of the person." "Notwithstanding any other provision of [MCR 2.305], until further order of the Court, a subpoena issued under [MCR 2.305] may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools." MCR 2.305(F).

B. Subpoena Duces Tecum (Subpoena for Production of Evidence)

The court may require a party or witness to produce documents or other portable tangible things. MCR 2.506(A)(1). A request for documents or tangible things must comply with MCR 2.302(B) and any scheduling order. MCR 2.506(A)(1). MCR 2.506(A)(1) does not apply to discovery subpoenas issued under MCR 2.305 or requests for documents to a party where discovery is available pursuant to MCR 2.310. MCR 2.506(A)(1). A copy of the subpoena must be provided to the opposing party or their counsel. *Id*. See Section 12.7(C) for information on objections to the subpoena.

Subpoenas for hospital medical records are controlled by MCR 2.506(I).

C. Motion to Quash Subpoena

MCR 2.506(H)(1) states that a person served with a subpoena or order to attend under MCR 2.506 may appear and challenge the subpoena. For good cause, the witness may be excused, with or without a hearing. MCR 2.506(H)(3). Otherwise, a subpoenaed person must appear unless excused by the court or the party who had the subpoena issued. MCR 2.506(H)(4). The obligation to produce documents, if timely written objections are served, is stayed pending resolution of a motion to quash. *Id*.

"Any party may move to quash or modify a subpoena by motion under MCR 2.302(C) filed before the time specified in the subpoena, and serve same upon the nonparty, in which case the non-party's obligation to respond is stayed until the motion is resolved." MCR 2.506(H)(5).

12.8 Conducting the Trial[23]

A. Duty of Court to Control Proceedings

"The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court." MCR 2.513(B).[24]

[23] See Section 12.9 for information on jury matters during trial. See the Michigan Judicial Institute's *Evidence Benchbook* for discussion of limitations on evidence.

B. Stipulations

The prosecution retains the burden of proving beyond a reasonable doubt each element of the crime charged, even if the defendant offers to stipulate to any elements of the crime charged. *People v Mills (Vester)*, 450 Mich 61, 69-70 (1995). For example, evidence may be properly admitted on an undisputed point—one to which the defendant has stipulated—if the evidence is necessary to establish intent. *Id.* at 66, 70 n 5, 71, 79-80 (holding that even though the defendants offered to stipulate to the contents of photographs depicting the severity of the burns inflicted on the victim, the trial court properly admitted the photographs because they were necessary to show the defendants' intent to kill and to corroborate the testimony of the prosecution's expert witness and the victim).

C. Opening Statement

"Unless the parties and the court agree otherwise, . . . the prosecutor, before presenting evidence, must make a full and fair statement of the case and the facts . . . the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a similar statement." MCR 2.513(C) (applicable only to jury trials). See also MCR 2.507(A), which is applicable to both jury and nonjury trials (unless waived with the consent of the court and opposing counsel, a party introducing evidence "must make a full and fair statement of that party's case and the facts the party intends to prove[]"). The court may impose reasonable time limits on opening statements and closing arguments. MCR 2.507(F); MCR 2.513(C).

"While [the Michigan Supreme Court] has always conceded to a trial court a liberal discretion in the control and direction of statements and arguments of counsel to the jury, it has as strongly upheld the right of counsel to state their theory of the law as applicable to the facts which they expect to prove." *People v Lee (Lum)*, 258 Mich 618, 621 (1932). In the absence of bad faith or prejudice to the defendant, it is not error when the prosecutor fails to prove the assertions made during opening statements. *People v Wolverton*, 227 Mich App 72, 75-78 (1997).[25]

It is improper for a prosecutor, during opening statement, to appeal to the jury to sympathize with a victim. *People v Watson*, 245 Mich App 572, 591 (2001). However, reversal is not required where the

[24] "The provisions of the rules of civil procedure apply to [criminal] cases[,] . . . except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, (3) when a statute or court rule provides a like or different procedure, or (4) with regard to limited appearances and notices of limited appearance." MCR 6.001(D).

[25] See Section 12.8(H) for discussion of prosecutorial error and attorney misconduct.

prosecutor's conduct is isolated and where the appeal to jury sympathy is not blatant or inflammatory. *Id.* at 591 (additionally noting that "the trial court instructed the jury to not be influenced by sympathy or prejudice[]"). The ultimate determination of whether the prosecutor engaged in improper conduct depends on whether the prosecutor's conduct, taken in context, deprived the defendant of a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645 (2003).

D. Interim Commentary

"Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial." MCR 2.513(D) (applicable only in jury trials).

E. Witness Examination

1. Trial Court's Duty to Exercise Control Over Witnesses

"The court must exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a). "The court must exercise reasonable control over the appearance of parties and witnesses so as to: (1)ensure that the fact-finder can see and assess their demeanor; and (2) ensure their accurate identification." MRE 611(b).

2. Taking Testimony by Use of Videoconferencing Technology[26]

Notwithstanding any other court rule, videoconferencing technology is not permitted to "be used in bench or jury trials, or any proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court after all parties have had notice and an opportunity to be heard on the use of videoconferencing technology." MCR 6.006(B)(4). See also MCR 6.006(C)(3) regarding trials in district court.

[26] For additional discussion of the use of audio and video technology, including confrontation clause issues associated with such technology, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 5. For thorough discussion of confrontation clause and hearsay issues, see the Michigan Judicial Institute's *Evidence Benchbook*.

MCL 600.2164a(1) specifically permits the use of video communication equipment for the purpose of presenting expert testimony at trial. If the court determines "that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony," and if all the parties consent, the court may allow a qualified expert witness "to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place." *Id*.[27]

Additionally, MCL 600.2163a permits the use of videorecorded statements or closed-circuit television in presenting the testimony of child victim-witnesses, victim-witnesses with developmental disabilities, and vulnerable adult victim-witnesses in prosecutions and proceedings involving certain offenses.[28] See MCL 600.2163a(1)(g); MCL 600.2163a(8); MCL 600.2163a(20).[29]

3. Special Protections for Certain Witnesses[30]

MCL 600.2163a affords child victim-witnesses, victim-witnesses with developmental disabilities, and vulnerable adult victim-witnesses special protections in prosecutions and proceedings involving certain offenses. MCL 600.2163a(1)(g).[31] The special protections available under MCL 600.2163a include the use of dolls or mannequins, the presence of a support person, the presence of a courtroom support dog[32] (and the dog's handler), the exclusion of all unnecessary persons from the courtroom, the placement of the defendant as far from the witness stand as is reasonable, the use of a podium, and the use of videorecorded statements or closed-circuit television in presenting the victim-witness's testimony.

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[27] The party wishing to present expert testimony by video communication equipment must file a motion at least seven days before the date set for trial, unless good cause is shown to waive that requirement. MCL 600.2164a(2). The party "initiat[ing] the use of video communication equipment" must pay the cost for its use, unless the court directs otherwise. MCL 600.2164a(3). "A verbatim record of the testimony shall be taken in the same manner as for other testimony." MCL 600.2164a(1).

[28] Section 17b of the Juvenile Code, MCL 712A.17b, affords similar protections, but does not apply to vulnerable adults. See MCL 712A.17b(1)(e).

[29] See also MCL 712A.17b(5); MCL 712A.17b(16).

[30] For additional discussion of special protections for certain victims and witnesses, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 5.

[31] Section 17b of the Juvenile Code, MCL 712A.17b, affords similar protections, but does not apply to vulnerable adults. See MCL 712A.17b(1)(e).

[32] Courtroom support dog "means a dog that has been trained and evaluated as a support dog pursuant to the Assistance Dogs International Standards for guide or service work and that is repurposed and appropriate for providing emotional support to children and adults within the court or legal system or that has performed the duties of a courtroom support dog prior to September 27, 2018." MCL 600.2163a(1)(a).

"[A] notice of intent to use a support person or courtroom support dog is only required if the support person or courtroom support dog is to be utilized during trial and is not required for the use of a support person or courtroom support dog during any other courtroom proceeding." MCL 600.2163a(5). "A notice of intent . . . must be filed with the court and must be served upon all parties to the proceeding," and "[t]he notice must name the support person or courtroom support dog, identify the relationship the support person has with the witness, if applicable, and give notice to all parties that the witness may request that the named support person or courtroom support dog sit with the witness when the witness is called upon to testify during trial." *Id*.

"A court must rule on a motion objecting to the use of a named support person or courtroom support dog before the date when the witness desires to use the support person or courtroom support dog." MCL 600.2163a(5).

"[A] fully abled adult witness may not be accompanied by a support animal or support person while testifying." *People v Shorter (Dakota)*, 324 Mich App 529, 542 (2018).[33]

4. Direct Examination

Unless otherwise ordered by the court, the prosecution must introduce its testimony first. MCR 2.507(B). As long as the prosecutor acts in good faith, he or she should be allowed wide latitude in presenting the case, so that the jurors can grasp the theory and the defendant's connection with the alleged offense. *People v Dye*, 356 Mich 271, 277 (1959).

"Leading questions should not be used on direct examination except as necessary to develop a witness's testimony." MRE 611(d)(1). See, e.g., *Watson*, 245 Mich App at 587 (holding that reversal was not required where the prosecutor asked leading questions of the thirteen-year-old victim only to the extent necessary to develop her testimony).[34]

[33] Note that *Shorter* was decided before 2018 PA 282 was enacted. The Court analyzed former MCL 600.2163a(4) in the context of support persons, which has been amended to also authorize the use of support dogs for certain witnesses. In addition, the Court relied on the definition of *witness* in coming to its conclusion that fully abled adult witnesses are not afforded the special protections under MCL 600.2163a; that definition has not been amended since the *Shorter* decision. Accordingly, although it is ultimately up to the trial court to decide, it does not appear that the 2018 amendments to MCL 600.2163a impact the outcome of the *Shorter* decision.

[34] See Section 12.8(H) for discussion of prosecutorial error and attorney misconduct.

Only one attorney for a party is permitted to examine a witness, unless otherwise ordered by the court. MCR 2.507(C).

"The court may examine a witness regardless of who calls the witness." MRE 614(b). See Section 12.8(F) for more information on judicial questioning.

5. Cross-Examination

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. But the judge may limit cross-examination regarding matters not testified to on direct examination." MRE 611(c). Additionally, under MRE 611(a), the trial court may limit cross-examination to protect a witness from harassment or undue embarrassment. *People v Daniels*, 311 Mich App 257, 268 (2015).

Leading questions are permissible during cross-examination. MRE 611(d)(1)(A).

"[H]ostile cross-examination of a defendant in a criminal prosecution is a function of the prosecuting attorney[,] and . . . a judge before whom a jury case is being tried should avoid any invasion of the prosecutor's role." *People v Cole*, 349 Mich 175, 196 (1957).

"Cross-examination is a powerful legal engine for discovering the truth. But when it repeatedly transgresses well-established boundaries, an improper cross-examination denies a defendant a fair trial." *People v Evans*, 335 Mich App 76, 78-79 (2020). In *Evans*, rather than calling an expert witness, "the prosecutor sought to undermine the opinions of the defense experts through cross-examination." *Id*. at 83. However, the prosecutor's cross-examination of a defense expert witness "crossed the line on multiple occasions," where the prosecutor "likened [the expert] to a cartoon character, accused her of writing her report in crayon, baselessly accused her of withholding evidence, misrepresented her testimony, and badgered her relentlessly." *Id*. at 79 (concluding this behavior denied defendant a fair trial).

Under MRE 611(a), "'a trial court, in certain circumstances, may prohibit a defendant who is exercising his right to self-representation from personally questioning the victim.'" *Daniels*, 311 Mich App at 268 (citation omitted). "MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault[; t]he court must balance the criminal defendant's right to self-representation with 'the State's important interest in protecting

child sexual abuse victims from further trauma.'" *Daniels*, 311 Mich App at 269 (citation omitted). "[T]he trial court wisely and properly prevented defendant from personally cross-examining [his children, regarding their testimony that he sexually abused them,] to stop the children from suffering 'harassment and undue embarrassment,'" following "a motion hearing at which [the court] heard considerable evidence that defendant's personal cross-examination would cause [the children] significant trauma and emotional stress." *Id*. at 270-271, quoting MRE 611(a). The defendant's right to self-representation was not violated under these circumstances where the defendant was instructed "to formulate questions for his [children], which his advisory attorney then used to cross-examine them." *Daniels*, 311 Mich App at 270-271.

6. Redirect Examination

On redirect examination, a witness may explain answers he or she made on cross-examination. *People v Babcock*, 301 Mich 518, 529 (1942).

7. Recross-Examination

On recross examination, the prosecution may inquire into new matters not covered during cross-examination where the new matters are in response to matters introduced during redirect examination. *People v Goddard*, 135 Mich App 128, 138 (1984), rev'd on other grounds 429 Mich 505 (1988).[35]

F. Questions or Comments by Judge - Judicial Impartiality

A trial court is vested with broad discretion over the administration of trial proceedings. *People v Taylor*, 252 Mich App 519, 522 (2002). See also MCL 768.29; MRE 611(a). "The court may examine a witness regardless of who calls the witness." MRE 614(b).

However, "[a] trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality," and "[a] judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *People v Stevens*, 498 Mich 162, 170-171 (2015) (citations omitted).[36] "Invading the prosecutor's role is a clear violation of this

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

tenet." *People v Boshell*, 337 Mich App 322, 347-348 (2021) (multiple times the trial judge in *Boshell* "asked numerous questions of the witness," and "[a]fter the parties followed up with a few questions of their own, the trial judge revisited the topic once again, asking several more questions"). Examples of objectionable conduct by the trial court include volunteering information not in evidence, "campaigning from the bench," and interrupting or making derogatory remarks toward counsel. *People v Conyers*, 194 Mich App 395, 405-406 (1992). "A defendant must overcome a heavy presumption of judicial impartiality when claiming judicial bias." *People v Biddles*, 316 Mich App 148, 152 (2016). "A single instance of misconduct generally does not create an appearance that the trial judge is biased, unless the instance is 'so egregious that it pierces the veil of impartiality.'" *Id.*, quoting *Stevens*, 498 Mich at 171.

The discussion in the following sub-subsections addresses judicial impartiality in the context of a post-trial claim of an unfair and partial trial. For discussion of judicial bias/impartiality in the context of a motion for judicial disqualification, see the Michigan Judicial Institute's *Judicial Disqualification in Michigan* publication.

1. Factors for Consideration

"In evaluating the totality of the circumstances, [a] reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial." *People v Stevens*, 498 Mich 162, 172, 190-191 (2015) (concluding that "it [was] reasonably likely that the judge's conduct with respect to defendant's expert witness improperly influenced the jury by creating the appearance of advocacy or partiality against defendant," and that the judge's curative instruction to the jury "was not enough to overcome the bias the judge exhibited against the defense throughout the trial").

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[36] The *Stevens* Court, noting that "there [was] no clear line of precedent establishing the appropriate test . . . to determine whether a trial judge's conduct pierced the veil of judicial impartiality," rejected earlier formulations of the standard that examined, for example, whether the judge's conduct "'*may well have* unjustifiably aroused suspicion in the mind of the jury as to [the] defendant's credibility,'" "'*may well have* created an atmosphere of prejudice,'" "'*unduly influence[d]* the jury,'" or "'place[d] his [or her] *great influence* on one side or the other[.]'" *Stevens*, 498 Mich at 169-170 (citations omitted). "In order to provide clarity going forward," the *Stevens* Court "propose[d] a new articulation of the appropriate test, grounded in a criminal defendant's right to a fair and impartial jury trial." *Stevens*, 498 Mich at 170.

2. Structural Error

"When the issue is preserved and a reviewing court determines that a judge has pierced the veil of judicial impartiality, a structural error has been established that requires reversing the judgment and remanding the case for a new trial." *People v Stevens*, 498 Mich 162, 178 (2015) (citations omitted). "[J]udicial partiality can never be held to be harmless and, therefore, is never subject to harmless-error review." *Id*. at 179-180 (citations omitted).

3. Analysis of Factors

Nature of Judicial Conduct. "'[I]t is appropriate for a judge to question witnesses to produce fuller and more exact testimony or elicit additional relevant information.'" *People v Swilley*, 504 Mich 350, 372 (2019), quoting *People v Stevens*, 498 Mich 162, 173 (2015). "However, 'undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses . . . may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto[.]'" *Swilley*, 504 Mich at 372, quoting *Stevens*, 498 Mich at 174 (alterations in original).

"[A] judge should not exhibit disbelief of a witness intentionally or unintentionally or permit his own views on disputed issues of fact to become apparent to the jury, [and a] judge should avoid questions that are intimidating, argumentative, or skeptical." *Swilley*, 504 Mich at 372-373 (quotation marks and citation omitted). "[I]t is not the role of the court to impeach a witness or undermine a witness's general credibility." *Id*. at 373. "Questions from a judge that are designed to emphasize or expose incredible, unsubstantiated, or contradictory aspects of a witness's testimony are impermissible." *Id*. at 374 (the trial judge's conduct weighed in favor of finding that he pierced the veil of judicial impartiality where his "questioning of [the witness] did not serve to clarify any of the issues or produce fuller testimony but, instead, served to impeach and to undermine the witness's general credibility").

Tone and Demeanor. "Because of the jury's inclination to follow the slightest indication of bias on the part of the judge, '[t]o ensure an appearance of impartiality, a judge should not only be mindful of the substance of his or her words, but also the manner in which they are said.'" *Swilley*, 504 Mich at 381, quoting *Stevens*, 498 Mich at 175. Controversial manner, tone, pert remarks, and quips should be avoided, and "[a]dversarial cross-examination of a witness by a judge is impermissible."

Swilley, 504 Mich at 381. While "[j]udicial questioning might be more necessary when confronted with a difficult witness who refuses to answer questions or provides unclear answers, . . . judicial intervention is less justified when a witness provides clear, responsive answers, or has done nothing to deserve heated judicial inquiry." *Id*. at 381-382 (the trial judge's repeated use of questions that suggested the witness's actions were illogical or unnatural cast doubt on the witness's truthfulness and indicated the judge was skeptical of the witness; the judge's use of questions to make substantive points and arguments supported a conclusion of judicial partiality).

Context and Scope of Judicial Intervention. "[I]n a long or complicated trial, it may be more appropriate for a judge to intervene a greater number of times than in a shorter or more straightforward trial." *Swilley*, 504 Mich at 386 (quotation marks and citation omitted). "However, the focus is not solely on whether the trial *itself* was long or complicated. . . . [A]n appellate court must consider the scope of the judicial conduct in the context of the length and complexity of the trial, *as well as the complexity of the issues therein*." *Id*. (quotation marks and citation omitted). "[A] judge's inquiries may be more appropriate when a witness testifies about *a topic* that is convoluted, technical, scientific, or otherwise difficult for a jury to understand." *Id*. at 387 (quotation marks and citation omitted; alteration in original). "[W]hen a witness testifies on a clear or straightforward issue, judicial questioning is less warranted, even if the testimony occurs within the context of a lengthy trial, or one that involves other complex but unrelated matters." *Id*. (concluding this factor "support[ed] the conclusion that the [trial] judge pierced the veil of judicial impartiality" when he "intervened extensively and inappropriately" during testimony that "was not technical, convoluted or scientific").

Extent Judicial Conduct was Directed At One Side. "Judicial partiality may be exhibited when an imbalance occurs with respect to *either* the frequency of the intervention *or* the manner of the conduct." *Swilley*, 504 Mich at 388 (quotation marks and citation omitted). "This inquiry is therefore twofold: in order to determine whether judicial questioning was imbalanced, a reviewing court must evaluate *both* the frequency of the questions *and* the manner in which they were asked." *Id*. "[T]o assess whether judicial questioning was imbalanced, [an appellate court does] not simply look at the number of questions but also the nature of those questions." *Id*. ("stark difference[s] between the trial judge's treatment of witnesses on opposing sides of [the] case . . . support[ed] a conclusion of judicial partiality").

Presence of a Curative Instruction. "[A] judge's administration of curative instructions does not always guarantee that a defendant has received an impartial trial; in some instances judicial conduct may so overstep its bounds that no instruction can erase the appearance of partiality." *Swilley*, 504 Mich at 390 (quotation marks and citation omitted) (although the trial judge instructed the jury throughout the trial that he had no interest in the case's outcome, "his lengthy badgering of [witnesses] suggested the opposite," leaving curative instructions "particularly empty").

G. Closing Argument

MCR 2.513(L) (applicable only to jury trials) provides, in relevant part:

> "After the close of all the evidence, the parties may make closing arguments. . . . [T]he prosecutor is entitled to make the first closing argument. If the defendant makes an argument, . . . the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments."

See also MCR 2.507(E)-(F) (applicable to jury and nonjury trials).

Committee Tip:

Many courts give jury instructions before closing argument, because it assists the jury in better understanding the closing arguments of the parties. See MCR 2.513(N)(1) (the trial court, in its discretion and on notice to the parties, may orally instruct the jury before closing arguments).[37]

In a case in which the defendant asserted the affirmative defense of insanity, the trial court's decision to deny the defendant's request to make a surrebuttal argument did not constitute an abuse of discretion because former MCR 6.414(G)[38] "references only the prosecution's ability to make a rebuttal argument[,]" and "the prosecution's burden

[37] See Section 12.12 for discussion of jury instructions.

[38] Effective September 1, 2011, ADM 2005-19 deleted MCR 6.414 and added MCR 2.513(L), which contains language similar to former MCR 6.414(G).

to prove the elements of the crime beyond a reasonable doubt was still greater than [the] defendant's burden to prove insanity by a preponderance of the evidence." *People v Lacalamita*, 286 Mich App 467, 472-473 (2009).

1. Permissible Content of Closing Argument

During closing argument, a prosecutor may argue the evidence admitted at trial and reasonable inferences arising from that evidence. *People v Kelly (Albert)*, 231 Mich App 627, 641 (1998). The prosecutor may not appeal to the sympathy of the jurors or to their sense of civic duty. *People v Abraham (Nathaniel)*, 256 Mich App 265, 273 (2003).[39]

"[P]rosecutorial comment that infringes on a defendant's right not to testify may constitute error." *People v Fields (Carl)*, 450 Mich 94, 115 (1995). Additionally, "[a] prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464 (2010). For the same reason, the prosecutor may not comment on the defendant's failure to present evidence. *Id*. at 464. "However, a prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment[; a] prosecutor may also argue that the evidence was uncontradicted even if the defendant is the only person who could have contradicted the evidence." *Id*. Furthermore, "where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant[; a]lthough a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *Fields (Carl)*, 450 Mich at 115.

The prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, because that type of argument effectively states that defense counsel does not believe his or her own client, which undermines the defendant's presumption of innocence. *People v Unger*, 278 Mich App 210, 236 (2008). See also *People v Schrauben*, 314 Mich App 181, 192-193 (2016), overruled in part on other grounds by *People v Posey*, ___ Mich ___ (2023).[40]

[39] See Section 12.8(H) for discussion of prosecutorial error and attorney misconduct.

"If the defendant makes an argument, . . . the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument." MCR 2.513(L); see also MCR 2.507(E).

2. Defendant's Right to Present a Defense

Where defense counsel, in closing argument, does "not . . . attempt to add new evidence to the trial," but rather makes "a permissible attempt to argue a reasonable inference from the evidence adduced at trial," a "trial court abuse[s] its discretion when it refuse[s] to allow defense counsel" to include this argument. *People v Stokes (Stokes I)*, 312 Mich App 181, 206-207 (2015), vacated in part on other grounds by *People v Stokes (Stokes II)*, 501 Mich 918 (2017)[41] (concluding that "the trial court abused its discretion when it refused to allow defense counsel to specifically argue that [a particular other individual had] . . . committed the crimes," because the argument was reasonably inferable from the evidence). However, "this error [does] not deprive [a defendant] of [the constitutional] right to present a defense" where "[t]he relevant evidence [is] presented to the jury" and counsel's other arguments "clearly impl[y]" the reasonable inference, such that the defendant is "not deprived of a meaningful opportunity to present a complete defense." *Stokes I*, 312 Mich App at 207-208 (citations omitted).

3. Remarks Involving Witness Testimony

The prosecutor is free to argue the evidence and all reasonable inferences from it as it relates to the prosecutor's theory of the case, *People v Schumacher*, 276 Mich App 165, 178-179 (2007), and may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief, *People v Howard (Connell)*, 226 Mich App 528, 548 (1997). However, "[a] prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness." *People v McGhee (Larry A)*, 268 Mich App 600, 630 (2005).[42]

"The prosecutor's characterization of defendant's account of the criminal episode as a lie or a 'story' did not deprive defendant of a fair and impartial trial, nor did it constitute plain error that

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

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

[42] See Section 12.8(H) for discussion of prosecutorial error and attorney misconduct.

affected defendant's substantial rights; . . . the prosecutor's classification of defendant's account of the incident as a lie properly advanced the prosecution's position that defendant's testimony was not credible in light of the contradictory evidence adduced at trial[, and] . . . [t]he prosecutor did not improperly imply that he had special knowledge that defendant fabricated his account of the incident." *People v Steanhouse*, 313 Mich App 1, 33-34 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017)[43] (citation omitted).

Where the complaining witness testified, without prompting, that she was a religious person, and the prosecutor then couched his closing argument in terms of a credibility contest between a person with a "'deep rooted belief in God'" and a person who was a "'liar,'" the defendant's conviction required reversal; the "case hinged on the crucial issue of credibility, which the prosecutor [improperly] urged the jury to resolve on the basis of the complainant's religious beliefs." *People v Leshaj*, 249 Mich App 417, 422 (2002).

A prosecutor may "argue from the evidence presented that an expert witness had a financial motive to testify at trial." *Unger*, 278 Mich App at 236, 239 (holding that the prosecutor was free to argue that defense counsel "had 'bought'" a defense expert's testimony by paying the expert a substantial sum of money). But where a case turns primarily on conflicting expert testimony, a prosecutor should take special steps to avoid misconduct designed to impugn the integrity of defense expert witnesses. *Id.* at 240. In *Unger*, 278 Mich App at 240, the Court found that the prosecutor unnecessarily and impermissibly impugned the integrity of a defense expert witness by arguing that the expert was hired "'to come in with [his] credentials and fool this jury,'" that the expert was hired to provide "'[r]easonable doubt at reasonable prices,'" and that the expert "'did what he was paid to do.'" (Alterations in original.)

"[A]ttacking the credibility of a theory advanced by a defendant does not [improperly] shift the burden of proof." *McGhee (Larry A)*, 268 Mich App at 635.

4. Remarks Involving Defendant's Failure to Testify

The Fifth Amendment prohibits the prosecutor from commenting on a defendant's failure to take the stand. *Griffin v California*, 380 US 609, 615 (1965). The prosecutor also may not,

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

during closing argument, direct questions to the defendant that would require a defendant who did not testify to explain the evidence against him or her. *People v Green (Louis)*, 131 Mich App 232, 234-239 (1983). Such a practice would shift the burden of proof to the defendant and violate the Fifth Amendment protection against self-incrimination. *Id.* at 236-237. However, when a defendant does take the stand, the prosecutor may comment on the validity of the argument without shifting the burden of proof to the defendant. *Fields (Carl)*, 450 Mich at 109-113, 116. Additionally, "a prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment[; a] prosecutor may also argue that the evidence was uncontradicted even if the defendant is the only person who could have contradicted the evidence." *Fyda*, 288 Mich App at 464.[44]

Questioning a defendant about his or her failure to confront his accomplice does not violate the defendant's right to silence. *People v Hackett (William)*, 460 Mich 202, 204-205 (1999).

"'[T]he Fifth Amendment is not violated when a defendant who testifies in his [or her] own defense is impeached with his [or her] prior silence' at his [or her] first trial. *Jenkins*[*v Anderson*, 447 US 231, 235 (1980)], citing *Raffel v United States*, [271 US 494 (1926)]." *People v Clary*, 494 Mich 260, 263-264, 266, 271-272 (2013) (noting that "even though this [type of] silence is . . . post-*Miranda* silence[,] . . . *Raffel* has not been overruled by . . . any . . . United States Supreme Court decision[,]" and holding that where the defendant did not testify at his first trial, which ended in a mistrial, he was not "improperly impeached with his silence when the prosecutor [at the retrial] made repeated references to his failure to testify at his first trial[]").[45]

"[I]f the prosecutor's comments do not burden a defendant's right not to testify, commenting on a defendant's failure to call a witness does not shift the burden of proof." *Fields (Carl)*, 450 Mich at 112. See also *People v Gant*, 48 Mich App 5, 9 (1973) (noting that although the prosecutor may not comment on a defense witness's failure to testify when the witness has invoked the right to remain silent, the prosecutor may "comment upon (1) [the] defendant's failure to call an accomplice or indicted co-defendant and (2) the failure of such witnesses to testify[]").

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[44] See Section 12.8(H) for discussion of prosecutorial error and attorney misconduct.

[45] The defendant's convictions following his second trial were nevertheless reversed because the prosecutor improperly referred to the defendant's post-arrest, post-*Miranda* silence in violation of *Doyle v Ohio*, 426 US 610, 618-619 (1976). *Clary*, 494 Mich at 263. See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3, for discussion of self-incrimination and *Miranda*.

5. Remarks Referring to the Defendant's Pre-Arrest Silence or Conduct

"[T]he prosecutor may not . . . refer to [a] defendant's post-arrest, post-*Miranda*[46] silence with the police[.]" *Clary*, 494 Mich at 271, citing *Doyle v Ohio*, 426 US 610, 618-619 (1976). However, "[a] defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and *before Miranda* warnings have been given[; a] prosecutor may not comment on a defendant's silence in the face of accusation, but may comment on silence that occurred before any police contact." *McGhee (Larry A)*, 268 Mich App at 634 (citation omitted; emphasis added). Furthermore, although "*due process* prohibits prosecutors from pointing to the fact that a defendant was silent after he heard *Miranda* warnings, *Doyle*[, 426 US at 617-618], . . . that rule does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him, *Jenkins*[, 447 US at 240]." *Salinas v Texas*, 570 US 178, 188 n 3 (2013) (plurality opinion).

A criminal suspect generally must "expressly invoke the privilege against self-incrimination in response to [noncustodial police questioning] . . . in order to benefit from it," because "[a] suspect who stands mute has not done enough to put police on notice that he [or she] is relying on his [or her] Fifth Amendment privilege."[47] *Salinas*, 570 US at 181. Accordingly, where "[the] petitioner voluntarily answered the [noncustodial] questions of a police officer who was investigating a murder[, b]ut . . . balked when the officer asked whether a ballistics test would show that the shell casings found at the crime scene would match [the] petitioner's shotgun[,]" the prosecution's argument at trial "that [the petitioner's] reaction to the officer's question suggested that he was guilty[]" did not violate the Fifth Amendment privilege against self-incrimination, because the petitioner had failed to expressly invoke the privilege. *Id*. at 181.

"'[A] prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true.'" *McGhee (Larry A)*, 268 Mich App at 634-635 (citations omitted). See also *People v Gibbs (Phillip)*, 299 Mich App 473, 484 (2013) (the prosecutor's

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[46] *Miranda v Arizona*, 384 US 436 (1966). See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3, for discussion of self-incrimination and *Miranda*.

[47] "[T]wo exceptions [apply] to the requirement that witnesses invoke the privilege[against self-incrimination:] . . . First, . . . a criminal defendant need not take the stand and assert the privilege at his [or her] own trial[, *Griffin v California*, 380 US 609, 613-615 (1965), and] . . . [s]econd, . . . a witness' failure to invoke the privilege must be excused where governmental coercion makes his [or her] forfeiture of the privilege involuntary[, *Miranda*, 384 US at 467-468, 468 n 37]." *Salinas*, 570 US at 184.

comments suggesting that if the defendant's "testimony were true—that his participation in [a] robbery was coerced—he would have called 911 or gone to the police immediately[]" were not improper; the comments "referred to [the defendant's] prearrest silence and, therefore, did not violate his right to remain silent[,]" and "if [the defendant's] version of the events were true[] . . . it would have been natural for him to contact the police[]").

"[A] prosecutor may comment on the inferences that may be drawn from a defendant's flight." *McGhee (Larry A)*, 268 Mich App at 635.

H. Claims of Prosecutorial Error[48] and Attorney Misconduct During Trial

Prosecutors are generally "'accorded great latitude regarding their arguments and conduct.'" *People v Cooper*, 309 Mich App 74, 91 (2015), quoting *People v Bahoda*, 448 Mich 261, 282 (1995). The ultimate determination of whether the prosecutor engaged in improper conduct depends on whether the prosecutor's conduct, taken in context, deprived the defendant of a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645 (2003).

Appeals to sympathy or duty. The prosecutor may not appeal to the sympathy of the jurors or to their sense of civic duty. *People v Abraham*, 256 Mich App 265, 273 (2003); see also *People v Watson*, 245 Mich App 572, 591 (2001). However, reversal is not required where the prosecutor's conduct is isolated and where the appeal to jury sympathy is not blatant or inflammatory. *Id.* (additionally noting that "the trial court instructed the jury to not be influenced by sympathy or prejudice").

Closing arguments. "[P]rosecutors are not permitted to make statements that are unsupported by the evidence." *People v Urbanski*, ___ Mich App ___, ___ (2023). Accordingly, the prosecutor engaged in misconduct by making comments during closing arguments that "were clearly an invitation for the jury to find defendant guilty based on an inference" where "there was no evidence supporting such an argument[.]" *Id.* at ___.

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[48] See *People v Cooper*, 309 Mich App 74, 87-88 (2015), agreeing with the "prosecutor's contention that it is a misnomer to label [these types of] claims . . . as 'prosecutorial misconduct'" and that "the term 'misconduct' is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct." Where "the conduct about which a defendant complains is premised on the contention that the prosecutor made a technical or inadvertent error at trial, . . . [rather than] the kind of conduct that would warrant discipline under [the] code of professional conduct, . . . [the claim] of error might be better and more fairly presented as [a claim] of 'prosecutorial error[.]'" *Id.* at 88.

Comments infringing on defendant's presumption of innocence. The prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, because that type of argument effectively states that defense counsel does not believe his or her own client, which undermines the defendant's presumption of innocence. *People v Unger*, 278 Mich App 210, 236 (2008). In *Unger*, the prosecution exceeded the bounds of proper argument in its initial closing argument, not in response to defense counsel's comments, "when it suggested (1) that defense counsel had attempted to 'confuse the issue[s]' and 'fool the jury' by way of 'tortured questioning,' 'deliberately loaded questions,' and 'a deliberate attempt to mislead,' (2) that defense counsel had attempted to 'confuse' and 'mislead' the jury by using 'red herrings' and 'smoke and mirrors,' and (3) that defense counsel had attempted 'to deter [the jury] from seeing what the real issues'" were. *Id*. at 238. (Alterations in original.) However, because the trial court instructed the jury that the attorneys' arguments were not evidence, and "because a timely objection and curative instruction could have alleviated any prejudicial effect the improper prosecutorial comments may have had, [there was] no error requiring reversal." *Id*. See also *People v Schrauben*, 314 Mich App 181, 192-193 (2016), overruled in part on other grounds by *People v Posey*, ___ Mich ___ (2023)[49] (holding that "the prosecutor's argument that defense counsel is a 'mud slinger' who 'pulls things out of people and muddies up the water' [improperly] suggest[ed] that defense counsel was distracting the jury from the truth and deterring the jury from seeing the real issues[,]" but nevertheless concluding that reversal was not warranted because "the trial court instructed the jury that the attorneys' statements and arguments were not evidence," and "any prejudicial effect created by the improper statements could have been alleviated by a timely objection and curative instruction").

"[I]t is not improper for a prosecutor to comment on the weakness of a defense theory," and "a prosecutor's remarks, which might be improper in his closing statement, may be proper when offered to rebut an argument proffered by the defense in closing." *People v Clark*, 330 Mich App 392, 435 (2019) (the prosecutor's remarks during rebuttal "were proper commentary on the weakness of the defense theory of the case" where the prosecutor "did not denigrate defense counsel or otherwise suggest that defense counsel did not believe her own client" and his remarks "did not amount to commenting that defense counsel was intentionally trying to mislead the jury").

Comments infringing on defendant's right to silence. "[P]rosecutorial comment that infringes on a defendant's right not to testify may constitute error." *People v Fields*, 450 Mich 94, 115 (1995).

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

During the defendant's trial for carjacking, "the prosecutor's remarks during rebuttal closing about what defendant 'might have said' but 'didn't say,' namely, answering the officer's question, 'Where did you get the car from?' [did not] amount[] to an improper comment on defendant's failure to testify." *People v Savage*, 327 Mich App 604, 615 (2019). "[T]he prosecutor's comments were not an improper reference to defendant's decision not to testify at trial, nor were they an improper reference to defendant decision not to answer a police officer's question," because "the prosecutor's argument was directly responsive to defense counsel's argument [that another person could have stolen the car] . . . and it was a commentary on the pattern of defendant's responses to the police officer, which the jury could observe for itself [via video recording], rather than on any invocation of defendant's Fifth Amendment right to remain silent or decision not to testify at trial." *Id*. at 616.

Comments shifting burden of proof. The prosecutor may not imply "that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464 (2010). For the same reason, the prosecutor may not comment on the defendant's failure to present evidence. *Id*. at 464. "However, a prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment[; a] prosecutor may also argue that the evidence was uncontradicted even if the defendant is the only person who could have contradicted the evidence." *Id*. Furthermore, "where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant[; a]lthough a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *Fields*, 450 Mich at 115.

"[T]he prosecutor erred by asking the jury to consider the defendant's 'moral duty' to retreat from his own dwelling in relation to his self-defense claim" because "[a]sking a jury to consider a defendant's 'moral duty' to retreat is inconsistent with the Self-Defense Act,[50] . . . legally irrelevant to such a claim, and creates a danger of confusion of the issues." *People v Adamowicz*, 503 Mich 880, 880 (2018). "The prosecutor also erred by eliciting testimony and presenting argument regarding the defendant's retrospective assessment of his ability to retreat, where it was undisputed that the defendant had no duty to retreat." *Id*. "[T]he prosecutor's questioning and argument in this regard were legally irrelevant and created a danger of confusion of

[50] MCL 780.971 *et seq*.

the issues. See MRE 401; MRE 403." *Adamowicz*, 503 Mich App at 880.[51]

The prosecutor did not improperly shift the burden of proof "by comparing the aiding-and-abetting theory of criminal culpability to teamwork[]" and by "[telling] the jury that it could convict [the defendant] based on a team theory of guilt[.]" *People v Blevins*, 314 Mich App 339, 354-355 (2016). "The prosecutor's references to the way in which all members of a sports team share in the team's victory was obviously a metaphor, . . . [and] the trial court clearly instructed the jury that the arguments of counsel were not evidence." *Id*. at 355.

Cumulative effect of prejudicial comments. "[T]he cumulative effect of an attorney's misconduct at trial may require retrial when the misconduct sought 'to prejudice the jury and divert the jurors' attention from the merits of the case.'" *Yost v Falker*, 301 Mich App 362, 363-367 (2013) (quoting *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978), and holding that although defense counsel "intended to prejudice the jury" through his repeated suggestions during opening statement, cross-examination, and closing argument "that the jury should find for [the] defendant to deter the filing of lawsuits," retrial was not required "because a note sent by the jury to the court during deliberations unequivocally demonstrated that [defense counsel's] efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim").

Improper questioning of an inflammatory nature. The prosecutor engaged in misconduct where, "throughout his cross-examination of [an expert witness], [he] accused [the expert] of being a hypocrite, engaging in deceit, purposely appearing dense, lacking intelligence, and ignoring or hiding evidence to make her opinion [that the defendant was legally insane] more palatable to the jury." *People v Evans*, 335 Mich App 76, 104-105 (2020) (finding that "[a]bsent the prosecutor's brutal and improper cross-examination, there was more than a reasonable likelihood that a reasonable juror would have determined that [the defendant] was legally insane when she murdered her mother").

Opening statement. In the absence of bad faith or prejudice to the defendant, it is not error when the prosecutor fails to prove the assertions made during opening statements. *People v Wolverton*, 227 Mich App 72, 75-78 (1997).

Prosecutor's duty to correct false or misleading testimony. "It is inconsistent with due process when the prosecution allows false

[51]The matter was remanded to the Court of Appeals to determine whether the prosecutorial errors constituted plain error affecting the defendant's substantial rights. *Adamowicz*, 503 Mich at 881.

testimony from a state's witness to stand uncorrected." *People v Smith*, 498 Mich 466, 475 (2015), citing *Napue v Illinois*, 360 US 264, 269 (1959) (additional citations omitted). This duty applies "especially when that testimony conveys to the jury an asserted confession from the defendant." *People v Brown*, 506 Mich 440, 446 (2020). "When credibility is a dominant consideration in ascertaining guilt or innocence, other independent evidence apart from the testimony of the defendant and the victim is particularly vital to the fact-finding process. And false testimony simply undermines the jury's ability to discern the truth in these circumstances." *Id*. at 453. Notwithstanding, "[i]n some cases, a new trial will not be warranted given the sheer strength of the truthful evidence relative to the false testimony." *Id*.

In *Brown*, 506 Mich at 447, the detective, who interviewed defendant regarding the victim's allegations of sexual assault, "asked defendant if the truth was 'somewhere in the middle'" of the victim's allegations and his claim of innocence, to which the defendant gave no verbal or nonverbal response. At trial, the detective "testified that defendant said that the truth . . . was actually 'somewhere in the middle.'" *Id*. "Therefore, the prosecutor elicited false testimony from the detective on direct examination." *Id*. During cross-examination, the detective "never admitted that he was mistaken," and "simply stated that it was 'possible' he was wrong and agreed that his testimony 'could be incorrect.'" *Id*. at 448-449. "Instead of correcting the record and having [the detective] concede that defendant never made any such admission," the prosecutor stated he could rely on the previous testimony and the police report. *Id*. at 449. However, the detective's "testimony on direct and cross-examination was contradictory, and the police report was patently false. Thus, the redirect examination did nothing to correct the record and, indeed, further suggested that the prosecutor believed that [the detective] initially told the truth and that defendant made the admission during the interview." *Id*. at 449-450. "[T]he prosecutor's failure to correct the testimony and instead rely on that testimony in questioning is especially problematic because it reinforced the deception of the use of false testimony and thereby contributed to the deprivation of due process." *Id*. at 450 (cleaned up). The prosecutor's actions "left it to the jury to decide if defendant made self-incriminatory statements during the interview. Leaving this kind of false testimony for the jury to assess on its own is highly prejudicial," and likely "affected the jury's verdict, one ultimately resting on the credibility of the victim and the defendant." *Id*. at 454 (vacating defendant's conviction and remanding for a new trial).

In *Smith*, 498 Mich at 470, "the prosecution breached a duty to correct the substantially misleading, if not false, testimony of a key witness about his formal and compensated cooperation in the government's investigation." The defendant was entitled to a new trial because,

"[g]iven the overall weakness of the evidence against the defendant and the significance of the witness's testimony, . . . there [was] a reasonable probability that the prosecution's exploitation of the substantially misleading testimony affected the verdict." *Id.*, citing *Napue*, 360 US at 271-272. "Due process required that the jury be accurately apprised of the incentives underlying the testimony of this critical witness," and "[c]apitalizing on [the witness]'s testimony that he had no paid involvement in the defendant's case [was] inconsistent with a prosecutor's duty to correct false testimony." *Smith*, 498 Mich at 480, 487, citation omitted. Because "there [was] a 'reasonable likelihood' that the false impression resulting from the prosecutor's exploitation of the testimony affected the judgment of the jury, . . . the defendant [was] entitled to a new trial." *Id.* at 483, quoting *Napue*, 360 US at 271.

See, however, *Schrauben*, 314 Mich App at 187-189, overruled in part on other grounds by *People v Posey*, ___ Mich ___ (2023)[52] (holding that "the trial court did not abuse its discretion by denying [the] defendant's motion for a new trial based on perjury" where, "[e]ven if the prosecutor knowingly presented perjured testimony, the false testimony likely would not have affected the judgment of the jury[;]" although "the inconsistencies [in a key witness's testimony] . . . certainly cast doubt on [the witness's] testimony at trial and raised questions as to his involvement in the [defendant's crimes]," "there was concrete evidence presented which implicated [the] defendant, despite the level of [the witness's] potential involvement").

Vouching or bolstering. "A prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness[.]" *People v McGhee*, 268 Mich App 600, 630 (2005); see also *Cooper*, 309 Mich App at 91; *People v Tomasik*, 498 Mich 953, 953 (2015) (holding that "[t]he trial court abused its discretion by admitting the recording of the defendant's interrogation," and noting that "[i]n a trial in which the evidence essentially presents a 'one-on-one' credibility contest between the complainant and the defendant, the prosecutor cannot improperly introduce statements from the investigating detective that vouch for the veracity of the complainant and indicate that the detective believes the defendant to be guilty").

"The prosecutor may, however, argue from the facts that a witness is worthy of belief." *Clark*, 330 Mich App at 434 (there was no misconduct where "the prosecutor did not imply that he had special knowledge that [the witness] was telling the truth"; [r]ather he argued that [the witness's] testimony was credible because it was

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

corroborated by other evidence, which was a proper argument"). A prosecutor may also "comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455 (2004). For example, in *People v Isrow*, 339 Mich App 522, 528-531 (2021), the prosecutor did not commit misconduct when he noted in his closing argument that testimony from police officers could assist the jury in determining which of the other witnesses' testimony was credible because he did not ask the jury to accept any specific determinations by the police officers regarding other witnesses' credibility.

"The mere disclosure of a plea agreement with a prosecution witness, which includes a provision for truthful testimony, does not constitute improper vouching or bolstering by the prosecutor, provided the prosecutor does not suggest special knowledge of truthfulness." *Cooper*, 309 Mich App at 91.

Standard of review. Issues of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the entire record and evaluate a prosecutor's remarks in context. *People v Dobek*, 274 Mich App 58, 64 (2007). "Prosecutorial arguments are also considered in light of defense arguments." *People v Lawton*, 196 Mich App 341, 353 (1992).

Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Bennett*, 290 Mich App 465, 475 (2010). "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *Id*.

Prosecutorial misconduct may constitute constitutional or nonconstitutional error. *People v Blackmon*, 280 Mich App 253, 269-271 (2008). Whether an error is constitutional or nonconstitutional is a question of law subject to de novo review. *Id*. at 259. "[T]o be constitutional error, [in the absence of an allegation that the misconduct violated a specific constitutional right,] the misconduct must have *so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law*." *Id*. at 269.

If prosecutorial misconduct is preserved and is constitutional in nature, the proper standard of review on direct appeal is the "harmless beyond a reasonable doubt" standard. *Blackmon*, 280 Mich App at 271; see *People v Carines*, 460 Mich 750, 774 (1999). If prosecutorial misconduct is preserved and is nonconstitutional in nature, the proper standard of review on direct appeal is whether "it is more probable than not that the error in question 'undermine[d] the reliability of the verdict,' thereby making the error 'outcome

determinative.'" *Blackmon*, 280 Mich App at 270, quoting *People v Lukity*, 460 Mich 484, 495-496 (1999) (alteration in original).

"'Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error.'" *Cooper*, 309 Mich App at 88 (citation omitted). "A plain error is one that is 'clear or obvious,' and the error must affect the defendant's 'substantial rights.'" *Id.*, quoting *Carines*, 460 Mich at 763. "'Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of [the] defendant's innocence.'" *Cooper*, 309 Mich App at 88-89, quoting *Carines*, 460 Mich at 763 (first alteration in original).

Unfair prejudice produced by prosecutorial comments may be cured by the court's instruction to the jury that counsel's arguments are not evidence. *People v Green*, 228 Mich App 684, 693 (1998); see also *People v Roscoe*, 303 Mich App 633, 649 (2014) (citing *Unger*, 278 Mich App at 235, and holding that although the prosecutor improperly "stated that she had personal knowledge that the government's witness was lying," the "error was not outcome determinative . . . [because, h]ad [the] defendant objected to this instance of prosecutorial misconduct, an immediate curative instruction would have been sufficient to cure the error" and "the jury eventually heard other testimony that the witness was lying").

I. Summation of Evidence by Court

"After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury." MCR 2.513(M) (applicable only to jury trials).

12.9 Issues Affecting the Jury During Trial

A. Reference Document

"The court may authorize or require counsel in . . . criminal cases to provide the jurors with a reference document or notebook, the contents of which should include, but which is not limited to, a list of witnesses, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the preliminary jury

instructions, admitted exhibits, and other admissible information to assist jurors in their deliberations." MCR 2.513(E).[53]

B. Jury Note Taking

MCR 2.513(H) states:

> "The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded."[54]

C. Jury Questions

The court may allow the jury to ask questions of any witness. MCR 2.513(I). "If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions." *Id.* The court must inform the jury "of the procedures to be followed for submitting questions to witnesses." *Id.* See M Crim JI 2.9:

> "(1) During the trial you may think of an important question that would help you understand the facts in this case. You are allowed to ask such questions.
>
> (2) You should wait to ask questions until after a witness has finished testifying and both sides have finished their questioning. If you still have an important question after this, do not ask it yourself. Raise your hand, write the question down, and pass it to the bailiff, who will give it to me. Do not show your question to other jurors.

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[53] "The provisions of the rules of civil procedure apply to [criminal] cases[,] . . . except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, (3) when a statute or court rule provides a like or different procedure, or (4) with regard to limited appearances and notices of limited appearance." MCR 6.001(D).

[54] In civil cases only, the court may allow jurors "to discuss the evidence among themselves in the jury room during trial recesses." MCR 2.513(K). There is no corresponding rule for criminal cases.

> (3) If your question is not asked, it is because I determined under the law that the question should not be asked. Do not speculate about why the question was not asked. In other words, you should draw no conclusions or inferences about the facts of the case, nor should you speculate about what the answer might have been. Also, in considering the evidence you should not give greater weight to testimony merely because it was given in answer to questions submitted by members of the jury.
>
> (4) On the other hand, if you cannot hear what a witness or lawyer says, please raise your hand immediately and ask to have the question or answer repeated."

D. Jury View of Property or Place

"It is within the trial court's discretion to order a jury view of the crime scene." *People v Unger*, 278 Mich App 210, 255 (2008); see also *People v Mallory*, 421 Mich 229, 245 (1984). A crime scene may be viewed despite changed conditions, where the jury has been apprised of the changes. *People v King (Levurn)*, 210 Mich App 425, 432 (1995).

MCL 768.28 states that the court may order a view by the jury "whenever [the] court shall deem such view necessary."[55] MCR 2.513(J) provides:

> "On motion of either party, on its own initiative, or at the request of the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view, provided, however, that in a criminal case, the court may preclude a defendant from attending a jury view in the interests of safety and security. During the view, no person, other than an officer designated by the court, may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion."

Committee Tip:

Take a tape recorder along to the jury view to record any questions that jurors may have.

[55] See also MCR 2.507(D) (applicable to bench trials), which provides that "[o]n application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred." See Section 12.3 for discussion of bench trials.

Additionally, make a record of the jury view after returning to court.

Because the purpose of a jury view is to help the jury understand evidence *already introduced* at trial, a jury view should not be conducted until *after* the relevant evidence has been admitted at trial. *Unger*, 278 Mich App at 256-257 (nevertheless concluding that the defendant failed to establish prejudice resulting from defense counsel's failure to object).

According to MCR 2.513(J), "in a criminal case, the court may preclude a defendant from attending a jury view in the interests of safety and security." However, an accused defendant in custody has the fundamental right to be present at a jury view of the crime scene. *Mallory*, 421 Mich at 245-250; *King (Levurn)*, 210 Mich App at 432-433. A defendant may waive his or her right to be present at a jury view by affirmative consent, by failure to appear at the view when he or she is free to do so, and by disorderly or disruptive conduct at trial precluding continuation of the trial in his or her presence. *Mallory*, 421 Mich at 432-433; *King (Levurn)*, 210 Mich App at 433. Additionally, the trial court has discretion to order the presence of armed guards or the shackling of the defendant while in the presence of the jury at a view. *Mallory*, 421 Mich at 249.

E. Prohibited Jury Actions

The court is required to instruct the jurors regarding certain prohibited actions during the term of jury service. MCR 2.511(I)(2). Specifically, the jurors must not:

> "(a) discuss the case with others, including other jurors, except as otherwise authorized by the court;
>
> (b) read or listen to any news reports about the case;
>
> (c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose information prohibited in [MCR 2.511(I)(2)(d)];
>
> (d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:

(*i*) information about a party, witness, attorney, or court officer;

(*ii*) news accounts of the case;

(*iii*) information collected through juror research on any topics raised or testimony offered by any witness;

(*iv*) information collected through juror research on any other topic the juror might think would be helpful in deciding the case." MCR 2.511(I)(2)(a)-(d).

12.10 Defendant's Conduct and Appearance at Trial

A. Presumption of Innocence

1. Generally

Due process entitles an accused to the presumption of innocence. *In re Winship*, 397 US 358, 364 (1970). The Sixth Amendment guarantees the right to a fair trial, which means that a criminal defendant is entitled to have his or her guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. *Taylor v Kentucky*, 436 US 478, 485 (1978). "[A] criminal defendant generally has the right to appear before the court with the appearance, dignity, and self-respect of a free and innocent [person.]" *People v Payne*, 285 Mich App 181, 187 (2009) (quotation marks and citation omitted).

2. Clothing

The defendant's right to a fair and impartial trial generally requires that the defendant not appear before the jury in jail or prison clothes. *Estelle v Williams*, 425 US 501, 504-505 (1976); *People v Shaw*, 381 Mich 467, 480 (1969) *People v Daniels*, 163 Mich App 703, 710 (1987). The trial court generally has no discretion in this matter, *Shaw*, 381 Mich at 474, and "[a] defendant's timely request to wear civilian clothing must be granted." *People v Harris*, 201 Mich App 147, 151-152 (1993) (noting, however, that an exception is permissible where the defendant's clothing is not recognizable as jail or prison garb). However, "[t]here is no authority . . . that viewing a video in which the defendant is seen in jail garb would so undermine the presumption of innocence

as to violate the constitutional guarantees of due process." *People v Horton*, 341 Mich App 397, 402 (2022) (observing that "the jury briefly saw a video of the defendant wearing jail garb, but only saw him wearing civilian clothing when in person at trial").

3. Handcuffs/Shackles

MCR 6.009 governs the procedure regarding the use of restraints on a criminal defendant in court proceedings that are or could be before a jury.[56] Specifically, MCR 6.009 provides:

> (A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a defendant during a court proceeding that is or could have been before a jury unless the court finds, using record evidence, that the use of restraints is necessary due to one of the following factors:
>
> > (1) Instruments of restraint are necessary to prevent physical harm to the defendant or another person.
> >
> > (2) The defendant has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.
> >
> > (3) There is a founded belief that the defendant presents a substantial risk of flight from the courtroom.
>
> (B) The court's determination that restraints are necessary must be made outside the presence of the jury. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order.
>
> (C) Any restraints used on a defendant in the courtroom must allow the defendant limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a defendant be

[56] MCR 6.009 is applicable to felony, misdemeanors, and juvenile matters through MCR 6.001(A)-(C).

> restrained using fixed restraints to a wall, floor, or furniture.
>
> (D) If the court determines restraints are needed, the court must order restraints that reflect the least restrictive means necessary to maintain the security of the courtroom. A court should consider the visibility of a given restraint and the degree to which it affects an individual's range of movement. A court may consider, but is not limited to considering, participation by video or other electronic means; the presence of court personnel, law enforcement officers, or bailiffs; or unobtrusive stun devices."

Freedom from shackling in the presence of the jury is an important component of a fair trial. *People v Dixon*, 217 Mich App 400, 404 (1996). "[T]he use of shackles at trial 'affront[s]' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" *Deck v Missouri*, 544 US 622, 631 (2005), quoting *Illinois v Allen*, 397 US 337, 344 (1970). Absent a showing of manifest need for restraints, appearing shackled or handcuffed before a jury may adversely affect a defendant's constitutional presumption of innocence, *People v Dunn*, 446 Mich 409, 425 n 26 (1994); interfere with a defendant's ability to communicate with his attorney, *Allen*, 397 US at 344; and interfere with a defendant's ability to participate in his or her own defense (by freely choosing to testify), *Deck*, 544 US at 631.

"[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Deck*, 544 US at 632. A defendant may appear before the jury shackled only on a finding, supported by record evidence, that it is necessary to prevent escape or injury to persons in the courtroom or to maintain order. *Dunn*, 446 Mich at 425. The decision is discretionary with the trial court, and the trial court should consider the totality of the circumstances, including the defendant's background. *Dixon*, 217 Mich App at 404-405. A decision to restrain a defendant may be based on information from the Department of Corrections or a county jail. *Id*. at 405.

"'[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.'" *People v Arthur*, 495 Mich 861, 862 (2013) (quoting *Deck*, 544 US at 629, with added emphasis, and holding that "the trial court did not violate the defendant's due process rights by ordering [him] to

wear leg shackles" in light of his reported escape attempt and his history of physical violence; "the court sought to shield the defendant's leg restraints from the jury's view[, and] . . . no juror actually saw the defendant in shackles"). See also *Mendoza v Berghuis*, 544 F3d 650, 654-656 (CA 6, 2008)[57] (the defendant's due process rights were not violated where his leg restraints were concealed from the jury by "skirting both counsel tables with brown paper for the duration of the trial," and where he was unshackled to testify); *People v Payne*, 285 Mich App 181, 186 (2009) ("even if a trial court abuses its discretion and requires a defendant to wear restraints, the defendant must show that he [or she] suffered prejudice as a result of the restraints to be entitled to relief;"; if the jury was unable to see shackles on the defendant, no prejudice occurs.

A defendant's constitutional rights are not violated when jurors see him or her shackled during transport to or from the courtroom. *Mendoza*, 544 F3d at 655-656. See also *United States v Moreno*, 933 F2d 362, 368 (CA 6, 1991) (discussing the reasonableness of transporting defendants with restraints).

"The trial court did not unconstitutionally 'nullify' the defendant's right to self-representation by declining to remove the defendant's leg shackles." *Arthur*, 495 Mich at 862. "While a defendant's right to self-representation encompasses certain specific core rights, including the right to be heard, to control the organization and content of his [or her] own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at times, the right to self-representation is not unfettered." *Id.*, citing *McKaskle v Wiggins*, 465 US 168, 174, 176-178 (1984). "That the defendant elected to relinquish his right of self-representation rather than exercise that right while seated behind the defense table does not amount to a denial of the defendant's right of self-representation." *Arthur*, 495 Mich at 862 (citation omitted).

The court may also face the question whether it is proper to handcuff or otherwise restrain witnesses. "[T]he propriety of handcuffing or shackling a testifying witness is subject to the same analysis as that for defendants[.]" *People v Banks*, 249 Mich App 247, 256-258 (2002) (holding that the trial court abused its discretion to control trial proceedings and infringed on the defendant's right to a fair trial by ordering an alibi witness to be

[57] Although the decisions of lower federal courts may be followed if considered persuasive, Michigan state courts are not bound by them. *People v Gillam*, 479 Mich 253, 261 (2007).

handcuffed without facts on the record to support the need to restrain the witness).

4. Gagging

"[I]f a defendant is unruly, disruptive, rude, and obstreperous, a trial court is within its discretion to gag a defendant when repeated warnings have been ineffective." *People v Conley* , 270 Mich App 301, 309 (2006) (holding that the defendant was not denied his right to a fair trial when, after he interrupted the court proceedings on several occasions, the trial judge threatened to tape his mouth shut if he continued to make disruptive verbal outbursts).

There are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant: (1) binding and gagging him or her, and thereby keeping the defendant present; (2) holding the defendant in contempt; and (3) removing the defendant from the courtroom until he or she promises to properly conduct him- or herself. *Allen*, 397 US at 343-344. In some situations, binding and gagging might be the most fair and reasonable way to handle a defendant who is disruptive, although these procedures should be used only "as a last resort." *Id.* at 344.

B. Right to Be Present

1. Failure to Appoint Foreign Language Interpreter[58]

The lack of simultaneous translation as provided for in MCL 775.19a may implicate a defendant's rights to due process of law guaranteed by the United States and Michigan Constitutions. *People v Gonzalez-Raymundo*, 308 Mich App 175, 188 (2014), citing US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. "Specifically, a defendant has a right to be present at a trial against him[or her], . . . and a defendant's lack of understanding of the proceedings against him [or her] renders him [or her] effectively absent[;]" furthermore, "lack of simultaneous translation impairs a defendant's right to confront witnesses against him [or her] and participate in his [or her] own defense." *Gonzalez-Raymundo*, 308 Mich App at 188.

[58] See Section 1.7 for discussion of foreign language interpreters.

2. Disruptive Conduct of Defendant

A defendant has the constitutional right to be present at his or her trial, which includes voir dire. US Const, Am VI; Const 1963, art 1, § 20; *Allen*, 397 US at 338; *People v Buie (On Remand) (Buie IV)*, 298 Mich App 50, 56-57 (2012). Michigan law requires that a defendant charged with a felony be present at his or her trial. MCL 768.3. However, neither the constitutional nor the statutory right to be present is absolute. *People v Kruger*, 466 Mich 50, 54 n 9 (2002). When the conduct of the defendant disrupts the administration of justice, the court has the authority to examine the circumstances of the case and take appropriate action. *Id.* at 54. "Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself [or herself] consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Allen*, 397 US at 343.

A trial court's decision to remove a defendant from the courtroom during trial is reviewed for an abuse of discretion. See *Buie IV*, 298 Mich App at 58-59 (holding that the defendant's removal from the courtroom following a single interruption of voir dire was not justified).

Where a competent defendant "defiantly refused to participate in the [judicial] process or to accept any and all services, regularly interrupted the courts with his denunciation of the justice system, made far-fetched claims that had no basis in fact or law, . . . refused to answer questions posed to him by the courts[,] . . . defiantly showed up in inappropriate attire and in [an unnecessary] wheelchair[,] . . . accused the courts of being derelict in their duties, . . . and generally engaged in disrespectful, disorderly, and disruptive behavior[,]" he forfeited his right to be present and was properly excluded from the courtroom during his trial. *People v Kammeraad*, 307 Mich App 98, 100, 120-121 (2014).

3. Defendant's Absence

A defendant may waive his or her right to be present by failing to appear for trial. *People v Woods (Art)*, 172 Mich App 476, 479 (1988). Two elements are necessary for a valid waiver of the right to be present at trial: (1) specific knowledge of the right, and (2) an intentional decision to abandon the right. *Buie IV*, 298 Mich App at 57; *Woods (Art)*, 172 Mich App at 479.

"A defendant's *voluntary* absence from the courtroom after trial has begun waives his [or her] right to be present and does not preclude the trial judge from proceeding with the trial to conclusion." *People v Swan*, 394 Mich 451, 452 (1975). See also

Buie IV, 298 Mich App at 58-59 (the defendant, who "specifically asked to be excused from the courtroom[,]" could not be found to have voluntarily waived his right to be present because "[t]he record [was] silent[] . . . as to whether he was ever specifically apprised of his constitutional right to be present[;]" nor did the defendant waive his right to be present by interrupting voir dire, because his removal following his single interruption of the proceedings was not justified).

4. Standard of Review

The test for determining whether a defendant's absence from a part of a trial requires reversal of his or her conviction is whether there is any reasonable possibility of prejudice. *People v Armstrong (Douglas)*, 212 Mich App 121, 129 (1995); see also *Buie IV*, 298 Mich App at 59-60 (the defendant's absence "for only a short period during voir dire" before he agreed to behave and was allowed to return did not result in any reasonable possibility of prejudice, where the "evidence of [the] defendant's guilt was overwhelming" and he was present for the remainder of trial).

C. Right to Testify

The trial court is not required to advise the defendant that he or she has a right to testify, or to obtain a waiver of that right on the record. *People v Harris (Derrick)*, 190 Mich App 652, 661-662 (1991).

D. Medication

A defendant may have the right to be taken off antipsychotic drugs before testifying unless the court finds that he or she presents a risk to himself or herself, or others. See *Riggins v Nevada*, 504 US 127, 134, 137 (1992) (holding that a defendant has a due process liberty interest in freedom from the involuntary administration of anti-psychotic drugs).

12.11 Directed Verdict

A. Rule[59]

MCR 6.419(A)-(C) provide:

> "(A) Before Submission to the Jury. After the prosecutor has rested the prosecution's case-in-chief or after the

[59] MCR 6.419(D) governs motions for acquittal in bench trials. See Section 12.3(E).

> close of all the evidence, the court on the defendant's motion must direct a verdict of acquittal on any charged offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.
>
> (B) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.
>
> (C) After Jury Verdict. After a jury verdict, the defendant may file an original or renewed motion for directed verdict of acquittal in the same manner as provided by MCR 6.431(A) for filing a motion for a new trial."

A postjudgment motion for a directed verdict must be filed within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and MCR 7.205(A)(2)(b)(*i*)-(*iii*). See MCR 6.419(C); MCR 6.431(A)(3).[60]

B. Test Applied by the Court

A directed verdict of acquittal is appropriate only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Mehall*, 454 Mich 1, 6 (1997). It is impermissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict, no matter how inconsistent or vague that testimony may be. *Id*.

If the court has reserved decision on a motion for directed verdict, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." MCR 6.419(B).

[60] For motions filed after a jury verdict, the motion may be deemed presented for filing on the date it is deposited into the institution's outgoing mail if the appellant is pro se, is incarcerated in prison or jail, and meets the other requirements of MCR 1.112. The motion is deemed timely if deposited on or before the filing deadline. MCR 1.112.

"The 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 and for conditionally granting or denying a motion for a new trial." MCR 6.419(F).

C. Double Jeopardy Implications

When a trial court grants a defendant's motion for a directed verdict of acquittal, the prohibition against double jeopardy generally prevents further action against the defendant based on the same charges. *People v Nix (Terressa)*, 453 Mich 619, 626-627 (1996). "However, the trial court's characterization of its ruling is not dispositive, and what constitutes an 'acquittal' is not controlled by the form of the action." *Mehall*, 454 Mich at 5. Rather, a reviewing court must "determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v Martin Linen Supply Co*, 430 US 564, 571 (1977); see also *Mehall*, 454 Mich at 5. "Retrial is not permitted if the trial court evaluated the evidence and determined that it was *legally insufficient* to sustain a conviction." *Id.* at 6.

"[R]etrial is barred when a trial court grants an acquittal because the prosecution . . . failed to prove an 'element' of the offense that, in actuality, it did not have to prove." *Evans v Michigan*, 568 US 313, 317 (2013). In *Evans*, 568 US at 315, "[w]hen the State of Michigan rested its case at [the defendant's] arson trial, the [trial] court entered a directed verdict of acquittal, based upon its view that the State had not provided sufficient evidence of a particular element of the offense." However, "the unproven 'element' was not actually a required element at all." *Id.* The United States Supreme Court held that "a midtrial acquittal in these circumstances is an acquittal for double jeopardy purposes[.]" *Id.* at 316. Accordingly, the defendant's "trial ended in an acquittal when the trial court ruled the State had failed to produce sufficient evidence of his guilt." *Id.* at 330. "The Double Jeopardy Clause thus bars retrial for his offense and should have barred the State's appeal." *Id.*, reversing *People v Evans*, 491 Mich 1 (2012).[61]

See also MCR 6.419(B), permitting the court to "reserve decision on the motion[for directed verdict] . . . and decide the motion[, on the basis of the evidence at the time the ruling was reserved,] either

[61] On April 5, 2013, the Michigan Supreme Court, "[i]n conformity with the mandate of the Supreme Court of the United States[]" in *Evans*, 568 US 313, entered an order vacating its judgment and opinion in *Evans*, 491 Mich 1, and affirming the judgment of the Wayne County Circuit Court. *People v Evans*, 493 Mich 959, 959-960 (2013).

before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict."[62]

D. Standard of Review

In reviewing a trial court's decision on a motion for a directed verdict, an appellate court reviews the record de novo to determine whether the evidence presented, viewed in the light most favorable to the prosecution, could have persuaded a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122 (2001).

12.12 Jury Instructions

A. Generally

A defendant has a constitutional right to jury instructions that include: (1) the elements of the offense, *United States v Gaudin*, 515 US 506, 510 (1995); (2) any applicable defenses, *Mathews v United States*, 485 US 58, 63 (1988); (3) the requisite intent, *Morissette v United States*, 342 US 246, 274 (1952); and (4) a proper reasonable doubt instruction, *In re Winship*, 397 US 358, 363 (1970). Taken as a whole, the instructions must be accurate and fair. *Estelle v McGuire*, 502 US 62, 72 (1991).

The court is required to instruct the jury on the law applicable to the case. MCL 768.29. "The trial court must instruct the jury not only on all the elements of the charged offense, but also, upon request, on material issues, defenses, and theories that are supported by the evidence. *People v Anstey*, 476 Mich 436, 453 (2006). Instructions for which no supporting evidence exists should not be given. *People v Wess*, 235 Mich App 241, 243 (1999).

MCR 2.512[63] governs instructions to the jury. "At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict." MCR 2.512(B)(1). Additionally, "[b]efore or after arguments or at both times, as the court elects, the court shall instruct the jury on the

[62] "Allowing the court to reserve judgment until after the jury returns a verdict mitigates double jeopardy concerns because 'reversal would result in reinstatement of the jury verdict of guilt, not a new trial.'" Staff Comment to ADM 2010-34, quoting *Evans*, 568 US at 330 n 9.

[63] "The provisions of the rules of civil procedure apply to [criminal] cases[,] . . . except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, (3) when a statute or court rule provides a like or different procedure, or (4) with regard to limited appearances and notices of limited appearance." MCR 6.001(D).

applicable law, the issues presented by the case, and, if a party requests as provided in [MCR 2.512(A)(2)], that party's theory of the case." MCR 2.512(B)(2). See also MCR 2.513(N)(1), which provides, in part, that "[a]fter closing arguments are made or waived, the court must orally instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may orally instruct the jury before the parties make closing arguments." The trial court must "provide a written copy of the final jury instructions to take into the jury room for deliberation." MCR 2.513(N)(3).

The court should be careful to characterize the instructions given as the court's instructions rather than identify them as instructions requested by a party. *People v Hunter (Ralph)*, 370 Mich 262, 267 n * (1963).

B. Model Jury Instructions

The Committee on Model Civil Jury Instructions and the Committee on Model Criminal Jury Instructions are authorized to adopt, amend, and repeal model jury instructions. MCR 2.512(D)(1). Trial courts are required to use the model civil jury instructions and model criminal jury instructions in the manner set out in MCR 2.512(D)(2)-(4), which provides as follows:

> "(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or the Committee on Model Criminal Jury Instructions or a predecessor committee must be given in each action in which jury instructions are given if
>
> > (a) they are applicable,
> >
> > (b) they accurately state the applicable law, and
> >
> > (c) they are requested by a party.
>
> (3) Whenever a committee recommends that no instruction be given on a particular matter, 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 accurately, and
> >
> > (b) the matter is not adequately covered by other pertinent model civil jury instructions.
>
> (4) [MCR 2.512(D)] does not limit the power of the court to give additional instructions on applicable law not

> covered by the model instructions. Additional instructions, when given, must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative."

C. Request for Instructions

MCR 2.512(A) provides:

> "(1) At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.
>
> (2) In addition to requests for instructions submitted under [MCR 2.512(A)(1)], after the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted.
>
> (3) A copy of the requested instructions must be served on the adverse parties in accordance with MCR 2.107.
>
> (4) The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury.
>
> (5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party."

MCR 2.513(N)(1) provides, in relevant part:

> "Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments."

"The Michigan Court Rules do not limit the power of trial courts to give additional instructions on applicable law not covered by the model instructions as long as the additional instructions are concise,

understandable, conversational, unslanted, and nonargumentative, and are patterned as nearly as practicable after the style of the model instructions." *People v Montague*, 338 Mich App 29, 38-39 (2021) (quotation makes and citation omitted).

MCR 2.513(N)(1) gives "the trial court broad authority to carry out its duty to instruct the jury properly, and this authority extends to instructing the jury even during deliberations." *People v Craft*, 325 Mich App 598, 607 (2018). "There is nothing in the court rules that preclude the trial court from supplementing its original instructions . . ., nor is there anything in the rules to suggest that a party's acquiescence to the original instructions [bars] the trial court [from] supplementing its instructions."[64] *Id*. at 607.

D. Preliminary Instructions

MCR 2.513(A) provides:

> "After the jury is sworn and before evidence is taken, the court shall orally provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be orally instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall also provide each juror with a written copy of such instructions. MCR 2.512(D)(2) [(requiring the court to give requested model civil and criminal jury instructions where applicable and accurate)] does not apply to such preliminary instructions."

E. Interim Instructions

"At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict." MCR 2.512(B)(1).

The court must also instruct the jury on the applicable law, issues presented, and, if requested under MCR 2.512(A)(2), a party's theory

[64]See Section 12.12(I) for additional discussion of supplemental instructions.

of the case. MCR 2.512(B)(2). These instructions may be given "[b]efore or after arguments or at both times, as the court elects[.]" *Id.*

F. Final Instructions

"After closing arguments are made or waived, the court must orally instruct the jury as required and appropriate." MCR 2.513(N)(1). Additionally, the trial court has the discretion (after giving notice to the parties) to orally instruct the jury *before* the parties give their closing arguments. *Id.* After deliberations begin, additional instructions may be given as appropriate. *Id.*

Additionally, the court must provide the jury with a written copy of the final instructions to take into the jury room during deliberations. MCR 2.513(N)(3). If a juror requests additional copies of the written instructions, the court may provide them as necessary. MCR 2.513(N)(3). The court also has discretion to provide the jury with a copy of electronically recorded instructions. *Id.*

G. Jurors' Questions About Instructions and Clarifications

Jurors may submit questions about the court's jury instructions. See MCR 2.513(N)(2). As part of its final instructions, the court must "advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations." *Id.* In addition, after orally delivering its final instructions, the court must "invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate." *Id.*

If the jurors have questions, "the court and the parties shall convene, in the courtroom or by other agreed-upon means." MCR 2.513(N)(2). The question must be read aloud on the record, and the attorneys must offer suggestions for an appropriate response. *Id.* The court has discretion whether to provide the jury with a specific response. *Id.* No matter what it decides, the court must respond to all questions asked by the jury, "even if the response consists of a directive for the jury to continue its deliberations." *Id.*

"When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions." MCR 2.513(N)(4). See also *People v Kosik*, 303 Mich App 146, 156 (2013) (a trial court may provide an instruction clarifying an issue that the trial court believes the jurors might question).

"'There is no requirement that when a jury has asked for supplemental instruction on specific areas that the trial judge is

obligated to give all the instructions previously given. The trial judge need only give those instructions specifically asked.'" *People v Katt*, 248 Mich App 282, 311 (2001) (citation omitted).

H. Instructions on Lesser Included Offenses

1. Necessarily Included Offenses

"'Necessarily included' lesser offenses encompass situations in which it is impossible to commit the greater offense without first having committed the lesser." *People v Hendricks*, 446 Mich 435, 443 (1994). In other words, "'[n]ecessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense.'" *People v Nickens*, 470 Mich 622, 626 (2004) (citation omitted). Either party may request instructions on lesser included offenses. *Id.* at 442. "[A] requested instruction on a necessarily included lesser offense is proper if [(1)] the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and [(2)] a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357 (2002); see also *People v Jones*, 497 Mich 155, 163-165 (2014).

MCL 768.32 expressly allows a jury to find a defendant guilty of an inferior degree of an offense. *Hendricks*, 446 Mich at 441-442. MCL 768.32(1) provides:

> "(1) Except as provided in [MCL 768.32(2),[65]] upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense."

"[T]he word 'inferior' in [MCL 768.32(1)] does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense." *People v Torres (On Remand)*, 222 Mich App 411, 419-420 (1997). MCL 768.32(1) permits instructions on only *necessarily* included offenses, not cognate

[65] MCL 768.32(2) addresses indictments for certain controlled substance offenses. See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 1, for more information.

offenses.[66] *People v Reese*, 466 Mich 440, 446 (2002); *Cornell*, 466 Mich at 355-357.

The duty of the trial judge to instruct on lesser included offenses is determined by the evidence. *Torres*, 222 Mich App at 416. If evidence has been presented which would support a conviction of a lesser included offense, refusal to give a requested instruction is error requiring reversal. *Id.* at 416. Even over the objection of counsel, however, a defendant can make a knowing waiver of the right to instructions on lesser included offenses. *People v Jones*, 424 Mich 893, 893 (1986).

Offenses divided into degrees. Where an offense is divided into degrees, MCL 768.32(1) permits finding a defendant guilty of a lesser degree of the charged offense if the lesser degree is an "inferior" offense as defined in *Cornell*, 466 Mich 335. *People v Nyx*, 479 Mich 112, 121, 136 (2007) (plurality opinion). In other words, the lesser degree of the offense must be a necessarily included offense and not a cognate offense of the crime charged. *Id*. (holding that second-degree criminal sexual conduct (CSC-II) is a cognate offense of first-degree criminal sexual conduct (CSC-I) and, therefore, a defendant charged with CSC-I could not properly be convicted of CSC-II under MCL 768.32(1)).

However, "when dealing with degreed offenses that can be committed by alternative methods," "a more narrowly focused evaluation of the statutory elements at issue is necessary[.]" *People v Wilder*, 485 Mich 35, 44 (2010). "Such an evaluation requires examining the charged predicate crime to determine whether the alternative elements of the lesser crime committed are subsumed within the charged offense. As long as the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense. Not all possible statutory alternative elements of the lesser offense need to be subsumed within the elements of the greater offense in order to conclude that the lesser offense is a necessarily included lesser offense." *Id.* at 44-45.

Home invasion offenses. In *Wilder*, 485 Mich at 38, the defendant entered a residence without permission, displayed a weapon, and committed a larceny; he was charged with first-degree home invasion under MCL 750.110a(2) (requiring commission/intent to commit a felony, larceny, or assault in the dwelling), and was convicted of third-degree home invasion under MCL 750.110a(4)(a) (requiring commission/intent to

[66] *Cognate offenses* "are only 'related' or of the same 'class or category' as the greater offense and may contain some elements not found in the greater offense." *Cornell*, 466 Mich at 355. See Section 12.12(H)(2) for discussion of cognate offenses.

commit a misdemeanor in the dwelling). The Michigan Supreme Court instructed that "in order to determine whether the specific elements used to convict [the] defendant of third-degree home invasion in this case constitute a necessarily included lesser offense of first-degree home invasion, one must examine the offense of first-degree home invasion as charged and determine whether the elements of third-degree home invasion as convicted are subsumed within the charged offense." *Wilder*, 485 Mich at 45.

In *Wilder*, 485 Mich at 44, the Court of Appeals erred in concluding that third-degree home invasion in this case was not a necessarily included offense of first-degree home invasion because "it failed to confine its analysis to the elements at issue in this case; rather, it based its decision on an analysis of alternative elements that were not at issue." In reaching its conclusion, the Court of Appeals wrongly "reasoned that if there *could* be any instance in which the underlying misdemeanor is not subsumed within the predicate felony, then the entire crime is a cognate offense." *Id*. The Michigan Supreme Court concluded that in this case, third-degree home invasion under MCL 750.110a(4)(a) based on the commission of misdemeanor larceny is a necessarily included offense of first-degree home invasion, MCL 750.110a(2), because "every felony larceny necessarily includes within it a misdemeanor larceny." *Wilder*, 485 Mich at 46. The remaining alternative elements on which a third-degree home invasion conviction can be based were not relevant to the analysis in this case. *Id*. at 44.

"[E]ither a misdemeanor *or* felony larceny . . . may serve as the predicate offense for second-degree home invasion[, MCL 750.110a(3); c]onsequently, where . . . the predicate offense for [a] home invasion charge [is] a larceny, third-degree home invasion[, MCL 750.110a(4), is] a lesser-included offense of second-degree home invasion." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 422-423 (2015), applying *Wilder*, 485 Mich at 46. However, a trial court errs in giving an instruction on third-degree home invasion where there "is no record evidence that [the] defendant entered [a] home to commit any crime other than a larceny." *Jackson (On Reconsideration)*, 313 Mich App at 423-424 (nevertheless concluding "that the improper jury instruction did not affect [the] defendant's substantial rights" because "the instruction allowed [the] defendant the chance to be convicted of a *lesser* offense than that which the evidence supported").

Larceny and robbery. Larceny from the person, MCL 750.357, is not a necessarily included offense of robbery, MCL 750.530. *People v Smith-Anthony*, 494 Mich 669, 672, 674 n 7, 687 n 53 (2013)

(because, generally,[67] a defendant must take property from the physical person or immediate presence of a victim to commit a larceny from the person, while robbery, under MCL 750.530(2), does not require that the taking have been made in the immediate presence of the victim, the trial court erred in instructing the jury on larceny from the person as a lesser included offense of robbery).

Entering without permission. "[E]ntering without permission[, MCL 750.115,] is not a lesser offense of entering with the intent to commit a larceny[, MCL 750.111]," because "entering without permission contains an additional element—the lack of permission—on which the prosecution would have to prove additional facts that are not necessary for the prosecution to prove entering with intent to commit a larceny." *People v Heft*, 299 Mich App 69, 75-76 (2012). Although the Michigan Supreme Court in *Cornell*, 466 Mich at 360, held that entering without permission is necessarily included in entering with intent to commit larceny, *Cornell* was distinguishable "because it expressly concerned a situation in which the prosecution charged the defendant with 'breaking and entering,' not merely entering." *Heft*, 299 Mich App at 75-76. In contrast, in *Heft*, 299 Mich App at 76-77, "the [defendant's theory] of [the] case [was] inconsistent with entering without permission," and "[t]he prosecution was not required to prove that [the defendant] did not have permission to enter the house to prove entering with intent to commit larceny, but would have been required to prove that [he] did not have permission to enter the house to prove entering without permission."

Assault with intent to commit murder and assault with intent to do great bodily harm less than murder. Assault with intent to do great bodily harm less than murder is a lesser included offense of assault with intent to commit murder; therefore, the trial court properly instructed the jury on both offenses. *People v Brown*, 267 Mich App 141, 150-151 (2005) (holding that the specific intent necessary for the offense of assault with intent to do great bodily harm less than murder was "completely subsumed" by the specific intent necessary for the offense of assault with intent to commit murder).

Possession with intent to deliver controlled substances. Where "the only difference . . . between . . . possession with intent to deliver offenses is the amount of the illegal substance, it [is]

[67] "In rare cases, a taking outside the victim's immediate presence may satisfy the from-the-person element only if a defendant or the defendant's accomplices use force or threats to create distance between a victim and the victim's property." *People v Smith-Anthony*,494 Mich 669, 672-673 (2013). These circumstances were not present in the *Smith-Anthony* case. *Id.* at 673.

not . . . possible to commit the greater offense without committing the lesser offense." *People v McGhee*, 268 Mich App 600, 607 (2005). However, this does not necessarily mean that a trial court must give instructions for all possible amounts if the defendant so requests. *Id*. at 607-608. "[A]n instruction on the lesser offense need only be given if a rational review of the evidence indicates that the element distinguishing the lesser offense from the greater offense is in dispute." *Id*. at 607.

Similarly, simple possession under MCL 333.7403 is a necessarily included offense of possession with intent to deliver a controlled substance under MCL 333.7402 where the offenses involve the same amount of the controlled substance; however, "if the offenses involve differently categorized statutory amounts, possession will be treated as a cognate lesser offense." *People v Robar*, 321 Mich App 106, 130 (2017) (noting that having a valid prescription, the absence of which is not an element of the crime, only exempts a defendant from prosecution for simple possession and does not constitute an exemption to possession with intent to deliver).

Voluntary/involuntary manslaughter and murder. "[B]ecause both voluntary and involuntary manslaughter are necessarily included lesser offenses and inferior to murder under MCL 768.32, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Yeager*, ___ Mich ___, ___ (2023) (quotation marks and citation omitted).

The *Yeager* Court opined that the Court of Appeals "erred to the extent that it concluded that [*People v Raper*, 222 Mich App 475 (1997)] created a bright-line rule under which the absence of a voluntary manslaughter instruction is automatically considered harmless if the jury was instructed on both first- and second-degree murder and convicted the defendant of first-degree murder." *Yeager*, ___ Mich at ___. "[W]hen considering whether a jury should have been instructed on a lesser included offense, appellate courts must consider whether, in light of the proposed defense theory and the factual elements of the relevant offense, the intermediate charge rejected by the jury would necessarily have to indicate a lack of likelihood that the jury would have adopted the lesser requested charge." *Id*. at ___ (quotation marks and citation omitted). "Because the instructions given [by the trial court] did not present to the jury the differing states of mind required for murder and voluntary manslaughter" and "a reasonable jury could have found that defendant acted in the state of mind required for voluntary manslaughter," the *Yeager* Court concluded the "gap in information provided to the jury [was] sufficient to undermine confidence in the outcome of

defendant's trial." *Id.* at ___ (quotation marks and citation omitted).

Involuntary manslaughter and second-degree murder. Statutory involuntary manslaughter is not an inferior offense of second-degree murder because it is possible to commit second-degree murder without first committing involuntary manslaughter. *People v Smith*, 478 Mich 64, 71 (2007). Because statutory involuntary manslaughter requires elements not required to commit second-degree murder (that the death resulted from the discharge of a firearm intentionally pointed at the victim), statutory involuntary manslaughter is not a necessarily included offense of second-degree murder, and denial of a defendant's request for such a jury instruction is proper. *Id.* at 71.

Attempted offenses. It is not error to refuse to instruct the jury on a lesser offense or attempted offense that is unsupported by the evidence. *People v Davis*, 277 Mich App 676, 688-689 (2008), vacated in part on other grounds 482 Mich 978 (2008)[68] (noting that attempted robbery is a necessarily included offense of assault with intent to rob while armed, but holding that the trial court's refusal to instruct the jury on attempted assault with intent to rob was not error because the facts did not support the instruction).

Reckless driving causing death and moving violation causing death. Where a defendant is charged with the greater offense of reckless driving causing death, MCL 257.626(5) precludes an instruction on the misdemeanor lesser offense of moving violation causing death. *People v Jones*, 497 Mich 155, 172 (2014), rev'g 302 Mich App 434 (2013). "MCL 257.626(5) is not a matter of practice and procedure, and, consequently, there [is] no violation of separation of powers simply because a necessarily included lesser offense exists and the Legislature has acted within its constitutional authority by creating a substantive exception that prohibits or otherwise limits the [factfinder's] consideration of that lesser offense." *Jones*, 497 Mich at 169.

2. Cognate Offenses

Cognate offenses are those that share some common elements, and are of the same class or category as the greater offense, but have some additional elements not found in the greater offense. *People v Hendricks*, 446 Mich 435, 443 (1994). The jury should not

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

be instructed on cognate offenses. *People v Cornell*, 466 Mich 335, 357 (2002).

Criminal sexual conduct. Second-degree criminal sexual conduct (CSC-II) is a cognate offense of CSC-I. *People v Nyx*, 479 Mich 112, 121, 136 (2007) (plurality opinion).

Third-degree criminal sexual conduct (CSC-III) is not a necessarily included offense of CSC-I because it is possible to commit CSC-I without first committing CSC-III. *People v Apgar*, 264 Mich App 321, 326-327 (2004), overruled in part on other grounds by *People v White*, 501 Mich 160 (2017).[69] In *Apgar*, the defendant was charged with two counts of CSC-I. After jury selection, the prosecution moved to amend the information to include a charge of CSC-III. *Apgar*, 264 Mich App at 324-325. The trial court denied the motion, but instructed the jury on CSC-III. *Id*. at 325. The jury ultimately convicted the defendant of CSC-III. *Id*. While the trial court improperly instructed the jury on CSC-III because the defendant was not charged with CSC-III and CSC-III is a *cognate* offense of CSC-I, the error did not require reversal because the defendant was provided adequate notice of the uncharged offense (CSC-III) when all elements of the offense were proved, without objection, at the defendant's preliminary examination and trial. *Id*. at 327-329.

Felonious assault, assault with intent to commit murder, and other assault offenses. It was error for the trial court to instruct the jury on the cognate offense of felonious assault where, although the defendant was originally charged with felonious assault, the information was amended to instead charge assault with intent to commit murder. *People v Wheeler*, 480 Mich 965, 965 (2007). Thus, where the defendant was no longer charged with felonious assault, instruction on that offense constituted plain error because felonious assault is a cognate offense of assault with intent to commit murder. *Id*.

Felonious assault (MCL 750.82) is a cognate offense of assault with intent to rob while armed (MCL 750.89), and not a necessarily included offense. *People v Walls*, 265 Mich App 642, 646 (2005). While a conviction for felonious assault requires that the offender possess a dangerous weapon, a conviction for assault with intent to rob while armed may be based on the offender's possession of "any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon." MCL 750.89. Because conviction of

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

felonious assault (lesser offense) requires possession of a dangerous weapon, and conviction of assault with intent to rob while armed (greater offense) does not require possession of a dangerous weapon, it is possible to commit the greater offense without first committing the lesser offense. *Walls*, 265 Mich App at 646.

I. "Objections to the Instructions and Preservation of Error

Failure to give an instruction is not grounds for setting aside the verdict unless it was requested by the defendant. MCL 768.29. A party may object to the giving or the failure to give a jury instruction, "only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations)[.]" MCR 2.512(C). The "only if" language in MCR 2.512(C) "does not act as a bar to proceedings in the trial court, but rather as a restriction on appeal." *People v Craft*, 325 Mich App 598, 605 (2018). Accordingly, "a party can alter its position on the appropriateness of jury instructions [during trial court proceedings] when a question is subsequently raised," and "is not barred from asking for supplemental instructions even if the party . . . earlier acquiesced to the original . . . instructions." *Id*. at 600, 605 (finding the prosecutor did not waive, and was not estopped, from arguing in favor of supplemental instructions after approving the original instructions).[70]

The party must state "specifically the matter to which the party objects and the grounds for the objection." MCR 2.512(C). The court must give the objecting party the opportunity to make the objection outside the hearing of the jury. *Id*.

To preserve an instructional error for appellate review, a defendant must object to the instruction before the jury deliberates. *People v Gonzalez*, 256 Mich App 212, 225 (2003). Failure to make a timely objection to a jury instruction constitutes forfeiture and relief is only warranted if the error was plain and it affected the defendant's substantial rights. *People v Kowalski*, 489 Mich 488, 505-506 (2011); see also *People v Carines*, 460 Mich 750, 763 (1999).

If a party expresses satisfaction with the trial court's instructions, it constitutes a waiver that extinguishes appellate review regarding the instructions. *People v Carter*, 462 Mich 206, 215 (2000). See also *Craft*, *325* Mich App at 605 ("[i]f a party fails to object to the trial court's instructions, then the party has failed to preserve the objection for *appellate* review). Furthermore, where a defendant's attorney "clearly

[70]See Section 12.12(J) for discussion of when supplemental instructions are appropriate.

expresses satisfaction with a trial court's decision [regarding a jury instruction], counsel's action will be deemed to constitute a waiver[]" of the defendant's claim on appeal that a jury instruction was improper. *Kowalski*, 489 Mich at 503-504 ("by expressly and repeatedly approving the jury instructions on the record, [the] defendant waived any objection to the erroneous instructions"). However, where "the only reason defense counsel agreed to submission of the felony-murder charge was his mistaken view of the law that false pretenses could serve as an underlying felony for a felony murder conviction[,]" the defendant did not waive his right to plead guilty; "[t]he nature of the instructional error . . . [rose] to the level of a due process violation," because "[t]he error was not merely one in which the jury received an imprecise definition or in which the trial court omitted an element of the offense for which the evidence was overwhelming[;]" rather, "the instruction directed the jury to convict [the] defendant on the basis of affirmative findings that, by statute, are not grounds on which to convict" and "[the] defendant's trial counsel could not unilaterally waive this issue without [the] defendant's full knowledge and understanding about exactly what he was waiving." *People v Oros*, 320 Mich App 146, 160-161 (2017), overruled in part on other grounds 502 Mich 229 (2018).[71]

J. Instructional Error and Standard of Review

Claims of instructional error are generally reviewed de novo on appeal, but a trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 82 (2007). The trial court's role is to clearly present the case to the jury and to instruct the jury on the applicable law. *Id.* at 82.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *McGhee*, 268 Mich App at 603. Even if somewhat imperfect, jury instructions are not erroneous if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v McLaughlin*, 258 Mich App 635, 668 (2003).

"The verdict form is treated as, essentially, part of the package of jury instructions." *People v Eisen*, 296 Mich App 326, 330, 329-331 (2012) (holding that, although the trial court's oral jury instructions were plainly erroneous in omitting an element of a charged offense, no reversible error occurred because the verdict form reflected the missing element).

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

Under MCL 769.26, the failure to give a requested jury instruction constitutes error that requires reversal only where "'it is more probable than not that the error was outcome determinative.'" *People v Lyles*, 501 Mich 107, 117-118 (2017), quoting *People v Lukity*, 460 Mich 484, 496 (1999). See also *People v Mitchell*, 301 Mich App 282, 288-289 (2013) (citing *People v Cornell*, 466 Mich 335, 365 (2002), and holding that the trial court's abuse of discretion in failing to give a requested instruction on a lesser included offense constituted error requiring reversal where an inquiry sent by the jury during deliberations "strongly suggest[ed] that it wanted to consider, and likely would have convicted [the] defendant of, a lesser charge"); *People v Hawthorne*, 474 Mich 174, 176, 181 (2006) (when a trial judge refuses a defendant's request to deliver an instruction on the defense of accident, a verdict is reversible if the defendant "establishe[s] that the alleged error undermined the reliability of the verdict[]"). In determining whether an error was outcome determinative, "the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *Lyles*, 501 Mich at 118 (quotation marks and citation omitted).

Elements of offense. The omission of an essential element of a criminal jury instruction is an error of constitutional magnitude. *Carines*, 460 Mich at 761. If the defendant preserves the issue at trial, and 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 was harmless beyond a reasonable doubt. *Id.* at 774. See also *Neder v United States*, 527 US 1, 10 (1999) (indicating that failure to instruct a jury on one of several elements may be subject to a harmless-error analysis). If the defendant fails to preserve the issue at trial, review on appeal is for plain error. *Carines*, 460 Mich at 764.

Where an instruction omitted an element of an offense, and "the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings." *Kowalski*, 489 Mich at 506.

However, where a jury instruction "directed the jury to convict defendant on the basis of affirmative findings that, by statute, are not grounds on which to convict," defense counsel's approval of the instruction did not waive the defendant's right to raise the instructional error on appeal; "defendant's trial counsel could not unilaterally waive this issue without defendant's full knowledge and understanding about exactly what he was waiving." *People v Oros*, 320 Mich App 146, 160-161 (2017), overruled in part on other grounds 502 Mich 229 (2018).[72] In *Oros*, 320 Mich App at 159, the defendant was convicted of first degree murder on a felony-murder theory; "[t]he

prosecution presented evidence that the murder occurred during either of two crimes: larceny from a person . . . or use of false pretenses to defraud." The jury was instructed that it could convict on either basis, and the jury verdict form did not require the jury to specify on which theory it relied in convicting the defendant of felony murder *Id*. Defense counsel "expressed his [mistaken] belief that false pretenses could serve as an underlying felony to support a first-degree felony murder conviction, and he affirmatively stated that he had no issue with the jury being [so] instructed." *Id*. at 160. The Court concluded that because "the instruction directed the jury to convict defendant on the basis of affirmative findings that, by statute, are not grounds on which to convict . . . defendant's trial counsel could not unilaterally waive this issue without defendant's full knowledge and understanding about exactly what he was waiving." *Id*. at 160-161 (holding that the evidence to support larceny from a person as the underlying felony for the felony murder charge "falls well short" of the "overwhelming and uncontested" standard applied by the Court in *Kowalski*, 489 Mich at 506).

In the defendant's trial for murder, the trial court's failure to give the defendant's requested instruction regarding evidence of his character for peacefulness did not constitute reversible error where his good-character evidence was "minimal and strongly contradicted by the prosecution's witnesses[; g]iven this and the other evidence implicating [the] defendant in the murder," he "failed to show that the instructional error more likely than not affected the outcome of his trial[.]" *Lyles*, 501 Mich at 112, 126. The Court of Appeals erred by "focusing on the importance of the good-character instruction to [the] defendant's defense strategy instead of evaluating the likelihood of [the] defendant's *prevailing* on that strategy[;]" "[w]hen considering whether the error was harmless, the question is whether the instruction *would have made a difference in the outcome*[,]" which "requires a court to consider not only the relationship between the instruction and [the] defendant's defense strategy, but also the strength of that strategy relative to the proofs as a whole." *Id*. at 118, citing *Lukity*, 460 Mich at 495-496.

"It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt." *People v Duncan*, 462 Mich 47, 48 (2000) (the defendant's two felony-firearm convictions were reversed because the jury was not instructed on any elements of that offense).

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

"[I]f time is not an element of the charged offense, the prosecution need not prove the date and time of the offense beyond a reasonable doubt even though the felony information must identify the date and time of the offense." *People v Miller*, 326 Mich App 719, 727 (2019). In *Miller*, the trial court did not commit error when, during the defendant's trial for identity theft, it instructed the jury that it could find "that the offense occurred within a specific time period" because "the prosecution was not actually required to prove the timing of the offense as an element of the crime of identity theft." *Id*. at 728.

"[T]he trial court did not commit a structural constitutional error, but rather *averted* one" by providing timely supplemental instructions after it received a request for clarification from the jury regarding the unintentional omission of any instruction on two entire counts. *People v Craft*, 325 Mich App 598, 607 (2018) ("[b]efore the jury returns its verdict, the trial court may supplement its instructions in any manner consistent with the accurate determination of the charges"). In *Craft*, "[t]he trial court's decision to reinstruct the jury . . . was reasonably calculated to protect defendant's right to a properly instructed jury while avoiding the time and costs of a new trial." *Id*. at 609.

"[W]hen a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element," a challenge to the sufficiency of the evidence "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." *Musacchio v United States*, 577 US 237, 243 (2016). "If a jury instruction requires the jury to find guilt on the elements of the charged crime, a defendant will have had a 'meaningful opportunity to defend' against the charge[, a]nd if the jury instruction requires the jury to find those elements 'beyond a reasonable doubt,' the defendant has been accorded the procedure that [is] required to protect the presumption of innocence." *Id*. at 243-244 (citations omitted).

Impermissible Theory. "It is improper for a court to give instructions regarding a theory that is not supported by the evidence." *People v Urbanski*, ___ Mich App ___, ___ (2023). A trial court's instructions were clearly improper where "they provided in no uncertain terms that it was permissible to find defendant guilty based on a conclusion that his [blood alcohol content (BAC)] reached 0.08" despite having insufficient evidence "to support this theory."*Id*. at ___. In *Urbanski*, the Court of Appeals concluded "there [was] a reasonable probability that the jury based its verdict on the premise that defendant's BAC decreased after he stopped driving but before the test[.]" *Id*. at ___. "If there is no way to know if the jury chose the impermissible theory then it follows that there is a reasonable probability that the jury did choose the impermissible theory." *Id*. at ___. Accordingly, the *Urbanski* Court held that "there likewise is a reasonable probability that the

outcome of the trial would have been different had the jury not been presented with the impermissible theory." *Id*. at ___.

Reasonable doubt. Jury instructions, when read as a whole, must convey the correct concept of reasonable doubt. *Victor v Nebraska*, 511 US 1, 5, 7, 18, 22 (1994) (approving of instructions defining reasonable doubt as, among other things, "not a mere possible doubt," but one "depending on moral evidence," such that the jurors could not say they felt an abiding conviction, "to a moral certainty," of the truth of the charge; and as a doubt that will not permit an abiding conviction, "to a moral certainty," of the accused's guilt, and an "actual and substantial doubt" that is not excluded by the "strong probabilities of the case").

Affirmative Defense. "[A]n affirmative-defense instruction is not automatic upon request. In order to properly raise the defense, the defendant has the burden of producing some evidence from which the jury can conclude that the essential elements of the defense are present." *People v Leffew*, 508 Mich 625, 644 (2022) (cleaned up). If a defendant puts forward evidence to be entitled to an instruction on an affirmative-defense theory, then it is the prosecution's burden to prove beyond a reasonable doubt that the defense is not valid. *Id*. at 644. In *Leffew*, the defendants testified that they broke into the victim's home in an attempt to rescue the long-term-partner of one defendant's mother, whom they believed was being held against her will. *Id*. at 644-645. The defendants were charged with first-degree and third-degree home invasion, respectively, and one defendant was charged with felonious assault. The Michigan Supreme Court held that the defendants were entitled to a new trial because their defense attorneys failed to request a jury instruction on defense of others. The Court found that the instruction would have provided jurors a framework for acquitting the defendants of the charges because the evidence supported the defense, and the failure to request the instruction was unreasonable, prejudiced the defendants, and constituted ineffective assistance of counsel. *Id*. at 626, 629.

"The sufficiency of the evidence of a defendant's self-defense theory is for the jury to decide under proper instructions." *People v Rajput*, 505 Mich 7, 11 (2020) (quotation marks and citation omitted). "If supported by the evidence, defendant's theory of the case must be given." *Id*. at 10 (quotation marks and citation omitted). "[I]nstructions cannot exclude the theory of self-defense if there is evidence to support it." *Id*. at 11 (quotation marks, alteration, and citation omitted).

Because the act of "pointing—without shooting—a loaded gun" is a threat to use deadly force— "not the *use of* deadly force," the trial court erred when it "instructed [the jury] regarding the use of deadly

force in self-defense or in defense of others" rather than "the use of nondeadly force." *People v Ogilvie*, 341 Mich App 28, 37, 39 (2022). "Had the jury been properly instructed, it would have been asked to resolve . . . whether defendant reasonably believed that pointing his gun at [his neighbor] was necessary to protect himself or his son from the imminent unlawful use of nondeadly force by [his neighbor]." *Id*. at 45. The Court concluded that defendant's trial "was fundamentally tainted by applying the wrong legal principles regarding self-defense and by giving the wrong jury instructions." *Id*. at 45.

The trial court did not err when it "distinguished its willingness to give two standard instructions on self-defense, i.e., M Crim JI 7.15 and [M Crim JI] 7.16, from its unwillingness to give the rebuttable-presumption instruction on self-defense, M Crim JI 7.16a." *People v Thigpen*, ___ Mich App ___, ___ (2023). Because a defendant in a motor vehicle "can rely on the rebuttable presumption only when the individual against whom deadly force is used is unlawfully attempting to remove the defendant from an occupied vehicle against his or her will," the trial court properly deemed M Crim JI 7.16a "inapplicable because the only evidence that the victim was unlawfully attempting to remove defendant from his vehicle consisted of defendant's statement to the police that the victim grabbed at or jiggled the door handle of defendant's vehicle." *Thigpen*, ___ Mich App at ___ (cleaned up).

Omission of Charge. No error results from the omission of a charge in the preliminary-jury instructions where "that error was timely corrected by the trial court in its subsequent instructions and verdict form." *People v Flores*, ___ Mich App ___, ___ (2023) (noting that "the trial court included this charge in the final-jury instructions" and the "verdict form . . . made it clear that the jury was to reach a decision on each charge.")

12.13 Jury Matters During Deliberations

A. Separation or Sequestration of the Jury

Sequestration of a jury is within the trial court's discretion. *People v King*, 215 Mich App 301, 304 (1996); MCL 768.16; M Crim JI 2.15. It is within the trial court's discretion whether to permit jurors to separate after deliberations have started. *People v Nick*, 360 Mich 219, 225 (1960). Where the deliberations are lengthy, it is proper to permit the jury to recess from time to time and to go home at night. *Id*.

B. Communication with the Jury

There are three categories of communication with a deliberating jury. *People v France*, 436 Mich 138, 142-144 (1990). These categories are discussed below. Ex parte communication with a deliberating jury is discouraged. *Id.* at 161. Consistent with MCR 2.513(B), a court must ensure that all case-related communications between the court and the jury are made part of the record.

1. Substantive

"Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an *absence* of prejudice." *France*, 436 Mich at 143.

An example of a substantive communication is where the jury asks the trial court for a further definition of a particular crime, and the trial court provides the jury with a typewritten definition of that crime. *France*, 436 Mich at 144, 146 n 9.

2. Administrative

"Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial. Upon an objection, the burden of persuasion lies with the nonobjecting party to demonstrate that the communication lacked any prejudicial effect." *France*, 436 Mich at 143.

An example of an administrative communication is where the jury asks the trial court for an exhibit or police report, and the trial court responds that because those items were not received in evidence, they are unavailable to the jury. *France*, 436 Mich at 145-146. See also *People v Marshall*, 298 Mich App 607, 624 (2012), vacated in part on other grounds 493 Mich 1020 (2013)[73] (prejudice was not presumed from the absence of a record regarding whether there were any communications between the jury and the trial court concerning four handwritten juror notes

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

that were stapled to the verdict form, where each note referred to an evidentiary matter); *People v Powell*, 303 Mich App 271, 274-276 (2013) (the trial court's instruction that the jury should continue its deliberations until it could reach an agreement was administrative in nature and did not violate the defendant's rights to be present and to have counsel at a critical stage of trial).

3. Housekeeping

"Housekeeping communications are those which occur between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general 'housekeeping' needs that are unrelated in any way to the case being decided. A housekeeping communication carries the presumption of no prejudice. First, there must be an objection to the communication, and then the aggrieved party must make a firm and definite showing which effectively rebuts the presumption of no prejudice." *France*, 436 Mich at 144.

Committee Tip:

In order to effectively respond to written jury questions:

- *Provide jury with envelopes and paper for questions;*
- *Meet with attorneys to see if an agreement can be reached on a response;*
- *Have attorneys review the written response;*
- *When next on the record, describe the question, agreement with counsel, and the response;*
- *Always obtain consent of counsel, on the record, for written, substantive communications with the jury.*

C. Materials in Jury Room and Juror Exposure to Extraneous Evidence

The court *must* allow the jurors to take their notes (if they were permitted to take notes)[74] and final jury instructions[75] into the jury

[74] See Section 12.9(B) for information on jury note taking.

room when retiring to deliberate. MCR 2.513(O); see also MCR 2.513(H). The court *may* allow the jurors to take the reference document (if prepared under MCR 2.513(E)) and any exhibits or writings admitted into evidence into the jury room when retiring to deliberate. MCR 2.513(O).

"Consistent with a defendant's right to a fair and impartial jury, 'jurors may only consider the evidence that is presented to them in open court.'" *People v Stokes*, 312 Mich App 181, 187 (2015), quoting *People v Budzyn*, 456 Mich 77, 88 (1997). A trial court may not provide the jury with evidence that has not been admitted. *People v Davis* , 216 Mich App 47, 57 (1996). "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his [or her] rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Budzyn*, 456 Mich at 88.

To establish that the jury's exposure to extraneous evidence was error requiring reversal, a defendant must prove that the jury was exposed to extraneous influences, and that the extraneous influences created a real and substantial possibility of affecting the jury's verdict (i.e., that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict). *Budzyn*, 456 Mich at 88-89. If the defendant establishes his or her initial burden, the burden shifts to the prosecution to demonstrate that the error was harmless beyond a reasonable doubt, by proving that the extraneous evidence was duplicative of evidence produced at trial, or that the evidence of guilt was overwhelming. *Id.* at 89-90.

The defendant failed to establish "that the jury was subject to any extraneous influence through the use of cell phones" where a juror "testified that jurors, himself included[(for text messaging)], used their cell phones during breaks" but that "he had no personal knowledge for what purposes the other jurors used their cell phones." *People v Garay*, 320 Mich App 29, 41 (2017), rev'd and vacated in part on other grounds 506 Mich 936 (2020).[76]

A juror's statements to other jurors during deliberations "that he knew [a testifying officer] well, that [the officer] was an expert in firearms, and that they could be extremely confident in [the officer's] testimony" did not constitute an extraneous influence on the jury because the statements "were based on [the juror's] own personal knowledge of and experience with the officer," and thus constituted an "[i]nternal matter[][, which] include[s] the general body of

[75] See Section 12.12(F) for information on providing copies of final jury instructions to the jurors.

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

experiences that jurors are understood to bring with them to the jury room." *Garay*, 320 Mich App at 41-42. "While [the juror] should have disclosed his relationship with [the officer] during voir dire, [his] statements did not provide him or the other jurors with any knowledge regarding [the victim's] murder." *Id.* at 42.

The jury's use of a dictionary to define a relevant legal term is error, but is not per se prejudicial. *People v Messenger*, 221 Mich App 171, 175-177 (1997) (holding that the jury's use of a dictionary definition of "premeditation" did not constitute prejudicial error because the relevant jury instructions were substantively identical to the dictionary definition).

A collective reenactment by the jury with a gun as to where the victim was likely sitting and where the gun should have fallen was not a sufficient basis for a new trial because the reenactment was based on trial testimony. *People v Fletcher*, 260 Mich App 531, 541-544 (2004). The Court of Appeals distinguished this conduct from a reenactment or experiment that takes into account "matters extraneous to the trial testimony." *Id.* at 543.

"Assuming arguendo that [a juror's experimental attempt to recreate the crime scene in his own home] constituted an improper extraneous influence on the jury," there was no "real and substantial possibility" that the juror's experiment affected the jury's verdict where the juror did not share the results of his experiment with the other jurors. *People v Stokes (Stokes II)*, 500 Mich 918 (2017).

D. Requests to Review Testimony or Evidence

If, after retiring to deliberate, the jury requests to review any testimony or evidence that has not been allowed into the jury room under MCR 2.513(O), "the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request." MCR 2.513(P). If a court decides to permit the jury to review requested testimony or evidence, it "may make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration." MCR 2.513(P).

"[T]he mere presence of other people in the courtroom while the jury reviewed [video] evidence and then retired back to the jury-deliberation room [was] not enough to create a prejudicial chill" where "[n]othing on [the] record suggests even a remote possibility of a chilling effect on the jurors' deliberations." *People v Flores*, ___ Mich App ___, ___ (2023) (rejecting defendant's argument that "the presence of the judge, lawyers, and others in the courtroom, while the

two videos were replayed, interfered with the jury's ability to deliberate among themselves while watching the videos"). The *Flores* Court observed that (1) "no one outside the jurors themselves entered the jury-deliberation room," (2) "no one in the courtroom communicated with the jurors, other than the trial court's brief explanation about the replaying of the videos," and (3) "there is nothing to suggest that the jurors were somehow barred from taking notes during the replaying of the videos." *Id*. at ___.

If a court decides not to permit the jury to review requested testimony or evidence, it may order the jury to continue deliberating, "as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." MCR 2.513(P).

It may not constitute an abuse of discretion for a trial court to deny a jury's request for a copy of the entire transcript after deliberating for only a short time. *People v Holmes*, 482 Mich 1105, 1105 (2008); *People v McDonald*, 293 Mich App 292, 297 (2011).

12.14 Hung Jury

A. Instructions

Before the jury begins deliberating, the judge should instruct the jury pursuant to M Crim JI 3.11. See *People v Galloway*, 307 Mich App 151, 158 (2014), rev'd in part on other grounds 498 Mich 902 (2015).[77] "When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions." MCR 2.513(N)(4). Upon indication that the jury is deadlocked, the judge should instruct the jury pursuant to M Crim JI 3.12. *Galloway*, 307 Mich App at 159. "The goal of such an instruction is to encourage further deliberations without coercing a verdict." *People v Walker*, 504 Mich 267, 277 (2019). "The relevant question is whether the instruction given could cause a juror to abandon his or her conscientious dissent and defer to the majority solely for the sake of reaching agreement. The inquiry must consider the factual context in which the instruction was given and is conducted on a case-by-case basis." *Id*. at 278 (quotation marks, alteration marks, and citations omitted). Although "not every deviation from M Crim JI 3.12 will be erroneous," *Walker*, 504 Mich at 285, "the safest course to avoid juror coercion is to read the standard jury instructions." *Galloway*, 307 Mich App at 166.

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

Generally, comments made to the jury by the trial court *before* delivering M Crim JI 3.12 that do not represent a substantial departure from the instruction will not require reversal of a defendant's conviction. *People v Rouse (Rouse II)*, 477 Mich 1063, 1063 (2007) (adopting the rationale of the dissenting opinion in *People v Rouse (Rouse I)*, 272 Mich App 665, 675-677 (2006) (opinion by Jansen, J.). In *Rouse I*, the judge's extraneous comments included reference to the fact that if the jury was unable to reach a verdict, the defendant would have to be retried and all involved would be required to "'go[] through this entire process again with another jury.'" *People v Rouse (Rouse I)*, 272 Mich App 665, 667 (2006) (opinion of the Court). The Court of Appeals majority concluded that the trial court's comments constituted a coercive supplemental instruction. *Id.* at 672-673. The Michigan Supreme Court reversed "for the reasons stated in the Court of Appeals dissenting opinion[.]" *Rouse II*, 477 Mich at 1063. In concluding that the trial court's comments did *not* represent a substantial departure from the standard instruction, the dissenting judge stated:

> "Before reading [M Crim JI 3.12] to the jury, the trial court advised the jury that if it did not reach a verdict, a new trial would be required. However, immediately thereafter, the trial court emphasized that no juror should change his or her honest beliefs simply for the sake of reaching a verdict. The trial court then read [M Crim JI 3.12], which also cautions that a juror should not relinquish his or her honest beliefs simply to reach a verdict. Contrary to defendant's assertion, the jury did not return its verdict shortly after hearing these instructions. Instead, the jury deliberated for approximately five more hours. During this time span, the jury responded to an inquiry from the trial court by indicating that it wished to continue deliberating.
>
> The trial court's remarks did not appeal to the jury's sense of civic duty and did not suggest a failure of purpose. Nor did the trial court's remarks coerce the jurors by informing them that they were *required* to reach a verdict. Quite simply, the trial court's statement that another trial would be necessary if the jury could not reach a verdict did not suggest that the jury should take a different approach to its deliberations. Accordingly, the remarks did not constitute a substantial departure from the instruction mandated by [*People v Sullivan*, 392 Mich 324, 341-342 (1974)]." *Rouse I*, 272 Mich App at 676-677 (citation omitted).

However, reversal was required in *Walker*, where after the jury indicated it was deadlocked slightly more than an hour after it began

deliberating, the trial court repeatedly informed the jury "that's not the way this works," and suggested that the jury should send a note "if there's someone among you who's failing to follow the instructions or there's someone who's refusing to participate in the process[.]" *Walker*, 504 Mich at 274. The jurors were then released for lunch, after which, a guilty verdict was returned approximately 90 minutes later. *Id*. at 274-275, 283 (the "quick turnaround in arriving at a guilty verdict after the trial court's supplemental instruction had been given suggests coercion"). "Furthermore, earlier that day, the trial court had made clear to the jury that dissent would not be tolerated and that public humiliation would be the consequence for anyone who stepped out of line." *Id*. at 283 (a late arriving juror was placed in a spot reserved for in-custody defendants during the completion of the prosecutor's case after the trial court had advised the other jurors that "bad things might happen" upon the late juror's arrival). "[T]aken together, the omission of constructive guidance to the jury on how to deliberate, the omission of an honest-conviction reminder, the addition of coercive language suggesting that jurors single out other jurors for refusing to deliberate when there was no indication that a juror had refused to deliberate, and the trial court's conduct throughout the proceedings telegraphed that failing to reach a verdict would not be tolerated; thus, the instruction was unduly coercive." *Id*. at 284-285. "[T]he instruction . . . impermissibly coerc[ed] jurors to surrender their honestly held beliefs for the sake of reaching a verdict," constituting reversible error. *Id*. at 272, 285 (noting that "not every deviation from M Crim JI 3.12 will be erroneous").

If it appears the jury is unable to reach a verdict after having been given M Crim JI 3.12, the court should have the jury return and then question the foreperson on the record to determine whether it appears that it is impossible for the jury to reach a verdict; the trial court should not ask how the jury's voting stands. *People v Hickey*, 103 Mich App 350, 353 (1981); see also *People v Wilson*, 390 Mich 689, 692 (1973).

Committee Tip:

Possible questions include:

- *Is the jury deadlocked?*
- *How long has it been deadlocked?*
- *Has there been any change in the voting one way or the other?*
- *Do the jurors appear to have fundamental differences that cannot be resolved?*

• Also, ask counsel if they wish to inquire of the foreperson.

B. Discharge of Hung Jury and Mistrial[78]

The court may declare a mistrial and discharge the jury "after determining that the jury is deadlocked or that some other manifest necessity exists[.]" MCR 6.420(D). "Before ordering a mistrial, the court must, on the record, give each defendant and the prosecutor an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." MCR 6.417.

If the jury is discharged, the court may order a new trial before a new jury. MCR 2.514(C). "The decision to declare a mistrial after a finding of manifest necessity because of a deadlocked jury is entrusted to the '"sound discretion of the trial court."'" *People v Ackah-Essien*, 311 Mich App 13, 31 (2015), quoting *People v Lett*, 466 Mich 206, 216-217 (2002), aff'd sub nom *Renico v Lett*, 559 US 766 (2010) (additional citation omitted).

"[A] trial court, before declaring a mistrial because of a hung jury, [is not required] to consider any particular means of breaking the impasse[or] to consider giving the jury new options for a verdict." *Blueford v Arkansas*, 566 US 599, 609 (2012), citing *Renico*, 559 US at 773-774. *Blueford* was decided before MCR 6.417 was adopted; it is unclear whether the court rule provides heightened protections for the defendant in this regard.

Committee Tip:

If the trial court decides to declare a mistrial, explain to the jury on the record that the declaration of a mistrial is discretionary with the court, and that the court is exercising its discretion in light of the information received regarding the state of the jury deliberations.

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[78] See Section 12.17 for discussion of mistrial and the double jeopardy implications of declaring a mistrial.

C. Refusal of Juror to Deliberate

"A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views." *People v Caddell*, 332 Mich App 27, 48 (2020) (quotation marks and citation omitted). Examples of circumstances that do not constitute a refusal to deliberate and are not grounds for discharge include a juror who does not deliberate well; relies on faulty logic or analysis; or disagrees with the majority regarding what the evidence shows, how the law should be applied to the facts, or how deliberations should be conducted. *Id*. "A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." *Id*. (quotation marks and citation omitted).

"[W]hen a refusal to deliberate is first presented to the court, generally a court should first reinstruct the jury on any necessary issue, such as the jurors' duties or what it means to be deadlocked." *Caddell*, 332 Mich App at 46 n 8. If an assertion that a juror refuses to deliberate is not resolved following additional instruction, the trial court should conduct a "limited investigation" focusing "on the conduct of the jurors and the *process* of deliberations, rather than the *content* of discussions." *Id*. at 47-48 (quotation marks and citation omitted). The inquiry "should reflect an attempt to gain a balanced picture of the situation; it may be necessary to question the complaining juror or jurors, the accused juror, *and* all or some of the other members of the jury." *Id*. at 48 (quotation marks and citation omitted). "Finally, after conducting this limited investigation, the court must determine whether the juror is actually engaging in misconduct by refusing to deliberate." *Id*.

"[W]hen . . . a juror specifically indicates that he or she is engaging in some form of exchange with fellow jurors, and there is other evidence to support that possibility, a trial court should deem that sufficient to keep the juror on the panel so as to avoid a reasonable possibility that the juror is being removed for his or her views on the merits of the case presented by the government." *Caddell*, 332 Mich App at 55. "By erring on the side that a juror is properly following the trial court's instructions on how to deliberate, [courts] can best preserve the state constitutional right to a unanimous jury and avoid any unnecessary intrusion into private jury deliberations." *Id*. However, it would be proper for a court to remove a juror if the juror "admitted to (1) making her mind up before deliberations and (2) refusing to participate in discussions from the start of deliberations[.]" *Id*. at 56.

In *Caddell*, 332 Mich App at 52-54, 56, the actions of the removed juror "did not rise to the level of refusing to deliberate," and defendant "was deprived of his state constitutional right to a unanimous verdict, a plain error affecting his substantial rights" that required a new trial where "the record evidence establishe[d] a reasonable probability that what led to the multiple notes from the jury, and what put the issue of [the juror's] removal before the judge, was her view on the merits of the case and her status as the holdout juror" ("the trial court crossed the threshold into the deliberative process by discharging a reluctant juror who repeatedly said that she was minimally cooperating," that "she had not entered deliberations with her mind made up, and that she was focusing on the reasonable doubt standard"; such statements indicated the juror "was deliberating, . . . understood her obligations, and . . . was attempting to fulfill them").

D. Multiple Defendants

"If two or more defendants are jointly on trial, the jury at any time during its deliberations may return a verdict with respect to any defendant as to whom it has agreed." MCR 6.420(B). However, "[i]f the jury cannot reach a verdict with respect to any other defendant, the court may declare a mistrial as to that defendant. *Id*.

E. Multiple Charges—Verdict on One or More Counts But Not All

Where a defendant is charged with multiple counts and the jury reaches a unanimous verdict on any of the counts, the court may accept the jury's verdict with regard to that count or those counts, even if the jury is unable to reach a unanimous verdict on all counts charged against the defendant. Specifically, MCR 6.420(C) states:

> "If a defendant is charged with two or more counts, and the court determines that the jury is deadlocked so that a mistrial must be declared, the court may inquire of the jury whether it has reached a unanimous verdict on any of the counts charged, and, if so, may accept the jury's verdict on that count or counts."

Where a jury, before returning to deliberations, verbally reported that it had voted unanimously against guilt on two charges, was deadlocked on one lesser charge, and had not yet considered a fourth lesser charge, the jury's announcement did not constitute an acquittal of the greater charges, and retrial on all four charges was not barred after the trial court eventually declared a mistrial because the jury remained hopelessly deadlocked. *Blueford*, 566 US at 601, 610. Although the jury was instructed to consider the offenses in order, from greater to lesser, and to proceed to each lesser offense only after

agreeing that the defendant was not guilty of the greater offenses, "the foreperson's announcement of the jury's unanimous votes on capital and first-degree murder [did not] represent[] . . . a resolution of some or all of the elements of those offenses in [the defendant's] favor." *Id*. at 606. "The foreperson's report was not a final resolution of anything[,] . . . [and t]he jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report[;]" because it was possible for the "jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes[,] . . . the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses[.]" *Id*. at 606, 608.

F. Standard of Review

A trial court's declaration of a mistrial on the basis that the jury is unable to reach a unanimous verdict is reviewed for an abuse of discretion. *Lett*, 466 Mich at 208.

12.15 Verdict

A. Unanimity Requirement and Alternate Theories of the Offense

"The text and structure of the Constitution clearly suggest that the term 'trial by impartial jury'" [found in the Sixth Amendment] requires that "[a] jury must reach a unanimous verdict in order to convict." *Ramos v Louisiana*, 590 US ___, ___ (2020). See also MCR 6.410(B). "This mandate implicitly prohibits a stipulation or waiver to a less than unanimous verdict." 1989 Staff Comment to MCR 6.410.

When the prosecution "offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." *People v Cooks*, 446 Mich 503, 530 (1994). "When neither of these factors is present . . . a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of his [or her] right to a unanimous verdict." *Id*.

"[A]lternate theories of a defendant's state of mind relate to a single element of a single offense." *People v Johnson*, 187 Mich App 621, 629 (1991). "When a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the

alternate theory." *Id.* at 629-630. For example, the mental state of malice necessary to support a conviction for second-degree murder may be established in three ways: (1) by proof that the defendant acted with an intent to kill; (2) by proof that the defendant acted with an intent to inflict great bodily harm; or (3) by proof that the defendant acted with wanton and willful disregard of the likelihood that the natural tendency of his behavior would cause death or great bodily harm. *Id.* at 629. Where the trial court instructed the jurors that it was unnecessary that they unanimously agree on *which* of those three alternative states of mind the defendant held so long as they unanimously agreed that the defendant acted with *one* of those states of mind, the defendant's right to a unanimous verdict was not violated. *Id.* at 629-630.

Similarly, where the defendant was charged with unlawful imprisonment and the jury was given the option to convict "on the basis of either [the] defendant's restraint of the victim by means of a weapon or dangerous instrument, [MCL 750.349b(1)(a),] or on [the] defendant's restraint of the victim in order to facilitate the commission of another felony, [MCL 750.349b(1)(c),]" a specific unanimity instruction was not required because MCL 750.349b "expressly provides alternative theories under which a defendant may be convicted." *People v Chelmicki*, 305 Mich App 58, 67-68 (2014), citing *Cooks*, 446 Mich at 515, and *Johnson*, 187 Mich App at 629-630.

Bodily injury, mental anguish, and the other conditions listed in the definition of *personal injury*, MCL 750.520a(n),[79] are merely different ways of defining the single element of personal injury for the crime of first-degree criminal sexual conduct; therefore, these listed conditions should not be construed to represent alternative theories upon which jury unanimity is required. *People v Asevedo*, 217 Mich App 393, 397 (1996). Accordingly, if the evidence of any one of the listed conditions is sufficient, then the element of personal injury has been proven. *Id.* at 397.

The jury does not have to unanimously decide whether the defendant was the principal or an aider and abettor where both theories are supported by the evidence. *People v Smielewski*, 235 Mich App 196, 201-203 (1999).

B. Inconsistent and Mutually Exclusive Verdicts

"[C]onsistency in jury verdicts is not necessary." *People v Russell*, 297 Mich App 707, 722 (2012), citing *People v Vaughn*, 409 Mich 463, 465-467 (1980); see also *Dunn v United States*, 284 US 390, 393 (1932). "Each

[79] Formerly MCL 750.520a(j).

count in an indictment is regarded as if it was a separate indictment." *Dunn*, 284 US at 393. "Verdicts are considered inconsistent when the verdicts cannot rationally be reconciled. Inconsistent verdicts within a single jury trial are permissible, and do not require reversal absent a showing of confusion by the jury, a misunderstanding of the instructions, or impermissible compromises. The burden is on the defendant to prove evidence of one of these three things. The defendant may not merely rely on the alleged inconsistency itself to support such an argument." *People v Montague*, 338 Mich App 29, 51 (2021) (quotation marks and citations omitted). "[A]n apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts [does not] affect[] the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment." *Yeager v United States*, 557 US 110, 112 (2009).

"Juries are not held to any rules of logic nor are they required to explain their decisions." *Vaughn*, 409 Mich at 466. "The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power." *Id*. "An element of this power is the jury's capacity for leniency." *Id*. Conversely, "a trial judge sitting as the trier of fact may *not* enter an inconsistent verdict." *People v Walker*, 461 Mich 908, 908 (1999).

Generally, an inconsistent verdict arises in a situation where the jury acquits the defendant of one charge and convicts him or her of another even though the acquittal on one charge renders it impossible for the jury to have found the existence of all the elements of the charge on which it convicts; for example, where a defendant is acquitted of an underlying felony charge but convicted of felony-firearm. *People v Davis*, 320 Mich App 484, 491 (2017) (noting that "[i]n these circumstances, it is easily surmised that the jury did its job but acted leniently"), vacated in part on other grounds 503 Mich 984 (2019)[80].

While the Michigan Supreme Court indicated that it is unclear if Michigan "jurisprudence recognizes the principle of mutually exclusive verdicts," see *People v Williams* 504 Mich 892 (2019),[81] the Michigan Court of Appeals has held that felonious assault, MCL 750.82, and assault with intent to do great bodily harm (AWIGBH) less than murder, MCL 750.84(1)(a) are mutually exclusive verdicts

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

[81] Note that the Michigan Supreme Court has granted leave to appeal in *People v Price*, unpublished order of the Court of Appeals, entered June 1, 2017 (Docket No. 330710), to determine, among other things, whether the Court of Appeals has "erred in recognizing a rule against mutually exclusive verdicts in Michigan[.]" *People v Price*, 501 Mich 1066 (2018).

requiring one of the convictions to be vacated, *People v McKewen*, 326 Mich App 342, 352, 353 (2018). "By convicting defendant on [the charge of AWIGBH], [the jury] made a finding–one we may not disturb–that defendant acted with the intent to do great bodily harm. But that finding is inconsistent with felonious assault as defined by MCL 750.82." *McKewen*, 326 Mich App at 353. "[T]he proper action for the trial court is to enter judgment of conviction on the AWIGBH charge but not on felonious assault charge, even though the jury found defendant guilty of both." *Id*. (it was problematic that the trial court did not instruct on negative elements because "two crimes [were] charged based on the same conduct, one of which [had] a negative element that is the direct opposite of a positive element of the other charge," and "the lack of instruction on the negative element deprive[d] the jury of knowledge that their verdicts [were] inconsistent").

"[T]he Court of Appeals erred by relying on the principle of mutually exclusive verdicts to vacate [only] defendant's aggravated domestic assault conviction" where the defendant challenged his aggravated domestic violence and assault with intent to do great bodily harm (AWIGBH) convictions under double-jeopardy principles. *People v Davis*, 503 Mich 984, 985 (2019). Although "the statutory language of AWIGBH requires a defendant to commit assault *with* the specific intent to do great bodily harm, whereas the statutory language of aggravated domestic assault requires a defendant to commit assault *without* the intent to commit great bodily harm," "the jury was *not* instructed that it must find that defendant acted *without* the intent to inflict great bodily harm" relative to the aggravated domestic assault charge. *Id*. ("the jury was instructed that to convict defendant of AWIGBH, it must find that defendant acted 'with intent to do great bodily harm . . .'"). Therefore, "the jury never found that defendant acted without the intent to inflict great bodily harm," and his "guilty verdict for [aggravated domestic violence] was not mutually exclusive to [his] guilty verdict for AWIGBH, where the jury affirmatively found that defendant acted with intent to do great bodily harm." *Id*. (remanded to address the merits of defendant's double-jeopardy argument).

Similarly, "the Court of Appeals erred by relying on the principle of mutually exclusive verdicts to vacate the defendant's larceny in a building conviction," where "the jury was instructed that to convict the defendant of larceny from a person, it must find that the defendant took the property from the victim's person or immediate presence," but "with respect to the larceny in a building conviction, the jury was *not* instructed that it must find that the property was *not* taken from the victim's person or immediate presence." *Williams*, 504 Mich at 892. "Since, with respect to the larceny in a building conviction, the jury never found that the property was not taken from

the victim's person or immediate presence, a guilty verdict for that offense was not mutually exclusive to the defendant's guilty verdict for larceny from a person, where the jury affirmatively found that the property was taken from the victim's person or immediate presence." *Id*. ("reinstat[ing] the defendant's conviction of larceny in a building").

C. Several Counts

A verdict must be returned on each count if there is more than one count; a general verdict of guilty cannot be received. *People v Huffman*, 315 Mich 134, 137-139 (1946).

MCR 6.420(C) allows a jury deadlocked on one or more of multiple charges to issue verdicts on those counts on which it can reach a unanimous verdict.

A verdict form is defective if it does not give the jury the opportunity to return a general verdict of not guilty or to find the defendant not guilty on each count. *People v Wade (Michael)*, 283 Mich App 462, 468 (2009) (reversing the defendant's conviction where the verdict form only gave the jury the options of finding the defendant guilty or not guilty of first-degree murder, guilty of second-degree murder, or guilty of involuntary manslaughter; the jury was not given the opportunity to find the defendant generally not guilty, or not guilty of the lesser included offenses).

D. Use of Special Verdicts

"The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict." MCR 2.515(A). The form of a special verdict must be settled on the record or in writing, "in advance of argument and in the absence of the jury[.]" *Id*. MCR 2.515(A) provides, in part:

> "The court may submit to the jury:
>
> > (1) written questions that may be answered categorically and briefly;
> >
> > (2) written forms of the several special findings that might properly be made under the pleadings and evidence; or
> >
> > (3) the issues by another method, and require the written findings it deems most appropriate."

The court must adequately instruct the jury on the matter submitted so that the jury is able to make findings on each issue. MCR 2.515(A).

The court must enter judgment in accordance with the special verdict. MCR 2.515(B).

Where the court omits from the special verdict form an issue of fact that was raised in the pleadings or the evidence, a party must demand its submission before the jury retires, or else the party is deemed to have waived the right to a jury trial on that issue. MCR 2.515(C). "The court may make a finding with respect to an issue omitted without a demand. If the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict." *Id.*

E. Verdict Against the Great Weight of the Evidence

"A verdict is against the great weight of the evidence when 'the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.'" *In re JP*, 330 Mich App 1, 13 (2019), quoting *People v Lacalamita*, 286 Mich App 467, 469 (2009). "A verdict may be vacated only when it does not find reasonable support in the evidence, but is more likely attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v Allen*, 331 Mich App 587, 612-613 (2020), vacated in part on other grounds 507 Mich 856 (2021)[82] (also noting that "[a]bsent compelling circumstances, the credibility of witnesses is for the jury to determine") (quotation marks and citation omitted).

See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1, for more information on grounds to support a motion for new trial, including when the verdict is against the great weight of the evidence.

F. Polling

MCR 6.420(D) provides:

> "Before the jury is discharged, the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the

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

> jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury."

The option "permitting the court to 'discontinue the poll and order the jury to retire for further deliberations' requires the court to cut off the polling as soon as disagreement is disclosed. The court should not allow the polling to continue because of its potentially coercive effect. Nor, for the same reason, should the court question the jury to determine where the jury stands numerically. See [*People v Wilson*, 390 Mich 689, 692 (1973)]." 1989 Staff Comment to MCR 6.420.

A jury verdict in a criminal case becomes final when it is announced in open court, assented to by the jury, and accepted by the trial court. *People v Henry*, 248 Mich App 313, 319-320 n 19 (2001); see also MCR 6.420(A). But a jury may change the form and substance of its verdict to coincide with its intent if the jury has not yet been discharged. *Henry*, 248 Mich App at 320 n 20. Before being discharged, a jury may return to deliberations after announcing a verdict and polling discloses lack of unanimity. MCR 6.420(D). The jury cannot be reconvened after being discharged in a criminal case. *Henry*, 248 Mich App at 320.

Committee Tip:

Because the jury cannot be reconvened after being discharged, trial judges should individually poll jurors in every case, even if the attorneys do not request it.

G. Entry of Judgment

"[W]hen a jury finds a defendant not guilty of a charge, that verdict may be reflected by the entry of a dismissal of the charge in the judgment of sentence[.]" *People v Kenny*, 332 Mich App 394, 405 (2020).

12.16 No-Impeachment Rule

The "no-impeachment rule" generally prohibits impeachment of a jury verdict based on statements or incidents occurring during deliberations. *Peña-Rodriguez v Colorado*, 580 US 206, ___ (2017). Michigan's no-impeachment rule, MRE 606(b), provides:

> "(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror

> may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) Exceptions. A juror may testify about whether:
>
> > (A) extraneous prejudicial information was improperly brought to the jury's attention;
> >
> > (B) an outside influence was improperly brought to bear on any juror; or
> >
> > (C) a mistake was made in entering the verdict on the verdict form."

The no-impeachment rule is subject to a constitutional exception "when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." *Peña-Rodriguez*, 580 US at ___. "[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id*. at ___. "Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry[; rather, f]or the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict[, and] . . . the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id*. at ___. "Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." *Id*. at ___.

12.17 Mistrial and Double Jeopardy Implications of Mistrial Declaration[83]

A. Determination and Permissibility of Retrial

"A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Beesley*, 337 Mich App 50, 54 (2021) (quotation marks and citation omitted). "The proper analysis for a motion for mistrial depends principally, if not exclusively, on whether a defendant has been prejudiced by an irregularity or error." *Id*. at 55. "A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266 (1992). "Before ordering a mistrial, the court must, on the record, give each defendant and the prosecutor an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." MCR 6.417.

A motion for mistrial raises the issue of double jeopardy, because the federal and state constitutions prohibit twice placing an individual in jeopardy of life or limb for the same offense. US Const, Am V; Const 1963, art 1, § 15. As summarized in *People v Ackah-Essien*, 311 Mich App 13, 32 (2015):

> "Generally, jeopardy attaches in a jury trial once the jury is empaneled and sworn.[84] [*People v Mehall*, 454 Mich 1, 4 (1997)]. Once jeopardy attaches, the defendant has a constitutional right to have his or her case completed and decided by that tribunal. [*People v Henry*, 248 Mich App 313, 318 (2001)]. 'If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity.' [*Mehall*, 454 Mich at 4]. A jury's inability to reach a unanimous verdict is one circumstance that constitutes a manifest necessity permitting retrial. *Id*. Indeed, a 'hung jury' is the 'prototypical example' of a situation when the 'manifest necessity' standard is satisfied with respect to granting a mistrial and permitting retrial. [*People v Lett*, 466 Mich 206, 217 (2002), aff'd sub nom *Renico v Lett*, 559 US 766 (2010)] (quotation marks omitted), quoting [*Oregon v Kennedy*, 456 US 667, 672

[83] See Section 9.10 for additional discussion of double jeopardy.

[84] In a bench trial, jeopardy attaches when the court begins to hear evidence. *People v Robbins (Darrell)*, 223 Mich App 355, 362 (1997).

> (1982)]. 'Necessarily intertwined with the constitutional [double jeopardy] issue . . . is the threshold issue whether the trial court properly declared a mistrial.' [*Lett*, 466 Mich at 213]."

"If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity." *People v Beck*, ___ Mich ___, ___ (2022) (quotation marks and citation omitted). "It is the prosecutor's 'heavy' burden to show manifest necessity." *Id*. at ___. "To declare a mistrial, the trial court must find the facts justifying the mistrial. When such procedures are not followed, there is no manifest necessity for declaring a mistrial." *Id*. at ___ . In *Beck*, "during deliberations, a juror informed the judge that another juror may have done outside research on the case. *Id*. at ___. "The trial court did poll the jury by written note, go on the record with counsel to discuss the matter, and briefly consider each side's proposed alternatives to a mistrial. However, the court's consideration of the matter was too abrupt, and its conclusions were not supported by sufficient evidence." *Id*. at ___ (holding that "although the trial court may have believed it was acting with an abundance of caution, the standard for declaring a mistrial was not satisfied"). "The nature of the juror's outside research was unclear to the trial court and yet, instead of further probing what the juror researched and whether it would affect the proceedings, the trial court summarily declared a mistrial." *Id*. at ___. "Further, despite learning through polling the jurors that only one other juror had knowledge of the outside research, the trial court concluded that the entire jury was tainted." *Id*. at ___. Finally, "the trial court's consideration of less drastic alternatives failed to sufficiently determine the extent of any jury taint and whether it was limited to jurors who could be excused and replaced. Due to these failures, the trial court did not adequately find a justification for mistrial that outweighed the defendant's interest in continuing the trial." *Id*. at ___.

A mistrial granted on the defendant's motion or with his or her consent waives double jeopardy protections unless the motion or consent is prompted by prosecutorial conduct intended to goad the defendant into the mistrial request. *Kennedy*, 456 US at 669, 675-676, 679 (where the prosecutor did not intend to provoke a mistrial when he asked a prosecution witness if the reason the witness had not done business with the defendant was because the defendant was "'a crook[,]'" the double jeopardy clause did not bar retrial after the defendant successfully moved for a mistrial).

B. Retrial Following Mistrial Due to Hung Jury

"The decision to declare a mistrial after a finding of manifest necessity because of a deadlocked jury is entrusted to the '"sound discretion of the trial court."'" *Ackah-Essien*, 311 Mich App at 31 (2015), quoting *Lett*, 466 Mich at 216-217 (2002) (additional citation omitted). "[A] trial court, before declaring a mistrial because of a hung jury, [is not required] to consider any particular means of breaking the impasse[or] to consider giving the jury new options for a verdict." *Blueford v Arkansas*, 566 US 599, 609 (2012), citing *Lett*, 559 US at 773-774. *Blueford* was decided before MCR 6.417 was adopted; it is unclear whether the court rule provides heightened protections for the defendant in this regard.

Retrial after a mistrial due to a deadlocked jury does not violate the Double Jeopardy Clause. *Lett*, 559 US at 773. "A 'mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.'" *Id.* at 774, quoting *Arizona v Washington*, 434 US 497, 509 (1978). In *Renico*, 559 US at 775, quoting *Washington*, 434 US at 517, the United States Supreme Court reiterated its holding "that a trial judge declaring a mistrial is not required to make explicit findings of "'"manifest necessity"'" nor to 'articulate on the record all the factors which informed the deliberate exercise of his [or her] discretion.'" The United States Supreme Court has "never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse." *Renico*, 559 US at 775. In fact, the United States Supreme Court has never "'overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the "manifest necessity" standard had not been met.'" *Id.*, quoting *Winston v Moore*, 452 US 944, 947 (1981).

Where, "[b]efore the jury concluded deliberations . . . , [the jury foreperson] reported that [the jury] was unanimous against guilt on charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide[,]" and where the jury then continued deliberations before a mistrial was declared because the jury remained hopelessly deadlocked, the Double Jeopardy Clause did not bar the defendant's retrial on all of the charged offenses. *Blueford*, 566 US at 601, 610. Although the jury was instructed to consider the offenses in order, from greater to lesser, and to proceed to each lesser offense only after agreeing that the defendant was not guilty of the greater offenses, "the foreperson's announcement of the jury's unanimous votes on capital and first-

degree murder [did not] represent[] . . . a resolution of some or all of the elements of those offenses in [the defendant's] favor." *Id*. at 606. "The foreperson's report was not a final resolution of anything[,] . . . [and t]he jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report[;]" because it was possible for the "jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes[,] . . . the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses[.]" *Id*. at 606, 608.

C. Examples of Other Common Bases for Mistrial Motions

Defendant's incompetence. If the issue of the defendant's competence to stand trial arises during trial, "the court may, consonant with double jeopardy considerations, declare a mistrial." MCR 6.125(B).

Juror misconduct. "A trial court's denial of a motion for a mistrial based on juror misconduct is an abuse of discretion only where the misconduct was such that it affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment." *People v Messenger*, 221 Mich App 171, 175 (1997). "A new trial will not be granted if no substantial harm was done thereby to the defendant, even though the misconduct may merit a rebuke from the trial court if brought to its notice." *Id*. Defendant failed to show "that the presence of . . . prospective jurors during the questioning of other prospective jurors who expressed biases tainted the entire jury pool" or "that the remarks by some of the prospective jurors had any effect on the impartiality of the jury." *People v Haynes*, ___ Mich App ___, ___ (2021). In *Haynes*, the record demonstrated "that the trial court removed for cause the majority of the prospective jurors who expressed a potential bias in favor of the prosecution, and that defense counsel used his peremptory challenges to remove the remainder." *Id*. at ___. "Each of the remaining jurors affirmed that they would be impartial and that they would be able to follow the trial court's instructions." *Id*. at ___. The "prospective jurors' answers to questions about their personal beliefs [did not constitute] extraneous evidence" that had "a real and substantial possibility that . . . could have affected the jury's verdict." *Id*. at ___ (quotation marks and citation omitted). See Section 12.13(C) for more information on extraneous evidence.

Reference to polygraph test. Reference to a polygraph test is normally inadmissible before a jury, *People v Nash*, 244 Mich App 93, 97 (2000), and may constitute grounds for the declaration of mistrial, *People v Smith*, 211 Mich App 233, 234-235 (1995). However, an inadvertent, unsolicited mention by a witness that a polygraph was

administered does not necessarily require declaration of a mistrial. *People v Ortiz-Kehoe*, 237 Mich App 508, 514 (1999). "[F]actors that can be considered when deciding whether a trial court abused its discretion in failing to grant a mistrial when a witness has mentioned a polygraph[include]:

> "'(1) [W]hether [the] defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted.'" *Ortiz-Kehoe*, 237 Mich App at 514 (citation omitted; first alteration in original).

Unresponsive testimony. Generally, "'unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony[.]'" *People v Jackson (On Reconsideration)*, 313 Mich App 409, 427 (2015) (citation omitted). "While . . . police witnesses (and all witnesses) have an obligation not to venture into forbidden areas of testimony, the key point is in regards to testimony which is 'forbidden.' An area of testimony is only 'forbidden' if the court rules it inadmissible. While many things, including a defendant's criminal history, are generally inadmissible, there are exceptions for all such rules." *People v Beesley*, 337 Mich App 50, 57-58 (2021) (citation omitted) (suggesting "that it would be a good practice for a trial court ruling on the admissibility of testimony to instruct the prosecutor to inform the officer regarding what has been ruled inadmissible prior to an officer's testimony," and that it is error to create "a blanket assumption that a police officer will in all instances know precisely what has been ruled admissible and what has been ruled 'forbidden'). "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting a mistrial." *People v Haywood*, 209 Mich App 217, 228-229 (1995) (holding that "improper comments by the victim's father were not grounds for a mistrial" where the "witness was not in a position to know that his testimony was improper," "the prejudicial effect of the witness' statement was lessened because he did not refer to defendant as the cause of the victim's injury," and "because [the comments] were not elicited by the prosecutor's questioning").

D. Standard of Review

The trial court's decision on a motion for mistrial is reviewed for an abuse of discretion. *Alter*, 255 Mich App at 205. A trial court should

grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his or her ability to get a fair trial. *Id*.

Glossary

A

Accused

- For purposes of the Code of Criminal Procedure, *person*, *accused*, or a similar word means "an individual or, unless a contrary intention appears, a public or private corporation, partnership, or unincorporated or voluntary association." MCL 761.1(p).

Alcoholic liquor

- For purposes of MCL 8.9(10)(c), *alcoholic liquor* means "that term as defined in . . . MCL 436.1105." MCL 8.9(10)(c)(*i*).

- For purposes of the MCL 768.37, *alcoholic liquor* means "that term as defined in . . . MCL 436.1105." MCL 768.37(3)(a).

- For purposes of the Michigan Vehicle Code, *alcoholic liquor* means "any liquid or compound, whether or not medicated, proprietary, patented, and by whatever name called, containing any amount of alcohol including any liquid or compound described in . . . [MCL 436.1105(2)]." MCL 257.1d.

- For purposes of the Natural Resources and Environmental Protection Act, Part 801, Marine Safety, *alcoholic liquor* means "that term as defined in . . . MCL 257.1d." MCL 324.80101(b). MCL 257.1d defines *alcoholic liquor* as "any liquid or compound, whether or not medicated, proprietary, patented, and by whatever name called, containing any amount of alcohol including any liquid or compound described in . . . [MCL 436.1105(2)]."

Appearance ticket

- For purposes of MCL 764.9c to MCL 764.9g, *appearance ticket* means "a complaint or written notice issued and subscribed by a police officer or other public servant authorized by law or ordinance to issue it directing a designated person to appear in a designated local criminal court at a designated future time in connection with his or her alleged commission of a designated violation or violations of state law or local ordinance." MCL 764.9f(1).

Appointing authority

- For purposes of the Deaf Persons' Interpreters Act, *appointing authority* means "a court or a department, board, commission, agency, or licensing authority of this state or a political subdivision of this state or an entity that is required to provide a qualified interpreter in circumstances described under [MCL 393.503a]." MCL 393.502(a). MCL 393.503a provides that "[i]f an interpreter is required as an accommodation for a deaf or deaf-blind person under state or federal law, the interpreter shall be a qualified interpreter."

Arrest card

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), *arrest card* means "a paper form or an electronic format prescribed by the [Michigan State Police] that facilitates the collection and compilation of criminal and juvenile arrest history record information and biometric data." MCL 28.241a(a).

Assaultive crime

- For purposes of MCL 762.10d, MCL 764.1a, MCL 764.3, and MCL 765.6e, *assaultive crime* "includes any of the following:

  (*i*) A violation described in [MCL 770.9a].

  (*ii*) A violation of . . . MCL 750.81 to [MCL] 750.90g, not otherwise included in [MCL 762.10d(5)(a)(*i*), MCL 764.1a(9)(a)(*i*), MCL 764.3(5)(a)(*i*), or MCL 765.6e(2)(a)(*i*), respectively].

  (*iii*) A violation of . . . MCL 750.110a, [MCL] 750.136b, [MCL] 750.234a, [MCL] 750.234b, [MCL] 750.234c, [MCL] 750.349b, [or MCL] 750.411h, or any other violent felony.

  (*iv*) A violation of a law of another state or of a political subdivision of this state or of another state that substantially

corresponds to a violation described in [MCL 762.10d(5)(a)(*i*)-(*iii*), MCL 764.1a(9)(a)(*i*)-(*iii*), MCL 764.3(5)(a)(*i*)-(*iii*), or MCL 765.6e(2)(a)(*i*)-(*iii*), respectively]." MCL 762.10d(5)(a); MCL 764.1a(9)(a); MCL 764.3(5)(a); MCL 765.6e(2)(a).

- For purposes of MCL 764.9c and MCL 765.6b(6), *assaultive crime* means "that term as defined in [MCL 770.9a.]" MCL 764.9c(9)(a); MCL 765.6b(6)(a). MCL 770.9a(3) defines *assaultive crime* as "an offense against a person described in [MCL 750.81c(3), MCL 750.82, MCL 750.83, MCL 750.84, MCL 750.86, MCL 750.87, MCL 750.88, MCL 750.89, MCL 750.90a, MCL 750.90b(a), MCL 750.90b(b), MCL 750.91, MCL 750.200–MCL 750.212a, MCL 750.316, MCL 750.317, MCL 750.321, MCL 750.349, MCL 750.349a, MCL 750.350, MCL 750.397, MCL 750.411h(2)(b), MCL 750.411h(3), MCL 750.411i, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, MCL 750.520g, MCL 750.529, MCL 750.529a, MCL 750.530, or MCL 750.543a–MCL 750.543z.]"

- For purposes of MCL 770.9a, *assaultive crime* means "an offense against a person described in [MCL 750.81c(3), MCL 750.82, MCL 750.83, MCL 750.84, MCL 750.86, MCL 750.87, MCL 750.88, MCL 750.89, MCL 750.90a, MCL 750.90b(a), MCL 750.90b(b), MCL 750.91, MCL 750.200–MCL 750.212a, MCL 750.316, MCL 750.317, MCL 750.321, MCL 750.349, MCL 750.349a, MCL 750.350, MCL 750.397, MCL 750.411h(2)(b), MCL 750.411h(3), MCL 750.411i, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, MCL 750.520g, MCL 750.529, MCL 750.529a, MCL 750.530, or MCL 750.543a–MCL 750.543z." MCL 770.9a(3).

Authorized user

- For purposes of MCR 1.109(G), *authorized user* "means a user of the e-filing system who is registered to filed, serve, and receive documents and related data through approved electronic means. A court may revoke user authorization for good cause as determined by the court, including but not limited to a security breach." MCR 1.109(G)(1)(a).

B

Before

- For purposes of the Code of Criminal Procedure, *taken*, *brought*, or *before* "a magistrate or judge for purposes of criminal

arraignment or the setting of bail means either" physical presence before a judge or district court magistrate or presence before a judge or district court magistrate by use of 2-way interactive video technology. MCL 761.1(t).

Bicycle

- For purposes of the Michigan Vehicle Code, *bicycle* means "a device propelled by human power upon which a person may ride, having either 2 or 3 wheels in a tandem or tricycle arrangement, all of which are over 14 inches in diameter." MCL 257.4.

Biometric data

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), *biometric data* means "all of the following:

  (*i*) Fingerprint images recorded in a manner prescribed by the [Michigan State Police].

  (*ii*) Palm print images, if the arresting law enforcement agency has the electronic capability to record palm print images in a manner prescribed by the [Michigan State Police].

  (*iii*) Digital images recorded during the arrest or booking process, including a full-face capture, left and right profile, and scars, marks, and tattoos, if the arresting law enforcement agency has the electronic capability to record the images in a manner prescribed by the [Michigan State Police].

  (*iv*) All descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b).

Brought

- For purposes of the Code of Criminal Procedure, *taken*, *brought*, or *before* "a magistrate or judge for purposes of criminal arraignment or the setting of bail means either" physical presence before a judge or district court magistrate or presence

before a judge or district court magistrate by use of 2-way interactive video technology. MCL 761.1(t).

C

Case or court proceeding

- For purposes of MCR 1.111, concerning foreign language interpreters, *case or court proceeding* means "any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

Certified foreign language interpreter

- For purposes of MCR 1.111, concerning foreign language interpreters, *certified foreign language interpreter* means "a person who has:

  (a) passed a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,

  (b) met all the requirements established by the state court administrator for this interpreter classification, and

  (c) registered with the State Court Administrative Office." MCR 1.111(A)(4).

Citation

- For purposes of the Michigan Vehicle Code, *citation* means "a complaint or notice upon which a police officer shall record an occurrence involving 1 or more vehicle law violations by the person cited." MCL 257.727c(1)

Civil infraction

- For purposes of the Michigan Vehicle Code, *civil infraction* means "an act or omission prohibited by law which is not a crime as defined in . . . MCL 750.5 . . . and for which civil sanctions may be ordered." MCL 257.6a.

Commercial motor vehicle

- For purposes of the Michigan Vehicle Code, *commercial motor vehicle* means "a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property[,]" other than "a vehicle used exclusively to transport personal possessions or family members for nonbusiness purposes[,]" "if 1 or more of the following apply:

  (a) It is designed to transport 16 or more passengers, including the driver.

  (b) It has a gross vehicle weight rating or gross vehicle weight, whichever is greater, of 26,001 pounds or more.

  (c) It has a gross combination weight rating or gross combination weight, whichever is greater, of 26,001 pounds or more, inclusive of towed units with a gross vehicle weight rating or gross vehicle weight, whichever is greater, of more than 10,000 pounds.

  (d) A motor vehicle carrying hazardous material and on which is required to be posted a placard as defined and required under 49 CFR parts 100 to 199." MCL 257.7a.

Commercial quadricycle

- For purposes of the MVC, *commercial quadricycle* means "a vehicle that satisfies all of the following:

  (a) The vehicle has fully operative pedals for propulsion entirely by human power.

  (b) The vehicle has at least 4 wheels and is operated in a manner similar to a bicycle.

  (c) The vehicle has at least 6 seats for passengers.

  (d) The vehicle is designed to be occupied by a driver and powered either by passengers providing pedal power to the drive train of the vehicle or by a motor capable of propelling the vehicle in the absence of human power.

  (e) The vehicle is used for commercial purposes.

  (f) The vehicle is operated by the owner of the vehicle or an employee of the owner of the vehicle." MCL 257.7b

Commercial vehicle

- For purposes of the Michigan Vehicle Code, *commercial vehicle* "includes all motor vehicles used for the transportation of passengers for hire, or constructed or used for transportation of goods, wares, or merchandise, and all motor vehicles designed and used for drawing other vehicles that are not constructed to carry a load independently or any part of the weight of a vehicle or load being drawn[, but] . . . does not include a limousine operated by a limousine driver, a taxicab operated by a taxicab driver, or a personal vehicle operated by a transportation network company driver." MCL 257.7.

Complaint

- For purposes of the Code of Criminal Procedure, *complaint* means "a written accusation, under oath or upon affirmation, that a felony, misdemeanor, or ordinance violation has been committed and that the person named or described in the accusation is guilty of the offense." MCL 761.1(c).

Confidential

- For purposes of MCR 1.109, *confidential* "means that a case record is nonpublic and accessible only to those individuals or entities specified in statute or court rule. A confidential record is accessible to parties only in the manner specified in statute or court rule." MCR 1.109(H)(1).

Consumed

- For purposes of the Code of Criminal Procedure, *consumed* means "to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body." MCL 768.37(3)(b).

Controlled substance

- For purposes of MCL 8.9(10)(c), *controlled substance* means "that term as defined in . . . MCL 333.7104." MCL 8.9(10)(c)(*ii*). MCL 333.7104(3) defines *controlled substance* as "a drug, substance, or immediate precursor included in schedules 1 to 5 of [MCL 333.7201 *et seq.*]."

- For purposes of the MCL 768.37, *controlled substance* means "that term as defined in . . . MCL 333.7104." MCL 768.37(3)(c). MCL 333.7104(3) defines *controlled substance* as "a drug,

substance, or immediate precursor included in schedules 1 to 5 of [MCL 333.7201 *et seq*.]."

- For purposes of the Michigan Vehicle Code, *controlled substance* means "a controlled substance or controlled substance analogue as defined in . . . MCL 333.7104[.]" MCL 257.8b. MCL 333.7104(3) defines *controlled substance* as "a drug, substance, or immediate precursor included in schedules 1 to 5 of [MCL 333.7201 *et seq*.]."

- For purposes of the Natural Resources and Environmental Protection Act, Part 801, Marine Safety, *controlled substance* means "that term as defined in . . . MCL 333.7104." MCL 324.80101(i). MCL 333.7104(3) defines *controlled substance* as "a drug, substance, or immediate precursor included in schedules 1 to 5 of [MCL 333.7201 *et seq*.]."

Co-occurring disorder

- For purposes of Chapter 10C of the Revised Judicature Act of 1961 (juvenile mental health courts), *co-occurring disorder* "means having 1 or more disorders relating to the use of alcohol or other controlled substances of abuse as well as any serious mental illness, serious emotional disturbance, or developmental disability. A diagnosis of co-occurring disorders occurs when at least 1 disorder of each type can be established independent of the other and is not simply a cluster of symptoms resulting from 1 disorder." MCL 600.1099b(a).

Court records

- For purposes of the Michigan Court Rules, *court records* "are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules. Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules.

  (a) Court records include, but are not limited to:

  (*i*) documents, attachments to documents, discovery materials, and other materials filed with the clerk of the court,

  (*ii*) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of

transmitting, accessing, reproducing, or maintaining court records.

(b) For purposes of [MCR 1.109(A)]:

(*i*) Documents include, but are not limited to, pleadings, orders, and judgments.

(*ii*) Recordings refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records.

(*iii*) Data refers to any information entered in the case management system that is not ordinarily reduced to a document but that is still recorded information, and any data entered into or created by the statewide electronic-filing system.

(*iv*) Other recorded information includes, but is not limited to, notices, bench warrants, arrest warrants, and other process issued by the court that do not have to be maintained on paper or digital image.

(2) Discovery materials that are not filed with the clerk of the court are not court records. Exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930 during the pendency of a proceeding are not court records." MCR 1.109(A).

Courtroom support dog

- For purposes of MCL 600.2163a, courtroom support dog "means a dog that has been trained and evaluated as a support dog pursuant to the Assistance Dogs International Standards for guide or service work and that is repurposed and appropriate for providing emotional support to children and adults within the court or legal system or that has performed the duties of a courtroom support dog prior to September 27, 2018." MCL 600.2163a(1)(a).

Crime

- For purposes of the Crime Victim's Rights Act, Article 1, *crime* means "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment

for more than 1 year or an offense expressly designated by law as a felony." MCL 780.752(1)(b).

Criminal history record information

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), *criminal history record information* means "name; date of birth; personal descriptions including identifying marks, scars, amputations, and tattoos; aliases and prior names; social security number, driver's license number, and other identifying numbers; and information on misdemeanor arrests and convictions and felony arrests and convictions." MCL 28.241a(d).

Culpable/culpability

- For purposes of MCL 8.9, *culpable* means "sufficiently responsible for criminal acts or negligence to be at fault and liable to punishment for commission of a crime." MCL 8.9(10)(a).

D

Dangerous weapon

- For purposes of MCL 764.1f(2)(b), *dangerous weapon* means "1 or more of the following:

  (*i*) A loaded or unloaded firearm, whether operable or inoperable.

  (*ii*) A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.

  (*iii*) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.

  (iv) An object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*)."

Data

- For purposes of MCR 1.109(A)(1), in which the term *court records* is defined, *data* "refers to any information entered in the

case management system that is not ordinarily reduced to a document but that is still recorded information, and any data entered into or created by the statewide electronic-filing system." MCR 1.109(A)(1)(b)(*iii*).

Dating relationship

- For purposes of MCL 764.1a, *dating relationship* "means frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 764.1a(9)(b).

- For purposes of MCL 764.15a(b), *dating relationship* means "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 764.15a(b).

- For purposes of MCL 780.582a(1)(b), *dating relationship* means "that term as defined in . . . MCL 600.2950." MCL 600.2950(30)(a) defines *dating relationship* as "frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."

Deaf person

- For purposes of the Deaf Persons' Interpreters Act, *deaf person* means "a person whose hearing is totally impaired or whose hearing, with or without amplification, is so seriously impaired that the primary means of receiving spoken language is through other sensory input; including, but not limited to, lip reading, sign language, finger spelling, or reading." MCL 393.502(b).

Deaf-blind person

- For purposes of the Deaf Persons' Intepreters Act, *deaf-blind person* means "a person who has a combination of hearing loss and vision loss, such that the combination necessitates specialized interpretation of spoken and written information in a manner appropriate to that person's dual sensory loss." MCL 393.502(c).

Deaf interpreter

- For purposes of the Deaf Persons' Interpreters Act, *deaf interpreter* or *intermediary interpreter* means "any person, including any deaf or deaf-blind person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a deaf or deaf-blind person and a qualified interpreter." MCL 393.502(e).

Defendant

- For purposes of the Crime Victim's Rights Act, Article 1, *defendant* means "a person charged with, convicted of, or found not guilty by reason of insanity of committing a crime against a victim." MCL 780.752(1)(d).

- For purposes of the Crime Victim's Rights Act, Article 3, *defendant* means "a person charged with or convicted of having committed a serious misdemeanor against a victim." MCL 780.811(1)(c).

Developmental disability

- For purposes of Chapter 10C of the Revised Judicature Act of 1961 (juvenile mental health courts), *developmental disability* "means that term as defined in . . . MCL 330.1100a." MCL 600.1099b(c).

District court magistrate

- For purposes of the Code of Criminal Procedure, *magistrate* does not include a district court magistrate unless specifically preceded by the words *district court*. See MCL 761.1(*l*).

Division

- For purposes of the Deaf Persons' Interpreters Act, *division* means "the division on deaf and hard of hearing of the department of labor and economic growth." MCL 393.502(d).

Document

- For purposes of the Michigan Court Rules, *document* means "a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to 8 $^{1/2}$ x 11 inch paper without manipulation." MCR 1.109(B).

- For purposes of MCR 1.109(A)(1), in which the term *court records* is defined, *documents* "include, but are not limited to, pleadings, orders, and judgments." MCR 1.109(A)(1)(b)(*i*).

Domestic violence

- For purposes of MCL 762.10d. MCL 764.1a, MCL 764.3, MCL 764.9c, and MCL 765.6b(6), *domestic violence* means "that term as defined in . . . MCL 400.1501." MCL 762.10d(5)(b); MCL 764.1a(9)(c); MCL 764.3(5)(b); MCL 764.9c(3)(a); MCL 765.6b(6)(b). MCL 400.1501(d) defines *domestic violence* as "the occurrence of any of the following acts by an individual that is not an act of self-defense: (*i*) [c]ausing or attempting to cause physical or mental harm to a family or household member[;] (*ii*) [p]lacing a family or household member in fear of physical or mental harm[;] (*iii*) [c]ausing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress[;] [and/or] (*iv*) [e]ngaging in activity toward a family or household member that would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

Drug treatment court

- For purposes of MCL 600.1060 *et seq.*, *drug treatment court* means "a court supervised treatment program for individuals who abuse or are dependent upon any controlled substance or alcohol. A drug treatment court shall comply with the 10 key components promulgated by the national association of drug court professionals, which include all of the following essential characteristics:

- (*i*) Integration of alcohol and other drug treatment services with justice system case processing.

- (*ii*) Use of a nonadversarial approach by prosecution and defense that promotes public safety while protecting any participant's due process rights.

- (*iii*) Identification of eligible participants early with prompt placement in the program.

- (*iv*) Access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.

- (*v*) Monitoring of participants effectively by frequent alcohol and other drug testing to ensure abstinence from drugs or alcohol.

- (*vi*) Use of a coordinated strategy with a regimen of graduated sanctions and rewards to govern the court's responses to participants' compliance.

- (*vii*) Ongoing close judicial interaction with each participant and supervision of progress for each participant.

- (*viii*) Monitoring and evaluation of the achievement of program goals and the program's effectiveness.

- (*ix*) Continued interdisciplinary education in order to promote effective drug court planning, implementation, and operation.

- (*x*) The forging of partnerships among other drug courts, public agencies, and community-based organizations to generate local support." MCL 600.1060(c).

DWI/sobriety court

- For purposes of MCL 600.1084, *DWI/sobriety court* means "the specialized court docket and programs established within judicial circuits and districts throughout this state that are designed to reduce recidivism among alcohol offenders and that comply with the 10 guiding principles of DWI courts as promulgated by the National Center for DWI Courts." MCL 600.1084(9)(a).

E

Electric bicycle

- For purposes of the Michigan Vehicle Code, *electric bicycle* "means a device upon which an individual may ride that satisfies all of the following:

  (a) The device is equipped with all of the following:

  (*i*) A seat or saddle for use by the rider.

  (*ii*) Fully operable pedals for human propulsion.

  (*iii*) An electric motor of not greater than 750 watts.

  (b) The device falls within 1 of the following categories:

  (*i*) Class 1 electric bicycle. As used in this subparagraph, 'class 1 electric bicycle' means an electric bicycle that is equipped with an electric motor that provides

assistance only when the rider is pedaling and that disengages or ceases to function when the electric bicycle reaches a speed of 20 miles per hour.

(*ii*) Class 2 electric bicycle. As used in this subparagraph, 'class 2 electric bicycle' means an electric bicycle that is equipped with a motor that propels the electric bicycle to a speed of no more than 20 miles per hour, whether the rider is pedaling or not, and that disengages or ceases to function when the brakes are applied.

(*iii*) Class 3 electric bicycle. As used in this subparagraph, 'class 3 electric bicycle' means an electric bicycle that is equipped with a motor that provides assistance only when the rider is pedaling and that disengages or ceases to function when the electric bicycle reaches a speed of 28 miles per hour." MCL 257.13e.

Electric skateboard

- For purposes of the Michigan Vehicle Code, *electric skateboard* "means a wheeled device that has a floorboard designed to be stood upon when riding that is no more than 60 inches long and 18 inches wide, is designed to transport only 1 person at a time, has an electrical propulsion system with power of no more than 2,500 watts, and has a maximum speed on a paved level surface of not more than 25 miles per hour. An electric skateboard may have handlebars and, in addition to having an electrical propulsion system with power of no more than 2,500 watts, may be designed to also be powered by human propulsion." MCL 257.13f.

Electronic data

- For purposes of the Fourth Amendment Rights Protection Act, *electronic data* means "information related to an electronic communication or the use of an electronic communication service, including, but not limited to, the contents, sender, recipients, or format of an electronic communication; the precise or approximate location of the sender or recipients of an electronic communication at any time during the communication; the time or date the communication was created, sent, or received; and the identity of an individual or device involved in the communication, including, but not limited to, an internet protocol address. The term does not include subscriber information." MCL 37.262(a).

Electronic filing or e-filing

- For purposes of MCR 1.109(G), *electronic filing* or *e-filing* "means the electronic transmission of data and documents to the court through the electronic-filing system." MCR 1.109(G)(1)(b).

Electronic-filing system

- For purposes of MCR 1.109(G), *electronic-filing system* "means a system provided by the State Court Administrative Office that permits electronic transmission of data and documents." MCR 1.109(G)(1)(c).

Electronic monitoring device

- For purposes of MCL 765.6b(6), *electronic monitoring device* "includes any electronic device or instrument that is used to track the location of an individual or to monitor an individual's blood alcohol content, but does not include any technology that is implanted or violates the corporeal body of the individual." MCL 765.6b(6)(c).

Electronic notification

- For purposes of MCR 1.109(G), *electronic notification* "means the electronic transmission of information from the court to authorized users through the electronic-filing system. This does not apply to service of documents. See [MCR 1.109(G)(1)(f)]." MCR 1.109(G)(1)(d).

Electronic service or e-service

- For purposes of MCR 1.109(G), *electronic service* or *e-service* "means the electronic service of information by means of the electronic-filing system under [MCR 1.109]. It does not include service by alternative electronic service under MCR 2.107(C)(4)." MCR 1.109(G)(1)(e).

Electronic signature

- For purposes of the Michigan Court Rules, *electronic signature* "means an electronic sound, symbol, or process, attached to or logically associated with a record and executed or adopted by a

person with the intent to sign the record. The following form is acceptable: /s/ *John L. Smith*." MCR 1.109(E)(4)(a).

F

Felony

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), *felony* means "a violation of a penal law of this state for which the offender may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 28.241a(f).

- For purposes of the Code of Criminal Procedure, *felony* means "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(f).

- For purposes of the Michigan Penal Code, *felony* means "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison." MCL 750.7.

Financially able to pay for interpretation costs

- For purposes of MCR 1.111, concerning foreign language interpreters, a person is *financially able to pay for interpretation costs* if "the court determines that requiring reimbursement of interpretation costs will not pose an unreasonable burden on the person's ability to have meaningful access to the court." MCR 1.111(A)(3). For purposes of MCR 1.111, a person is *financially able to pay for interpretation costs* when:

  "(a) The person's family or household income is greater than 125% of the federal poverty level; and

  (b) An assessment of interpretation costs at the conclusion of the litigation would not unreasonably impede the person's

ability to defend or pursue the claims involved in the matter." MCR 1.111(A)(3).

G

Guaranteed appearance certificate

For purposes of the Michigan Vehicle Code, *guaranteed appearance certificate* "means a card or certificate containing a printed statement that a surety company authorized to do business in this state guarantees the appearance of the person whose signature appears on the card or certificate, and that the company, if the person fails to appear in court at the time of trial or sentencing or to pay any fines or costs imposed under this act, will pay any fine, costs, or bond forfeiture imposed on the person in a total amount not to exceed $200.00." MCL 257.728(5)(d).

H

Highway

- For purposes of the Michigan Vehicle Code, *highway* means "the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." MCL 257.20.

I

Indigent

- For purposes of the Michigan Indigent Defense Commission Act, *indigent* "means meeting 1 or more of the conditions described in [MCL 780.991(3)]." MCL 780. 983(e).

Indigent criminal defense services

- For purposes of the Michigan Indigent Defense Commission Act, *indigent criminal defense services* means "local legal defense services provided to a defendant and to which both of the following conditions apply: (*i*) [t]he defendant is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the

defendant's initial appearance in court to answer to the criminal charge[, and] (*ii*) [t]he defendant is determined to be indigent under [MCL 780.991(3)]." MCL 780.983(f). *Indigent criminal defense services* do not include services authorized to be provided under the appellate defender act, MCL 780.711—MCL 780.719. MCL 780.983(g).

Indigent criminal defense system

- For purposes of the Michigan Indigent Defense Commission Act, *indigent criminal defense system* means either "[t]he local unit of government that funds a trial court[,]" or "[i]f a trial court is funded by more than 1 local unit of government, those local units of government, collectively." MCL 780.983(h).

Ingestion

- For purposes of MCL 8.9(10)(c), *ingestion* means "to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body." MCL 8.9(10)(c)(*iii*).

Insane/insanity

- For purposes of the Code of Criminal Procedure, "[a]n individual is legally insane if, as a result of mental illness as defined in . . . MCL 330.1400, or as a result of having an intellectual disability as defined in . . . MCL 330.1100b, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity." MCL 768.21a(1).

Intellectual disability

- For purposes of the Mental Health Code and the Code of Criminal Procedure, *intellectual disability* "means a condition manifesting before the age of 18 years that is characterized by significantly subaverage intellectual functioning and related limitations in 2 or more adaptive skills and that is diagnosed based on the following assumptions:

  (a) Valid assessment considers cultural and linguistic diversity, as well as differences in communication and behavioral factors.

(b) The existence of limitation in adaptive skills occurs within the context of community environments typical of the individual's age peers and is indexed to the individual's particular needs for support.

(c) Specific adaptive skill limitations often coexist with strengths in other adaptive skills or other personal capabilities.

(d) With appropriate supports over a sustained period, the life functioning of the individual with an intellectual disability will generally improve." MCL 330.1100b(13); see also MCL 768.21a(1).

Intent

- For purposes of MCL 8.9, *intent* means "a desire or will to act with respect to a material element of an offense if both of the following circumstances exist: a desire or will to act with respect to a material element of an offense if both of the following circumstances exist:

  (*i*) The element involves the nature of a person's conduct or a result of that conduct, and it is the person's conscious object to engage in conduct of that nature or to cause that result.

  (*ii*) The element involves the attendant circumstances, and the person is aware of the existence of those circumstances or believes or hopes that they exist." MCL 8.9(10)(b).

Intermediary interpreter

- For purposes of the Deaf Persons' Interpreters Act, *intermediary interpreter* or *deaf interpreter* means "any person, including any deaf or deaf-blind person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a deaf or deaf-blind person and a qualified interpreter." MCL 393.502(e).

Interpret/interpretation

- For purposes of MCR 1.111, concerning foreign language interpreters, *interpret* and *interpretation* mean "the oral rendering of spoken communication from one language to another without change in meaning." MCR 1.111(A)(5).

Intoxicated or impaired

- For purposes of MCL 8.9, *intoxicated or impaired* "includes, but is not limited to, a condition of intoxication resulting from the ingestion of alcoholic liquor, a controlled substance, or alcoholic liquor and a controlled substance." MCL 8.9(10)(c).

Intoxicating substance

- For purposes of the MCL 257.625, *intoxicating substance* means "any substance, preparation, or a combination of substances and preparations other than alcohol or a controlled substance, that is either of the following:

  (*i*) Recognized as a drug in any of the following publications or their supplements:

  (A) The official United States pharmacopoeia.

  (B) The official homeopathic pharmacopoeia of the United States.

  (C) The official national formulary.

  (*ii*) A substance, other than food, taken into a person's body, including, but not limited to, vapors or fumes, that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication." MCL 257.625(25)(a).

J

Judicial district

- For purposes of the Code of Criminal Procedure, *judicial district* means "(*i*) [w]ith regard to the circuit court, the county[;] (*ii*) [w]ith regard to municipal courts, the city in which the municipal court functions or the village served by a municipal court under . . . MCL 600.9928[;] (*iii*) [w]ith regard to the district court, the county, district, or political subdivision in which venue is proper for criminal actions." MCL 761.1(i).

Juvenile

- For purposes of Subchapter 6.900 of the Michigan Court Rules, *juvenile* means an individual at least 14 years of age who allegedly committed a specified juvenile violation on or after

the individual's 14th birthday and before the individual's 18th birthday. MCR 6.903(E).

- For purposes of the Crime Victim's Rights Act, Article 2, *juvenile* means "an individual alleged or found to be within the court's jurisdiction under . . . [MCL 712A.2(a)(1)], for an offense, including, but not limited to, an individual in a designated case." MCL 780.781(1)(e).

Juvenile history record information

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), *juvenile history record information* means "name; date of birth; personal descriptions including identifying marks, scars, amputations, and tattoos; aliases and prior names; social security number, driver's license number, and other identifying numbers; and information on juvenile offense arrests and adjudications or convictions." MCL 28.241a(g).

Juvenile mental health court

- For purposes of Chapter 10C of the Revised Judicature Act of 1961, *juvenile mental health court* "means all of the following:

  (*i*) A court-supervised treatment program for juveniles who are diagnosed by a mental health professional with having a serious emotional disturbance, co-occurring disorder, or developmental disability.

  (*ii*) Programs designed to adhere to the 7 common characteristics of a juvenile mental health court as described under [MCL 600.1099c(3)].

  (*iii*) Programs designed to adhere to the 10 essential elements of mental health court promulgated by the Bureau of Justice Assistance, or amended, that include all of the following characteristics:

    (A) A broad-based group of stakeholders representing the criminal justice system, the juvenile justice system, the mental health system, the substance abuse treatment system, any related systems, and the community guide the planning and administration of the court.

    (B) Eligibility criteria that address public safety and a community's treatment capacity, in addition to the availability of alternatives to pretrial

detention for juveniles with mental illnesses, and that take into account the relationship between mental illness and a juvenile's offenses, while allowing the individual circumstances of each case to be considered.

(C) Participants are identified, referred, and accepted into mental health courts, and then linked to community-based service providers as quickly as possible.

(D) Terms of participation are clear, promote public safety, facilitate the juvenile's engagement in treatment, are individualized to correspond to the level of risk that each juvenile presents to the community, and provide for positive legal outcomes for those individuals who successfully complete the program.

(E) In accordance with the Michigan indigent defense commission act, [MCL 780.981–MCL 780.1003], provide legal counsel to juvenile respondents to explain program requirements, including voluntary participation, and guide juveniles in decisions about program involvement. Procedures exist in the juvenile mental health court to address, in a timely fashion, concerns about a juvenile's competency whenever they arise.

(F) Connect participants to comprehensive and individualized treatment supports and services in the community and strive to use, and increase the availability of, treatment and services that are evidence based.

(G) Health and legal information are shared in a manner that protects potential participants' confidentiality rights as mental health consumers and their constitutional rights. Information gathered as part of the participants' court-ordered treatment program or services is safeguarded from public disclosure in the event that participants are returned to traditional court processing.

(H) A team of criminal justice, if applicable, juvenile justice, and mental health staff and treatment providers receives special, ongoing training and assists mental health court participants to achieve treatment and criminal and

juvenile justice goals by regularly reviewing and revising the court process.

(I) Criminal and juvenile justice and mental health staff collaboratively monitor participants' adherence to court conditions, offer individualized graduated incentives and sanctions, and modify treatment as necessary to promote public safety and participants' recovery.

(J) Data are collected and analyzed to demonstrate the impact of the juvenile mental heath court, its performance is assessed periodically, procedures are modified accordingly, court processes are institutionalized, and support for the court in the community is cultivated and expanded." MCL 600.1099b(e).

Juvenile offense

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), *juvenile offense* means "an offense committed by a juvenile that, if committed by an adult, would be a felony, a criminal contempt conviction under . . . MCL 600.2950 [or MCL] 600.2950a, a criminal contempt conviction for a violation of a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i, or a misdemeanor." MCL 28.241a(h).

K

Knowledge

- For purposes of MCL 8.9, *knowledge* means "awareness or understanding with respect to a material element of an offense if both of the following circumstances exist:

  (*i*) The element involves the nature or the attendant circumstances of the person's conduct, and the person is aware that his or her conduct is of that nature or that those circumstances exist.

  (*ii*) The element involves a result of the person's conduct, and the person is aware that it is practically

certain that his or her conduct will cause that result." MCL 8.9(10)(d).

L

Law enforcement agency

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), *law enforcement agency* means "the police department of a city, township, or village, the sheriff's department of a county, the department, or any other governmental law enforcement agency of this state." MCL 28.241a(i).

M

Magistrate

- For purposes of the Code of Criminal Procedure, *magistrate* means "a judge of the district court or a judge of a municipal court. Magistrate does not include a district court magistrate, except that a district court magistrate may exercise the powers, jurisdiction, and duties of a magistrate if specifically provided in this act, the revised judicature act[,] . . . MCL 600.101 to [MCL] 600.9947, or any other statute. This definition does not limit the power of a justice of the supreme court, a circuit judge, or a judge of a court of record having jurisdiction of criminal cases under this act, or deprive him or her of the power to exercise the authority of a magistrate." MCL 761.1(*l*).

Mental health court

- For purposes of MCL 600.1090 *et seq*., *mental health court* means "any of the following:

  (*i*) A court-supervised treatment program for individuals who are diagnosed by a mental health professional with having a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.

  (*ii*) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the bureau of justice assistance that include all of the following characteristics:

(A) A broad-based group of stakeholders representing the criminal justice system, mental health system, substance abuse treatment system, any related systems, and the community guide the planning and administration of the court.

(B) Eligibility criteria that address public safety and a community's treatment capacity, in addition to the availability of alternatives to pretrial detention for defendants with mental illnesses, and that take into account the relationship between mental illness and a defendant's offenses, while allowing the individual circumstances of each case to be considered.

(C) Participants are identified, referred, and accepted into mental health courts, and then linked to community-based service providers as quickly as possible.

(D) Terms of participation are clear, promote public safety, facilitate the defendant's engagement in treatment, are individualized to correspond to the level of risk that each defendant presents to the community, and provide for positive legal outcomes for those individuals who successfully complete the program.

(E) In accordance with the Michigan indigent defense commission act, . . . MCL 780.981 to [MCL] 780.1003, provide legal counsel to indigent defendants to explain program requirements, including voluntary participation, and guides defendants in decisions about program involvement. Procedures exist in the mental health court to address, in a timely fashion, concerns about a defendant's competency whenever they arise.

(F) Connect participants to comprehensive and individualized treatment supports and services in the community and strive to use, and increase the availability of, treatment and services that are evidence based.

(G) Health and legal information are shared in a manner that protects potential participants' confidentiality rights as mental health consumers and their constitutional rights as defendants. Information gathered as part of the participants'

court-ordered treatment program or services are safeguarded from public disclosure in the event that participants are returned to traditional court processing.

(H) A team of criminal justice and mental health staff and treatment providers receives special, ongoing training and assists mental health court participants achieve treatment and criminal justice goals by regularly reviewing and revising the court process.

(I) Criminal justice and mental health staff collaboratively monitor participants' adherence to court conditions, offer individualized graduated incentives and sanctions, and modify treatment as necessary to promote public safety and participants' recovery.

(J) Data are collected and analyzed to demonstrate the impact of the mental health court, its performance is assessed periodically, and procedures are modified accordingly, court processes are institutionalized, and support for the court in the community is cultivated and expanded." MCL 600.1090(e).

Mental health professional

- For purposes of Chapter 10C of the Revised Judicature Act of 1961 (juvenile mental health courts), *mental health professional* "means an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is 1 of the following:

  (*i*) A physician.

  (*ii*) A psychologist.

  (*iii*) A registered professional nurse licensed or otherwise authorized to engage in the practice of nursing under part 172 of the public health code, . . . MCL 333.17201 to [MCL] 333.17242].

  (*iv*) A licensed master's social worker licensed or otherwise authorized to engage in the practice of social work at the mater's level under part 185 of the public health code, . . . MCL 333.18501 to [MCL] 333.18518.

(*v*) A licensed professional counselor licensed or otherwise authorized to engage in the practice of counseling under part 181 of the public health code, . . . MCL 333.18101 to [MCL] 333.18117.

(*vi*) A marriage and family therapist licensed or otherwise authorized to engage in the practice of marriage and family therapy under part 169 of the public health code, . . . MCL 333.16901 to [MCL] 333.16915." MCL 600.1099b(f).

Mental illness/mentally ill

- For purposes of the Mental Health Code and the Code of Criminal Procedure, *mental illness* "means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g); see also MCL 768.21a(1).

Metadata

- For purposes of the Fourth Amendment Rights Protection Act, *metadata* means "information generally not visible when an electronic document is printed describing the history, tracking, or management of the electronic document, including information about data in the electronic document that describes how, when, and by whom the data were collected, created, accessed, or modified and how the data are formatted. The term does not including any of the following:

  (*i*) A spreadsheet formula.

  (*ii*) A database field.

  (*iii*) An externally or internally linked file.

  (*iv*) A reference to an external file or hyperlink." MCL 37.262(b).

Minor offense

- For purposes of the Code of Criminal Procedure, *minor offense* means "a misdemeanor or ordinance violation for which the maximum permissible imprisonment does not exceed 92 days and the maximum permissible fine does not exceed $1,000.00." MCL 761.1(m).

Misdemeanor

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), *misdemeanor* means "either of the following:

  (*i*) A violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine.

  (*ii*) A violation of a local ordinance that substantially corresponds to state law and that is not a civil infraction." MCL 28.241a(j).

- For purposes of the Code of Criminal Procedure, *misdemeanor* means "a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(n).

- For purposes of the Michigan Penal Code, "[w]hen any act or omission, not a felony, is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor." MCL 750.8.

Motorboat

- For purposes of the Natural Resources and Environmental Protection Act, Part 801, Marine Safety, *motorboat* means "a vessel propelled wholly or in part by machinery." MCL 324.80103(f).

Motor vehicle

- For purposes of the Michigan Vehicle Code, *motor vehicle* means "every vehicle that is self-propelled, but for purposes of chapter 4, motor vehicle does not include industrial equipment such as a forklift, a front-end loader, or other construction equipment that is not subject to registration under this act. Motor vehicle does not include a power-driven mobility device when that power-driven mobility device is being used by an individual with a mobility disability. Motor vehicle does not include an electric patrol vehicle being operated in compliance with the electric patrol vehicle act . . . MCL 257.1571 to [MCL] 257.1577. Motor vehicle does not include an electric personal assistive mobility device. Motor vehicle does not include an

electric carriage. Motor vehicle does not include a commercial quadricycle. Motor vehicle does not include an electric bicycle. Motor vehicle does not include an electric skateboard." MCL 257.33.

Moving violation

- For purposes of MCL 257.601b, *moving violation* means "an act or omission prohibited under this act or a local ordinance substantially corresponding to this act that occurs while a person is operating a motor vehicle, and for which the person is subject to a fine." MCL 257.601b(5)(b).

N

Negligence

- For purposes of MCL 8.9, *negligence* means "the failure to use reasonable care with respect to a material element of an offense to avoid consequences that are the foreseeable outcome of the person's conduct with respect to a material element of an offense and that threaten or harm the safety of another." MCL 8.9(10)(e).

Nonpublic

- For purposes of MCR 1.109, *nonpublic* "means that a case record is not accessible to the public. A nonpublic case record is accessible to parties and only those other individuals or entities specified in statute or court rule. A record may be made nonpublic only pursuant to statute or court rule. A court may not make a record nonpublic by court order." MCR 1.109(H)(2).

Notice of electronic filing or service

- For purposes of MCR 1.109(G), *notice of electronic filing or service* "means a notice automatically generated by the e-filing system at the time a document is filed or served." MCR 1.109(G)(1)(f).

O

Offense

- For purposes of the Crime Victim's Rights Act, Article 2, *offense* means "1 or more of the following:

(*i*) A violation of a penal law of this state for which a juvenile offender, if convicted as an adult, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony.

(*ii*) A violation of [MCL 750.81] (assault and battery, including domestic violence), [MCL 750.81a] (assault; infliction of serious injury, including aggravated domestic violence), [MCL 750.115] (breaking and entering or illegal entry), [MCL 750.136b(7)] (child abuse in the fourth degree), [MCL 750.145] (contributing to the neglect or delinquency of a minor), [MCL 750.145d] (using the internet or a computer to make a prohibited communication), [MCL 750.233] (intentionally aiming a firearm without malice), [MCL 750.234] (discharge of a firearm intentionally aimed at a person), [MCL 750.235] (discharge of an intentionally aimed firearm resulting in injury), [MCL 750.335a] (indecent exposure), or [MCL 750.411h] (stalking)[.]

(*iii*) A violation of [MCL 257.601b(2)] (injuring a worker in a work zone) or [MCL 257.617a] (leaving the scene of a personal injury accident) . . . or a violation of [MCL 257.625] (operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with unlawful blood alcohol content) . . . if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual.

(*iv*) Selling or furnishing alcoholic liquor to an individual less than 21 years of age in violation of section 33 of the former 1933 (Ex Sess) PA 8, or [MCL 436.1701], if the violation results in physical injury or death to any individual.

(*v*) A violation of [MCL 324.80176(1) or MCL 324.80176(3)] (operating a motorboat while under the influence of or impaired by intoxicating liquor or a controlled substance, or with unlawful blood alcohol content) . . . if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual.

(*vi*) A violation of a local ordinance substantially corresponding to a law enumerated in subparagraphs (*i*) to (*v*).

(*vii*) A violation described in subparagraphs (i) to (vi) that is subsequently reduced to a violation not included in subparagraphs (*i*) to (*vi*)." MCL 780.781(1)(g).

Operate

- For purposes of MCL 324.80176, *operate* means "to be in control of a vessel propelled wholly or in part by machinery while the vessel is underway and is not docked, at anchor, idle, or otherwise secured." MCL 324.80176(8).

Operating while intoxicated

- For purposes of the Michigan Vehicle Code, *operating while intoxicated* means "any of the following:

  (a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

  (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning 5 years after the state treasurer publishes a certification under [MCL 257.625(28)], the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

  (c) The person has an alcohol content of 0.17 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine." MCL 257.625(1).

Operating while intoxicated offense

- For purposes of MCL 764.9c, *operating while intoxicated offense* "means a violation of any of the following:

  (*i*) . . . MCL 257.625 [or MCL] 257.625m.

  (*ii*) A local ordinance substantially corresponding to a violation listed in [MCL 764.9c(9)(b)(*i*)].

  (*iii*) A law of an Indian tribe substantially corresponding to a violation listed in [MCL 764.9c(9)(b)(*i*)].

  (*iv*) A law of another state substantially corresponding to a violation listed in [MCL 764.9c(9)(b)(*i*)].

  (*v*) A law of the United States substantially corresponding to a violation listed in [MCL 764.9c(9)(b)(*i*)]." MCL 764.9c(9)(b).

Ordinance violation

- For purposes of the Code of Criminal Procedure, *ordinance violation* means "either of the following: (*i*) [a] violation of an ordinance or charter of a city, village, township, or county that is punishable by imprisonment or a fine that is not a civil fine[;] (*ii*) [a] violation of an ordinance, rule, or regulation of any other governmental entity authorized by law to enact ordinances, rules, or regulations that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(o).

Other recorded information

- For purposes of MCR 1.109(A)(1), in which the term *court records* is defined, *other recorded information* "includes, but is not limited to, notices, bench warrants, arrest warrants, and other process issued by the court that do not have to be maintained on paper or digital image." MCR 1.109(A)(1)(b)(*iv*).

P

Parking

- For purposes of the Michigan Vehicle Code, *parking* means "standing a vehicle, whether occupied or not, upon a highway, when not loading or unloading except when making necessary repairs." MCL 257.38.

Partially Indigent

- For purposes of the Michigan Indigent Defense Commission Act, *partially indigent* means "a criminal defendant who is unable to afford the complete cost of legal representation, but is able to contribute a monetary amount toward his or her representation." MCL 780.983(k).

Participant

- For purposes of MCL 600.1200 *et seq.*, *participant* means "individual who is admitted into a veterans treatment court." MCL 600.1200(e).

- For purposes of Chapter 10C of the Revised Judicature Act of 1961 (juvenile mental health courts), *participant* "means a juvenile who is admitted into a juvenile mental health court." MCL 600.1099b(g).

Person

- For purposes of the Code of Criminal Procedure, *person*, *accused*, or a similar word means "an individual or, unless a contrary intention appears, a public or private corporation, partnership, or unincorporated or voluntary association." MCL 761.1(p).

- For purposes of the Crime Victim's Right Act, Article 1, *person* means "an individual, organization, partnership, corporation, or governmental entity." MCL 780.752(1)(j).

- For purposes of the Crime Victim's Right Act, Article 2, *person* means "an individual, organization, partnership, corporation, or governmental entity." MCL 780.781(1)(h).

- For purposes of the Crime Victim's Right Act, Article 3, *person* means "an individual, organization, partnership, corporation, or governmental entity." MCL 780.811(1)(e).

- For purposes of the Michigan Vehicle Code, *person* means "every natural person, firm, copartnership, association, or corporation and their legal successors." MCL 257.40.

Power-driven mobility device

- For purposes of the Michigan Vehicle Code, *power-driven mobility device* means "a mobility device powered by a battery, fuel, or other engine and used by an individual with a mobility disability for the purpose of locomotion. Notwithstanding any other provisions of this act, the requirements of this act apply to a power-driven mobility device while that device is being operated on a street, road, or highway in this state." MCL 257.43c.

Preliminary chemical breath analysis

- For purposes of the Michigan Vehicle Code, *preliminary chemical breath analysis* means "the on-site taking of a preliminary breath test from the breath of a person for the purpose of detecting the presence of any of the following within the person's body:

  (a) Alcoholic liquor.

  (b) A controlled substance, as that term is defined in . . . MCL 333.7104.

  (c) Any other intoxicating substance, as that term is defined in [MCL 257.625].

> (d) Any combination of the substances listed in subdivisions (a) to (c)." MCL 257.43a

Preferred mode

- For purposes of MCR 6.006(B) and MCR 6.006(C), *preferred mode* means "scheduled to be conducted remotely subject to a request under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by [MCL 780.752(1)(m)] or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5)." MCR 6.006(B)(2); MCR 6.006(C)(1).

Program participant

- For purposes of the Address Confidentiality Program Act, *program participant* "means an individual who is certified by the department of the attorney general as a program participant under MCL 780.855." MCL 780.853(n).

Prosecuting attorney

- For purposes of the Code of Criminal Procedure, *prosecuting attorney* means "the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, a special prosecuting attorney, or, in connection with the prosecution of an ordinance violation, an attorney for the political subdivision or governmental entity that enacted the ordinance, charter, rule, or regulation upon which the ordinance violation is based." MCL 761.1(r).

- For purposes of the Crime Victim's Rights Act, *prosecuting attorney* means "the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, or a special prosecuting attorney." MCL 780.752(1)(l).

Q

Qualified foreign language interpreter

- For purposes of MCR 1.111, *qualified foreign language interpreter* means:

> "(a) A person who provides interpretation services, provided that the person has:

(*i*) registered with the State Court Administrative Office; and

(*ii*) passed the consecutive portion of a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator (if testing exists for the language), and is actively engaged in becoming certified; and

(*iii*) met the requirements established by the state court administrator for this interpreter classification; and

(*iv*) been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(b) A person who works for an entity that provides in-person interpretation services provided that:

(*i*) both the entity and the person have registered with the State Court Administrative Office; and

(*ii*) the person has met the requirements established by the state court administrator for this interpreter classification; and

(*iii*) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(c) A person who works for an entity that provides interpretation services by telecommunication equipment, provided that:

(*i*) the entity has registered with the State Court Administrative Office; and

(*ii*) the entity has met the requirements established by the state court administrator for this interpreter classification; and

(*iii*) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services." MCR 1.111(A)(6).

Qualified interpreter

- For purposes of the Deaf Persons' Interpreters Act, *qualified interpreter* means "a person who is certified through the national registry of interpreters for the deaf or certified through the state by the division." MCL 393.502(f).

R

Record

- For purposes of MCL 600.1428, *record* means "information of any kind that is recorded in any manner and that has been created by a court or filed with a court in accordance with supreme court rules." MCL 600.1428(4).

Recklessness

- For purposes of MCL 8.9, *recklessness* means "an act or failure to act that demonstrates a deliberate, willful, or wanton disregard of a substantial and unjustifiable risk without reasonable caution for the rights, safety, and property of others." MCL 8.9(10)(f).

Recordings

- For purposes of MCR 1.109(A)(1), in which the term *court records* is defined, *recordings* "refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records." MCR 1.109(A)(1)(b)(*ii*).

Redact

- For purposes of MCR 1.109, *redact* "means to obscure individual items of information within an otherwise publicly accessible document." MCR 1.109(H)(3).

S

School bus zone

- For purposes of MCL 257.601b, *school bus zone* means "the area lying within 20 feet of a school bus that has stopped and is displaying 2 alternately flashing red lights at the same level, except as described in [MCL 257.682(2)]." MCL 257.601b(5)(c).

School property

- For purposes of MCL 764.15(1)(n), *school property* means "that term as defined in . . . MCL 333.7410." MCL 333.7410(8)(b) defines *school property* as "a building, playing field, or property used for school purposes to impart instruction to children in grades kindergarten through 12, when provided by a public, private, denominational, or parochial school, except those building used primarily for adult education or college extension courses."

Sealed

- For purposes of MCR 1.109, *sealed* "means that a document or portion of a document is sealed by court order pursuant to MCR 8.119(I). Except as required by statute, an entire case may not be sealed." MCR 1.109(H)(5).

Serious emotional disturbance

- For purposes of Chapter 10C of the Revised Judicature Act of 1961 (juvenile mental health courts), *serious emotional disturbance* "means that term as defined in . . . MCL 330.1100d." MCL 600.1099b(h).

Serious impairment of a body function

- For purposes of the Michigan Vehicle Code, *serious impairment of a body function* "includes, but is not limited to, 1 or more of the following:

  (a) Loss of a limb or loss of use of a limb.

  (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.

  (c) Loss of an eye or ear or loss of use of an eye or ear.

  (d) Loss or substantial impairment of a bodily function.

  (e) Serious visible disfigurement.

  (f) A comatose state that lasts for more than 3 days.

  (g) Measurable brain or mental impairment.

  (h) A skull fracture or other serious bone fracture.

  (i) Subdural hemorrhage or subdural hematoma.

  (j) Loss of an organ." MCL 257.58c.

Serious mental illness

- For purposes of Chapter 10C of the Revised Judicature Act of 1961 (juvenile mental health courts), *serious mental illness* "means that term as defined in . . . MCL 330.1100d." MCL 600.1099b(i).

Serious misdemeanor

- For purposes of MCL 764.9c and the Crime Victim's Rights Act, Article 3, "[e]xcept as otherwise defined in this article, as used in this article[, *serious misdemeanor*] means 1 or more of the following:

  (*i*) A violation of [MCL 750.81], assault and battery, including domestic violence.

  (*ii*) A violation of [MCL 750.81a], assault; infliction of serious injury, including aggravated domestic violence.

  (*iii*) Beginning January 1, 2024, a violation of [MCL 750.81c(1)], threatening a [DHHS'] employee with physical harm.

  (*iv*) A violation of [MCL 750.115], breaking and entering or illegal entry.

  (*v*) A violation of [MCL 750.136b(7)], child abuse in the fourth degree.

  (*vi*) A violation of [MCL 750.145], contributing to the neglect or delinquency of a minor.

  (*vii*) A misdemeanor violation of [MCL 750.145d], using the internet or a computer to make a prohibited communication.

  (*viii*) Beginning January 1, 2024, a violation of [MCL 750.174a(2)] or [MCL 750.174a(3)(b)], embezzlement from a vulnerable adult of an amount less than $200.00.

  (*ix*) Beginning January 1, 2024, a violation of [MCL 750.174a(3)(a)], embezzlement from a vulnerable adult of an amount of $200.00 to $1,000.00.

  (*x*) A violation of [MCL 750.233], intentionally aiming a firearm without malice.

  (*xi*) A violation of [MCL 750.234], discharge of a firearm intentionally aimed at a person.

(*xii*) A violation of [MCL 750.235], discharge of an intentionally aimed firearm resulting in injury.

(*xiii*) A violation of [MCL 750.335a], indecent exposure.

(*xiv*) A violation of [MCL 750.411h], stalking.

(*xv*) A violation of [MCL 257.601b(2)], injuring a worker in a work zone.

(*xvi*) Beginning January 1, 2024, a violation of [MCL 257.601d(1)], moving violation causing death.

(*xvii*) Beginning January 1, 2024, a violation of [MCL 257.601d(2)], moving violation causing serious impairment of a body function.

(*xviii*) A violation of [MCL 257.617a], leaving the scene of a personal injury accident.

(*xix*) A violation of [MCL 257.625], operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual.

(*xx*) Selling or furnishing alcoholic liquor to an individual less than 21 years of age in violation of [MCL 436.1701], if the violation results in physical injury or death to any individual.

(*xxi*) A violation of [MCL 324.80176(1) or MCL 324.80176(3)], operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual.

(*xxii*) A violation of a local ordinance substantially corresponding to a violation enumerated in subparagraphs (*i*) to (*xxi*).

(*xxiii*) A violation charged as a crime or serious misdemeanor enumerated in subparagraphs (*i*) to (*xxii*) but subsequently reduced to or pleaded to as a misdemeanor. As used in this subparagraph, 'crime' means that term as defined in [MCL 780.752(1)(b)]." MCL 764.9c(9)(c); MCL 780.811(1)(a).

Sexual assault of a minor

- For purposes of MCL 770.9b, *sexual assault of a minor* "means a violation of any of the following:

  "(*i*) . . . MCL 750.520b, [MCL] 750.520c, and [MCL 750.520d(1)(b)-(e)], in which the victim of the offense is a minor.

  (*ii*) . . . [MCL 750.520d(1)(a)], if the actor is 5 or more years older than the victim.

  (*iii*) . . . MCL 750.520g, for assaulting an individual with the intent to commit criminal sexual conduct described in subparagraphs (*i*) and (*ii*)." MCL 770.9b(3)(b).

Sexually transmitted infection

- For purposes of MCL 333.5129(3), *sexually transmitted infection* "means syphilis, gonorrhea, chancroid, lymphogranuloma venereum, granuloma inguinale, and other sexually transmitted infections that the [Department of Health and Human Services] may designate and require to be reported under [MCL 333.5111]." MCL 333.5101(1)(h).

Snowmobile

- For purposes of MCL 324.82101 *et seq.*, *snowmobile* "means any motor-driven vehicle that is designed for travel primarily on snow or ice and that utilizes sled-type runners or skis, an endless belt tread, or any combination of these or other similar means of contact with the surface upon which it is operated, but is not a vehicle that must be registered under . . . MCL 257.1 to [MCL] 257.923." MCL 324.82101(x).

Specified juvenile violation

- For purposes of MCL 764.1f, *specified juvenile violation* means "any of the following:

  (a) A violation of [MCL 750.72, MCL 750.83, MCL 750.86, MCL 750.89, MCL 750.91, MCL 750.316, MCL 750.317, MCL 750.349, MCL 750.520b, MCL 750.529, MCL 750.529a, or MCL 750.531].

  (b) A violation of [MCL 750.84 or MCL 750.110a(2)], if the juvenile is armed with a dangerous weapon.[]

  (c) A violation of [MCL 750.186a], regarding escape or attempted escape from a juvenile facility, but only if the

juvenile facility from which the individual escaped or attempted to escape was 1 of the following:

(*i*) A high-security or medium-security facility operated by the family independence agency or a county juvenile agency.

(*ii*) A high-security facility operated by a private agency under contract with the family independence agency or a county juvenile agency.

(d) A violation of [MCL 333.7401(2)(a)(*i*) or MCL 333.7403(2)(a)(*i*)].

(e) An attempt to commit a violation described in subdivisions (a) to (d).

(f) Conspiracy to commit a violation described in subdivisions (a) to (d).

(g) Solicitation to commit a violation described in subdivisions (a) to (d).

(h) Any lesser included offense of a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g).

(i) Any other violation arising out of the same transactions as a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g)." MCL 764.1f(2). See also MCR 6.903(H).

State-certified treatment court

- For purposes of MCL 600.1088, *state-certified treatment court* "includes the treatment courts certified by the state court administrative office as provided in" MCL 600.1062 (drug treatment court), MCL 600.1084 (DWI/sobriety court), MCL 600.1091 (mental health court), MCL 600.1099c (juvenile mental health court), or MCL 600.1201 (veterans treatment court). MCL 600.1088(2).

T

Taken

- For purposes of the Code of Criminal Procedure, *taken*, *brought*, or *before* "a magistrate or judge for purposes of criminal

arraignment or the setting of bail means either" physical presence before a judge or district court magistrate or presence before a judge or district court magistrate by use of 2-way interactive video technology. MCL 761.1(t).

Technical probation violation

- For purposes of MCR 6.000-6800, *technical probation violation* means "any violation of the terms of a probation order, including missing or failing a drug test, excluding the following:

  (a) A violation of an order of the court requiring that the probationer have no contact with a named individual.

  (b) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.

  (c) The consumption of alcohol by a probationer who is on probation for a felony violation of MCL 257.625.

  (d) Absconding, defined as the intentional failure of a probationer to report to his or her supervising agent or to advise his or her supervising agent of his or her whereabouts for a continuous period of not less than 60 days." MCR 6.003(7).

V

Vehicle

- For purposes of the Michigan Vehicle Code, *vehicle* means "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks and except, only for the purpose of titling and registration under this act, a mobile home as defined in . . . [MCL 125.2302]." MCL 257.79.

Vessel

- For purposes of the Natural Resources and Environmental Protection Act, Part 801, Marine Safety, *vessel* means "every description of watercraft used or capable of being used as a means of transportation on water." MCL 324.80104(t).

Veterans treatment court/veterans court

- For purposes of MCL 600.1200 *et seq.*, *veterans treatment court* or *veterans court* means "a court adopted or instituted under [MCL 600.1201] that provides a supervised treatment program for individuals who are veterans and who abuse or are dependent upon any controlled substance or alcohol or suffer from a mental illness." MCL 600.1200(j).

Victim

- For purposes of the Crime Victim's Rights Act, Article 1, *victim* means "any of the following:

  (*i*) An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

  (*ii*) The following individuals other than the defendant if the victim is deceased, except as provided in subparagraph (*v*):

    (A) The spouse of the deceased victim.

    (B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

    (C) A parent of the deceased victim if sub-subparagraphs (A) and (B) do not apply.

    (D) The guardian or custodian of a child of the deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

    (E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

    (F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) to not apply.

  (*iii*) A parent, guardian, or custodian of the victim, if the victim is less than 18 years of age, who is neither the defendant nor incarcerated, if the parent, guardian, or custodian so chooses.

  (*iv*) A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the

legal process if he or she is neither the defendant nor incarcerated.

(*v*) For the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.752(1)(m).

- For purposes of the Crime Victim's Rights Act, Article 2, *victim* means "any of the following:

(*i*) A person who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of an offense, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

(*ii*) The following individuals other than the juvenile if the victim is deceased, except as provided in subparagraph (*v*):

(A) The spouse of the deceased victim.

(B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

(C) A parent of a deceased victim if sub-subparagraphs (A) and (B) do not apply.

(D) The guardian or custodian of a child of a deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

(E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

(F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.

(*iii*) A parent, guardian, or custodian of a victim who is less than 18 years of age and who is neither the juvenile nor incarcerated, if the parent, guardian, or custodian so chooses.

(*iv*) A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if he or she is neither the juvenile nor incarcerated.

(*v*) For the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the juvenile:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.781(1)(j).

- For purposes of the Crime Victim's Rights Act, Article 3, *victim* means "any of the following:

(*i*) An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a serious misdemeanor, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

(*ii*) The following individuals other than the defendant if the victim is deceased, except as provided in subparagraph (*v*):

(A) The spouse of the deceased victim.

(B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

(C) A parent of a deceased victim if sub-subparagraphs (A) and (B) do not apply.

(D) The guardian or custodian of a child of a deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

(E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

(F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.

(*iii*) A parent, guardian, or custodian of a victim who is less than 18 years of age and who is neither the defendant nor incarcerated, if the parent, guardian, or custodian so chooses.

(*iv*) A parent, guardian, or custodian of a victim who is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process if he or she is not the defendant and is not incarcerated.

(*v*) For the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.811(1)(h).

Videoconferencing

- For purposes of Subchapter 2.400 of the Michigan Court Rules, *videoconferencing* means "the use of an interactive technology, including a remote digital platform, that sends video, voice, and/or data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, cameras, audio microphones, and audio speakers. It includes use of a remote video platform through an audio-only option." MCR 2.407(A)(2).

Violent felony

- For purposes of MCL 762.10d, MCL 764.1a, and MCL 764.3, *violent felony* "means that term as defined in . . . MCL 791.236." MCL 762.10d(5)(c); MCL 764.1a(9)(d); MCL 764.3(5)(c). "As used in [MCL 791.236], 'violent felony' means an offense against a person in violation of MCL 750.82, [MCL] 750.83, [MCL] 750.84, [MCL] 750.86, [MCL] 750.87, [MCL] 750.88, [MCL] 750.89, [MCL] 750.316, [MCL] 750.317, [MCL] 750.321, [MCL] 750.349, [MCL] 750.349a, [MCL] 750.350, [MCL] 750.397, [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [MCL] 750.520g, [MCL] 750.529, [MCL] 750.529a, [or MCL] 750.530." MCL 791.236(20).

- For purposes of MCR 6.106(B)(1), *violent felony* means "a felony, an element of which involves a violent act or threat of a violent act against any other person." MCR 6.106(B)(2).

Vulnerable adult

- For purposes of MCL 764.1a, *vulnerable adult* means "that term as defined in . . . MCL 750.145m." MCL 764.1a(9)(b). MCL 750.145m(u) defines *vulnerable adult* as "1 or more of the following: (*i*) [a]n individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently[;] (*ii*) [a]n adult as defined in . . . MCL 400.703[;] (*iii*) [a]n adult as defined in . . . MCL 400.11."

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