Motion Practice

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September 2016

STATE OF MICHIGAN

IN THE MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

Case No. [redacted]
Hon. [redacted]

v

[redacted]

Defendant.

[redacted]
Prosecutor's Office
[redacted]

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

DEFENDANT'S MOTION *IN LIMINE*

NOW COMES Defendant, [redacted] by and through his Attorneys, [redacted] and moves this Honorable Court for an Order limiting the People's proofs to relevant and probative evidence and argument:

1. Defendant [redacted] is charged in a one Count Information of Manslaughter with a Motor Vehicle, a 15 year felony offense. MCL § 750.321.

2. On January 28, 2013, this Honorable Court entered an Order requiring that ". . . the People shall provide a Bill of Particulars, setting forth the theory of the prosecution's case, specifically, the acts or omissions of defendant that constitute gross negligence".

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3. On February 11, 2013, the People produced its "Response to the Order to Produce Bill of Particulars". **Exhibit 1.**

4. Several of the theories, and the evidence the prosecution intends to introduce to support its theories, are irrelevant, immaterial, unduly prejudicial, confusing and/or misleading.

5. Accordingly, pursuant to the Michigan Rules of Evidence, Rules 104, 401, 402 and 403, defense respectfully requests that this Honorable Court issue an Order *in limine* precluding the prosecution from seeking to admit, discussing, or referring to, inadmissible theories of criminal culpability, or facts that would support such inadmissible theories.

WHEREFORE, for the reasons more fully developed in the attached brief, Defendant requests this Honorable Court grant his motion.

Respectfully submitted,

Date: March 11, 2013

BY: _____

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PROOF OF SERVICE

The undersigned, under penalty of perjury, certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause or to the parties directly, if unrepresented, by mailing the same to them at their respective addresses as disclosed by the pleadings of record herein with postage fully prepaid thereon or by facsimile transmission on March 11, 2013.

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STATE OF MICHIGAN

IN THE MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

Case No. [redacted]

v

DYLAN ROBERT-JOHN CHILDERS,

Defendant.

[redacted]

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE*

NOW COMES Defendant, [redacted], by and through his Attorneys, BRIAN M. LEGGHIO and TREVOR B. GARRISON, and moves this Honorable Court for an Order limiting evidence in the trial of this matter and in support, states as follows:

FACTS

Defendant [redacted] stands charged with Homicide – Manslaughter with a Motor Vehicle. MCL § 750.321. Pursuant to this Court's Order, the People provided defendant with a bill of particulars, which outlines the People's multiple theories of the case,

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and the proffered evidence which support those theories. **(Exhibit 1, People's Response to Order to Produce Bill of Particulars)**.

What follows is defendant's motion to prohibit the People from referring to, admitting, introducing, or attempting to introduce, and soliciting irrelevant, immaterial, unduly prejudicial, confusing and/or misleading evidence.

ISSUES PRESENTED

Whether, based on the People's Bill of Particulars, this Court should restrict the People from introducing, or attempting to introduce, irrelevant, immaterial, confusing and/or unduly prejudicial testimony, pursuant to MRE 104(a).

STANDARD OF REVIEW

A trial Court's decision to either admit or exclude evidence "will not be disturbed absent an abuse of ... discretion." *People v McDaniel,* 469 Mich 409, 412, (2003). A trial court abuses its discretion when its decision falls "outside the range of principled outcomes." *People v Smith,* 482 Mich 292, 300, (2008).

DISCUSSION

It is well-established that the proponent of evidence, in this case the People, "bear the burden of establishing relevance and admissibility." *People v Crawford, 458 Mich 376, 388 n. 6, (1998).* This Court must, upon request, determine the admissibility of evidence pursuant to MRE 104(a), which provides:

> **Rule 104 Preliminary Questions**
>
> a. *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the

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> existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges. MRE 104(a).

The prosecution's approach is to make every argument to the jury, whether sensible or nonsensical, whether silly or ridiculous or irrelevant and unduly prejudicial, in its effort to secure a conviction. In short, the prosecutor intends, if left to its own devices, to throw every ounce of evidentiary pooh at the proverbial '*trial wall*', in hopes that a conviction will stick.

This attempted methodology of prosecution is unwarranted, and does not meet even the lowest threshold standards of the Michigan Rules of Evidence.

1. THE PEOPLE INTEND TO ARGUE THAT BECAUSE THERE WAS NO LICENSE PLATE AND THE MOTORCYCLE WAS *DESIGNED* FOR OFF STREET USAGE, DYLAN CHILDERS WAS GROSSLY NEGLIGENT.

In their Bill of Particulars, the People intend to argue, "[f]acts that the People argue would go to show the 'reckless' pattern of that day." **(Exhibit 1, p 9);** that the defendant demonstrated a pattern of reckless and wanton behavior, because, they allege, the "motorcycle is designed for closed course competition use only." **(Exhibit 1, p 9).** The People intend to introduce into evidence and argue to the jury that [redacted] was grossly negligent because:

> *The motorcycle was not properly licensed;*
> *Meaning the defendant was not even supposed to be driving the vehicle because it had no license (**Exhibit 1,** People's Bill of Particulars, p 9).*

This argument is a specious, eye-diverting, red herring. [redacted] was riding a dirt bike on private property, not an open, public highway requiring license plates.

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- Would having a license plate have prevented [redacted] death?
- If Mr. Childers had a license plate on his dirt bike, would the People stipulate he was **NOT** grossly negligent?
- If Mr. Childers had a license plate on his dirt bike, would he have been more likely, or less likely, to hit the dangerously outstretched tow cable?

Obviously, the answer is a resounding "NO". As such, the People's argument/evidence is not relevant, not material, confusing and unduly prejudicial. It is the People's effort to paint Mr. Childers as a reckless scofflaw. The proffered evidence is not relevant and must be excluded. Further, the evidence is unfairly prejudicial and must be excluded.

The People also intend to argue:

> There is a plate on the motorcycle that reads as such:
>
> ***This motorcycle is designed for closed course competition use only.***
>
> Facts that the People argue would go to show the "reckless" pattern of that day. . . . The warning label puts the defendant on notice that the vehicle is specifically designed for a specific form of track. He wasn't on that track." **Exhibit 1**, pp 9-10.

First, the plate contains more information than represented by the People. **Exhibit 2** is a complete copy of the plate. It informs the motorcycle is **designed** for closed course usage because:

a. The motorcycle has no speedometer;

b. The motorcycle has no tachometer;

c. The motorcycle has no headlights, no tail light, no turn signals;

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d. The motorcycle's two-stroke engine, ". . . does not conform to U.S. EPA motorcycle noise standards."

See **Exhibit 2**.

The motorcycle manufacturer's disclaimer plate is just that, a disclaimer plate. The dirt bike is not designed for public highway usage; it is a dirt bike *designed* for closed course (non-public street) competition, trail and field driving. The People's desire to argue that Dylan Childers was grossly negligent because he operated a dirt bike on a field trail is puzzling.

- How is a dirt bike, operated on an open, grassy field "gross negligence"?
- What makes operating a dirt bike on a grassy field more probable or less probable that Mr. Childers will strike an unmarked, dangerously outstretched tow cable?

It does NOT; the People simply seek to besmirch [redacted] This proffered evidence has no probative value. It is not relevant, nor probative of whether, or how, Mr. [redacted] struck the outstretched steel tow cable. It is simply irrelevant evidence; it is confusing as to the genuine issues for the jury to resolve and is unduly prejudicial.

2. THE PROSECUTOR SEEKS TO INTRODUCE EVIDENCE, TESTIMONY, AND MAKE ARGUMENT TO THE JURY THAT [redacted] WAS GROSSLY NEGLIGENT, CAUSING [redacted] TH, BECAUSE THE DIRT BIKE MOTORCYCLE WAS NOT DESIGNED TO CARRY A PASSENGER.

The prosecution intends to introduce evidence, solicit testimony, and make argument to the jury that [redacted]rs operated his motorcycle in a grossly negligent manner, causing death to his neighborhood friend [redacted], because she rode on a dirt bike motorcycle designed for one person.

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Below is the prosecutor's articulated logic as to why he should be able to argue that [redacted] was grossly negligent because he and [redacted] rode on a dirt bike designed for one.

> How does the Defendant's ***gross negligence cause an accident resulting in injuries to*** [redacted], if the victim, Leslie Allen, is not on the vehicle? It can't; therefore, she needs to be on the bike. **(Exhibit 1**, p 5).

This is the prosecutor's argument in favor of it being allowed to solicit evidence and argue to the jury that [redacted] was grossly negligent because he took a passenger on his dirt bike designed for a single rider. Even though the People know there is no causal connection between the design of the dirt bike and the accident causing her death, he seeks to introduce this evidence, nonetheless. Notwithstanding that the singular cause of her death was the negligently outstretched towing cable which [redacted] unknowingly drove into, the People intend to make this inane argument.

This evidence is not relevant; it is not material, it is confusing and unduly prejudicial. This evidence and the argument the prosecution seeks to make from it must be excluded.

3. THAT MS. ALLEN DID NOT WEAR A HELMET, WHERE NO CRANIAL INJURIES OCCURRED, IS IRRELEVANT TO THE CAUSE OF DEATH AND INADMISSIBLE.

The People intend to introduce evidence and argue that [redacted] did not wear a helmet, to prove the elements of gross negligence. **(Exhibit 1, p 6).**

The evidence does not meet the threshold relevancy requirements because the uncontroverted autopsy results establish the cause of death to [redacted] was blunt force trauma to her torso. There is no evidence, whatsoever, that the cause of her death, or even a contributing cause, had any connection to her not wearing a helmet. This evidence is

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irrelevant, immaterial and unduly prejudicial and should be excluded from presentment to the jury.

First, the autopsy report established [redacted] did not suffer injuries to her head or her brain. **(Exhibit 3, Autopsy Report)**. Because [redacted] did not suffer injuries to her head or brain, a helmet would not have altered the probability that she would have survived the accident. Accordingly, it is irrelevant pursuant to MRE 401, and inadmissible pursuant to MRE 402 and 403.

Second, defendant was operating his motorcycle on private land, not a public highway, and as such, a helmet is not required under Michigan law. (See MCL §257.658). Involuntary manslaughter involves an "unlawful act", committed in a grossly negligent manner that causes death. *People v Datema,* 448 Mich 585, 606 (1995). Because the non-use of a helmet is a lawful act on private, non-public roads, the People must be excluded from misleading the jury into believing the non-use of a helmet is an unlawful act, or proof of gross negligence.

In *People v Clark,* 171 Mich App 656 (1988), the trial Court excluded the introduction of the victim's non-use of a seatbelt, even though he may have survived the accident had he used the seatbelt. The Court of Appeals held that the trial Court did not abuse its discretion by excluding evidence that the victim was not wearing a seatbelt at the time of the accident. The Court of Appeals reasoned that "the introduction of such evidence would have had a significant prejudicial effect of confusing and misleading a jury from the actual issues before it." *Clark* at 661.

In short, this Court is within its inherent trial Court authority to exclude [redacted] non-use of a helmet, because (1) she suffered no cranial injuries, (2) the defendant did not

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have a legal duty to provide a helmet where the non-use was a lawful act, and (3) the introduction of evidence of the non-use of a helmet will have a significant prejudicial effect of confusing and misleading the jury from the actual issues before it, as was the decision in *People v Clark* 171 Mich App 656, 661 (1988).

4. THE PEOPLE'S ARGUMENT THAT THE DEFENDANT KNEW OF A SITUATION THAT REQUIRED HIM TO TAKE ORDINARY CARE TO AVOID INJURING ANOTHER BECAUSE HE DROVE BY THE TOW TRUCK ONCE BEFORE IS ONLY ADMISSIBLE IF THE PEOPLE CAN LAY A PROPER FOUNDATION.

In their Bill of Particulars, the People argue that the defendant knew of a situation that required him to take ordinary care to avoid injuring another person because he allegedly drove by the tow truck before the accident. **(Exhibit 1, p 7)**. To be admissible, the prosecution must lay a foundation identifying the actions as what they are purported to be and showing that they are connected with the crime or the accused. *People v Kremko*, 52 Mich App 565, 573 (1974); *People v Burrell*, 21 Mich App 451, 456-457 (1970); *People v Stevens*, 88 Mich App 421, 424 (1979); *People v Kemp*, 99 Mich App 485, 489 (1980). In this context, the People must lay a proper foundation identifying the motorcyclist as the defendant, as opposed to someone else, before they may be permitted to introduce evidence that defendant previously drove by the tow truck, and therefore make the argument that he knew of the situation requiring the use of ordinary care.

During the preliminary examination, Mr. Archer did not identify the defendant as the individual who drove by the tow truck before the accident, although the prosecutor has presented to this Court that the defendant did, in-fact, drive by the tow truck. Presented more thoroughly to this Court, Mr. Archer said that a guy "wearing a green shirt" was the first person on the motorcycle, then "there was a kid riding":

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> [redacted] And—and, what did you see?
>
> MR. ARCHER: Well, when we were walking the area before we hooked up the winch cable we seen a guy in a green shirt riding a dirt bike. Then once we hooked up the cable and got ready to winch the truck out, there's another—there was a kid riding a dirt bike, then he went back to get a girl on the dirt bike, and he was riding down the field west and east, and he came back down south towards Canal about—
>
> [redacted]w, if I can, … (PE, Page 72).

Thus, at no point does Mr. Archer identify the defendant was actually "the kid riding" the motorcycle. Upon information and belief, several of the defendant's friends and family took turns riding the motorcycle up and down the electrical field on the date and time in question.

In light of Mr. Archer's testimony, it is truly a stretch, albeit a creative stretch, for the People to claim the defendant knew of a situation requiring ordinary care to prevent injury to another, where Mr. Archer did not identify the defendant as the person who drove by the tow truck in the first place. At the very least, this Court should Order the People to refrain from making any such comments in their opening statement, so as not to mislead the jury, unless and until the proper foundation can be laid.

5. THE NON-EXPERT CIVILIAN PROFFERED TESTIMONY OF [redacted] ESTIMATED SPEED MUST BE EXCLUDED BECAUSE MR. ARCHER HAD NO REAL OPPORTUNITY TO MAKE AN OBSERVATION OF THE APPROACHING MOTORCYCLE

The testimony of a non-expert lay witness as to the estimated speed of an approaching vehicle may be stricken in the discretion of the trial Judge where it appears that the witness had no real opportunity to make an observation of the circumstances and conditions then

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existent. *Hinderer v Ann Arbor Railroad Co.*, 237 Mich 232 (1927). In *Hinderer*, a lay witness's opinion of speed based on his observation made from his automobile on a train track, in front of the train, where the train was two feet from his vehicle, was excluded as evidence, because he did not have the opportunity to observe the train to sufficiently formulate a reliable opinion of the speed. *Id* at 735. With respect to the opportunity for observation, the *Hinderer* witness testified as follows:

> Q. How far away from you was this engine or freight train when you first saw it?
>
> A. About two feet; just like that. I don't mean I was two feet from the track. I mean out here and two feet this way. I couldn't stop and get out of his way there. *Id* at 234.

In the matter now before the Court, Mr. Archer testified that as the defendant was headed southbound, he was going between 30 and 40 miles per hour, and he was "going toward the faster side than slow" (PE, pp 77-78). In the context of defendant traveling northbound, Mr. Archer testified that as the defendant was getting closer, "within two or three feet of the cable I had to jump out of the way, because he didn't want to stop." (PE, p 80). Like the *Hinderer* witness's testimony, Mr. Archer's testimony on the issue of how fast defendant was going is objectionable.

First, Mr. Archer's purported testimony that defendant was going 30 to 40 miles per hour and going toward the faster side than slow as he traveled *southbound* is irrelevant, because the accident occurred while defendant traveled in the *northbound* direction. That defendant was traveling 30 to 40 miles per hour earlier in time, and in an entirely different direction, does not alter the probability that defendant was going too fast at the point of

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impact with the tow cable. Accordingly, Mr. Archer's purported testimony as to defendant's speed is irrelevant, and inadmissible. (See MRE 401 and MRE 402).

Second, like the witness's opportunity for observation in the *Hinderer* case, Mr. Archer did not have sufficient opportunity to observe the approaching motorcycle. By his own words, Mr. Archer's attention was diverted, because "within two or three feet of the cable [he] had to jump out of the way." (PE, p 80). That Mr. Archer was required to jump out of the way immediately before impact demonstrates he did not have the necessary opportunity to observe, and therefore reliably estimate, the defendant's rate of speed. Perhaps if Mr. Archer witnessed the accident from a perpendicular vantage point, his estimation that the defendant was "going toward the faster side than slow", would be less objectionable. However, where Mr. Archer testified the defendant was coming right toward him, in his direct path (PE, p 99), Mr. Archer's speculative characterization of the defendant's speed is akin to the erroneously admitted testimony from the *Hinderer* witness, who should have been precluded from giving an opinion regarding the rate of speed as the train approached his direction in a linear fashion.

Third, Mr. Archer's impression that defendant "didn't want to stop" (PE, p 80) implies that defendant could have, in-fact, stopped his motorcycle before it struck the tow cable. In addition to being speculative, Mr. Archer's opinion invades the province of an expert witness, to which Mr. Archer is not. Mr. Archer's purported testimony that defendant could have avoided the tow cable, or didn't want to stop, must be excluded because the probative value is outweighed by the danger of unfair prejudice. (See MRE 403). Although relevant, the defendant's ability to stop the motorcycle based on Mr. Archer's calculation of speed must be

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excluded. Mr. Archer is not an expert in the science of accident reconstruction, vehicle velocity, or conspicuity. His testimony will only confuse or mislead the jury.

6. ALLEGING THAT A DEFENDANT *COULD HAVE DONE MORE* TO PREVENT AN ACCIDENT IS INSUFFICIENT TO ESTABLISH GROSS NEGLIGENCE UNDER MICHIGAN LAW. THE PEOPLE MUST BE PRECLUDED FROM ARGUING HOW THE ACCIDENT COULD HAVE BEEN AVOIDED HAD DEFENDANT BEEN DRIVING IN A DIFFERENT GEOGRAPHICAL LOCATION

The Prosecutor has declared his intention of eliciting the following testimony during trial:

- [redacted] could have drove 30 yards west of the trailer;
- [redacted] was reckless because he could have drove to the north of the stuck truck;
- [redacted] was reckless because he could have driven to the right, left, and south, to do his recreational driving;
- An ordinary person would have done multiple things, such as gong [sic] to the right or left, slowed down, or stopped; **(Exhibit 1, pp 7-8)**.

During trial, the Prosecutor must convince the jury that [redacted] was grossly negligent. To prove his case, the Prosecutor maintains he will present facts to show how Mr. [redacted] "could have exercised countless options to avoid the situation." **(Exhibit 1, pp 7-8)**. Apparently one of the ways in which he intends to establish these facts is by demonstrating how the accident would not have occurred had [redacted] not been there. Similar arguments have been struck down by our Court of Appeals.

In *Tarlea v Crabtree*, 263 Mich App 80 (2004), the deceased was a high school student participating in summer football conditioning drills. The decedent fell at the end of a running drill and was transported to the hospital where he passed away. The decedent's estate sued the school district. The circuit court judge refused to dismiss the case, claiming there were issues of fact for the jury. On appeal, the Court noted:

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> Simply alleging that an actor **could have done more** is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. *Id* at 90.

The Court of Appeals concluded there was not sufficient evidence to establish an issue of fact regarding gross negligence and dismissed the case. Thus, claiming that [redacted] **could have done more** to avoid the accident is a legally inadequate method to establish gross negligence, because with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. Because the People cannot meet their burden of establishing gross negligence by suggesting areas in which [redacted] *could have been* driving, the hypothetical scenarios are irrelevant pursuant to MRE 401, and inadmissible pursuant to MRE 402.

The issue is whether [redacted] was grossly negligent—not whether his conduct amounted to ordinary negligence. With the negligent homicide statute having been abolished, the jury will not have the opportunity to find [redacted] guilty of a lesser offense. Because "[e]vidence of ordinary negligence does not create a material question of fact concerning gross negligence", *Maiden v Rozwood*, 461 Mich 109, 122-123, (1999), evidence of ordinary negligence is irrelevant. MRE 401.

The suggestion that [redacted] could have drove 30 yards to the west of the trailer does not alter the probability that he was grossly negligent, and the concept of gross negligence will be difficult enough for the jurors to understand without the addition of irrelevant hypotheticals. Gross negligence is "conduct substantially more than negligent." *Costa v Community Emergency Med. Servs., Inc.*, 475 Mich 403, 411 (2006). To allow the People to

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describe areas where [redacted] **could have been**, but was not, is to authorize the People to tip the scales of justice in their favor by utilizing legally insufficient means.

MRE 403 "excludes evidence, even if relevant, if its probative value is 'substantially outweighed' by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *People v Feezel,* 486 Mich 184, 198 (2010). Further, "[e]vidence is unfairly prejudicial when there exists a danger that *marginally* probative evidence will be given undue or preemptive weight by the jury." *Id* (emphasis in original). That [redacted] could have drove to the west, to the east, to the south, or to the north, or not at all, are theoretical scenarios that will only confuse the jury. Accordingly, the People must be ordered not to make such confusing and misleading arguments.

WHEREFORE, Defendant requests this Honorable Court grant his motion.

Respectfully submitted,

Date: March 11, 2013

BY: _____

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PROOF OF SERVICE

The undersigned, under penalty of perjury, certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause or to the parties directly, if unrepresented, by mailing the same to them at their respective addresses as disclosed by the pleadings of record herein with postage fully prepaid thereon or by facsimile transmission on March 11, 2013.

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STATE OF MICHIGAN
IN THE MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

v

[redacted]

Defendant.

Case No. [redacted]
Hon. [redacted]

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[redacted]

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MOTION TO QUASH THE BINDOVER AND DISMISS THE INFORMATION

NOW COMES Defendant, [redacted], by and through his attorneys, Brian M. Legghio and Trevor B. Garrison, and moves this Honorable Court for an Order quashing and bindover and dismissing the Information, and hereby states as follows:

1. Mr. Childers is charged in an Information with one Count of manslaughter with a motor vehicle, a 15 year felony offense. MCL § 750.321.

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2. On August 6, 2012, a preliminary examination was held in the 41-A District Court. After this examination [redacted] was bound over for trial as charged.

3. There was insufficient evidence admitted during the preliminary examination to bind [redacted] over for trial as charged. Specifically, the elements of Manslaughter with a Motor Vehicle were not established.

4. Secondly, the district court failed to find that Defendan[redacted] acted with gross negligence. The Judge's failure to make this finding renders the bindover legally deficient.

4. For the reasons more fully developed in the attached brief, Defendant requests an Order quashing the bindover and dismissing Count 1 of the Information.

WHEREFORE, Defendant, [redacted] respectfully requests that this Honorable Court Quash the Bindover and Dismiss the Information against him.

Respectfully submitted,

Date: December 27, 2012

BY: _____

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[redacted]

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BRIEF IN SUPPORT OF MOTION TO QUASH THE BINDOVER AND DISMISS THE INFORMATION

NOW COMES Defendant, [redacted] by and through his Attorneys, BRIAN M. LEGGHIO and TREVOR B. GARRISON, and moves this Court for an Order quashing the bindover and dismissing the Information, and hereby states as follows:

STATEMENT OF FACTS

[redacted] faces trial in this Court on one charge of involuntary manslaughter with a motor vehicle. This case arises from a most unfortunate accident involving a tow-truck wrecker winching out a stuck pickup truck connected to a long recreational trailer

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(commonly known as a "fifth wheel"). (Preliminary Examination Transcript [hereafter "PE"] at p. 67). The accident occurred on May 30, 2011, in Sterling Heights in an open grassy field containing numerous "*Edison*" type industrial electrical towers; the field is now known as the ITC corridor.[1] It was a warm, sunny day. (PE 55). At that time, [redacted] who was seventeen (17) years old, was operating his dirt bike motorcycle with a female passenger, in the open electrical field when he unknowingly struck the wrecker's seventy (70) foot outstretched, unmarked towing cable, nearly severing himself in half and resulting in the death of his female passenger. [redacted] has maintained his innocence to the offense charged.

On August 6, 2012, a preliminary examination was conducted in the 41st District Court in the City of Sterling Heights. Judge Michael S. Maceroni presided over the hearing, and bound [redacted] over for trial. (PE 110-112). The prosecution presented three (3) witnesses at the examination.

The first witness at the preliminary examination was Gregory Roberts, the owner of the fifth wheel. Mr. Roberts described the events surrounding his stuck fifth wheel and the tragic accident.

Mr. Roberts has lived on Meadow Lake Drive in Sterling Heights for 14 years. (PE 19). Meadow Lake Drive is a residential street which backs up to the ITC corridor from the east. Mr. Roberts testified that he owns a large Dodge pickup truck which is approximately eighteen (18) feet long. Mr. Roberts also owns a thirty-four (34) foot long recreational trailer, which is hauled by his pickup truck. Mr. Roberts testified that he often drives his fifth wheel off of Oleander Street, across the ITC field and parks or unloads it at the rear of his residen-

[1] The ITC electrical tower corridor is bounded by M-59 to the north; Canal Road to the south; Oleander, a residential street, to the west; and commercial buildings, Magahay Elementary School and Meadow Lake Drive, a residential street, to the east.

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tial lot, which abuts the field.

On May 30, 2011, Mr. Roberts and his family were returning from a camping weekend (PE 9). Mr. Roberts turned south off of M-59 onto Oleander Street. He then drove off of Oleander Street onto the grassy field and attempted to proceed east across the ITC field to the rear of his residential lot. The western portion of the field had standing water and was mushy from earlier rains. (PE 21). As he crossed the field, his truck became stuck and unmovable in the mud. (PE 21).

Once he realized his truck and trailer were stuck in the mud, he called Utica Van Dyke Towing, LLC, (hereinafter "Utica Van Dyke") for assistance and they arrived on the scene (PE 22).

Ron Maynard of Utica Van Dyke arrived at the ITC corridor with two (2) other employees, James McBride and Steve Archer. Archer and McBride were new employees and Maynard described them as "trainees" (PE 27, 57).

Mr. Maynard testified that each drove a separate towing-wrecker truck down Oleander Street near the stuck fifth wheel. (PE 45). To determine the best solution, the three (3) wrecker employees inspected and analyzed the fifth wheel situation. (PE 58). Mr. Maynard observed,

> *"We walked around the field to find a safe spot for our tow trucks to enter without getting stuck".*
>
> * * *

Mr. Bukowski:	*Q.*	*" ... Describe the area of land that the trailer was stuck in?"*
Mr. Maynard:	A.	*"It was a low spot in the field, after it rained previously that week, there was standing water, it was soggy, soft ground."* (PE 46).

Mr. Maynard observed that the portion of the field east of the stuck truck was higher ground and dry. (PE 47). Mr. Maynard drove his vehicle around and entered the field from

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the east, which was slightly higher and drier than the western portion where the fifth wheel was stuck. Mr. Maynard situated his wrecker facing south and lowered his towing boom to give him a towing advantage. (PE 53). Mr. Maynard estimated that his vehicle was approximately 70 to 80 feet from the front of the stuck pickup truck. (PE 47).

Mr. Maynard, with the assistance of the two (2) trainee employees, pulled the wire cable from his wrecker over to the pickup truck, and affixed the cable underneath the front bumper to the truck's lower control arm to begin the winching process. With the cables affixed under the front of the stuck truck, Mr. Maynard estimated the cable was approximately one (1) to two (2) feet off of the ground. (PE 57). The parties stipulated that the entire length of the outstretched cable was seventy (70) feet, nine (9) inches long. (PE 7).

Mr. Maynard then positioned himself at his wrecker's winching controls at the rear of his vehicle, on the driver side; that is, he was situated at the northeast corner of his vehicle. Mr. Maynard stated that he would always winch from the opposite side of the cable to avoid injury, if the cable broke. (PE 57). Mr. Maynard had with him trainee James McBride. Mr. Maynard was teaching him winching techniques. (PE 52). The other trainee employee, Mr. Archer, was posted at the front passenger side wheel of the stuck pickup truck. Mr. Archer kept a watchful eye on the towing cable attached to the stuck truck. (PE 63). Mr. Roberts, the truck owner, was instructed to be in his truck and begin to drive forward, as instructed, to assist in the winching process. (PE 72).

Mr. Maynard explained that he spent approximately a total of thirty (30) minutes on the grassy field before the tragic accident occurred. During that time, he testified that he had not heard of any motorcycle or other motorized vehicles in the field area. (PE 60). From Mr. Maynard's position, he was only able to see west, to the pickup truck he was winching, and to

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his right, north, toward M-59. His vision to his left, the south, was obstructed by the cab of his wrecker truck. Thus, Mr. Maynard was able to see Mr. Roberts in his pickup truck and Mr. Archer. Mr. Maynard observed that Mr. Archer was, "*. . . looking at the vehicle we were winching out.*" (PE 63).

Mr. Maynard testified that he started to winch the stuck truck, and Mr. Roberts put the vehicle in gear and began driving forward to assist in the winching process. Mr. Maynard described the accident, as follows:

> *Well, I was rear winching, and we're watching the vehicle to make sure it follows the right path, Steve [Archer] starts coming toward us along the cable, starts yelling stop, waving his arms, stop, stop, stop.*
>
> * * *
>
> *So, when I heard him saying stop, I stopped, and* ***at that same time*** *the motorcycle flew by and hit the cable, just that fast.(*PE 52, 53*)* [Emphasis added].

Mr. Maynard admitted that he did not see or hear the motorcycle until just before it struck the cable. (PE 54, 60).

> *Q.* *Now, you testified you did see a motorcycle? But, you saw the motorcycle?*
>
> *A.* ***At the last second before it hit the cable****, I did not see it before that.* (PE 54). [Emphasis added].

Mr. Roberts, being situated in the pickup truck, had an uninterrupted vantage point to witness this unfortunate occurrence. Mr. Roberts explained that his truck has a diesel engine and thus is very loud. (PE 15). The wrecker employees did not have, nor use, walkie-talkies to communicate with each other (PE 31). Neither Mr. Roberts, nor seemingly did the Utica Van Dyke employees, realize that Mr. Childers was driving his dirt bike toward the out-stretched, tow-cable, with Leslie Allen riding as his passenger.

Mr. Roberts described just how quickly the accident occurred.

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[redacted]

Mr. Roberts:

Q. *And, so you got back inside your truck?*
A. *Yes, sir.*
Q. *Was there anybody by your truck when you did that?*
A. *One of his [Ron's] assistants was at my right front fender.*

* * *

Q. *Okay. So, then, where was the—the other person from the towing company standing next to your car—*
A. *At my right front—*

* * *

A. *--at my right front tire fender area.*
Q. *And, which way would that be facing?*
A. *He was like (sic) facing north, you know, like looking at where they attached it to my front end.*
(PE 13-14)

* * *

Q. *And, then did they actually start moving your truck?*
A. *Yes.*
Q. *And, then what happened?*
A. *Um, my truck is very loud, it's a diesel, and I'm focused on the guy that's running the controls on the tow truck, Ron.*
Q. *Okay.*
A. *So, my—my view is looking directly at him, and he's waiving (sic) me okay gently, you know, come forward as it started to pull me.*
(PE 15)

* * *

A. *As I said, my truck's very loud and I'm so focused on what Ron's trying to get me to do, the next thing I see is the tow truck driver at my right front tire jump up and start waving his hands.*
A. *Well, just as he jumped up, I could hear the dirt bike coming, you—*
(PE 16)
Q. *Now, when he jumped up, what did he do?*
A. *He turned away from me towards his right and started waving his hands.*
(PE 16-17).

Mr. Roberts then described how trainee Archer waved his hands, ran out toward the cable, when the motorcycle passed the trainee. Mr. Roberts witnessed the riders hit the cable full force:

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He hit the tow cable. . . . I saw them slam to the ground and I thought they were cut in half. (PE 19).

Defendant's passenger [redacted] died from the blunt force trauma to her body. The cable severed open [redacted] omach, nearly splitting him in half.

On cross-examination, Mr. Roberts provided a more precise timing of the tragic accident.

Mr. Legghio: *Q.* ***When you first heard the motorcycle, how much time passed before the motorcycle struck the cable, as—as (sic)*** **best you can recall?**

Mr. Roberts: *A.* ***Two to three seconds.***

Q. *When the—when you were in the cab of your vehicle, what was the wrecker employee doing at the front of your passenger fender?*

A. *He was watching the front end of my truck.*

Q. *Were you able to see him?*

A. *Yes.*

(PE 28) [Emphasis added].

* * *

Q. *You were able to see his head and his eyes?*

A. *Yes.*

Q. *And, based upon what you witnessed, you witnessed his eyes looking down in the direction of where the cable attached to your vehicle?*

A. *At that point, yes.*

(PE 28)

* * *

Q. *The employee—you saw the employee at your passenger fender jump up?*

A. *Stood up, jumped up? (sic)*

Q. *Turn around?*

A. *He started to turn, yes.*

Q. *And, how much time between when he started to turn and raise his arms and (sic) the motorcycle struck the cable?*

A. *It was immediate, I mean, he just turned and started waving his arms.*

(PE 29).

Steve Archer was the prosecution's last witness. Mr. Archer testified that he ran the cable from the tow truck boom to the customer's truck. (PE 70). After the cable was attached,

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Mr. Archer stood by the right front tire to watch the cable hook-up. (PE 71).

Mr. Archer acknowledged that, before they hooked up the towing cable, he had personally seen a man in a green shirt in the ITC corridor riding a dirt bike. (PE 72). Mr. Archer even admitted that when they began the winch out, he saw a "*kid riding a dirt bike, then he went back to get a girl on the dirt bike, and he was riding down the field*". (PE 72). Mr. Archer claims to have watched the dirt bike with its riders travel all the way south to Canal Road. (PE 75). After the motorcycle reached the furthest southern point, Canal Road, Mr. Archer testified he watched the motorcycle turn and proceed north in the field. (PE 75). According to Mr. Archer's testimony, which was contradicted by Mr. Maynard and Mr. Roberts, Mr. Archer claimed he watched the dirt bike motorcycle proceed from Canal Road, north toward the stuck fifth wheel. (PE 76).

Mr. Archer testified that he noticed the motorcycle "*get a little closer... and I notice he's not stopping or slowing down or trying to avoid us*". (PE 77). According to Mr. Archer's testimony, he first started yelling "*stop*" and waving his hands toward [redacted] when Mr. [redacted] was approximately 100 yards or less away. (PE 79). Mr. Archer claimed that he had to move out of the way from [redacted] motorcycle as it passed them by, straight into the wire cable.

On cross-examination, Mr. Archer admitted that he did not tell his supervisor or anybody else involved in the winch-out process [redacted] operating a motorcycle toward the cable, "*... because it wasn't a concern. He was north of us and he headed south, that was quite a distance from us*". (PE 90). Mr. Archer acknowledged that he saw the motorcycle heading toward the cable from two and a half (2-1/2) football fields away. (PE 92). Mr. Archer acknowledged that, if the motorcycle had not changed its course and if the mo-

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torcycle proceeded in a straight fashion, it would have struck the cable. (PE 94). Mr. Archer finally admitted that he took no corrective or protective action until Mr. Childers was "*less than 100 yards*" away. (PE 95).

According to Mr. Archer, from the time that he started waving his hands and yelling, until the motorcycle struck the cable, was "*about a minute or less*". (PE 96). Mr. Archer admitted that he never instructed Mr. Maynard to lower the cable, notwithstanding the oncoming motorcycle. (PE 96).

Steven Archer, one of the new employees, had only turned to waive his arms immediately before the impact. (PE 29). There was not enough time for [redacted] to turn and avoid the cable—but he speculated there was enough time for him to stop. (PE 101). On the other hand, according to Mr. Archer's testimony, there was not enough time for him to tell the winch operator to lower the outstretched tow-cable. (PE 96).

Mr. Archer then opined [redacted] was "*going toward the faster side than slow.*" (PE 78). Thus, there was no admitted testimony on the issue of how fas [redacted] was actually driving immediately before the collision with the tow-cable. (PE 1-113). The prosecutor admitted no forensic evidence as to the speed of [redacted] motorcycle, nor even what gear the bike was in upon impact. The prosecution offered no expert vehicle accident reconstruction evidence.

This is Defendant's Motion to Quash the Bindover and Dismiss the Information, because the prosecutor failed to establish [redacted] probably knew of the existence of the tow-cable, failed to prove he probably had the ability to avoid it, and failed to prove the tow-cable probably would have been apparent to a reasonable person in his position. Mr. [redacted] was not grossly negligent when the outstretched tow-cable killed his neighborhood

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friend and nearly killed him.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT THE PRELIMINARY EXAMINATION TO FIND PROBABLE CAUSE THAT A CRIME HAD BEEN COMMITTED.

A. ISSUE PRESENTED

In order to bind [redacted] over for trial on the charge of involuntary vehicular manslaughter, the examining judge was required to render a probable cause finding that the crime was committed. To make this finding, the examining judge must determine that Mr. [redacted] was operating a motor vehicle in a ***grossly negligent*** manner and that his gross negligence was a substantial cause of an accident which caused the death of another. Michigan Criminal Jury Instructions (CJI 2d) § 16.12.

To prove gross negligence, even to a probable cause standard, the prosecutor must prove that the defendant knew of the danger, could have avoided injuring another and that defendant failed to use ordinary care to prevent injury when to a reasonable person it must have been apparent that the result was likely to be serious injury. CJI 2d § 16.18.

The issue presented is whether the examining judge abused his discretion when he found the prosecutor proved [redacted] probably knew of, and probably had the ability to avoid, a low-hanging, unmarked seventy-foot (70) outstretched tow-cable, which was not made apparent to Defendant, and which caused the death of an innocent person.

B. STANDARD OF REVIEW

The district court's decision to bind a defendant over for trial is reviewed for an abuse of discretion. *People v Yamat,* 475 Mich 49, 52 (2006). "*An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.*"

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Woodard v Custer, 476 Mich 545, 557, (2006).

The purpose of a preliminary examination is to determine: 1.) whether a felony offense has been committed; and, if so, 2.) whether there exists probable cause to believe that the defendant committed the offense. MCL § 766.13; *People v Yost,* 468 Mich 122, 125-126, (2003). Probable cause requires evidence sufficient to make a person of ordinary caution and prudence to conscientiously entertain a reasonable belief of the defendant's guilt. *Yost, supra* at 126, 659 NW2d 604.

The examining magistrate was required to "*find evidence on each element of the crime charged or evidence from which those elements may be inferred.*" *People v Hammond,* 161 Mich App 719, 720-21(1987); *People v Hudson,* 241 Mich App 268 (2000).

C. THE FELONY CHARGE AGAINST [redacted]

The Information against [redacted] alleges that he,

> *[D]id operate a motor vehicle in a grossly negligent manner, thereby causing the death of Leslie Allen; contrary to MCL 750.321*[2]

Michigan's vehicular manslaughter statute [MCL § 750.321] provides, in pertinent part:

> *. . . any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison for not more than 15 years...*

The Michigan manslaughter statute provides a punishment for, but does not define manslaughter, and has left it as at common law. *People v Mendoza,* 468 Mich. 527 (2003); *Gillespie MI Crim Law & Proc § 91.28, 2nd Ed.* Manslaughter is defined as the unlawful killing of another without malice, express or implied.

> *"There are two kinds of manslaughter at common law which have been enacted into the statute by use of common-law term without alteration, voluntary and involuntary.* ***Voluntary manslaughter*** *is the killing of another inten-*

[2] The Information is attached as **Exhibit A.**

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tionally, but in a sudden heat of passion due to adequate provocation, but without malice..... ***Involuntary manslaughter*** *is the killing of another, without malice and unintentionally, but in the doing of some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or, in negligently doing some act lawful in itself, or, by the negligent omission to perform a legal duty." Gillespie, 2nd edition.* § 91:28 [Emphasis added].

During a preliminary examination, the prosecutor must present evidence sufficient to establish each element of the offense charged, or evidence from which those elements may be inferred. *People v. Tait,* 99 Mich App 19, 22 (1980). The elements of vehicular manslaughter are set forth in CJI 2d § 16.12, as follows:

> *First, that defendant was operating a motor vehicle.*
> *Second, that he operated the vehicle in a grossly negligent manner.*
> *Third, that defendant's gross negligence was a substantial cause of an accident resulting in injuries to Leslie Allen.*
> *Fourth, that such injuries caused the death of Leslie Allen.*
>
> CJI 2d, §16.12

The CJI 2d defines gross negligence:

> *Gross negligence means more than carelessness. It means willfully disregarding the results to others that might follow from an act or failure to act. In order to find that the defendant was grossly negligent, you must find each of the following three things beyond a reasonable doubt:*
>
> > *First, that the defendant knew of the danger to another, that is, he knew there was a situation that required him to take ordinary care to avoid injuring another.*
> > *Second, that the defendant could have avoided injuring another by using ordinary care.*
> > *Third, that the defendant failed to use ordinary care to prevent injuring another when, to a reasonable person, it must have been apparent that the result was likely to be serious injury.*
> >
> > CJI 2d, §16.18

In this case, the District Judge abused his discretion in binding [redacted] over on the charge of manslaughter with a motor vehicle.

This Court must quash the bindover, because all of the elements of gross negligence were not established at the preliminary examination. Applying the correct legal principles to

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the facts of this case, the prosecutor **failed to prove**:

1.) [redacted] **knew** of the outstretched, low-hanging tow-cable; that
2.) [redacted] **had the ability to avoid it**; and
3.) the tow-cable would have been **apparent to an ordinary person.**

This Court should quash the bindover because the examining magistrate did not make the requisite legal finding that there was probable cause that [redacted] was grossly negligent and that, therefore, a felony offense was committed. (PE 110-12). Because the district court did not make this requisite finding of gross negligence, but merely deferred its finding to a jury, the bindover was legally insufficient.

1. *The Prosecution Failed to Establish the Elements of Gross Negligence.*

An essential element of vehicular manslaughter is a finding that the defendant acted with gross negligence. *People v McCoy,* 233 Mich App 500, 502 (1997). Gross negligence, in the context of vehicular manslaughter, requires the defendant have (1) ***knowledge*** of a situation requiring the use of ordinary care and diligence to avoid injury to others, (2) ***an ability to avoid harm*** by using ordinary care and diligence, and (3) the failure to use care and diligence to avert the threatened danger when to the ordinary mind ***it must be apparent*** that the result is likely to prove disastrous to another. *People v Albers,* 258 Mich App 578, 582, (2003).

The kind of negligence required for manslaughter is something more than ordinary or simple negligence, however, and is often described as "*criminal negligence*" or "*gross negligence*[.]" *People v Herron*, 464 Mich 593, 603 (2001).

The first element of gross negligence is **knowledge**. The prosecution must prove that [redacted] knew of the situation requiring the use of ordinary care and diligence to avoid injury. The evidence at the examination, even viewed in a light most favorable to the prose-

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cution, utterly fails to establish that [redacted] ew of the 70-foot, outstretched, low slung, nearly invisible tow cable's presence.

According to the wrecker employees, there were three (3) wrecker vehicles on Oleander Street while assessing the stuck fifth wheel situation. (PE 11). The stuck truck owner and wrecker employees testified that they inspected the fifth wheel to analyze or "*size up*" the situation. (PE 46-7). Ron Maynard determined that the eastern part of the field was slightly higher and comprised of dry ground; whereas the stuck pickup truck was located in a wet, mushy and muddy area. (PE 46). Mr. Maynard then drove his wrecker on pavement to the eastern side of the field. Maynard situated his towing wrecker facing south.

He lowered his towing boom to the lowest setting to give the wrecker the greatest towing advantage. (PE 60). This is a significant factor because with the towing boom lowered [redacted], a seventeen year old, was less likely, even peripherally, to visually perceive that the wrecker was in the process of winching out a vehicle.

The fifth wheel was situated parallel to M-59, with the vehicle headlights facing east. Thus the stuck vehicle was perpendicular to, and more than 70 feet away from, the only wrecker on the grassy field. This configuration between the two vehicles is important because when a vehicle is being towed, the towing wrecker is nearly always in front of the inoperable vehicle; the boom is high, it lifts the vehicle and tows it away. The physical layout between these two (2) vehicles, more than seventy (70) feet apart in an open field, did not inform any viewer that a dangerous towing cable was outstretched. Moreover, no ordinary person, especially a seventeen (17) year old, would expect a towing operation to be occurring with such a large expanse between the two (2) vehicles, situated in a perpendicular configuration.

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Importantly, according to the wrecker employees, they came to the ITC corridor in three (3) separate towing vehicles. According to their testimony, all of their vehicles had emergency flashing lights operating. Thus, two (2) towing vehicles were still parked on Oleander Street, with their emergency lights flashing. Again, an ordinary person would not normally conclude that a towing operation was occurring in the open field with two (2) wreckers remaining on the street with lights flashing.

Most importantly, the evidence is uncontroverted that the wrecker employees took **no** precautions whatsoever to alert any persons that there was a seventy (70) foot low-hanging cable stretched taut between the fifth wheel, facing east, and the wrecker vehicle, facing south.

- *There were no employees standing along the cable between the two vehicles to warn any oncoming persons;*
- *There were no florescent orange traffic cones placed along the cable between the two vehicles to alert persons of the cable's existence;*
- *There was no warning tape affixed to the outstretched, taut cable;*
- *There were no warning flares ignited to alert persons of the dangerously taut wire cable affixed between the two vehicles;*
- *The wrecker employees had no walkie-talkies, or any other communication devices.*

Simply put, not a single effort was made to alert or inform persons or vehicles of the existence of the dangerously outstretched cable. The significance of the wrecker employees' failure to take any *notifying* precautions explains [redacted] uninformed, yet painful and deadly conduct driving directly into the cable.

There is no record evidence that the prosecutor established that seventeen (17) year

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old [redacted] knew of this life-threatening outstretched, low-hanging cable. No sane person would **knowingly** drive a motorcycle directly into a taut, stretched towing cable. The only logical, reasonable and compelling conclusion to be inferred from the testimony is that [redacted] had no knowledge whatsoever of the cable's existence.

If he knew of the taut cable being there, then the only explanation for his action was that he was experiencing a death wish; to drive his own body directly into it. However, there was no evidence that [redacted] was suicidal. There was no evidence that [redacted] was under the influence of controlled substances or alcohol, or otherwise suffered compromised rationality.

In sum, there is no record of, and the prosecutor failed to prove, that [redacted] had **knowledge**, "*... of the situation requiring the use of ordinary care and diligence to avoid injury*." CJI 2d, § 16.18. Secondly, there is no record from which the district judge could find probable cause that "*to a reasonable person*" the existence of the dangerous, low-hung, outstretched seventy (70) foot cable "*must have been apparent*". *Id.*

The case of *People v Staffeld*, 2012 WL 1020238 (Mich Ct App, No. 303056, March 27, 2012)[3] is instructive on the issue of what level of behavior is required to amount to gross negligence in the context of involuntary manslaughter. In *Staffeld,* the defendant was charged with involuntary manslaughter and second-degree child abuse arising from the accidental drowning death of her five-year-old son. Defendant had been playing with her two children in her backyard, which had a built-in swimming pool. She left the children alone briefly, while she went inside to get a bottle for her one-year-old baby. While gone, the five-year-old child who was playing on his scooter, entered the pool and drowned.

[3] Unpublished and attached as Exhibit B.

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After the examination, the district court concluded that whether defendant was "*grossly negligent*" was a question for the jury and consequently found that the prosecution met its burden of probable cause and bound the case over for trial. The Circuit Court found the district court abused its discretion in binding defendant over on both charges. The Court of Appeals affirmed and adopted the circuit court judge's reasoning:

> *And the issue isn't whether or not hindsight may cause her now to have made a different decision because she's charged with doing something that must be a reckless act or an act of gross negligence. And just to remind the record,* ***gross negligence means a lot more than carelessness****. It means a willful disregard of the results to others that might follow from an act or failure to act. It would require a great deal more foreseeability than what is apparent in this case from the record.* ***And it also requires that the defendant knew of the danger to another****. That is, that she knew that the situation would have required her to take ordinary care to avoid injuring her children. Again, that's the luxury of hindsight. ... Or actually if anything, there is evidence in the record of nonforeseeability, to wit, the husband's testimony that the deceased child was intensely afraid of water. ... And under those circumstances she's charged with manslaughter, which is just an insupportable charge. Completely insupportable based on the exam evidence. ... There was no reckless act here. There was a momentary oversight or inadvertence which may not even rise to the level of an act of negligent [sic]. But it was not a reckless act as defined in the jury instruction or the statute. . . . her act of going into the house to get the bottle for the baby was not an act of recklessness. At worst in hindsight since it had such calamitous consequences,* ***one could easily suggest other ways that she might have handled it. But there was no foreseeability that the act would have had the calamitous consequences that it did have****. So the motion to quash is granted as to both counts. Staffeld,* (Exhibit B). [Emphasis added].

The facts of *Staffeld* are far more egregious than the facts in this case. In *Staffeld,* the defendant had several minutes to reflect on her decision to leave her child unattended; a child who was incapable of attending to himself. [redacted] had mere seconds before Mr. Archer tried to warn him (PE 28), and not enough time to avoid a tow-cable, which clearly Mr.

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[redacted] did **not** see. (PE 101). The *Staffeld* defendant had time to contemplate whether her son would enter the water, and she knowingly accepted that risk when she entered her house and left him unattended. In the instant case, no such contemplation occurred, because there was not enough time.

[redacted] cannot legally be expected to avoid what he could not see, what was not made apparent to him, and what would not have been apparent to a reasonable person in his position. No informative safety measures, warning signs, or precautionary steps were taken by Utica Van Dyke employees; because no precautions were effected, the prosecution failed to prove [redacted] was informed of the dangerous situation. [redacted] could not avoid an unknown danger.

The prosecutor's witness, Mr. Archer, testified [redacted] did "not have enough time to turn" to avoid the tow-cable. (PE 101). It would be unsupportable for this Court to conclude that Defendant could have avoided the tow-cable when Mr. Archer testified there was not enough time for Defendant to turn away from it.

The Court of Appeals analysis in *Tarlea v Crabtree* also provides guidance. 263 Mich App 80 (2004). In *Tarlea,* the plaintiff's deceased was a high school student participating in summer football conditioning drills. The decedent fell at the end of a running drill and was transported to the hospital where he died. The decedent's estate sued the school district. The circuit court refused to dismiss the case, claiming there were "*issues of fact for the jury*". In reversing the circuit court, the Michigan Court of Appeals reasoned:

> *Simply alleging that an actor* ***could*** *have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. Id* at 90. [Emphasis added].

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The Court of Appeals concluded there was insufficient evidence to establish an issue of fact regarding gross negligence and dismissed the case. Like the Court of Appeals in *Tarlea,* this Court should determine that the district judge erred by reliance upon the prosecutor's argument that the Defendant could have done more, by driving his motorcycle in a different location.

This case is not about what [redacted] should have known, or could have known, because gross negligence requires that he have **actual knowledge.** *Albers,* supra, at 582.

None of the witnesses gave [redacted] a timely warning, because they failed to notice [redacted] until it was too late. For instance, supervisor Maynard was teaching a new employee how to operate the winch (PE 51-52); Mr. Maynard did not see the motorcycle in time because of the angle he was facing (PE 54); Mr. Maynard did not see the motorcycle until it passed the tow truck and hit the cable (PE 62); Mr. Maynard was not looking down field because it was not important to him (PE 63).

Mr. Roberts did not see the motorcycle sooner because he was focused on moving his vehicle forward, and he could not hear the motorcycle because his truck had a loud diesel engine (PE 15); and Mr. Archer tried to warn [redacted] but by the time he took action, it was too late (PE 29), as there was not even enough time to tell Mr. Maynard to drop the cable. (PE 96).

Like the *Staffeld* case, there is only evidence of nonforeseeability here, in that no safety measures were taken to inform [redacted] of the deadly, low-hanging cable. Mr. [redacted] cannot be expected to see what was not made apparent to him; he could not know, what he could not see.

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The prosecutor will argue that the mere presence of the tow truck should have given defendant warning of what lay ahead. But this was an unusual job, in that a 70-foot tow-cable was required to accomplish it. Unlike those situations where a tow-truck recovers a vehicle within a few feet from the front-end of the vehicle, the tow-truck involved here was positioned more than 70-feet from the inoperable vehicle, providing ample visual opportunity for another motorist to safely proceed. The Utica Van Dyke truck was not parallel to Mr. Roberts' vehicle, because Mr. Maynard wanted to protect himself in the event the cable snapped (PE 54). This means it was even less likely for [redacted] to believe the towing operation was in progress, because the back-end of the tow truck was not aligned with Mr. Roberts' vehicle, and therefore, not to be expected to be connected to Mr. Robert's vehicle in time or space.

Every reported case in Michigan where a Defendant was convicted of vehicular homicide included aggravating factors. For instance: fleeing and eluding the police (*People v Ebejer*, 66 Mich App 333 (1976)); drag racing (*People v Aldrich*, 246 Mich App 101 (2001)); drinking six (6) beers, disobeying four (4) traffic control devices, and weaving in and out of traffic (*People v Moseler,* 202 Mich App 296 (1993)); operating while intoxicated, failing to stop at stop sign, and failing to yield right of way (*People v England*, 176 Mich App 334, 336 (1989)); drag racing at speeds in excess of 90 miles per hour and operating while intoxicated (*People v Connor*, 295 Mich 1, 4, (1940)); drag racing and swerving (*People v Tims*, 449 Mich 83, 87 (1995)); attempting to chase a police vehicle off of the road, then fleeing and eluding (*People v Scott*, 29 Mich App 549, (1971)); and operating while intoxicated third offense (*People v Stewart*, 206 Mich App 662, 663 (1994)).

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No such aggravating factors existed in this case. The only relevant testimony presented at the preliminary examination of [redacted] pre-collision driving was that he drove in a straight line and "*he drove on the fast side*" (PE 94). This uncontroverted evidence conclusively supports the evidence that [redacted] was unaware of the existence of the dangerous tow-cable. There was no testimony that [redacted] swerved toward the tow-cable, used alcohol or drugs, or otherwise drove in a grossly negligent manner.

To support his request for a bindover, the prosecutor argued:

> [redacted] ***All that is to show (sic) what a reasonable person would do*** *because with this the elements does come—and it does become somewhat of* ***a civil burden*** *to show gross negligence,* ***to show where this person could have been driving, instead where he chose to drive.*** (PE 107).

The district court judge agreed with the prosecutor when he found probable cause; however, the prosecutor's reliance on a civil burden of proof was misplaced in the context of criminal manslaughter. The "*negligence required for manslaughter is something more than ordinary or simple negligence, however, and is often described as 'criminal negligence' or 'gross negligence.'*" *People v Herron,* 464 Mich 593, 605, (2001). Involuntary manslaughter is established if the defendant acts in a grossly negligent, wanton, or reckless manner, causing the death of another. *People v Moseler,* 202 Mich App 296 (1993).

Ordinary negligence implies inadvertence, i.e., that the defendant was unaware of the dangerousness of his conduct and did not intend to harm anyone. *People v Datema,* 448 Mich 585, 604, (1995). Gross negligence implies knowing advertence, i.e., that the defendant ***was aware of the dangerousness of his conduct*** and consciously chose to create that risk, but did not seek to cause harm. *Id.* Because [redacted] was unaware of the presence of the tow-cable, and since he did not intend to harm anyone, there was insufficient

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evidence presented at the preliminary examination to support the bindover on the charge of manslaughter under the theory of gross negligence.

CONCLUSION

Given the insufficient evidence presented at the preliminary examination, the district court abused its discretion in binding defendant over on the charge of involuntary vehicular manslaughter. There was no evidence to support the element of gross negligence, and no conflicting evidence presented that would have created the need for resolution of the issue by the trier of fact.

WHEREFORE, Defendant requests an Order dismissing Count 1 of the information.

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Respectfully submitted,

Date: December 27, 2012

BY: _____

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PROOF OF SERVICE

The undersigned, under penalty of perjury, certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause or to the parties directly, if unrepresented, by mailing the same to them at their respective addresses as disclosed by the pleadings of record herein with postage fully prepaid thereon or by facsimile transmission on December 27, 2012.

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STATE OF MICHIGAN
43RD JUDICIAL DISTRICT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

Case No. [redacted]
HON. [redacted]

[redacted]

Defendant.

OAKLAND COUNTY PROSECUTOR'S OFFICE
[redacted]
1200 North Telegraph Road, Pontiac, MI 48341 [redacted]

BRIAN M. LEGGHIO (P29658)
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DEFENDANT'S MOTION FOR BILL OF PARTICULARS PURSUANT TO M.C.L. §767.44 AND M.C.R. 6.112(E)

NOW COMES Defendant [redacted], by and through his attorney, Brian M. Legghio, and hereby submits his Motion for Bill of Particulars as follows:

1. On February 10, 2011, the Michigan State Police, without a warrant and without [redacted] consent, seized several thousand packets of herbal incense from [redacted] vehicle.

2. At the time that the Michigan State Police seized [redacted] inventory of herbal incense, most of the items contained manufacturer disclosures that they did not contain any unlawful synthetic marijuana

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ingredients, as proscribed by the newly enacted Michigan State Controlled Substance Statute amendments[1].

3. Additionally, in addition to disclosure labels that the manufacturer's product does not contain unlawful substances, the manufacturers provide to merchandisers like [redacted] independent forensic laboratory testing results which reflect that the product does not contain illegal synthetic cannabinoids.

4. At the time the Michigan State Police seized [redacted] herbal incense inventory, [redacted] presented to the Troopers, the forensic laboratory analysis which he received from the manufacturer's that their products had been analyzed and did not contain any unlawful substances as prescribed by the Michigan Controlled Substance Statutes.

5. [redacted] is now charged in a general criminal complaint with two (2) Counts of violating the Michigan Controlled Substance Act, as follows:

Count One

[redacted] "...did possess with intent to deliver"a controlled substance JWH-018; contrary to statute..." MCL 333.7401(2)(b)(iii);

Count Two

[redacted] "...did possess with intent to deliver the controlled substance JWH-250; contrary to statute..."

6. Although supplied with many packets of herbal incense, the MSP Forensic Science Division-Northville Laboratory tested only eight (8) separate, identifiable herbal incense packages. Only four (4) of the eight (8) packages tested, ostensibly contain unlawful synthetic cannabinoids, the other four (4) did

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[1] Public Act 171 effective October 1, 2010, added several substances, including several compounds of synthetic marijuana, including JWH-018 and JWH 250, to Michigan's list of Schedule 1 controlled substances.

not contain any illegal substances. The Michigan State Police laboratory report also states that, "...numerous bags and vials (not examined)."

7. Thus, of the several thousand packages of herbal incense seized by the MSP, the Michigan State Police forensic laboratory identified, only four (4) products allegedly containing an unlawful substance.

8. In order for defendant to be Constitutionally and statutorily informed of the precise charges against him, it is necessary for this Honorable Court to issue an Order for a Bill of Particulars requiring the prosecution to delineate with Constitutional sufficiency, the precise products which the State alleges contain unlawful substances so that [redacted] can be properly informed of the exact charges against him, to be able to defend against the charges and to enable him to make an independent determination whether to subject the products to independent testing. M.C.L. §767.44; M.C.R. 6.112(E). [redacted] has a Constitutional and statutory right to be informed of the extent and nature of the criminal charges the State has instituted regarding the unlawfulness of the products that he possessed.

Respectfully submitted,

By: _____
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[redacted]
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(586) 493-7000

Dated: August 1, 2011

PROOF OF SERVICE

The undersigned, under penalty of perjury, certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause or to the parties directly, if unrepresented, by mailing the same to them at their respective addresses as disclosed by the pleadings of record herein with postage fully prepaid thereon or by facsimile transmission on August 1, 2011.

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STATE OF MICHIGAN
43RD JUDICIAL DISTRICT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

Case No. [redacted]
HON. [redacted]

[redacted]

Defendant.

OAKLAND COUNTY PROSECUTOR'S OFFICE
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MEMORANDUM IN SUPPORT OF MOTION FOR BILL OF PARTICULARS PURSUANT TO M.C.L. §767.44 AND M.C.R. 6.112(E)

[redacted] is a self-employed sales merchant. [redacted] operates his small business, called F & A Sales, from his home located at 2427 Maplecrest, Sterling Heights, Michigan, which he shares with his wife and minor children.

[redacted] orders an extensive array of merchandise from wholesalers, loads the merchandise into his step-van, and delivers and sells his products throughout the Detroit metropolitan area, including Genesee and Livingston County areas. The items that [redacted] sells includes, for example, Duracell batteries, Aleve and Tylenol pain medications, salami sticks, beef jerky, Five (5) hour energy drinks, disposable lighters, etc. See **Exhibit 1.**

In addition to these items [redacted] also merchandises herbal incenses. Mr. [redacted] purchases these herbal incenses from out of state manufacturers and/or wholesalers.

In October, 2010, the Michigan law changed and added certain synthetic marijuana compounds to the Schedule 1 controlled substance list. *See, Motion, ftnt. 1*. Responding to the change, the manufacturer's and wholesaler's of herbal incenses began submitting their products for forensic testing to independent laboratories. The manufacturer's and wholesaler's of herbal incenses supplied the forensic laboratory testing results to the merchandisers, such as [redacted] See, **Exhibit 2**. The manufacturer's and wholesaler's of herbal incenses also began labeling their products to inform the purchaser that their products contained no controlled substances under any State or Federal law. *See*, for example, **Exhibit 3**. The manufacturer and wholesaler's invoice sheet sent to merchandiser's, lik[redacted] also reflected that their products contained no synthetic marijuana. See, **Exhibit 4**.

On February 10, 2011, MSP Troopers seized fro[redacted] work vehicle, over sixty five thousand (65,000) packets of herbal incenses. The MSP Troopers claimed the herbal incenses contained controlled substances. Despit[redacted] attempt to explain and show the Troopers the forensic laboratory testing results supplied by the manufacturers/wholesalers, the Troopers seized [redacted] entire inventory.

On February 18, 2011, the MSP Troopers submitted more than eight (8) different herbal incenses to the MSP Forensic Science Division- Northville laboratory for forensic testing. The State Police lab tested only eight (8) of the

numerous herbal incenses submitted. Of those eight (8) tested for controlled substances, only four (4) contained controlled substances. The forensic lab report states,"...numerous bags and vials (not examined)". See **Exhibit 5.** The total weight of controlled substances ostensibly found by the MSP Forensic Scientist, Jurgen Switalski, in the herbal incenses totaled 4.45 grams.

Although defense counsel had requested the Oakland County Prosecutor's Office and the Michigan State Police to test the remaining herbal incenses, their respective offices have declined to do any further testing. In response, the prosecution has stated, in essence, that much like cocaine cases, *"if we seize five (5) separate one (1) kilogram packages and test one (1) kilogram package, we do not test the remaining four (4) kilogram packages. "* The defense responded that this particular case is starkly different than the traditional controlled substance cases involving marijuana or cocaine. This case is more like the seizure of hundreds of different vials of legitimately possessed controlled substance pills, which would require forensic testing of each type to determine which items contain, or do not contain, a controlled substance. The prosecution has refused to conduct any further forensic testing, notwithstanding that the herbal incenses are manufactured by different manufacturers, with different product names, and from different batch numbers.

Under the totality of these circumstances, [redacted] is presently uncertain of the precise nature of the criminal charges he faces; which allegation of possession with intent to distribute JWH-018, applies to which of the sixty five thousand (65,000) packets of herbal incenses? Which charge of possession with intent to deliver a controlled substance JWH-250 applies to the

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over sixty five thousand (65,000) packets of herbal incenses? Is the prosecution only charging the four (4) packets ostensibly containing the synthetic marijuana? It is for these reasons that this Honorable Court, under the statute and Court Rule, should order the prosecutor to provide a Bill of Particulars.

M.C.L. §767.44 statutorily enables prosecutors to utilize the short form of charging defendants with crimes under the Michigan Code of Criminal Procedure, M.C.L. §767.1, *et seq.* Section 767.44, however, specifically states that:

> Provided, That the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

The Michigan Supreme Court *in People v. Johnson,* 427 Mich. 98 (1987) explained the application of M.C.L. §767.44:

> The statutory scheme [MCL §767.44] in question addresses concerns of unfair surprise, inadequate notice, and insufficient opportunity to defend, all relevant to a defendant's right to a fair opportunity to meet the charges against him. Thus, while allowing information or indictment based upon general pleading, M.C.L. §767.44; M.S.A. §28.984 also provides a means for obtaining specific information concerning the factual basis of the offense: "[T]he prosecuting attorney, if seasonably requested by the respondent, *shall* furnish a bill of particulars setting up specifically the nature of the offense charged." (Emphasis added). When 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. Tenerowicz,* 266 Mich. 276, 287-288, 253 N.W. 296 (1934). Once a bill of particulars is supplied, a defendant has a right "to have the trial confined to the particulars set up therein." *People v. Ept,* 299 Mich. 324, 326, 300 N.W. 105 (1941). Thus, the procedural implementation of M.C.L. §767.44; M.S.A. §28.984 assures that the defendant will have notice in advance of trial of the factual basis underlying the alleged offense.

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M.C.R. 6.112(E) provides:

> The Court, on motion, may order the prosecutor to provide the defendant a Bill of Particulars describing the essential facts of the alleged offense.

Accordingly, under the totality of circumstances in this case, in order for [redacted] be constitutionally informed of the exact nature of the charges against him, it is necessary for the prosecution to delineate in a Bill of Particulars, the exact packages which it alleges contain controlled substances. Under these unique circumstances, it is impossible for [redacted] be fully informed of the exact nature of the charges against him, to have Constitutional effective assistance of counsel and to be able to prepare a defense or otherwise confront the charges. It is for these reasons, under this statute, that this Honorable Court issue an appropriate Order for Bill of Particulars.

Respectfully submitted,

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Dated: August 1,2011

PROOF OF SERVICE

The undersigned, under penalty of perjury, certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause or to the parties directly, if unrepresented, by mailing the same to them at their respective addresses as disclosed by the pleadings of record herein with postage fully prepaid thereon or by facsimile transmission on August 1,2011.

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Defender Motions Book

2015

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PREFACE

The 2015 edition of the **Defender Motions Book** is an updated edition, part of a set including the **Defender Trial, Defender Plea, Sentencing & Post-Conviction**, and the **Defender Habeas Books**. The Motions Book focuses on motions commonly filed at trial by criminal defense attorneys practicing in Michigan courts. The Motions Book is intended to grow in contents and format, reflecting the dynamic nature of trial practice. Feedback from users is encouraged.

Format. Each chapter of the Motions Book contains its own table of contents, allowing quick identification of issues and location of useful material. Sample motions follow narrative text, and are linked numerically; for example, motion 2.4 relates to text 2-4, covering the same subject. Simpler motions contain highlighted fields which identify data which can be plugged in from a particular case. More complicated motions (search and seizure, for example) are more fact-driven, and data fields are not supplied. Instead, a sample appears for guidance on form.

Citations. Text and motions contain citations to court rules, statutes, and appellate decisions, updated through July, 2015. In all cases, attorneys are urged to update the authorities up to the date of filing. Summaries and full text of new developments are available on the SADO Web site, www.sado.org.

Additional resources for trial attorneys. Attorneys also should consult the online resources located on the State Appellate Defender Office's web site, www.sado.org. These include a database of constantly updated pleadings filed in trial and appellate courts, community pages for information about local practice in each circuit, a calendar of training events, new caselaw summaries, newsletters, and full text of all the Defender Books. A collection of trial motions, searchable by keyword and submitted by trial attorneys in Michigan, also is available exclusively to criminal defense lawyers.

Interactive version. The Defender Motions Book also is published in an interactive version, for use in word processing. This version, supplied on flash drive or Web-downloadable form, is meant to provide templates which can be customized for a particular case. Users may move from field to field, delete text, or add text as needed.

Archives of Earlier Editions. The most recent prior edition of the Defender Motions Book appears on the CDRC's web site, www.sado.org. Every edition is archived by CDRC and is available upon request. Older editions may contain material of continuing interest, for both comparison to new cases and direct application to older cases.

Questions or Comments. Users of the **Defender Motions Book** may address questions or comments to:

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CRIMINAL DEFENSE RESOURCES IN MICHIGAN

Attorneys who represent criminal defendants in Michigan's state or federal courts may take advantage of the comprehensive support services provided by the Criminal Defense Resource Center (formerly, the Legal Resources Project). For a quarter century, the CDRC has provided the tools needed for effective representation, all at very low cost due to generous funding from the Michigan Commission on Law Enforcement Standards, the Michigan State Bar Foundation, the Bureau of Justice Assistance, and the State Appellate Defender Office.

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- Databases of the CDRC Web site, www.sado.org, including expert witness database. a completely updated brief bank, opinion summaries, the Defender Books, Criminal Defense Newsletter, and much more, all searchable by key word;

- Access to the Forum, the CDRC's online discussion group of hundreds of criminal defense attorneys, including a searchable archive of e-mail messages and a unique database of reposited materials ;

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