The Michigan Indigent Defense Commission

and the

Oakland County Bar Association

present the following training opportunity:

Skills Training for Criminal Defense Lawyers

Friday September 30, 2016

Oakland County Bar Association

1760 S. Telegraph Road Suite 100

Bloomfield Hills, Michigan

MICHIGAN INDIGENT DEFENSE COMMISSION

OAKLAND COUNTY OCBA BAR ASSOCIATION

Skills Training for Criminal Defense Lawyers

Objective: Designed as a pilot project model for compliance with the *basic skills acquisition* requirement for the MIDC's *conditionally approved* Standard 1, this training event is designed for lawyers accepting appointments in adult criminal cases. Topics to be covered include initial interviews with clients, ethics and client-centeredness, preliminary exams and motion practice.

Schedule:

9:00 a.m. – 10:30 a.m. – Client communication essentials: early meetings, effective and ethical advocacy, advising your clients (*Cheryl Carpenter, MIDC Regional Consultant and Marla McCowan, MIDC Director of Training, Outreach and Support*)

10:30 – 10:45 – Break

10:45 – 12:15 – Skills training: interview and advocacy techniques in practice *(facilitated by Cheryl Carpenter and Marla McCowan)*

12:15 – 1:15 – lunch on your own

1:15 – 2:15 – Preliminary examinations (*John Shea, MIDC Commissioner and Attorney at Law, Ann Arbor*)

2:15 – 2:30 – Break

2:30 – 3:30 – Defender Motion Practice: core motions and innovative practice, legal updates, critical arguments, and strategy *(Robyn Frankel, Attorney at Law, Huntington Woods)*

3:30 – 5:00 – Skills training: Motion practice and procedure for criminal defense attorneys *(facilitated by Cheryl Carpenter and Marla McCowan)*

Order

Michigan Supreme Court
Lansing, Michigan

June 1, 2016

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

ADM File No. 2015-27

Administrative Order No. 2016-2

Regulations Governing a System for Appointment of Counsel for Indigent Defendants in Criminal Cases and Minimum Standards for Indigent Criminal Defense Services

---

Pursuant to the Michigan Indigent Defense Commission Act, 2013 PA 93, the Michigan Indigent Defense Commission submitted to this Court proposed standards that would regulate the manner in which counsel would be appointed to represent indigent defendants in criminal cases, and would further impose specific training, experience and continuing legal education requirements on attorneys who seek appointment as counsel in these types of cases. The Court published the proposed standards for comment, and after due consideration, conditionally approves the standards as set forth below.[1]

This approval is subject to and contingent on legislative revision of the MIDC Act to address provisions that the Court deems to be of uncertain constitutionality. These provisions include:

1. MCL 780.985 creates the MIDC as an "autonomous entity" and places it within "the judicial branch." Employees of the judicial branch are subject to this Court's exclusive constitutional authority to exercise general supervisory control. See Const 1963, art 6, §§ 1, 4, and 7; *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 298; 586 NW2d 635 (1998). We are concerned that placing the MIDC within the judicial branch, while denying the Court the ability to supervise and direct the commission's activities and employment, may contravene the general principle of separation of powers under the Michigan Constitution, Const 1963, art 3, § 2, and impinge upon the specific constitutional function of this Court to supervise the judicial branch.

2. MCL 780.983(f) defines "indigent criminal defense system," an entity subject to the authority of the MIDC, in a manner that includes trial courts, and combines trial courts with nonjudicial local governments. In addition,

[1] The conditional approval reflects the Court's ongoing authority to establish, implement, and impose professional standards. See Administrative Order No. 1981-7 (approving regulations and standards for the appellate indigent defense system); Administrative Order No. 2004-6 (altering the standards of AO No. 1981-7).

MCL 780.989(1)(a) allows the MIDC to "[d]evelop[] 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 in this state;" and MCL 780.989(1)(b) allows the MIDC "to assure compliance with the commission's minimum standards, rules, and procedures." We are concerned that these provisions might contain enforcement mechanisms that present an unconstitutional usurpation of this Court's authority under Const 1963, art 6, § 4, which provides that the Supreme Court "shall have general superintending control over all courts." They also raise general separation of powers concerns under Const 1963, art 3, § 2.

3. MCL 780.989(1)(f) and (2) and MCL 780.991(2) arguably allow the MIDC to regulate the legal profession. The Constitution exclusively assigns regulation of the legal profession to the judiciary. See Const 1963, art 6, § 5; *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000); *Attorney General v Michigan Public Serv Comm*, 243 Mich App 487, 517; 625 NW2d 16 (2000).

To promote the goal of providing effective assistance of counsel for indigent defendants in criminal cases without disruption, the Court urges legislative revision of the MIDC Act to address the constitutional concerns raised herein by this Court. If this Court determines before December 31, 2016, that legislative revisions of the MIDC Act have sufficiently addressed our concerns, the standards approved conditionally by this Court today will then take full effect. Otherwise, this Court's conditional approval of these standards will be automatically withdrawn on December 31, 2016. The Court will then determine what, if any, further action it may take to preserve its constitutional authority.

The conditionally approved standards and requirements, together with the commentary of the MIDC and the MIDC's description of the principles governing the creation of the standards, are as follows:

Minimum Standards for Appointed Counsel under the MIDC Act

Standard 1

Education and Training of Defense Counsel

The MIDC Act requires adherence to the principle that "[d]efense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients." MCL 780.991(2)(e). The United States Supreme Court has held that the constitutional right to

counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial "is not enough to satisfy the constitutional command." *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Ninth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided with and required to attend continuing legal education."

The MIDC proposed a minimum standard for the education and training of defense counsel. The version conditionally approved by the Court is as follows:

A. Knowledge of the law. Counsel shall have reasonable knowledge of substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices. Counsel has a continuing obligation to have reasonable knowledge of the changes and developments in the law. "Reasonable knowledge" as used in this standard means knowledge of which a lawyer competent under MRPC 1.1 would be aware.

B. Knowledge of scientific evidence and applicable defenses. Counsel shall have reasonable knowledge of the forensic and scientific issues that can arise in a criminal case, the legal issues concerning defenses to a crime, and be reasonably able to effectively litigate those issues.

C. Knowledge of technology. Counsel shall be reasonably able to use office technology commonly used in the legal community, and technology used within the applicable court system. Counsel shall be reasonably able to thoroughly review materials that are provided in an electronic format.

D. Continuing education. Counsel shall annually complete continuing legal education courses relevant to the representation of the criminally accused. Counsel shall participate in skills training and educational programs in order to maintain and enhance overall preparation, oral and written advocacy, and litigation and negotiation skills. Lawyers can discharge this obligation for annual continuing legal education by attending local trainings or statewide conferences. Attorneys with fewer than two years of experience practicing criminal defense in Michigan shall participate in one basic skills acquisition class. All attorneys shall annually complete at least twelve hours of continuing legal education. Training shall be funded through compliance plans submitted by the local delivery system or other mechanism that does not place a financial burden on assigned counsel. The MIDC shall collect or direct the collection of data regarding the number of hours of continuing legal education offered to and attended by assigned counsel, shall analyze the quality of the training, and shall ensure that the effectiveness of the training be measurable and validated. A report regarding these data shall be submitted to the Court annually by April 1 for the previous calendar year.

Comment:

The minimum of twelve hours of training represents typical national and some local county requirements, and is accessible in existing programs offered statewide.

Standard 2

Initial Interview

The MIDC Act requires adherence to the principle that "[d]efense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client." MCL 780.991(2)(a). United States Supreme Court precedent and American Bar Association Principles recognize that the "lack of time for adequate preparation and the lack of privacy for attorney-client consultation" can preclude "any lawyer from providing effective advice." *See United States v Morris*, 470 F3d 596, 602 (CA 6, 2006) (citing *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)). Further, the Fourth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided sufficient time and a confidential space within which to meet with the client."

The MIDC proposed a minimum standard for the initial client interview. The version conditionally approved by the Court is as follows:

A. Timing and Purpose of the Interview: Counsel shall conduct a client interview as soon as practicable after appointment to represent the defendant in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings. The purpose of the initial interview is to: (1) establish the best possible relationship with the indigent client; (2) review charges; (3) determine whether a motion for pretrial release is appropriate; (4) determine the need to start-up any immediate investigations; (5) determine any immediate mental or physical health needs or need for foreign language interpreter assistance; and (6) advise that clients should not discuss the circumstances of the arrest or allegations with cellmates, law enforcement, family or anybody else without counsel present. Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any subsequent court proceeding so as to be prepared for that proceeding. When a client is in local custody, counsel shall conduct an initial client intake interview within three business days after appointment. When a client is not in custody, counsel shall promptly deliver an introductory communication so that the client may follow-up and schedule a meeting. If confidential videoconference facilities

are made available for trial attorneys, visits should at least be scheduled within three business days. If an indigent defendant is in the custody of the Michigan Department of Corrections (MDOC) or detained in a different county from where the defendant is charged, counsel should arrange for a confidential client visit in advance of the first pre-trial hearing.

B. Setting of the interview: All client interviews shall be conducted in a private and confidential setting to the extent reasonably possible. The indigent criminal defense system shall ensure the necessary accommodations for private discussions between counsel and clients in courthouses, lock-ups, jails, prisons, detention centers, and other places where clients must confer with counsel.

C. Preparation: Counsel shall obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports concerning pretrial release, and discoverable material.

D. Client status:

1. Counsel shall evaluate whether the client is capable of participation in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate, and, where appropriate, raise as an issue for the court the client's capacity to stand trial or to enter a plea pursuant to MCR 6.125 and MCL 330.2020. Counsel shall take appropriate action where there are any questions about a client's competency.

2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings in a language or form of communication the client can understand. Steps include seeking the appointment of an interpreter to assist with pre-trial preparation, interviews, investigation, and in- court proceedings, or other accommodations pursuant to MCR. 1.111.

Comments:

1. The MIDC recognizes that counsel cannot ensure communication prior to court with an out of custody indigent client. For out of custody clients the standard instead requires the attorney to notify clients of the need for a prompt interview.

2. The requirement of a meeting within three business days is typical of national requirements (Florida Performance Guidelines suggest 72 hours; in Massachusetts, the Committee for Public Counsel Services Assigned Counsel Manual requires a visit within three business days for custody clients; the Supreme Court of Nevada issued a performance standard requiring an initial interview within 72 hours of appointment).

3. Certain indigent criminal defense systems only pay counsel for limited client visits in custody. In these jurisdictions, compliance plans with this standard will need to guarantee funding for multiple visits.

4. In certain systems, counsel is not immediately notified of appointments to represent indigent clients. In these jurisdictions, compliance plans must resolve any issues with the failure to provide timely notification.

5. Some jurisdictions do not have discovery prepared for trial counsel within three business days. The MIDC expects that this minimum standard can be used to push for local reforms to immediately provide electronic discovery upon appointment.

6. The three-business-day requirement is specific to clients in "local" custody because some indigent defendants are in the custody of the Michigan Department of Corrections (MDOC) while other defendants might be in jail in a different county from the charging offense.

7. In jurisdictions with a large client population in MDOC custody or rural jurisdictions requiring distant client visits compliance plans might provide for visits through confidential videoconferencing.

8. Systems without adequate settings for confidential visits for either in-custody or out-of-custody clients will need compliance plans to create this space.

9. This standard only involves the initial client interview. Other confidential client interviews are expected, as necessary.

Standard 3

Investigation and Experts

The United States Supreme Court has held: (1) "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052, 2066; 80 L Ed 2d 674 (1984); and (2) "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v Richter*, 562 US 86, 106; 131 S Ct 770, 788; 178 L Ed 2d 624 (2011). The MIDC Act authorizes "minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel…" MCL 780.985(3).

The MIDC proposed a minimum standard for investigations and experts. The version conditionally approved by the Court is as follows:

A. Counsel shall conduct an independent investigation of the charges and offense as promptly as practicable.

B. When appropriate, counsel shall request funds to retain an investigator to assist with the client's defense. Reasonable requests must be funded.

C. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Reasonable requests must be funded as required by law.

D. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts.

Comments:

1. The MIDC recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. Decisions to limit investigation should not be made merely on the basis of discovery or representations made by the government.

2. The MIDC emphasizes that a client's professed desire to plead guilty does not automatically alleviate the need to investigate.

3. Counsel should inform clients of the progress of investigations pertaining to their case.

4. Expected increased costs from an increase in investigations and expert use will be tackled in compliance plans.

Standard 4

Counsel at First Appearance and other Critical Stages

The MIDC Act provides that standards shall be established to effectuate the following: (1) "All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c); (2) "A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. MCL 780.991(3)(a); (3) …counsel

continuously represents and personally appears at *every court appearance* throughout the pendency of the case." MCL 780.991(2)(d)(emphasis added).

The MIDC proposed a minimum standard on counsel at first appearance and other critical stages. The version conditionally approved by the Court is as follows:

A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services. 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. Representation includes but is not limited to the arraignment on the complaint and warrant. 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. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

B. 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.

Comments:

1. The proposed standard addresses an indigent defendant's right to counsel at every court appearance and is not addressing vertical representation (same defense counsel continuously represents) which will be the subject of a future minimum standard as described in MCL 780.991(2)(d).

2. One of several potential compliance plans for this standard may use an on-duty arraignment attorney to represent defendants. This appointment may be a limited appearance for arraignment only with subsequent appointment of different counsel for future proceedings. In this manner, actual indigency determinations may still be made during the arraignment.

3. Among other duties, lawyering at first appearance should consist of an explanation of the criminal justice process, advice on what topics to discuss with the judge, a focus on the potential for pre-trial release, or achieving dispositions outside of the criminal justice system via civil infraction or dismissal. In rare cases, if an attorney has reviewed discovery and has an opportunity for a confidential discussion with her client, there may be a criminal disposition at arraignment.

4. The MIDC anticipates creative and cost-effective compliance plans like representation and advocacy through videoconferencing or consolidated arraignment schedules between multiple district courts.

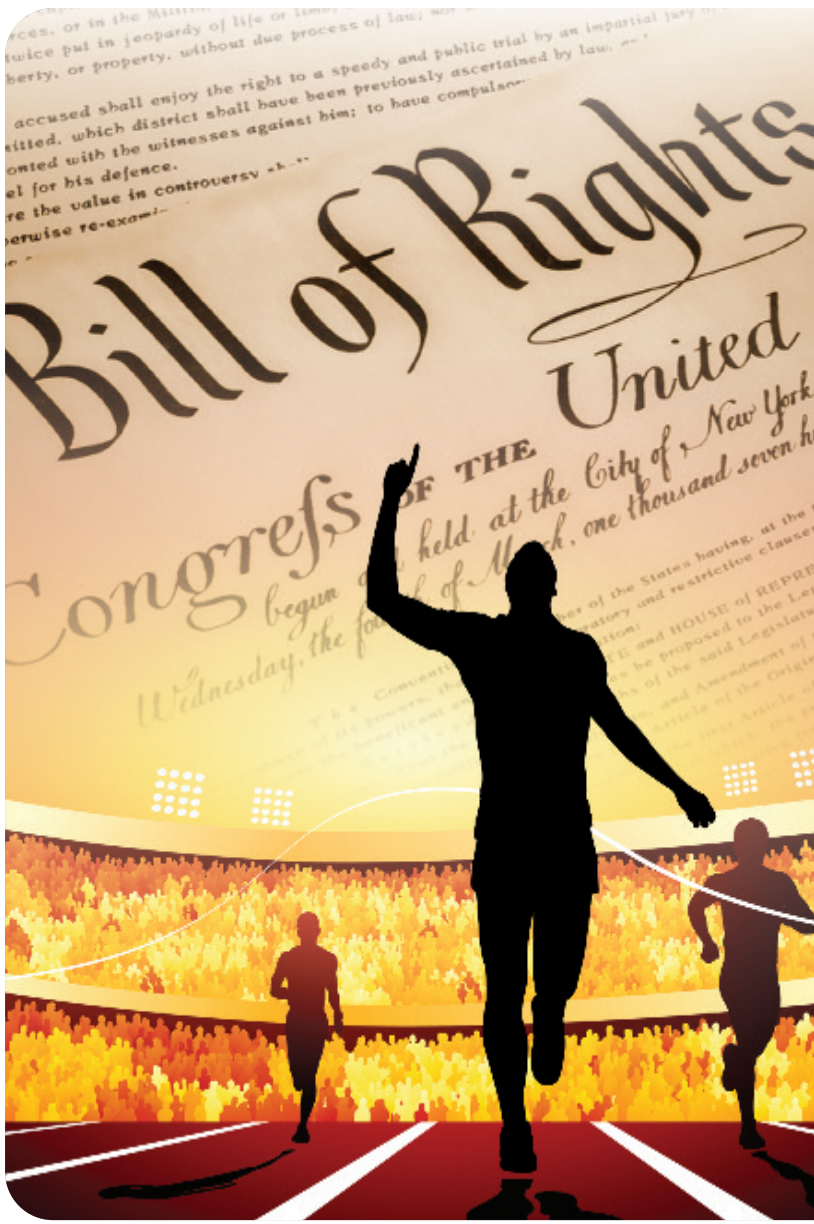
5. This standard does not preclude the setting of interim bonds to allow for the release of in-custody defendants. The intent is not to lengthen any jail stays. The MIDC believes that case-specific interim bond determinations should be discouraged. Formal arraignment and the formal setting of bond should be done as quickly as possible.

6. Any waiver of the right to counsel must be both unequivocal and knowing, intelligent, and voluntary. People v Anderson, 398 Mich 361; 247 NW2d 857 (1976). The uncounseled defendant must have sufficient information to make an intelligent choice dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.

Redefining Success as a Public Defender:

A Rallying Cry for Those Most Committed to *Gideon*'s Promise

By Jonathan Rapping



Young public defenders express the following sentiments almost daily:
"What's the point?"

"I cannot make a difference."

"I'll never be the public defender my clients need me to be!"

As the 50th anniversary of the decision in *Gideon v. Wainwright* approaches, the criminal justice system is not close to fulfilling its promise. Public defenders are on the front lines of a battle for the country's very sense of justice. They are the ones most acutely aware of the nation's failure in indigent defense. Yet every day they fight on, without the resources necessary to do the job well. Often they internalize the country's failures, blaming themselves for not achieving the most basic tenets of justice for the poor and disenfranchised. As they watch injustices proliferate, they often see themselves as failures. Public defenders are far from failures; they are just so focused on a long-term ideal that they have trouble seeing the many successes they have achieved.

The Dilemma of the Conscientious Public Defender

What does it mean to be successful as a public defender? Every public defender has good days and bad, and how we distinguish between them has everything to do with how we answer this question. Eighteen years after beginning my career as a public defender, I am still redefining my view of what it means to be successful as a public defender. Of course, the conscientious public defender is focused on achieving his or her client's desired objective. But this narrow way of thinking of success may drive the most conscientious public defenders from the profession when they fail to achieve this singular goal. Thus, the answer must involve more than merely winning an acquittal,

earning a dismissal, or negotiating a great plea.

I began my career at the Public Defender Service for the District of Columbia (PDS) as a lawyer with the simplistic notion of success just described, a notion which, to be honest, nearly kept me from surviving my first year. I was five months into my new career when I was assigned to represent a 15-year-old boy who was playing with a gun when it accidentally discharged, killing his best friend. I spoke with him in his cell; it was not much of a conversation. The young man appeared almost comatose, unable to communicate, and grief-stricken over the role he played in his best friend's death. It was apparent that there was no punishment the juvenile justice system could visit upon this child that was greater than the punishment he was wielding on himself. Far from being a threat to society, he was a young man deep in the throes of remorse and sorrow. Yet he was charged with murder.

As my co-counsel and I prepared for trial, we got to know this young man well. He was smart, compassionate, and so appreciative to have us fighting for him. He desperately wanted to finish high school and go on to college, something that would be unlikely if the court committed him to Oak Hill, a juvenile detention facility where kids were more likely to be guided towards crime than higher education. He made a mistake, a costly mistake. But he grew up in an environment where guns were prevalent and easily accessible. He and his friends were curious teenagers. He never meant to hurt anyone, and would almost certainly have nothing to do with guns again. None of that seemed to matter to the prosecutor who charged him, or to the judge who handed down the conviction. The judge sentenced the teenager to Oak Hill until his 21st birthday. That boy's dreams ended at that moment. As he was led through the courtroom's back door towards the cellblock, and I walked through the front door, I felt defeated. I walked to my office, closed the door, turned out the lights, and cried. Intellectually, I knew I had done all I could for this young man, but viscerally I felt like I failed. I could not prevent what was clear to me to be a great injustice. I questioned my career choice: "This work is too hard," I told myself. "It is too hard watching terrible things happen to people you come to care about deeply." I knew this was part of the job, and I knew I could not change it. I decided to quit.

Fortunately I worked in a public defender office where I was surrounded by a community of committed, inspiring lawyers. They supported me. They helped me understand that the result would have been the same if this young man had any other lawyer, and that this young man benefitted from having a lawyer who cared, treated him as a person, and fought for him. They helped me understand that we cannot underestimate the importance of giving clients respect and a sense of their own deep humanity during the most trying time of their lives. This was my first lesson in the importance of having a community if one is to sustain himself as a public defender.

I survived the setback and continued as a public defender, but I still never dealt with "losing" very well. At that stage of my career, I equated losing with guilty verdicts. I still labeled this experience a failure. I was young. I had much to learn.

We cannot underestimate the importance of giving clients respect and a sense of their own deep humanity during the most trying time of their lives. This was my first lesson in the importance of having a community if one is to sustain himself as a public defender.

The Epiphany

I learned the true importance of that lesson six years later when I was assigned to represent a man accused of committing a series of sexual assaults. I was provided a police report and asked to go to the jail to meet my new client. As I read the report, I learned this man was accused of picking up women and brutally raping them. The violence involved was horrific, leaving the women horribly injured, both physically and psychologically. The evidence was overwhelming. DNA, hair, and clothing fibers linked the client, the crimes, and the victims (strangers to the client) to the van that he allegedly used to pick them up. The women all identified him as the perpetrator. Although he never admitted to committing the crimes, he made a statement that placed him at the relevant scenes at the relevant times.

At this stage in my career I had represented many people accused of serious felonies, including rape and murder. I had yet to meet a client I did not deeply connect with on a human level. A quote adorning my office wall, by Sister Helen Prejean, served as a constant reminder of the humanity of every person we represent: *"The dignity of the human person means that every human being is worth more than the worst thing they've ever done."* However, as I read about the horrific nature of the assaults on perfect strangers who could have been my mother, my sister, or my wife, I wondered who could do these things. As I considered the strength of the evidence pointing to the man I was about to meet, I wondered if this would be the first client I could not connect with on a human level. When I arrived at the jail, my expectations were proven wrong.

Upon walking into the visiting room, I met a man in his early 40s. He was soft-spoken and polite. He asked how I was; he asked about his family; and he expressed concern for the women who were his accusers. He showed concern for everyone but himself. My newest client was not what I expected. I was no longer convinced by the evidence as laid out in the police report. But if he committed these crimes, he proved the message that hung on my office wall. People are complex and we cannot define them based on their worst moments.

I soon met his family: a very concerned mother, three doting sisters, a loving and supportive wife, and two little children who loved their daddy very much.

Through each of them, I came to understand my client better. As our trial date approached, we became closer. He never seemed worried about his own fate, but was very concerned about how this ordeal would impact his family. The trial lasted a couple of weeks and, as expected, the evidence was quite damning. However, the jury deliberated for several days, giving the defense team increasing hope. Then the jury reached a decision.

As we stood in the courtroom, awaiting the verdict, I was hopeful. The foreperson was asked to share the jury's findings. The foreperson did – *guilty* on all counts. The judge sentenced this man to a term of imprisonment that would guarantee he died in prison. As my client was led through the back doors and I walked through the front, I had that same feeling that I remembered from six years earlier. "This work is just too hard. It is too hard watching terrible things happen to people you come to care for." That evening I collected myself and went to see my client at the jail.

As I entered the visiting room to meet him, I looked at him and said, "I am so sorry."

He interrupted me. "Mr. Rapping, thank you."

"Thank you?" I replied. "Maybe you don't understand what happened today, but things didn't go so well."

He smiled. "No, you don't understand," he told me. He continued:

> All my life I've been in the system. I went to D.C. public schools and never had a teacher who cared about me. I was in the juvenile system and never had a lawyer care about me. I've had adult charges before and no lawyer ever fought for me. But you, your co-counsel, your investigator, and your law clerks, you all cared about me. You fought for me. You gave me the kind of representation the Constitution says I deserve. And for that, I thank you. But even more importantly, my family sat through the trial. My mother, sisters, wife, and children heard what they said I did and are convinced that the jury got it wrong. I could easily spend the rest of my life in prison as long as my family does not believe I had anything to do with these awful crimes. For that, I thank you.

I went home that night and had an epiphany. For the first time in six years I had an understanding of what it meant to be successful as a public defender with which I was comfortable. It was not simply "not guilty" verdicts, dismissals, and great plea offers. It meant being able to look in the mirror each night and know on that day I had given each and every client the representation she or he deserved.

I had spent six years in an organization surrounded by public defenders who could do this work every day. Not only were these lawyers talented and committed, but they had reasonable caseloads and the resources necessary to represent every client well. We earned a fraction of what our law school classmates were earning in the private sector. We worked long hours and dealt with the emotional stress that comes along with being a lawyer for poor people accused of crimes. But at the end of any case we could always say we did everything we could for each client. My career to date had been filled with "good days" – as measured by this more nuanced understanding of my role. I continued to hold this as the standard for public defender success for the next three years.

I became the training director for PDS and continued my career surrounded by lawyers who worked long hours, suffered emotional fatigue, watched terrible things happen to people they cared about, but still could find that each day was a "good day." Poor people in the District of Columbia could not get better representation than they received through PDS.

Then I moved to the South. Over the next few years I would be intimately involved in efforts to reform indigent defense, in Georgia following legislation to develop a statewide public defender system there, and in New Orleans helping to rebuild the public defender offices in the wake of Hurricane Katrina. During this time I worked with public defenders and represented indigent clients in states across the southeast. Unlike my experience in Washington, D.C., these systems did not hold high expectations for their public defenders. Far too often, the expectation was merely that these defenders would process huge caseloads efficiently. There was little respect for thorough investigation, case-specific motions practice, client loyalty, or the need to develop relationships with the people we represented. For the public defender who wanted to do these things, crushing caseloads and too few resources made it impossible. I came to understand that the most basic constitutional and ethical obligations were seen as inconveniences in systems that prioritized processing a high volume of cases over all else. The pressure on public defenders to conform to this practice was intense. In this world it simply was not possible for a public defender to provide every client the representation to which she or he was entitled.

Idealism Shattered

In 2004 I agreed to serve as the first training director for Georgia's new statewide public defender system, and have spent the last eight years working with public defender offices across the Southeast. It is a region with a shameful history regarding indigent defense. For many years there were well over a hundred legal lynchings annually in the South.[1] Once accused of a crime, the sentence was pronounced, without the slightest pretense of due process. While a national outcry put an end to much of this blatantly illegal practice, to keep the lynch mobs at bay the system replaced lynchings with "speedy trials that reliably produced guilty verdicts, death sentences, and rapid executions."[2]

Common were cases like the infamous Scottsboro Boys in which nine illiterate black youths, accused of rape, escaped an Alabama lynch mob only to be rushed to trial 12 days later with a lawyer appointed the morning of trial.[3] The defense conducted no investigation, called no defense witnesses and made no closing arguments. The prosecution sought death sentences against eight of the boys. Eight death sentences were handed down.

The same year the Scottsboro Boys were tried in Alabama, John Downer was accused of rape in Elberton, Ga.[4] One week after being arrested, Downer was tried. Like the Scottsboro Boys, counsel for Downer was appointed the day of trial. No continuance was requested so that the lawyers could conduct an investigation or interview their client. Trial began around 11:00 a.m. and concluded that afternoon. The jury deliberated a mere six minutes before returning a guilty verdict. Downer was sentenced to die.

The year was 1931 and defense attorneys were used as mere window dressing to further the appearance of legitimacy, allowing the public to rest easy that justice had been served. The Supreme Court attempted to end this charade when it decided *Gideon v. Wainwright* in 1963,[5] but 21 years later,

in *Strickland v. Washington*,[6] the Court set such a low bar for what constitutes effective assistance of counsel that for many indigent defendants not much has changed. Many states have taken advantage of the standard for ineffectiveness established in *Strickland* and come to view the mere provision of a warm body as sufficient to meet their Sixth Amendment obligations.

Consider the 14-year-old boy arrested in Union County, Miss., for allegedly taking $100 from an elderly woman. Despite his protestations of innocence, his lawyer never investigated his claims or even consulted with his client. Presumably concluding that the boy was guilty, and that he would lose at trial, the court-appointed lawyer advised him to plead guilty and told him that he was "looking at life" if he lost at trial. The lawyer assured the boy he would be eligible for parole in six years. The boy had spent months in jail with no meaningful access to counsel. Feeling he had no other option, he pled guilty. To add insult to injury, his lawyer's advice was wrong. Now 15, the boy was sentenced to 25 years and would not be eligible for parole until he served at least 10.[7]

Consider the countless clients of a defense attorney who held the contract to represent indigent defendants in Green County, Ga., for 14 years.[8] Although his position was only part time, and he continued to maintain a private practice, the attorney's annual appointed caseload was twice the recommended national standard. He began his public defender career as a young lawyer and quickly adapted to the expected standards of practice that prevailed in Georgia. The judges demanded that he process his cases quickly, and he obliged. In one four-year period he handled 1,493 cases, with 1,479 (more than 99 percent) resulting in pleas. Some days he would plead dozens of clients in a single court session, and he had little time to get the details necessary to negotiate on their behalf. He did not request investigative or expert services "claim[ing] not to need these resources, anyway, because most of his cases were 'pretty open and shut.'"[9] In addition he did not want to arouse public disapproval about spending the county's money. When clients complained about the limited time counsel spent talking to them, he chalked it up to "their [bottomless] need for attention," adding, "You have to draw the line somewhere."[10] He considered his high-volume, plea-bargain practice "a uniquely productive way to do business," and believed that he "achieved good results" for his clients.[11]

As shocking as these stories are, they are not isolated. They represent an embarrassingly low expectation of representation for poor people in much of the country. The lawyers who engage in this substandard practice are shaped by the systems in which they work. The judges who preside over these cases provide their tacit approval of the system. They are judges like Atlanta's Andrew Mickle who, when Georgia refused to fund its young public defender system a couple years after its birth, recommended a return to the days when indigent defense was localized and "starving" lawyers would handle a case for 50 dollars regardless of the time invested.[12] Although this policy would guarantee that no lawyer could afford to adequately represent a client, Mickle's concern was with processing people, not with justice.

Judges are often instrumental in creating this system of inadequate representation for the poor. Johnny Caldwell, for example, presided over the case of Jamie Weis in Pike County, Ga., who was charged with capital murder and appointed counsel experienced in death penalty litigation.[13] When the state did not have the funding to pay Weis' counsel for the preparation necessary to defend him, Caldwell removed his lawyers, over their objection, and appointed two local public defenders. The public defenders resisted, citing crushing caseloads that would make it impossible for them to adequately defend Weis. One had well over 200 cases already and the other more than 100 cases along with significant administrative responsibility. They further pointed out that the removed lawyers had represented Weis for over a year and they could not now recreate the attorney-client relationship. If Judge Caldwell were truly concerned with the right to counsel, these arguments would have been persuasive. He was not.

Many states have taken advantage of the standard for ineffectiveness established in *Strickland* and come to view the mere provision of a warm body as sufficient to meet their Sixth Amendment obligations.

Judges like Caldwell were common in New Orleans when I joined the management team charged with rebuilding the public defender office there after Hurricane Katrina. The scene I observed on my first courtroom visit was typical of what I observed throughout my stay there. It was chaotic. Lawyers wandered about the well of the court chatting with one another. The judge was on the bench and the prisoners were lined up in a row on the left side of the courtroom, wearing orange jumpsuits. The lawyers had no contact with the defendants and it was not clear that any of the lawyers had ever met any of the defendants.

When a case was called, one of the lawyers would speak for the accused. However, none of the men in jumpsuits would be brought to his spokesman's side and the lawyer often barely acknowledged his client. Then, the judge called a case with no lawyer. When it was clear that there was no representative for this particular man, the judge turned to the row of defendants and asked the man to stand. "Where is your lawyer?" asked the judge. "I haven't seen a lawyer since I got locked up," the man replied. "How long has that been?" asked the judge. "Seventy days," answered the man, seemingly resigned to the treatment afforded him. "Have a seat," was the judge's response as he moved on to the next case, completely unfazed by the answer.

In another instance in New Orleans, I was waiting to observe evening First Appearance Hearings when the magistrate took the bench at 6:35 p.m. There were approximately 40 arrestees whose cases needed to be heard that evening. A private attorney represented one of the defendants. The others were left to a team of two public defenders. As a professional courtesy, the judge called the private attorney's case first. After about 10 minutes of discussion, the judge granted the requested bond. Then, at 6:45, the judge turned to the public defenders in the courtroom and said, "You better talk fast because we are going to finish the rest of these by seven o'clock."

As I repeatedly witnessed judges showing such little concern for the rights of the people who rely on publicly funded lawyers, I often thought back to the first training I conducted when I moved to the South. One session focused on litigating basic

suppression motions: challenging searches and seizures, confessions, and identification on Fourth, Fifth, and Sixth Amendment grounds. The subject matter was foundational to the work of any criminal defense lawyer and there were many new public defenders present. I wanted to make sure all understood how to effectively litigate these issues. The first person to approach me after this session was a Circuit Public Defender, one of the nearly four dozen lawyers appointed to lead this new reform effort. He told me that he really enjoyed the session. He explained, however, that his lawyers could not do the things we were teaching. Confused, I assured him that they could do these things, and that the session was based entirely on federal and state principles that applied in his circuit. He then explained to me how things worked where he practices. The judges become very upset if the lawyers file motions, he explained. Because it slows down the docket, they would not allow his lawyers to litigate these issues. At the time I was dumbfounded. Over the next two years I trained and mentored young lawyers who would return from training sessions eager to demand hearings and litigate issues, only to encounter irate judges of the kind described. It was a daunting, but educational, experience for someone used to much different procedures in a well-functioning system.

It is a grueling task to spend every day pushing back against a system that harbors such low expectations for the quality of representation. It is not surprising that some lawyers enter this system full of idealism but ultimately resign themselves to the status quo. Others simply find it too difficult and leave before the pressure to conform overwhelms them. This is what happened to Marie, a young lawyer who came to Georgia in 2005 to be involved in the new reform effort.

Marie was a fiery lawyer who was part of a cohort of public defenders who was going to help transform indigent defense in Georgia. But Marie ultimately became discouraged as countless numbers of her clients fell through the cracks. In her final 13 months as a Georgia public defender, she resolved 900 cases, allowing her three hours per year to devote to each client if she worked 50-hour weeks without taking any vacation time or sick leave.[14] Given that these three hours included court time and client meetings, there was no time for her to be competent in every case. She struggled on as best she could under these conditions, until she found herself at a crossroads. Should she stay in Georgia, she saw herself becoming a desensitized lawyer resigned to processing poor people through an inhumane system. She left to become a public defender in a well-resourced system.

© Sergej Khackimullin | 123rf.com

My mother is an author who frequently writes about criminal justice. Marie's story reminds me of a dedication in one of my mother's books to "all the public defenders … who toil in the trenches every day, against the greatest odds, and with little financial or social reward, in the Sisyphean effort to make our government live up to the democratic rhetoric of its own Constitution."[15] Her reference to Sisyphus, the Greek mythological king condemned to endlessly push a boulder up a hill only to watch it roll back down, symbolizes the seemingly impossible task of advancing the cause of justice in the indigent defense arena. Many throw their hands up, accepting the current state of injustice. Others leave the important mission of trying to reform indigent defense in the most dysfunctional systems. But for those who remain energized and idealistic, they do move the cause of justice forward each day. This was a lesson I learned working in the South, which caused me to rethink my idea of success as a public defender. To explain what I mean, let me tell you about Janelle.

Like Marie, Janelle moved to Georgia to join the new statewide system in 2005. Despite her business suits and briefcase, as one of two African-Americans practicing in her county, it took some time before courthouse personnel stopped asking her where her lawyer was when she entered the courtroom. Undeterred, she threw herself into her new career, and quickly won over those with, and before whom, she practiced. Over time, she brought change to the courthouse. In one example, Janelle prepared a seemingly obvious release argument for her client that she had not heard made by any of the more experienced practitioners. One experienced lawyer advised her that the argument would be a waste of everyone's time. Unmoved, Janelle made her pitch to the judge against a chorus of snickers from some of the more experienced members of the bar. But the judge agreed with Janelle and released her client. Some of the lawyers who snickered subsequently adopted Janelle's argument. Janelle had acted on her duty to her client, not the corrupt ways of the existing system, and thus achieved the best outcome for the client. In the process she began to gradually change the practice in the courthouse. Even had the judge rejected her arguments, however, having the courage to challenge that system, in my newly evolving way of thinking, would have been success.

Today's Civil Rights Struggle

Given my experiences working in the South, I have come to understand something about the public defenders working in corrupt systems. That they fail to provide every client the representation they deserve does not necessarily mean they are worse lawyers than

those I practiced with at PDS. Rather, it indicates that even excellent lawyers, working in systems such as those I experienced in Georgia and Louisiana, have an impossible task. Over time, some do lose the will to continue to fight against the system. They come to accept the status quo and participate in injustice. But others, and they are heroic, never lose sight of our systems' ideals and their obligation to try to make them a reality for every client. They fight mightily every day to close the gap between those ideals and the reality of the American criminal justice system.

While there are some model public defender systems like PDS across the country, they are the exception. Most public defenders appear before judges who expect them to help process cases rather than fight for their clients. Most carry overwhelming caseloads and lack the resources necessary to do everything required of them. The most heroic public defenders find a way to maintain their ideals in the most broken systems, fighting every day to try to realize a modicum of justice for clients who otherwise would not have a chance. These lawyers are exceptional. But most are not able to maintain their values against the odds they fight each day. If we are ever to reform indigent defense in this country, we must find a way to steer the best public defenders to the systems that need them the most and provide them with training and support to help them maintain their idealism while raising the standard of representation where they work.

These experiences, and the need to train and nurture more public defenders committed to true justice, led me to create the Southern Public Defender Training Center (SPDTC). The driving goal of SPDTC is to groom a generation of public defenders in the South who will help raise the standard of representation across the region. We provide the training they need to have a strong sense of what their clients deserve. We provide mentorship and support to help reinforce these lessons when systemic pressures send the opposite message. Perhaps most importantly, we give these lawyers a community of like-minded colleagues to continually support and encourage them as they carry on the "Sisyphean effort" of rolling that seemingly immovable boulder of justice forward.

These ideas stemmed from my years at PDS. When I was a young public defender there, a group of my peers and I would meet regularly to remind ourselves of the reasons we chose this line of work. These gatherings connected us to one another, helping to build a much-needed support network, and kept us inspired as we shared and nurtured each other's idealism. It was this community to which we would turn to reassure us of the rightness of our mission when outsiders exhibited so little respect for our work and our clients.

In one such gathering a close friend, whose parents were active in the civil rights movement, told us that he chose to be a public defender because he always wanted to be a civil rights lawyer. In his mind, public defense was our generation's civil rights struggle. At the time I did not appreciate the importance and truth of this sentiment. I associated civil rights with efforts to desegregate the Woolworth's lunch counter in Greensboro, N.C., in 1960 or to register Black people to vote in Mississippi during Freedom Summer in 1964. I knew the work we were doing was important, but I did not see it as civil rights law. Now, after my experience in the South, the connection is clear and the realization that indigent defense is this generation's civil rights struggle has helped me to refine my view of what it means to be a successful public defender.

> Defenders have to be able to forgive themselves for not being able to give all clients everything they deserve while continuing to resist the pressure to see the status quo as acceptable. This is a noble and heroic task.

The lawyers I work with today, given caseloads and inadequate resources, cannot live up to the standard of success held at PDS. Despite their incredible sacrifices, they cannot make *Gideon*'s promise a reality overnight. Law students frequently ask me whether they should go to a well-resourced office that can give their clients all they deserve or join the growing community of lawyers in the South who frequently fall short. Whenever I am asked this question, I am reminded of my friend's point about the civil rights movement and a segment of a documentary I watched in which a rabbi discussed her experience with Freedom Summer.[16] She describes being with a group of summer volunteers on a college campus in Ohio training for the summer's work. The day before they were to board the bus for Mississippi, news of the disappearance of three civil rights workers made its way North. The workers were out investigating a church bombing when they failed to return. They were feared dead (fears that were confirmed later that summer). One of the civil rights workers training the volunteers told the group the frightening news. The worker explained that protection of the volunteers could not be guaranteed, and that if any of them had second thoughts about boarding the bus the next day, the trainers would understand. The future rabbi then describes a phone call to her mother later that evening. After explaining the situation, her mother urged her not to get on the bus. The young woman reminded her mother of their family members who perished in the Holocaust. She questioned whether, if more Germans had "gotten on the bus," some of her family might have survived. Given that history, she asked, how could she not go to Mississippi?

I think of that documentary when students ask whether they should forgo an opportunity to join one of the model public defender offices in the country to work in the South. In the 1960s there was important work to be done all across the country, but the front line of the civil rights movement was in places like Mississippi, Alabama, and Georgia. Ultimately, that movement was successful because of the civil rights workers in those states. Likewise, there is important work to be done in public defender offices across the country. And the lawyers working in the best public defender offices help provide a model for what all poor people accused of crimes deserve. But if we are to ever realize meaningful indigent defense reform on a national level, we will have to win the battle to bring justice to places like Mississippi, Alabama, and Georgia. I explain to these students that we need good public defenders here. Then comes the inevitable follow-up: "Can I make a difference under such challenging circumstances?" Again, I am reminded of my friend's civil rights analogy.

Changing the World Without Realizing It

Last year I read a book called *Freedom Summer* about the Summer Project in Mississippi in 1964.[17] The author chronicled that summer through the stories of the young people who spent the summer in Mississippi. Some were civil rights workers from the South. Others were college students from across the country. They signed up to change the world. They planned to register voters and educate children and adults in Freedom Schools in Black communities across the state. The task proved more difficult than they imagined. They witnessed beatings and fire bombings. Many people were too afraid to be seen speaking to them. One after another, the workers wondered if they were making any difference at all. They wondered if the Summer Project was a waste of time. The author then flashes forward to 2008. John Lewis, one of the leaders of the Summer Project and later a member of Congress, explained that had it not been for Freedom Summer, Barack Obama would not have been elected president of the United States. While in the middle of the firestorm, these young activists did not realize they were changing the world.

As I read that book, I thought of the countless calls from public defenders in Tennessee, Louisiana, Mississippi, South Carolina, and Alabama. How frequently these heroic lawyers expressed frustration that they could not provide the representation they know their clients deserve. I recalled the desperate email from a Georgia public defender, who several years later continues to raise the standard of representation in his rural county, worrying that he was losing his idealism and that he was "becoming part of the machine." These lawyers do not have the time they need to meet with all of their clients as frequently as they should. They lack the investigative resources to pursue important leads. With caseloads that can be two to three times the recommended maximum, they often have to prioritize the cases that will get the attention they deserve, leaving other clients neglected.

Like those heroes of Freedom Summer, these lawyers do not see the difference they make every day. The next generation will know a very different criminal justice system thanks to the work they do. They are changing the world.

The Epiphany Revisited: A Good Day as a Public Defender

I ultimately tell prospective public defenders that they can make a difference in places with the greatest need for reform. But they will only survive if they refine their view of success. In a handful of public defender offices, the standard I came to understand six years into my career defines a good day as a public defender. For the vast majority of public defenders, it is not possible to realize this ideal. They simply cannot give all clients the representation to which they are entitled by the Constitution. They have caseloads that are too overwhelming, insufficient resources with which to do their jobs, and they work in environments that pressure them to process cases efficiently. But that does not mean they are not successful. Every day that they do everything they can to close the gap between what clients deserve and what the system tolerates, they are successful. At times, theirs may be the only voice reminding the system of our most sacred ideals. That is when the voice is most valuable.

The last chapter of my journey as a public defender has proven transformational. It has caused me to once again redefine how I think about good and bad days for a public defender in those jurisdictions where *Gideon*'s promise remains an aspiration. It has helped me to understand that to sustain oneself in these environments, defenders have to be able to forgive themselves for not being able to give all clients everything they deserve while continuing to resist the pressure to see the status quo as acceptable. Again, this is a noble and heroic task.

Bad days will always exist. They are the ones when the defender becomes discouraged and decides to leave, or becomes complacent and begins to conform. Good days are those in which the defender can continue to raise the standard of representation, however incrementally, without losing sight of the representation clients deserve.

As more committed public defenders choose to work in places where *Gideon*'s promise remains unfulfilled and are able to embrace this standard of success, we will move towards a day when the gap between reality and our ideals is closed. Perhaps our children will see that day. When they do, they should be reminded that it was committed lawyers working to represent one client at a time, incapable of understanding the global difference they were making as they struggled, that made this day a reality.

Notes

1. Michael J. Klarman, *Powell v. Alabama*: The Supreme Court Confronts 'Legal Lynchings,' Criminal Procedure Stories 1 (Carol S. Steiker ed., 2006).
2. *Id.*
3. *Powell v. Alabama*, 287 U.S. 45 (1932).
4. This account of John Downer's case is taken from Anne Emanuel, Elbert Parr Tuttle: Chief Justice of the Civil Rights Revolution 1-7 (2011).
5. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
6. *Strickland v. Washington*, 466 U.S. 668 (1984).
7. NAACP Legal Defense and Educational Fund, Inc., Assembly Line Justice, Mississippi's Indigent Defense Crisis 13 (Feb. 2003).
8. This account is taken from Amy Bach, Ordinary Injustice: How America Holds Court 12-17 (2009).
9. *Id.* at 15.
10. *Id.* at 17.
11. *Id.* at 13.
12. Andrew A. Mickle, *Is the Process Choking the PD System?*, Daily Report, Atlanta, Ga., April 11, 2008.
13. For a summary of the facts, see Appellant's Brief at http://www.schr.org/files/post/WEIS_BREIF_GaSCt_9-2-09_0.pdf.
14. *See* Marie Pierre-Py, *Public Defender System Fails Georgians and Their Lawyers*, Atlanta J.-Const., Mar. 30, 2009.
15. Elayne Rapping, Law and Justice As Seen on TV (2003).
16. The Jewish Americans, PBS Home Video (2008).
17. Bruce Watson, Freedom Summer (2010).

About the Author

Jonathan Rapping is the founder of the Southern Public Defender Training Center. He teaches criminal law and procedure and is the founding director of the Honors Program in Criminal Justice at Atlanta's John Marshall Law School. He regularly teaches and presents at public defender programs nationally.

Jonathan Rapping
Southern Public Defender Training Center
34 Peachtree St., Ste. 2460
Atlanta, GA 30303
404-525-4505
E-MAIL jrapping@bellsouth.net

CHAPTER 2
Doing Right By Your Client While Doing Right: Ethics and Client-Centered Representation

As lawyers committed to representing poor people accused of crimes we must constantly strive to simultaneously live up to two important ideals: to be a client-centered lawyer and to be an ethical lawyer. The Rules of Professional Conduct (the Rules) set boundaries, outside of which we may not venture without violating our responsibility to our profession. However, within those boundaries we are often given wide latitude and much discretion. The duty of loyalty that we owe to our clients, people who did not choose us as their representatives and who have nowhere else to turn, dictates that we must strive to resolve all ethical dilemmas in a manner that falls within the range of permissible responses, while at the same time is calculated to maximize the likelihood of achieving the objectives of the representation as explicitly articulated by the client.

> *[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.*
> -- *Henry Lord Brougham*

I. 7 Principles of Ethical Lawyering

Jack Martin, an outstanding Georgia lawyer who has devoted much of his career to defending indigent defendants charged with the most heinous crimes, articulates seven principles of ethical lawyering. These principles serve as an excellent foundation from which to begin our discussion of ethics and indigent defense[19].

1. You don't have to do this work if you don't want to

This first principle serves as an obvious, yet important, reminder that we chose to do this work and, to therefore, shoulder the special responsibilities that come along with it. We do this work, in part, because we understand that a person's income should not determine the quality of justice s/he receives in our criminal justice system. The indigent defendant does not get to choose his or her attorney. The lawyer is appointed to represent the client without the client having any say in the matter. At a minimum, each client should expect that his or her lawyer will work as hard, and be as loyal, as if the client paid handsomely for the lawyer's services. As was discussed in the chapter on *The Special Role of the Public Defender*, this job is not for everyone. There is no shame in opting for another career path. However, if a lawyer chooses to represent poor people accused of crimes, s/he must always strive to provide the kind of representation s/he would want for his or her own loved ones.

[19] While the seven principles come from Jack Martin, the discussion of these principles represents the views of this author.

2. **If you do take on a client's case, you are ethically obligated to employ every legal means to maximize the outcome for your client**

It is not for the lawyer to decide how much justice a client deserves. Every client should receive as much justice as is available under the law. It is the lawyer's duty to ensure that happens. Therefore, unless the law or the Rules of Professional Conduct prohibit it, the lawyer should take any course of action that will advance the client's cause. At times the Rules are permissive; they tell us that a lawyer "may" undertake a course of action. Other times the Rules are mandatory; instructing that the lawyer "shall" undertake a course of action. While the lawyer must always do what the Rules, and the law, require, when there is discretion the criminal defense attorney should always choose the course most likely achieve the client's desired outcome. When the lawyer identifies an outcome or strategy that will benefit the client, it is incumbent upon the lawyer to look for legal avenues to achieve that end.

3. **It is your client's case, not yours, so it is unethical to preempt your client's moral judgments**

There will be times when the lawyer's moral compass will not be perfectly calibrated with the client's. It is not the lawyer's job to impose his or her moral code upon the client. As long as accomplishing the client's desire does not require the lawyer to violate the law, or the ethical rules, the lawyer should defer to the client. The case will be but one of many for the lawyer. For the client, it represents his or her life. The client should have the ultimate say since it is s/he who will have to live with the outcome. Of course, the lawyer serves as a counselor and advisor. It is the lawyer's duty to discuss the pros and cons of any strategy, and to advise the client about how various decisions will impact the case. However, there will be times when, after all counseling and advising is done, the client will not agree with the lawyer's advice. At these times, the lawyer must respect the client's wishes.

4. **The client, in making his or her decisions, has the right to know the law, *and the evidence*[20]**

This principle reminds me of a training session I facilitated for a group of young law firm associates who were preparing to handle some pro bono misdemeanor cases. The topic was client interviewing and relationship building. I posited that before asking the client for his or her version of events, you should begin by letting the client know the evidence the state has and the possible defenses to the charges. I opined that to ask the client to jump into his or her version of events before knowing anything about the case, the law, or the lawyer, would invite a distrustful client to give a version that s/he assumed would be favorable. This might lead to the client feeling wed to a narrative that is neither truthful nor helpful.

One of the lawyers in the audience suggested that to provide the client with this information without first ferreting out what s/he claims happened is tantamount to coaching the client. The lawyer argued that the client would then tailor his or her account based on the knowledge the lawyer provided. Suddenly, a young lawyer from the firm interrupted, implying that the other lawyer was employing a double standard. The younger lawyer reminded the audience that the firm represents white collar defendants and that these wealthy clients routinely walk into a firm

[20] Jack Martin's 4th principle only addresses the client's right to know the law but it is equally true that the client has the right to know all of the information about the case that the lawyer knows whether from informal discussions with the prosecutor, discovery, investigation, or another source.

lawyer's office demanding to know the charges against them, the evidence against them, and the possible defenses. The white collar client wants this information before he says a word. The younger lawyer suggested that not a lawyer in the room would refuse to provide the requested information until the client first committed to a story. The younger lawyer went further and said that if any firm lawyer did so, the client would simply go elsewhere and the lawyer would be appropriately chastised for his handling of the matter. The young lawyer concluded by asking, "Why should our more criminally sophisticated clients receive a better quality of representation than the less fortunate clientele we are volunteering to represent?"

This anecdote helps to illuminate the fact that many of us, whether consciously or sub-consciously, have a different standard for the indigent client. Some of us are more willing to assume that the poor client is going to concoct a lie if given the information with which to do so. Others are of the view that a client who is sophisticated enough to ask for the information that would allow him to craft a creative defense is entitled to it but that there is something wrong with the lawyer educating the ignorant client so that he can make the same decisions. However, it is our job to educate the client about the law and the facts that will impact the case. It is not our job to decide which clients are able to responsibly handle having certain information. Ultimately, the case is the client's and we work for him or her.

The American Bar Association Model Rule of Professional Conduct 1.4[21], governing the lawyer's duty of communication, supports this view. In requiring that the lawyer "promptly comply with reasonable requests for information," it is clear that if the client were savvy enough to ask for the information, the lawyer would have to provide it. Part of our responsibility in representing poor clients, who are often less educated , is to ensure they are equipped with the information and knowledge that a more sophisticated client may have so that justice is not determined by one's ability to maneuver in the criminal justice arena. Comment [7] to Rule 1.4 mandates that, while there may be extraordinary circumstances where sharing information with a client might not happen immediately, a lawyer may never "withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person." If a lawyer assumes the worst in the client, s/he are not giving the client the representation s/he deserves. If the lawyer believes that s/he needs to withhold information from the client in order to protect the client from his own shortcomings, the lawyer would do well to remember Principle #1: You don't have to do this work if you don't want to.

5. Never lie to or mislead a client, especially as to the confidentiality of communications

It is never okay to lie to, or to mislead a client. Imagine if you hired a lawyer, only to find out that s/he had been withholding information from you or lying to you about what s/he knows. You would likely fire that lawyer. Indigent defendants deserve no less than we expect from our agents and representatives. The lawyer must always be honest with his or her clients, even when the lawyer fears that doing so may upset the client or cause disharmony within the defense team. Successful representation requires that the client be able to trust his or her lawyer. The client must understand that the lawyer works for the client and has the client's

---

[21] When we refer to the Rules of Professional Conduct, and related commentary, throughout this article, we will be referring to the American Bar Association Model Rules of Professional Conduct and the comments to those Rules. While the Model Rules are not binding on any state, they serve as the model of the codes of professional conduct adopted by almost every state.

interests at heart. Only then will the client have the confidence in the lawyer necessary for a successful attorney-client relationship.

One way in which lawyers violate this principle is by withholding information, or lying about what they know, because they fear that disclosure will cause the client to make a choice with which the lawyer does not agree. Perhaps the lawyer has been advocating one defense theory over another and it has taken a while to get the client to agree with the lawyer's view. Suppose the lawyer later learns some information that the lawyer believes a jury will give little weight but that s/he fears will cause the client to gravitate back to the less desirable theory. There may be a temptation to not fully disclose the information. But this information belongs to the client, as it was learned during the course of the representation. Not sharing this information with the client, or lying about what we learned, is not an option. Lawyers must operate with full and honest disclosure, serving as counselor and advisor to help the client make the best decisions to achieve his or her goals.

A second way that lawyers frequently mislead clients is by disclosing confidential information. This is frequently done without the lawyer realizing s/he is violating a duty to the client because lawyers often do not appreciate the breadth of the obligation. Other times lawyers disclose confidential information because they believe it will help the client's cause. This is always permissible with the client's express permission, after consultation. But a lawyer may never preempt the client's decision about whether to reveal confidential information.

Confidentiality, as defined by Rule 1.6, is much broader than privileged information learned directly from the client. As the Comment makes clear, "the confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[22] Therefore, the Rules protect all information, whether learned through the client, investigation, discovery, or even public records, as long as that information relates to the representation.

When a lawyer undertakes the representation of a client, s/he makes a promise not to disclose any confidential information without the client's "informed consent."[23] S/he must never break that promise to the client.

6. Preserving client confidences preserves the truth finding process

Those who do not understand the defense function in our criminal justice system are sometimes critical of the defense lawyer's obligation to protect confidential information. These critics argue that this Rule keeps the truth from surfacing. They suggest that once a lawyer knows information that will shed light on important details, it thwarts the ends of justice to keep those facts confidential. This conclusion is the product of flawed thinking. In fact, preserving client confidences promotes the truth seeking process.

During the course of defending a criminal case, the defense attorney learns a lot of information that is not in the possession of the prosecution. Much of this information may come from direct conversations with the client. This is information that can only be learned if the client chooses to reveal it. Other important facts are gathered through the investigative process. Much of these investigative fruits ultimately trace back to leads acquired through communications with the client. Without the client's involvement, there are often important details that would never be

[22] Rule 1.6, Comment [3]
[23] Rule 1.6(a).

discovered. Frequently, it is the defense that is introducing evidence at trial that would otherwise remain hidden.

The Rule protecting client confidences is the reason the defense lawyer is able to learn anything from the client. Clients would frequently be unwilling to provide information and leads if they believed that they would have no say in whether the fruits would be provided to the prosecution. It is the confidence in knowing that the defense team will decide whether and how to reveal details learned during the course of its investigation that promotes candid communications between the client and the lawyer. While the defense attorney is not at liberty to disclose everything s/he learns while preparing the case, much of what the defense does disclose would never be learned otherwise.

Every time a defense lawyer violates the confidentiality rules, the client becomes more distrustful of the lawyer and is less willing to share information. The lawyer, in turn, is rendered a less effective vehicle through which important information about the case can be unearthed. By remaining faithful to the confidentiality rules the lawyer maximizes his or her ability to learn about the case, thereby increasing the likelihood that the defense will be a vehicle through which otherwise unknown information is learned.

Furthermore, comment [2] of the ABA Model Rules suggests that the confidentiality rules encourage individuals to seek legal advice and to openly reveal "legally damaging subject matter." This, in turn, allows lawyers to give appropriate legal advice. The commentators conclude that the facilitation of this relationship helps to uphold the law, as individuals will more often err on the side of violating the law if forced to make decisions without the counsel of an attorney.

7. To practice defense law defensively is unethical, because by definition you are then conflicted counsel

The Henry Lord Brougham quote at the start of this article brings home the truism that in order to be an effective advocate for one's client, the lawyer cannot consider any potential personal cost. The lawyer who considers how a course of action will impact him or her personally, is practicing defensively. This lawyer has pitted his or her own interests against those of the client. By definition, the lawyer is conflicted and, therefore, incompetent to represent that client.

This phenomenon manifests itself in many ways. We see it when a lawyer requires a client to sign a letter acknowledging that the lawyer relayed a plea offer and the client rejects it, if the motivation is because the lawyer thinks the client should have taken the plea and is worried that the client will later claim the lawyer never conveyed it.[24] This effort to gather evidence to be used against the client at a later date is defensive lawyering. We also see it when a client insists that a certain argument be made and the lawyer prefaces the argument with a disclaimer

---

[24] I do not mean to suggest that a lawyer should not thoroughly document all communications with the client. However, the instinct to require that the client sign a letter acknowledging the plea is often a way to gather evidence **against** the client should he later want to deny the lawyer ever conveyed the plea offer. One lawyer suggested to me that he has his client sign a letter rejecting a plea because it forces the client to take the decision more seriously. This potential benefit must be weighed against the risk that asking a client to sign such a letter may cause the client to view the lawyer's motives with suspicion. The client may perceive that the lawyer is trying to protect himself and that s/he does not trust the client. In any event, the lawyer should never practice defensively; taking precautionary steps to protect himself against the client.

that s/he is only making the argument because the client insists. This is usually the result of a lawyer who is more concerned about his or her reputation with the judge than making the best argument for the client. We see it when lawyers fail to file necessary motions or litigate important issues because they are afraid that the judge, whose primary interest is moving the docket along quickly, will become angry.

In each of these scenarios, the lawyer has failed to appreciate his or her constitutional obligation to provide zealous and loyal representation; that "the highest claim on the most noble advocate [is] . . . unquestioned, continuing fidelity to the client."[25] By allowing his or her own interests, or those of others, to interfere with the zealous defense of the client, the lawyer is conflicted.[26] This lawyer will be unable to fulfill his or her obligations as an advocate.

II. Review of the Rules Most Relevant to Our Practice

There are several Rules that are implicated in our practice most frequently. In this section we will quickly review the most relevant lessons from these rules. We are only examining aspects of certain rules that come up most office in the public defenders practice. Every lawyer must thoroughly review all of the rules to ensure that s/he is in compliance. Keep in mind that we are reviewing the ABA Model Rules and that any given jurisdiction may have made modifications to these Rules. You should be sure to consult the Rules in the jurisdiction where you are practicing.

1. Rules 1.1 and 1.3 – Competence and Diligence

Combined, Rules 1.1 and 1.3 place an obligation upon the lawyer to have the appropriate expertise and time to competently represent the client in a diligent manner. A lawyer may be rendered incompetent because s/he does not have the experience or skill to handle a particular matter. Obviously, some cases are more complex than others, either because of the charges involved or the evidence at issue. A new lawyer should not endeavor to handle a serious felony where the stakes are high and there is a great need to be skilled in many facets of practice. Likewise, a lawyer who has no understanding of a complicated issue like DNA should not take on a case where that issue is central to the prosecution.

A lawyer may also be rendered incompetent because s/he does not have the time to thoroughly study and prepare for the representation. Every client is entitled to a lawyer who will have the time to research up to date law relating to issues in the case and thoroughly investigate the relevant facts. Even the least complicated representation involves a significant investment of time devoted to investigation, legal research, discovery, drafting motions, client meetings, and other preparation.

Rule 1.3 requires that the lawyer have the time to fulfill these obligations promptly, so that the client does not have the burden of a pending criminal charge hanging over his or her head longer than necessary and so that the benefit of prompt attention, like pursuing investigative leads while they are still warm, does not fade.

---

[25] Nix v. Whiteside, 475 U.S. 157, 189 (1986).

[26] Rule 1.7(a)(2) tells us that whenever the lawyer's personal interest materially limits his responsibilities to a client, the lawyer is conflicted.

The complete version of the Michigan Rules of Professional Conduct can be found online at this link:

http://courts.mi.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf

Some of the rules most frequently referred to in the practice of indigent defense are:

1.1 Competence

1.2 Scope of Representation

1.3 Diligence

1.4 Communication

1.6 Confidentiality of Information

1.7 Conflict of Interest: General Rule

1.9 Conflict of Interest: Former Client

1.10 Imputed Disqualification: General Rule

1.16 Declining or Terminating Representation

3.1 Meritorious Claims and Contentions

3.3 Candor Toward the Tribunal

3.4 Fairness to Opposing Party and Counsel

3.7 Lawyer as Witness

4.1 Truthfulness in Statements to Others

4.2 Communication with a Person Represented by Counsel

4.3 Dealing with an Unrepresented Person

5.3 Responsibilities Regarding Non-Lawyer Assistants

determining a lawyer's fee, for example, in representation of an executor or administrator, of a class, or of a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Rule: 1.6 Confidentiality of Information

(a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:

(1) reveal a confidence or secret of a client;

(2) use a confidence or secret of a client to the disadvantage of the client; or

(3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

(c) A lawyer may reveal:

(1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;

(2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;

(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;

(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

Comment: The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client, but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and

correct. The common law recognizes that the client's confidences must be protected from disclosure. Upon the basis of experience, lawyers know that almost all clients follow the advice given and that the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the client-lawyer privilege (which includes the work-product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The client-lawyer privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies to confidences and secrets as defined in the rule. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also *Scope, ante,* p M 1-18.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

AUTHORIZED DISCLOSURE

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or, in negotiation, by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers, or unless the disclosure would breach a screen erected within the firm in accordance with Rules 1.10(b), 1.11(a), or 1.12(c).

DISCLOSURE ADVERSE TO CLIENT

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful. To the extent a lawyer is required or permitted to disclose a client's purposes, the client may be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened harm thus involves balancing the interests of one group of potential victims against those of another. On the assumption that lawyers generally fulfill their duty to advise against the commission

of deliberately wrongful acts, the public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Generally speaking, information relating to the representation must be kept confidential as stated in paragraph (b). However, when the client is or will be engaged in criminal conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may appropriately yield, depending on the lawyer's knowledge about and relationship to the conduct in question, and the seriousness of that conduct. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is illegal or fraudulent. See Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in illegal or fraudulent conduct. The same is true of compliance with Rule 4.1 concerning truthfulness of a lawyer's own representations.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (c)(3) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification. However, the constitutional rights of defendants in criminal cases may limit the extent to which counsel for a defendant may correct a misrepresentation that is based on information provided by the client. See comment to Rule 3.3.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. Inaction by the lawyer is not a violation of Rule 1.2(c), except in the limited circumstances where failure to act constitutes assisting the client. See comment to Rule 1.2(c). However, the lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime. If the prospective crime is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, a lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. As stated in paragraph (c)(4), the lawyer has professional discretion to reveal information in order to prevent a client's criminal act.

It is arguable that the lawyer should have a professional obligation to make a disclosure in order to prevent homicide or serious bodily injury which the lawyer knows is intended by the client. However, it is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a

change of mind. To require disclosure when the client intends such an act, at the risk of professional discipline if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma.

The lawyer's exercise of discretion requires consideration of such factors as magnitude, proximity, and likelihood of the contemplated wrong; the nature of the lawyer's relationship with the client and with those who might be injured by the client; the lawyer's own involvement in the transaction; and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make a disclosure permitted by paragraph (c) does not violate this rule.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer should make an inquiry within the organization as indicated in Rule 1.13(b).

Paragraph (c)(3) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

WITHDRAWAL

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

DISPUTE CONCERNING LAWYER'S CONDUCT

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of complicity or other misconduct has been made. Paragraph (c)(5) does not require the lawyer to await the commencement of an action or proceeding that charges complicity or other misconduct, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the

information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.

A lawyer entitled to a fee is permitted by paragraph (c)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

DISCLOSURES OTHERWISE REQUIRED OR AUTHORIZED

The scope of the client-lawyer privilege is a question of law. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (b)(1) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

FORMER CLIENT

The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

Rule: 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) 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

benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Rule: 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to a tribunal controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal

(b) If a lawyer knows that the lawyer's client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts that are known to the lawyer and that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) When false evidence is offered, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures. The advocate should seek to withdraw if that will remedy the situation. If withdrawal from the representation is not permitted or will not remedy the effect of the false evidence, the lawyer must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.

Comment: This rule governs the conduct of a lawyer who is representing a client in a tribunal. It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, subrule (a) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

As officers of the court, lawyers have special duties to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified, however, by the advocate's duty of candor to the tribunal. . Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

REPRESENTATIONS BY A LAWYER

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the comment to that rule. See also the comment to Rule 8.4(b).

LEGAL ARGUMENT

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly controlling adverse authority that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

OFFERING EVIDENCE

Paragraph (a)(3) requires that a lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness' testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false. A lawyer's knowledge that evidence is false can be inferred from the circumstances. Thus, although a lawyer should

resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

REMEDIAL MEASURES

Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. If that fails, the lawyer must take further remedial action. It is for the tribunal then to determine what should be done–making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing

The disclosure of a client's false testimony can result in grave consequences to the client, including a sense of betrayal, the loss of the case, or perhaps a prosecution for perjury. However, the alternative is that the lawyer aids in the deception of the court, thereby subverting the truth-finding process that the adversarial system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer must remediate the disclosure of false evidence, the client could simply reject the lawyer's counsel to reveal the false evidence and require that the lawyer remain silent. Thus, the client could insist that the lawyer assist in perpetrating a fraud on the court.

PRESERVING INTEGRITY OF ADJUDICATIVE PROCESS.

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure, if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding. See Rule 3.4.

DURATION OF OBLIGATION

A practical time limit on the obligation to rectify the presentation of false evidence or false statements of law and fact must be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

EX PARTE PROCEEDINGS

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer

for the represented party has the correlative duty to make disclosures of material facts that are known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

WITHDRAWAL.

Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 1.6.

Rule: 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) during trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:

(1) the person is an employee or other agent of a client for purposes of MRE 801(d)(2)(D); and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Preliminary Examinations

John A. Shea

Ann Arbor, Michigan

September 2016

Overview:

- Statutory and court rule provisions for probable cause conference and preliminary examination (see attached materials)
- Purpose of having an examination
- Waiving an examination
- The prosecutor's right to a preliminary examination

Mechanics:

- Identifying documents to collect and review prior to the exam
- Preparing for witness testimony (live and remote)
- Knowing the purpose of cross examining witnesses
- Preparing for non-witness testimony/evidence
- Order of the exam
- Goals or arguments to be made during the examination
- Strategies for addressing the possibility of charges being added and what to do if that actually happens
- Steps to take after the exam (including, if necessary, interlocutory appeals – see *People v Hall*, 435 Mich 599 (1990), attached).

Preliminary Examinations

Michigan Court Rule Provisions

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.

(3) 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 subrule (I)(1).

Rule 6.107 Grand Jury Proceedings

(A) Right to Grand Jury Records. Whenever an indictment is returned by a grand jury or a grand juror, the person accused in the indictment is entitled to the part of the record, including a transcript of the part of the testimony of all witnesses appearing before the grand jury or grand juror, that touches on the guilt or innocence of the accused of the charge contained in the indictment.

(B) Procedure to Obtain Records.

(1) To obtain the part of the record and transcripts specified in subrule (A), a motion must be addressed to the chief judge of the circuit court in the county in which the grand jury issuing the indictment was convened.

(2) The motion must be filed within 14 days after arraignment on the indictment or at a reasonable time thereafter as the court may permit on a showing of good cause and a finding that the interests of justice will be served.

(3) On receipt of the motion, the chief judge shall order the entire record and transcript of testimony taken before the grand jury to be delivered to the chief judge by the person having custody of it for an in-camera inspection by the chief judge.

(4) Following the in-camera inspection, the chief judge shall certify the parts of the record, including the testimony of all grand jury witnesses that touches on the guilt or innocence of the accused, as being all of the evidence bearing on that issue contained in the record, and have two copies of it prepared, one to be delivered to the attorney for the accused, or to the accused if not represented by an attorney, and one to the attorney charged with the responsibility for prosecuting the indictment.

(5) The chief judge shall then have the record and transcript of all testimony of grand jury witnesses returned to the person from whom it was received for disposition according to law.

Rule 6.108 The Probable Cause Conference

(A) Right to a probable Cause Conference. The state and the defendant are entitled to a probable cause conference, unless waived by both parties. If the probable cause conference is waived, the parties shall provide written notice to the court and indicate whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea.

(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.

(C) The probable cause conference shall include discussions regarding a possible plea agreement and other pretrial matters, including bail and bond modification.

(D) The 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.

(E) The probable cause conference for codefendants who are arraigned at least 72 hours before the probable cause conference shall be consolidated and only one joint probable cause conference shall be held unless the prosecuting attorney consents to the severance, a defendant seeks severance by motion and it is granted, or one of the defendants is unavailable and does not appear at the hearing.

Rule 6.110 The Preliminary Examination

(A) Right to Preliminary Examination. Where a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination. The defendant may waive the preliminary examination with the consent of the prosecuting attorney. 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. The preliminary examination for codefendants shall be consolidated and only one joint preliminary examination shall be held unless the prosecuting attorney consents to the severance, a defendant seeks severance by motion and it is granted, or one of the defendants is unavailable and does not appear at the hearing.

(B) Time of Examination; Remedy.

(1) 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. If the parties consent, for good cause shown, the court may adjourn the preliminary examination for a reasonable time. 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. A violation of this subrule is deemed to be harmless error unless the defendant demonstrates actual prejudice.

(2) 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.

(C) Conduct of Examination. A verbatim record must be made of the preliminary examination. Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. The court must conduct the examination in accordance with the Michigan Rules of Evidence.

(D) Exclusionary Rules.

(1) The court shall allow the prosecutor and defendant to subpoena and call witnesses from whom hearsay testimony was introduced on a satisfactory showing that live testimony will be relevant.

(2) 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.

(E) Probable Cause Finding. If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial. If 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.

(F) 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), the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge.

(G) Return of Examination. Immediately on concluding the 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.

(H) Motion to Dismiss. If, on proper motion, the trial court finds a violation of subrule (C), (D), (E), or (F), it must either dismiss the information or remand the case to the district court for further proceedings.

(I) Scheduling the 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.

Rule 6.111 Circuit Court Arraignment in District Court

(A) The 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. 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.

(B) Arraignments conducted pursuant to this rule shall be conducted in conformity with MCR 6.113.

(C) Pleas taken pursuant to this rule shall be taken in conformity with MCR 6.301, 6.302, 6.303, and 6.304, as applicable, and, once taken, shall be governed by MCR 6.310.

Rule 6.112 The Information or Indictment

(A) Informations and Indictments; Similar Treatment. Except as otherwise provided in these rules or elsewhere, the law and rules that apply to informations and prosecutions on informations apply to indictments and prosecutions on indictments.

(B) Use of Information or Indictment. A prosecution must be based on an information or an indictment. Unless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives a preliminary examination. An indictment is returned and filed without a preliminary examination. When this occurs, the indictment shall commence judicial proceedings.

(C) Time of Filing Information or Indictment. The prosecutor must file the information or indictment on or before the date set for the arraignment.

(D) Information; Nature and Contents; Attachments. The information must set forth the substance of the accusation against the defendant and the name, statutory citation, and penalty of the offense allegedly committed. If applicable, the information must also set forth the notice required by MCL 767.45, and the defendant's Michigan driver's license number. To the extent possible, the information should specify the time and place of the alleged offense. Allegations relating to conduct, the method of committing the offense, mental state, and the consequences of conduct may be stated in the alternative. A list of all witnesses known to the prosecutor who may be called at trial and all res gestae witnesses known to the prosecutor or investigating law enforcement officers must be attached to the information. A prosecutor must sign the information.

(E) Bill of Particulars. The court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense.

Preliminary Examinations

Michigan Statutory Provisions

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.1 Right of state and defendant to prompt examination and determination; authority of district court magistrate.

Sec. 1. 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. A district court magistrate appointed under chapter 85 of the revised judicature act of 1961, 1961 PA 236, MCL 600.8501 to 600.8551, 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 section 8511(a), (b), or (c) of the revised judicature act of 1961, 1961 PA 236, MCL 600.8511.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17193;—CL 1948, 766.1;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Constitutionality: There is no federal constitutional right to a preliminary examination or hearing in a criminal prosecution. The procedure is left to the states. In Michigan, the right is statutory. People v Johnson, 427 Mich 98; 398 NW2d 219 (1986).

Compiler's note: Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.4 Probable cause conference and preliminary examination; dates; scope; waiver; acceptance of plea agreement; scheduling and commencement of preliminary examination; testimony of victim; definition; codefendants; examination by magistrate.

Sec. 4. (1) Except as provided in section 4 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.4, the magistrate 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. 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.

(2) 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.

(3) 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.

(4) If 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 section 7 of this chapter. The parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference. Upon the request of the prosecuting attorney, however, 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.

(5) 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.

(6) 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 sections 11a and 11b of this chapter, 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.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17196;—CL 1948, 766.4;—Am. 1970, Act 213, Imd. Eff. Oct. 4, 1970;—Am. 1974, Act 63, Eff. May 1, 1974;—Am. 1988, Act 64, Eff. Oct. 1, 1988;—Am. 1993, Act 287, Eff. Mar. 1, 1994;—Am. 1994, Act 167, Eff. Oct. 1, 1994;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Compiler's note: Section 2 of Act 63 of 1974 provides:

"Effective date.

"Section 2. To give judges, prosecutors, and defense counsel a reasonable opportunity to become aware of and familiar with the time periods and sequence prescribed in this amendatory act and the effects of noncompliance, sections 20 and 21 of chapter 8 of Act No. 175 of the Public Acts of 1927, being sections 768.20 and 768.21 of the Michigan Compiled Laws, as amended by this amendatory act shall take effect May 1, 1974, and apply to cases in which the arraignment on an information occurs on or after that date. The other provisions of this amendatory act shall take effect May 1, 1974 and apply to offenses committed on or after that date."

Section 3 of Act 64 of 1988 provides: "This amendatory act shall take effect June 1, 1988." This section was amended by Act 175 of 1988 to read as follows: "This amendatory act shall take effect October 1, 1988."

Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

Former law: See section 13 of Ch. 163 of R.S. 1846, being CL 1857, § 5989; CL 1871, § 7855; How., § 9466; CL 1897, § 11850; and CL 1915, § 15677.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.7 Adjournment, continuance, or delay of preliminary examination.

Sec. 7. 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. The defendant may waive the preliminary examination with the consent of the prosecuting attorney. An adjournment, continuance, or delay of a preliminary examination may be granted by a magistrate without the consent of the defendant or the prosecuting attorney for good cause shown. A magistrate may adjourn, continue, or delay the examination of any cause with the consent of the defendant and prosecuting attorney. An action on the part of the magistrate in adjourning or continuing any case does not cause the magistrate to lose jurisdiction of the case.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17199;—CL 1948, 766.7;—Am. 1974, Act 63, Eff. May 1, 1974;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Compiler's note: Section 2 of Act 63 of 1974 provides:

"Effective date.

"Section 2. To give judges, prosecutors, and defense counsel a reasonable opportunity to become aware of and familiar with the time periods and sequence prescribed in this amendatory act and the effects of noncompliance, sections 20 and 21 of chapter 8 of Act No. 175 of the Public Acts of 1927, being sections 768.20 and 768.21 of the Michigan Compiled Laws, as amended by this amendatory act shall take effect May 1, 1974, and apply to cases in which the arraignment on an information occurs on or after that date. The other provisions of this amendatory act shall take effect May 1, 1974 and apply to offenses committed on or after that date."

Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

Former law: See section 10 of Ch. 163 of R.S. 1846, being CL 1857, § 5986; CL 1871, § 7852; How., § 9463; CL 1897, § 11847; and CL 1915, § 15674.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.9 Closure of preliminary examination.

Sec. 9. (1) Upon the motion of any party, the examining magistrate may close to members of the general public the preliminary examination of a person charged with criminal sexual conduct in any degree, assault with intent to commit criminal sexual conduct, sodomy, gross indecency, or any other offense involving sexual misconduct if all of the following conditions are 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.

(2) In determining whether closure of the preliminary examination is necessary to protect a victim or witness, the magistrate shall consider all of the following:

(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.

(3) The magistrate may close a preliminary examination to protect the right of a party to a fair trial only if both of the following apply:

(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.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17201;—CL 1948, 766.9;—Am. 1988, Act 106, Eff. June 1, 1988.

Former law: See Act 138 of 1895, being CL 1897, § 11873; and CL 1915, § 15700.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.10 Exclusion of persons from examination; witness not examined, minor; separation of witnesses.

Sec. 10. The magistrate while conducting such examination may exclude from the place of the examination all the witnesses who have not been examined; and he may also, if requested or if he sees cause, direct the witnesses whether for or against the prisoner, to be kept separate so that they cannot converse with each other until they shall have been examined. And such magistrate may in his discretion, also exclude from the place of examination any or all minors during the examination of such witnesses.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17202;—CL 1948, 766.10.

Former law: See section 15 of Ch. 163 of R.S. 1846, being CL 1857, § 5991; CL 1871, § 7857; How., § 9468; CL 1897, § 11852; CL 1915, § 15679; and Act 178 of 1885.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.11 Subpoena of witnesses; taking down evidence in shorthand; appointment, oath, and fees of stenographer; signing of testimony not required; testimony to be typewritten, certified, received, and filed; testimony as prima facie evidence.

Sec. 11. (1) 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, 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.

(2) Unless otherwise provided by law, the evidence given by the witnesses examined in a municipal court shall be taken down in shorthand by a county stenographer where one has been appointed under the provision of a local act of the legislature or by the county board of commissioners of the county in which the examination is held, or the magistrate for cause shown may appoint some other suitable stenographer at the request of the prosecuting attorney of the county with the consent of the respondent or the respondent's attorney to act as official stenographer pro tempore for the court of the magistrate to take down in shorthand the testimony of an examination. A stenographer so appointed shall take the constitutional oath as the official stenographer and shall be entitled to the following fees: $6.00 for each day and $3.00 for each half day while so employed in taking down the testimony and 10 cents per folio for typewriting the testimony taken down in shorthand, or other compensation and fees as shall be fixed by the county board of commissioners appointing the stenographer.

The fees may be allowed and paid out of the treasury of the county in which the testimony is taken. It shall not be necessary for a witness or witnesses whose testimony is taken in shorthand by the stenographer to sign the testimony. Except as provided in section 15 of this chapter, the testimony so taken under this subsection, shall be typewritten, certified, received, and filed in the court to which the accused is held for trial.

(3) Testimony taken by a stenographer appointed pursuant to subsection (2) or taken by shorthand or recorded by a court stenographer or district court recorder as provided by law, when transcribed, shall be considered prima facie evidence of the testimony of the witness or witnesses at the examination.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17203;—CL 1948, 766.11;—Am. 1954, Act 19, Imd. Eff. Mar. 22, 1954;—Am. 1978, Act 155, Eff. July 1, 1978.

Former law: See section 16 of Ch. 163 of R.S. 1846, being CL 1857, § 5992; CL 1871, § 7858; How., § 9469; CL 1897, § 11853; CL 1915, § 15680; Act 168 of 1863; Act 160 of 1915; and Act 329 of 1917.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.11a Testimony of witness; conduct by telephonic, voice, or video conferencing.

Sec. 11a. 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.

History: Add. 2004, Act 20, Imd. Eff. Mar. 4, 2004;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Compiler's note: Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.11b Rules of evidence; exception; hearsay testimony; "controlled substance" defined.

Sec. 11b. (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.

(3) As used in this section, "controlled substance" means that term as defined under section 7104 of the public health code, 1978 PA 368, MCL 333.7104.

History: Add. 2007, Act 89, Eff. Dec. 29, 2007;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Compiler's note: Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.12 Evidence for defense; examination, cross-examination of witnesses.

Sec. 12. After the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he have any, shall be sworn, examined and cross-examined and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17204;—CL 1948, 766.12.

Former law: See section 14 of Ch. 163 of R.S. 1846, being CL 1857, § 5990; CL 1871, § 7856; How., § 9467; CL 1897, § 11851; and CL 1915, § 15678.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.13 Discharge of defendant or reduction of charge; binding defendant to appear for arraignment.

Sec. 13. 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. 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.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17205;—CL 1948, 766.13;—Am. 1974, Act 63, Eff. May 1, 1974;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Compiler's note: Section 2 of Act 63 of 1974 provides:

"Effective date.

"Section 2. To give judges, prosecutors, and defense counsel a reasonable opportunity to become aware of and familiar with the time periods and sequence prescribed in this amendatory act and the effects of noncompliance, sections 20 and 21 of chapter 8 of Act No. 175 of the Public Acts of 1927, being sections 768.20 and 768.21 of the Michigan Compiled Laws, as amended by this amendatory act shall take effect May 1, 1974, and apply to cases in which the arraignment on an information occurs on or after that date. The other provisions of this amendatory act shall take effect May 1, 1974 and apply to offenses committed on or after that date."

Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

Former law: See section 17 of Ch. 163 of R.S. 1846, being CL 1857, § 5993; CL 1871, § 7859; How., § 9470; CL 1897, § 11854; and CL 1915, § 15681.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.14 Proceedings where offense charged not felony; transfer of case to family division of circuit court; waiver of jurisdiction; "specified juvenile violation" defined.

Sec. 14. (1) 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.

(2) If at the conclusion of the preliminary examination of a juvenile the magistrate finds that a specified juvenile violation did not occur or that there is not probable cause to believe that the juvenile committed the violation, but that there is probable cause to believe that some other offense occurred and that the juvenile committed that other offense, the magistrate shall transfer the case to the family division of circuit court of the county where the offense is alleged to have been committed.

(3) A transfer under subsection (2) does not prevent the family division of circuit court from waiving jurisdiction over the juvenile under section 4 of chapter XIIA of 1939 PA 288, MCL 712A.4.

(4) As used in this section, "specified juvenile violation" means any of the following:

(a) A violation of section 72, 83, 86, 89, 91, 316, 317, 349, 520b, 529, 529a, or 531 of the Michigan penal code, 1931 PA 328, MCL 750.72, 750.83, 750.89, 750.91, 750.316, 750.317, 750.349, 750.520b, 750.529, 750.529a, and 750.531.

(b) A violation of section 84 or 110a(2) of the Michigan penal code, 1931 PA 328, MCL 750.84 and 750.110a, if the juvenile is armed with a dangerous weapon. As used in this subdivision, "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*).

(c) A violation of section 186a of the Michigan penal code, 1931 PA 328, 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 section 7401(2)(a)(*i*) or 7403(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403.

(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 transaction as a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g).

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17206;—CL 1948, 766.14;—Am. 1974, Act 63, Eff. May 1, 1974;—Am. 1988, Act 67, Eff. Oct. 1, 1988;—Am. 1994, Act 195, Eff. Oct. 1, 1994;—Am. 1996, Act 255, Eff. Jan. 1, 1997;—Am. 1996, Act 418, Eff. Jan. 1, 1998;—Am. 1998, Act 520, Imd. Eff. Jan. 12, 1999.

Compiler's note: Section 2 of Act 63 of 1974 provides:

"Effective date.

"Section 2. To give judges, prosecutors, and defense counsel a reasonable opportunity to become aware of and familiar with the time periods and sequence prescribed in this amendatory act and the effects of noncompliance, sections 20 and 21 of chapter 8 of Act No. 175 of the Public Acts of 1927, being sections 768.20 and 768.21 of the Michigan Compiled Laws, as amended by this amendatory act shall take effect May 1, 1974, and apply to cases in which the arraignment on an information occurs on or after that date. The other provisions of this amendatory act shall take effect May 1, 1974 and apply to offenses committed on or after that date."

Section 3 of Act 67 of 1988 provides: "This amendatory act shall take effect June 1, 1988." This section was amended by Act 173 of 1988 to read as follows: "This amendatory act shall take effect October 1, 1988."

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.15 Certification and return of examinations and recognizances; effect of refusing or neglecting to return examinations and recognizances; written demand or motion to prepare or file written transcript of testimony of preliminary examination; listening to electronically recorded testimony, copy of recording tape or disc, or stenographer's notes.

Sec. 15. (1) Except as provided in subsection (2) or (3), all examinations and recognizances taken by a magistrate pursuant to this chapter shall be immediately certified and returned by the magistrate to the clerk of the court before which the party charged is bound to appear. 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.

(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 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.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17207;—CL 1948, 766.15;—Am. 1978, Act 155, Eff. July 1, 1978.

Former law: See section 25 of Ch. 163 of R.S. 1846, being CL 1857, § 6001; CL 1871, § 7867; How., § 9478; CL 1897, § 11862; and CL 1915, § 15689.

An error during the preliminary examination stage "does not require automatic reversal of the subsequent conviction absent a showing that defendant was prejudiced at trial." *People v. Hall*, 435 Mich. 599, 602–603; 460 NW2d 520 (1990).

People v Childs, No. 326054, 2016 WL 3639901, at *4 (Mich Ct App July 7, 2016)

435 Mich. 599
Supreme Court of Michigan.

PEOPLE of the State of Michigan,
Plaintiff-Appellant,
v.
Lisa Ann HALL, Defendant-Appellee.

No. 85050.
|
Argued Nov. 8, 1989.
|
Decided Sept. 11, 1990.

Defendant was convicted of conspiracy to deliver cocaine in the Circuit Court, Wayne County, Charles S. Farmer, J. Defendant appealed. The Court of Appeals reversed, based on insufficiency of evidence at preliminary examination to bind defendant over for trial. The People appealed. The Supreme Court, Griffin, J., held that error in binding defendant over for trial on basis of inadmissible hearsay evidence did not require reversal of subsequent conviction under applicable harmless error analysis, since defendant received fair trial and was not otherwise prejudiced.

Court of Appeals reversed and remanded.

Cavanagh, J., filed dissenting opinion, in which Levin and Archer, JJ., joined.

West Headnotes (3)

[1] **Criminal Law**
Right of accused to examination

Preliminary examination in Michigan is statutory, rather than constitutional, right.

26 Cases that cite this headnote

[2] **Criminal Law**

Where error occurs during preliminary examination involving improper admission of evidence, subsequent verdict is not to be set aside unless, on record as whole, error resulted in miscarriage of justice; automatic reversal is not called for and such pretrial evidentiary error is to be analyzed under harmless error standard; overruling *People v. Walker*, 385 Mich. 565, 189 N.W.2d 234.

44 Cases that cite this headnote

[3] **Criminal Law**
Preliminary Proceedings

Error in admission of inadmissible hearsay evidence in form of coconspirator's statements at defendant's preliminary hearing did not compel automatic reversal of defendant's subsequent conviction, even though other admissible evidence would have been insufficient by itself to bind defendant over for trial; error was subject to harmless error analysis. MRE 801(d)(2)(E).

106 Cases that cite this headnote

Attorneys and Law Firms

****521 *600** Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., John D. O'Hair, Pros. Atty., County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, Thomas M. Chambers, Asst. Pros. Atty., Detroit, for plaintiff-appellant.

Jonathan B.D. Simon, Detroit, for defendant-appellee.

OPINION

GRIFFIN, Justice.

Defendant was bound over for trial to face felony charges on the basis of hearsay testimony erroneously admitted at the preliminary examination. Although it appears that the ensuing trial was fair and error free, the Court of Appeals determined that this error compelled automatic reversal of defendant's conviction. We disagree. Concluding that a harmless error analysis is applicable, ***601** [1] we hold that such an evidentiary deficiency 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.

I

Following a preliminary examination, defendant was bound over on charges of delivery and conspiracy to deliver cocaine upon the basis of hearsay statements made to police by two alleged coconspirators.[2] Defendant made timely objection to admission of the hearsay evidence. Subsequently, the coconspirators pleaded guilty and then testified at the trial of defendant, who was convicted of the conspiracy to deliver charge. On appeal, the prosecutor conceded that the hearsay statements at the preliminary examination were not admissible under MRE 801(d)(2)(E).[3] The Court of Appeals reversed the conviction on the authority of *People v. Walker,* 385 Mich. 565, 189 N.W.2d 234 (1971).[4]

In *Walker,* the defendant's car was stopped, and the car and his person were searched by police officers on the basis of a ****522** "tip" they received from an informant. The defendant was arrested and ***602** subsequently convicted of unlawful possession of narcotics. On appeal, the defendant complained that at the preliminary examination probable cause for the search and seizure of the defendant's person and automobile had not been established. Motions to quash the information, made by the defendant at the preliminary examination and again prior to trial, were denied. Subsequently, at a preliminary stage of the trial, testimony by a police officer clearly established that in fact there had been probable cause. Nevertheless, the *Walker* Court set aside the conviction, and stated:

> "From both the Michigan and Federal cases, it is clear that while police officers may proceed upon the basis of information received from an informer and need not disclose the identity of the informer, in order to establish probable cause there must be a showing that the information was something more than a mere suspicion, a tip, or anonymous telephone call, and that it came from a source upon which the officers had a right to rely. This is the showing which should have been made at the preliminary examination in this case, but was not. Unless we require such a showing, the preliminary examination becomes meaningless, and a defendant is forced to stand trial in violation of a proper determination *from legally admissible evidence* at the preliminary examination stage that a crime has been committed and that there is probable cause to believe he is guilty of it." *Id.,* at pp. 575-576, 189 N.W.2d 234. (Emphasis in original). See also *People v. White,* 276 Mich. 29, 31, 267 N.W. 777 (1936); *People v. Kennedy,* 384 Mich. 339, 183 N.W.2d 297 (1971).

In this appeal we are urged to reconsider *Walker* and to hold that error at the preliminary examination stage should be examined under a harmless error analysis. We agree and hold that the evidentiary error committed at the preliminary ***603** examination stage of this case does not require automatic reversal of the subsequent conviction absent a showing that defendant was prejudiced at trial.

II

[1] Initially, it should be recognized that the preliminary examination is not a procedure that is constitutionally based. While it has been determined that a judicial determination of probable cause is a prerequisite to extended restraint of liberty following arrest, the federal constitution does not require that an adversary hearing, such as a preliminary examination, be held prior to prosecution by information. *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). "In Michigan, the preliminary examination is solely a creation of the Legislature-it is a statutory right."[5] *People v. Johnson,* 427 Mich. 98, 103, 398 N.W.2d 219 (1986) (opinion of Boyle, J.). See also *People v. Dunigan,* 409 Mich. 765, 770, 298 N.W.2d 430 (1980); *People v. Duncan,* 388 Mich. 489, 495, 201 N.W.2d 629 (1972).

[2] [3] The Legislature, which created the preliminary examination procedure, has also mandated by statute that a conviction shall not be reversed where error is harmless:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, *or the improper admission or rejection of evidence,* or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively

> appear that the error complained of has resulted in a miscarriage ***604** of justice." M.C.L. § 769.26; M.S.A. § 28.1096. (Emphasis added.)

M.C.L. § 769.26; M.S.A. § 28.1096 parallels F.R.Crim.P. 52(a), which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Although the United States Supreme Court has held that certain constitutional violations do require automatic reversal, see, e.g., ****523** *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (denial of counsel at trial), "[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations...." *United States v. Hasting,* 461 U.S. 499, 509, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983). See also *People v. Johnson, supra,* 427 Mich. at p. 103, n. 1, 398 N.W.2d 219.

Under the federal system, it is well established that a defendant's conviction will not be set aside even though only hearsay evidence was presented to the grand jury which indicted him, *Costello v. United States,* 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956),[6] or for other evidentiary errors at the indictment stage, *Holt v. United States,* 218 U.S. 245, 247, 31 S.Ct. 2, 4, 54 L.Ed. 1021 (1910). See also *United States v. Blue,* 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966) (the fact that the grand jury was presented with self-incriminating evidence obtained from the defendant in violation of the Fifth Amendment does not bar prosecution).

In its review of Florida court proceedings against a criminal defendant charged under Florida law, the United States Supreme Court made clear that while a defendant presently detained ***605** may challenge the probable cause for his confinement, once he has been tried and convicted, there is no requirement under the federal constitution that the conviction be vacated because the defendant was detained pending trial without a determination of probable cause. The *Gerstein* Court explained:

> "In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington,* 369 US 541, 545 [82 S Ct 955, 957; 8 L Ed 2d 98] (1962); *Lem Woon v. Oregon,* 229 US 586 [33 S Ct 783; 57 L Ed 1340] (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins,* 342 US 519 [72 S Ct 509; 96 L Ed 541] (1952); *Ker v. Illinois,* 119 US 436 [7 S Ct 225; 30 L Ed 421] (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, *a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause.* [*Pugh v. Rainwater*] 483 F2d, [778] at 786-787." [5th Cir. (1973)] *Id.,* 420 U.S. at pp. 118-119, 95 S.Ct. at pp. 865-866. (Emphasis added.)

See also *Murphy v. Beto,* 416 F.2d 98 (CA 5, 1969); *McCoy v. Wainwright,* 396 F.2d 818 (CA 5, 1968); *Scarbrough v. Dutton,* 393 F.2d 6 (CA 5, 1968); cf. *Hamilton v. Alabama,* 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961).

The Supreme Court has recognized the viability of the harmless error principle even where fundamental constitutional rights of a defendant are involved at the preliminary examination. In *Coleman* ***606** *v. Alabama,* 399 U.S. 1, 9, 90 S.Ct. 1999, 2003, 26 L.Ed.2d 387 (1970), the Court held that because the preliminary hearing prior to indictment is a " 'critical stage' " in the course of prosecution under Alabama law, the Sixth Amendment right to counsel attaches. However, instead of reversing the defendant's conviction, after finding that the right to counsel had been unconstitutionally denied, the Court remanded the case to the state courts for a determination of whether denial of counsel at the preliminary hearing was harmless error.

More recently, the Supreme Court reaffirmed its commitment to the harmless error doctrine in a context that is close to this case. In *United States v. Mechanik,* 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), two government agents appeared together and testified in sequence before a federal grand jury in violation of ****524** F.R.Crim.P. 6(d), which states that only "the witness under examination" may be present. The United States Court of Appeals for the Fourth Circuit ruled that transgression of Rule 6(d) required automatic reversal of the defendant's subsequent conviction which came at the conclusion of a five-month jury trial. However, the Supreme Court reversed, and Chief Justice Rehnquist, writing for a majority, explained:

> "The Rule [6(d)] protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty ... [b]ut the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the

charging decision was harmless beyond a reasonable doubt.

" ***607** It might be argued in some literal sense that because the Rule was designed to protect against an erroneous charging decision by the grand jury, the indictment should not be compared to the evidence produced by the Government at trial, but to the evidence produced before the grand jury. But even if this argument were accepted, there is no simple way after the verdict to restore the defendant to the position in which he would have been had the indictment been dismissed before trial. He will already have suffered whatever inconvenience, expense, and opprobrium that a proper indictment may have spared him. In courtroom proceedings as elsewhere, 'the moving finger writes; and, having writ, moves on.' " 475 U.S. at pp. 70-71, 106 S.Ct. at pp. 941-942. (Emphasis deleted.)

The Court noted:

"No long line of precedent requires the setting aside of a conviction based on a rule violation in the antecedent grand jury proceedings.... See, e.g., *Gerstein v. Pugh,* 420 US 103, 119-123 [95 S.Ct. 854, 865-868, 43 L.Ed.2d 54] (1975); *Coleman v. Alabama,* 399 US 1, 10-11 [90 S.Ct. 1999, 2003-2004, 26 L.Ed.2d 387] (1970); *Chapman v. California,* 386 US 18 [87 S Ct 824; 17 L Ed 2d 705] (1967)." *Id.,* 475 U.S. at p. 71, n. 1, 106 S.Ct. at p. 942, n. 1.

Importantly, the Court found that the error in *Mechanik* was harmless when measured by a standard which requires a showing that the error prejudicially affected the outcome of the trial. *Id.,* at p. 72, 106 S.Ct. at p. 943.

Subsequently, in *Bank of Nova Scotia v. United States,* 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), the Supreme Court dealt with a trial court's authority to dismiss an indictment prior to trial on the basis of the cumulative effect of several acts of prosecutorial misconduct in the grand jury proceeding. By a vote of eight to one, the Court found the harmless error principle to be ***608** applicable. Pointing to *Mechanik, supra,* the Court said:

> "In *United States v. Mechanik,* 475 US 66 [106 S.Ct. 938, 89 L.Ed.2d 50] (1986), we held that there is 'no reason not to apply [Rule 52(a)] to "errors, defects, irregularities, or variances," occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself.' *Id.* at 71-72 [106 S.Ct. at 942-943]. In *United States v. Hasting,* 461 US [at p.] 506 [103 S.Ct. at p. 1979], we held that '[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error.' We stated that deterrence is an inappropriate basis for reversal where 'means more narrowly tailored to deter objectionable prosecutorial conduct are available.' *Ibid.* We also recognized that where the error is harmless, concerns about the 'integrity of the [judicial] process' will carry less weight, *ibid,* and that a court may not disregard the doctrine of harmless error simply 'in order to chastise what the court view[s] as prosecutorial overreaching.' *Id.* at 507 [103 S.Ct. at 1980]. Unlike the present ****525** cases, see *infra* [487 U.S.] at 258-259 [108 S.Ct. at 2376-2377] *Hasting* involved constitutional error. *It would be inappropriate to devise a rule permitting federal courts to deal more sternly with nonconstitutional harmless errors than with constitutional errors that are likewise harmless.*" 487 U.S. at pp. 255-256, 108 S.Ct. at pp. 2374-2375.[7] (Emphasis added).

As *Mechanik* made clear, if the federal standard were to be applied in this case, the nonconstitutional ***609** error assigned by defendant would not be ground for reversal in the absence of a showing that the error prejudiced the outcome of his subsequent trial. *Id.,* 475 U.S. at p. 72, 106 S.Ct. at p. 942.[8]

State courts have also addressed the question before us and have concluded that errors in the preliminary examination proceedings do not require reversal per se on an appeal from a subsequent trial. For example, the California Supreme Court has held that reversal of a conviction is not required unless the defendant shows that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. ***610** *People v. Pompa-Ortiz,* 27 Cal.3d 519,

165 Cal.Rptr. 851, 612 P.2d 941 (1980). In so holding, the *Pompa-Ortiz* court expressly overruled precedent (*People v. Elliot*, 54 Cal.2d 498, 6 Cal.Rptr. 753, 354 P.2d 225 [1960]) in which it had earlier ruled that preliminary examination errors required reversal per se.[9] See also *People v. Lofink*, 206 Cal.App.3d 161, 169-170, 253 Cal.Rptr. 384 (1988); *People v. Moore*, 185 Cal.App.3d 1005, 1017-1018, 230 Cal.Rptr. 237 (1986); *People v. Oyaas*, 173 Cal.App.3d 663, 670-671, 219 Cal.Rptr. 243 (1985). The California Supreme Court, sitting en banc, has explained its *Pompa-Ortiz* rule by pointing ****526** to art VI, § 13, of the California Constitution which mandates that "a judgment shall not be set aside for error not resulting in a miscarriage of justice." *People v. Crandell*, 46 Cal.3d 833, 856, 251 Cal.Rptr. 227, 760 P.2d 423 (1988). See also *People v. Alcala*, 36 Cal.3d 604, 205 Cal.Rptr. 775, 685 P.2d 1126 (1984).

The issue at hand has also been addressed by the Colorado Supreme Court. In *People v. Alexander*, 663 P.2d 1024, 1025-1026, n. 2 (Colo, 1983), it said:

> "The defendant ... argues that the trial court erred in finding probable cause at the preliminary hearing. Absent unusual circumstances not present here, however, any issue as to the presence of probable cause is rendered moot by the jury's guilty verdict.
>
> " 'Resolution of these questions must be made ***611** prior to trial in order to avoid the anomalous situation where a defendant may be found guilty at trial, and then attempt to have the conviction reversed for a preliminary hearing on probable cause. The illogic of this anomaly is further exemplified by the observation of Judge McGowan, writing for the District of Columbia Circuit Court of Appeals, when he states:
>
> > 'Where, as here, the accused has been found guilty of those charges in a full-scale trial that we have otherwise found to be free of error, the chances that he could persuade a magistrate that no probable cause exists for his continued detention are perhaps not ungenerously to be characterized as speculative. *Blue v. United States*, [119 US App DC 315] 342 F2d 894 (1964) [cert den 380 US 944; 85 S Ct 1029; 13 L Ed 2d 964 (1965)].' *Kuypers v. District Court*, 188 Colo 332, 335; 534 P2d 1204, 1206 (1975).
>
> "Accord *People v. Horrocks*, 190 Colo 501; 549 P2d 400 (1976). We consider the probable cause issue to be moot, and we accordingly do not discuss it further." See also *Commonwealth v. Troop*, 391 Pa Super 613; 571 A2d 1084 (1990); *State v. West*, 223 Neb 241; 388 NW2d 823 (1986); *State v. Navarrete*, 221 Neb 171; 376 NW2d 8 (1985); *State v. Tomrdle*, 214 Neb 580; 335 NW2d 279 (1983); *State v. Franklin*, 194 Neb 630; 234 NW2d 610 (1975); *State v. Mitchell*, 104 Idaho 493; 660 P2d 1336 (1983), cert den 461 US 934 [103 S.Ct. 2101, 77 L.Ed.2d 308] (1983); *Commonwealth v. McCullough*, 501 Pa 423; 461 A2d 1229 (1983).

We agree with the United States Supreme Court and with state courts which have held that automatic reversal is not warranted in the present circumstances. Like the California Constitution and F.R.Crim.P. 52(a), M.C.L. § 769.26; M.S.A. § 28.1096 clearly mandates that a conviction shall not be reversed for harmless error. Except for this Court's decision in *Walker*, we find no impediment ***612** to the application of that principle in this case.[10] It is significant that the question of possible application of the harmless error standard was not decided or even discussed in *Walker*. If, and to the extent that, the *Walker* decision by this Court can be read as rejecting the applicability of the harmless error doctrine in circumstances such as are presented by this case, it is overruled.

In this appeal it is contended that a harmless error analysis would be inconsistent with recently adopted revisions of the Michigan Court Rules which were based upon recommendations by a committee appointed by this Court. Among its recommendations, the committee proposed MCR 6.107(G), which would have incorporated the harmless error principle into postconviction ****527** review of preliminary examination errors. The proposed rule read:

> "Motions to Dismiss; Harmless Error on Appeal. If, on proper motion, the circuit court finds a violation of subrule (C), (D), (E), or (F), it shall either dismiss the information or remand the case to district court for further proceedings. *Absent a showing of prejudice, a court may not reverse an otherwise valid conviction because of either a violation of these subrules or an error in failing to dismiss an information for violation of the subrules.*" 422A Mich. 28 (1985). (Emphasis supplied.)

It is true that the rule as finally adopted and ***613** renumbered by this Court, MCR 6.110(H), does not contain the words emphasized above. However, deletion of this language need not be read as a rejection by this Court of a harmless error analysis in the present situation.

Rather, as staff comments which accompanied MCR 6.110(H) explain:

> "Subrule (H) is consistent with current practice. This subrule 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." *Michigan Reports, Court Rules*, p R 6.1-9.

In other words, as adopted, MCR 6.110(H) was designed merely to reflect the then-existing state of the law. Of course, the new rule could not, and was not intended to, preclude this Court from reexamining the rule in *Walker*.

In our view, this Court can no longer ignore the applicability of M.C.L. § 769.26; M.S.A. § 28.1096 to facts such as those presented in this case. Since we consider ourselves bound by the legislation which established the preliminary examination procedure, it is reasonable and logical to also consider the Legislature's harmless error mandate which has direct application to the "admission or rejection of evidence." This case involves exactly such a situation.

Moreover, the instant case provides insight concerning the exacting toll of an automatic reversal rule. When the two coconspirators testified at defendant's trial, and thus were subject to cross-examination, the hearsay issue was mooted. The trial was rather lengthy for a bench trial,[11] and the error at the preliminary examination was unrelated ***614** to the issues which were the focus of the trial. To require automatic reversal of an otherwise valid conviction for an error which is harmless constitutes an inexcusable waste of judicial resources and contorts the preliminary examination screening process so as to protect the guilty rather than the innocent. As Chief Justice Rehnquist explained in *Mechanik, supra*, 475 U.S. at p. 72, 106 S.Ct. at p. 942:

> "The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. See *Morris v. Slappy*, 461 US 1, 14 [103 S Ct 1610, 1617; 75 L Ed 2d 610] (1983). The '[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible.' *Engle v. Isaac*, 456 US 107, 127-128 [102 S Ct 1558, 1571-1572; 71 L Ed 2d 783] (1982). Thus, while reversal 'may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution,' *id.* at 128 [102 S.Ct. at 1572], and thereby 'cost society the right to punish admitted offenders.' *Id.* at 127 [102 S.Ct. at 1571]. Even if a defendant is convicted in a second trial, the intervening delay may compromise society's 'interest in the prompt administration of justice,' *United States v. Hasting, supra* [461 U.S.] at 509 [103 S.Ct. at 1980], and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable ****528** and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial."[12]

***615** Otherwise stated,

> "[Procedural rules] are not to be things to which individual litigants have claims in and of themselves. Nothing is so subversive of the real purposes of legal procedure as individual vested rights in procedural errors...." Pound, *The canons of procedural reform*, 12 ABA J 541, 543 (1926).

Although we do not overlook the concerns expressed in the dissenting opinion, we believe 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.[13] Given the viability of that remedy and the enormous price of reversing valid convictions obtained pursuant to fair, error-free trials, we cannot support application of the automatic reversal rule under circumstances such as those presented in this case.[14]

Accordingly, we reverse and remand this case to the Court of Appeals for an analysis of whether ***616** the admission of hearsay evidence at the preliminary examination constituted harmless error and, if so, for resolution of the other issues raised by defendant in her appeal of right.

RILEY, C.J., and BRICKLEY and BOYLE, JJ., concur.

CAVANAGH, Justice (dissenting).

Today, four members of this Court have whimsically and waywardly rendered purportless a historic, fundamental and perhaps, in the vast majority of criminal cases, the most significant stage in the criminal process. The clear

message they today impart to police and prosecutors and the trial court judges of this state is this:

> "Don't worry if the evidence introduced at the preliminary examination is legally inadmissible or even if it is insufficient to warrant a bindover. As long as there is sufficient evidence to convict at the time of trial, this Court will ignore any pretrial error."

Why do we find it necessary to abandon this time-honored statute and court-rule sanctioned procedure? It simply cannot be because our appellate courts are deluged with claims of preliminary examination errors. ****529** There are probably two good reasons why they are not. First, until today, police, ***617** prosecutors, defense counsel and trial judges operated under the impression that the preliminary examination was a very important step in the criminal process at which sufficient legally admissible evidence was required. So, as a result, they got it right in the overwhelming number of cases. Secondly, inasmuch as some ninety-two percent[1] of our criminal cases result in a guilty plea, most pretrial claims of error are waived. Therefore, the occasion is rare indeed that we are confronted with a confessed error as in this case.

Once it becomes established that the evidence submitted at the trial cures any error or other deficiency at the preliminary examination, circuit and Recorder's Court judges considering a motion to quash an information, asserting as a basis that there was insufficiency in the evidence or other deficiency, will be asked to ignore the same on the representation and promise of the prosecutor that the error or deficiency will be cured at the trial. That is the next step in the slippery slope.

A motion to quash can then become almost a waste of time. In some counties they may not even pay the lawyers for filing them on the ground that the only motion that the court should be asked to consider is a motion for dismissal after the prosecutor completes the proofs at the trial. What then is the purpose; what is left of the preliminary examination?

It will be interesting to see if today's majority enthusiastically remands to our already overburdened Court of Appeals all those routine denials of interlocutory appeals from denials of motions to quash. It will certainly require a change in our usual treatment of such matters-a change necessitated by today's majority's fear that a conviction ***618** of one improperly required to stand trial in the first instance, will be, on very rare occasion, reversed. I must dissent.

I

In this case, the prosecution admitted on appeal in the Court of Appeals that the hearsay statements related by the undercover officer at defendant's preliminary examination were improperly admitted into evidence.[2]

> "Appellee must concede that the examining judge erroneously admitted into evidence at the preliminary examination the statements which Julia LeClair and Sandra Bell [codefendants] made [to the] officer.... [T]his is so because while there was evidence that Appellant had delivered the cocaine to Ms. LeClair, which Ms. LeClair subsequently delivered to [the] officer ... there was no evidence presented which established that Appellant knew or understood that the cocaine she delivered to LeClair was to be distributed to a third party rather than used by LeClair for her own personal use."

Nonetheless, the prosecution urged the Court of Appeals to sustain defendant's conviction for conspiracy to delivery a controlled substance because there was sufficient evidence at trial to convict. The prosecution argued that *People v. Johnson*, 427 Mich. 98, 398 N.W.2d 219 (1986), reh. den. 428 Mich. 1206 (1987), supported its contention; however, the Court disagreed:

> "To the extent *Johnson* can be read in the manner suggested by the prosecution, it is dicta and we cannot say that the concurring opinion by then Chief Justice Williams provides the crucial vote in ***619** support of that proposition. Hence, we will follow *People v Charles D Walker*, 385 Mich 565; 189 NW2d 234 (1971), and reverse defendant's conviction." Unpublished opinion per curiam of the Court of Appeals, decided December 8, 1988 (Docket No. 100610).

****530** The Court of Appeals reversed the defendant's conviction, and we granted the prosecution's application for leave.

In *People v. Walker, supra*, the defendant was convicted of unlawful possession or control of narcotics. Police officers, after receiving a "tip" from an informant, stopped the defendant's car and seized heroin from the car and incriminating drug paraphernalia from his person. At the preliminary examination, probable cause for the

search and seizure was not shown. The defendant's motion to quash the information for lack of probable cause was nonetheless denied. At trial, the prosecutor conducted an examination of one of the police officers outside the presence of the jury. The defendant's attorney objected on the ground that probable cause must be shown first at the preliminary examination, not later at trial. The officer's testimony at trial clearly established probable cause.

The *Walker* Court noted the longstanding rule in this state that at the preliminary examination, the people are required to show that a crime has been committed and that there is probable cause to believe that the accused is guilty of having committed that crime. In the absence of such a showing, the accused cannot properly be bound over by the examining magistrate. See *People v. Dellabonda*, 265 Mich. 486, 251 N.W. 594 (1933); *People v. Kennedy*, 384 Mich. 339, 183 N.W.2d 297 (1971).

We stated in *Walker:*

> " ***620** In light of what was presented to the examining magistrate, it was clearly error to allow the narcotics into evidence to determine probable cause. Since probable cause for the arrest and search was not properly established at the preliminary examination, it begs the question to say that probable cause existed to believe that a crime had been committed. There can be no judicial determination of probable cause unless it is made at the proper stage of the proceedings.... Unless we require such a showing [to establish probable cause], the preliminary examination becomes meaningless, and a defendant is forced to stand trial in violation of a proper determination *from legally admissible evidence* at the preliminary examination stage that a crime has been committed and that there is probable cause to believe he is guilty of it." *Id.* 385 Mich. at 574-576, 189 N.W.2d 234. (Emphasis in original.)

The Michigan Code of Criminal Procedure requires that a magistrate discharge a defendant if at the conclusion of the preliminary examination it appears that an offense has not been committed or there is not probable cause for charging the defendant with the crime. M.C.L. § 766.13; M.S.A. § 28.931. See also *People v. Asta*, 337 Mich. 590, 611, 60 N.W.2d 472 (1953):

> "[P]roofs on which to base the findings required by the statute must be introduced on a preliminary examination to justify binding over to circuit court for trial. In the case at bar the burden rested on the people to show by competent evidence, circumstantial or otherwise, that the crime of conspiracy as charged in the warrant had been committed, and that there was probable cause to believe defendants guilty thereof."

Thus, evidence sufficient to constitute probable cause must be shown at the preliminary examination. Evidence adduced at the subsequent trial ***621** cannot relieve the prosecution of the burden of producing sufficient admissible evidence to establish probable cause at the preliminary examination.

This principle has been an integral part of Michigan law. In *People v. White*, 276 Mich. 29, 267 N.W. 777 (1936), the defendants were arraigned for larceny and conspiracy to commit larceny. Over the defendants' objection, the people introduced admissions by the defendants and a transcript of unsigned statements that were made earlier to the police. The defendants were held for trial following a denial of their motion to quash the information, and were found guilty of receiving stolen property. This Court reversed the convictions, stating:

> "Aside from the confessions, there was not sufficient testimony in the examination to connect defendants with the offenses charged in the warrant.... The ****531** motion to quash should have been granted.... *The failure of the people to sustain their charge may be unfortunate, in view of the subsequent testimony at the trial, but it would be more unfortunate to upset established and well-understood rules of law.*" *Id.* at 31-32, 267 N.W. 777. (Emphasis supplied.)

See also *People v. Kennedy*, *supra.*

The requirement that sufficient evidence to bind a defendant over for trial must be presented at the preliminary examination has survived in Michigan for good reason. The preliminary examination has been held to be a *critical* step of the criminal process. *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S.Ct. 1999, 2003-2004, 26 L.Ed.2d 387 (1970); *People v. Bellanca*, 386 Mich. 708, 712, 194 N.W.2d 863 (1972); *People v. Duncan*, 388 Mich. 489, 501-502, 201 N.W.2d 629 (1972). By statute, a felony information cannot be filed against any person

until that person has ***622** undergone or waived a proper preliminary examination. M.C.L. § 767.42; M.S.A. § 28.982.

As this Court stated in *People v. Dochstader,* 274 Mich. 238, 244, 264 N.W. 356 (1936):

> "This binding conclusion and finding of the examining magistrate is a judicial determination, and constitutes the basis of the right of the prosecuting attorney to proceed in the circuit court by filing an information against defendant. Without such finding and determination by the examining magistrate, the prosecuting attorney is without jurisdiction to proceed in the circuit court by filing an information against defendant."

The prosecutor in this case maintains that, while there was insufficient admissible evidence at the preliminary examination to warrant the bindover of the defendant to the circuit court, there was sufficient evidence adduced at trial to sustain defendant's conviction. Therefore, we are urged to approach this case with hindsight and to subject the error to a harmless error analysis rather than reverse the conviction pursuant to MCR 6.110(H).

In 1989, this Court had an opportunity to adopt such a harmless error rule. The Criminal Rules Committee proposed MCR 6.107(G), which would have prohibited a court from reversing an otherwise valid conviction because of an evidentiary error, absent a showing of prejudice by the defendant.[3]

***623** This Court, however, rejected the proposed rule and instead adopted the present rule, MCR 6.110(H). This rule provides that upon a proper motion, a violation of various subrules at a preliminary examination requires the circuit court either to dismiss the information or remand the case to the district court.

Exemplifying the importance of adherence to proper preliminary examination procedures, this Court in *People v. Weston,* 413 Mich. 371, 319 N.W.2d 537 (1982), reversed the conviction of a defendant whose preliminary examination was held to be in violation of M.C.L. § 766.4; M.S.A. § 28.922.[4] There was no question that the ****532** date set for the defendant's preliminary examination was more than twelve days after the defendant appeared in district court. At the beginning of the preliminary examination, defense counsel challenged the holding of the examination on the basis of M.C.L. § 766.4; M.S.A. § 28.922. However, the defendant was bound ***624** over for trial and was subsequently found guilty of armed robbery. The Court of Appeals found that the error did not require reversal because the defendant did not suffer any prejudice because of the delay. This Court noted the strict limitation on any delay as provided by M.C.L. § 766.7; M.S.A. § 28.925. We rejected the Court of Appeals application of a "no prejudice/no reversible error" rule, despite its "repeated application." *Id.* at 375, 319 N.W.2d 537.

We stated in *Weston:*

> "A preliminary examination functions, in part, as a screening device to ensure that there is a basis for holding a defendant to face a criminal charge. A defendant against whom there is insufficient evidence to proceed should be cleared and released as soon as possible. The notion that a presumptively innocent defendant should remain in custody until a convenient time arrives for the magistrate to conduct the preliminary examination is exactly what the Legislature precluded in MCL 766.1; MSA 28.919." *Id.* at 376, 319 N.W.2d 537.

The rule in *Weston* was later modified and upheld in *People v. Crawford,* 429 Mich. 151, 414 N.W.2d 360 (1987), reh. den. 429 Mich. 1213 (1987).

Thus, it is clear to us that if a defendant is entitled to a prompt preliminary examination as mandated by statute, a fortiori, a defendant is entitled to a preliminary examination where the substantive evidence presented is legally admissible. See *People v. Kubasiak,* 98 Mich.App. 529, 536, 296 N.W.2d 298 (1980) ("It is well-settled that an examining magistrate may consider only legally admissible evidence in reaching a decision to bind a defendant over for trial"); *People v. Gwinn,* 47 Mich.App. 134, 139, 142, 209 N.W.2d 297 (1973).

At one point in its appeal, the people argued that this Court's decision in *People v. Johnson,* ***625** *supra,* supported the assertion that a conviction should only be reversed where there is error at the preliminary examination if the defendant shows prejudice as a result. The prosecution seized upon the language in a footnote in *Johnson* which addressed reversals for errors at preliminary examinations.[5] As stated by the Court of Appeals and as conceded by the prosecution at oral argument, that was a misreading of the *Johnson* decision since that language was dicta.

FN5. 427 Mich. 115, n. 14.

The prosecution cites a number of jurisdictions which have adopted a harmless error rule in preliminary examinations in cases involving matters of state law. Where there has been insufficient evidence at the preliminary hearing, some courts hold that a subsequent jury conviction either cures or renders moot those earlier deficiencies. *People v. Alexander*, 663 P.2d 1024 (Colo, 1983); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975); *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986). The prosecution relies heavily upon *People v. Pompa-Ortiz*, 27 Cal.3d 519, 612 P.2d 941, 165 Cal.Rptr. 851 (1980), in which the California Supreme Court determined that the defendant was denied a public preliminary hearing, yet nevertheless held that unless such denial prejudiced the defendant, his subsequent conviction at trial would not be reversed despite the error. I acknowledge that some other jurisdictions have developed different rules concerning the effect of error at preliminary examinations. However, I am not persuaded that these decisions mandate a change in our own state law. Some jurisdictions do have laws pertaining to preliminary examinations that are similar to Michigan's. For instance, in *Myers v. Commonwealth*, 363 Mass. 843, 849, n. 6, 298 N.E.2d 819 (1973), the Massachusetts Supreme Court stated ***626** that the rules of evidence should apply to preliminary examinations. ("Since the primary objective of the probable cause hearing is to screen out those cases where the ****533** legally admissible evidence of the defendant's guilt would be insufficient to warrant submission of the case to a jury if it had gone to trial, the rules of evidence at the preliminary hearing should in general be the same rules that are applicable at the criminal trial.") See also *State v. Jacobson*, 106 Ariz. 129, 130, 471 P.2d 1021 (1970) (" 'The proof which will authorize a magistrate in holding an accused person for trial must consist of legal, competent evidence. No other type of evidence may be considered by the magistrate. The rules of evidence require the 'production of legal evidence' and the exclusion of 'whatever is not legal.' " Citing *People v. Schuber*, 71 Cal.App.2d 773, 775, 163 P.2d 498 [1945]; see also *Rogers v. Superior Court of Alameda Co*, 46 Cal.2d 3, 8, 291 P.2d 929, (1955); *Goldsmith v. Sheriff of Lyon Co*, 85 Nev. 295, 303, 454 P.2d 86 (1969).

The people further contend that MCR 6.110(H) is contrary to M.C.L. § 769.26; M.S.A. § 28.1096, which provides:

> "No 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 ... the 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."

The prosecution argues that the automatic reversal rule conflicts with the statute because it does not require defendant to show prejudice or a "miscarriage of justice."

***627** In *People v. Weston, supra* 413 Mich. at 376, 319 N.W.2d 537, this Court rejected that argument, stating:

> "We are unable to apply this more general statute in the face of an unqualified statutory command that the examination be held within 12 days.
>
> "A preliminary examination functions, in part, as a screening device to insure that there is a basis for holding a defendant to face a criminal charge. A defendant against whom there is insufficient evidence to proceed *should be cleared and released as soon as possible.*"

In affirming this principle in *People v. Crawford, supra* 429 Mich. at 159, n. 12, 414 N.W.2d 360, we noted:

> "The burden imposed on the prosecution, when the charges are dismissed without prejudice before the preliminary examination is held, is substantial and sufficient to encourage the magistrate timely to schedule and hold the preliminary examination or to establish a record with the requisite showing of good cause for delay required by the statute. The burden on the prosecution of dismissal without prejudice if the requisite showing is not made, while substantial, is not overwhelming. The charges can be refiled, the defendant rearrested, and a timely preliminary examination held."

Here, the same considerations are present. Despite the language of M.C.L. § 769.26; M.S.A. § 28.1096, there are unqualified statutory commands that a defendant only be bound over after a preliminary examination if there is probable cause, and if not, the defendant *shall* be discharged, M.C.L. § 766.13; M.S.A. § 28.931, and that a

preliminary examination or a waiver thereof is a condition precedent to even the filing of a felony information, M.C.L. § 767.42; M.S.A. § 28.982.

***628** In addition, our own rule of evidence, MRE 801(d)(2)(E), requires independent proof of the conspiracy before a statement of a coconspirator is allowed. This requirement was disregarded in the instant preliminary examination, and defendant was bound over solely on the basis of this improperly admitted evidence, rendering meaningless the significance of this preliminary examination. Michigan courts have held several times over that the Michigan Rules of Evidence apply to preliminary examinations. *People v. Makela,* 147 Mich.App. 674, 383 N.W.2d 270 (1985); *People v. Washington,* 84 Mich.App. 750, 270 N.W.2d 511 (1978); see also *People v. Woodland Oil Co.,* 153 Mich.App. 799, 396 N.W.2d 541 (1986).

In adopting the prosecutor's view that an error at preliminary examination could be ****534** cured by sufficient evidence at trial, the majority leaves a defendant no remedy, short of seeking a motion to quash the information, or then an interlocutory appeal, which is granted very infrequently. See *People v. Johnson, supra* 427 Mich. at 127, n. 9, 398 N.W.2d 219 (Levin, J., dissenting). Additionally, I am persuaded that a harmless error requirement would undermine the accuracy of the screening process of the preliminary examination. The intended beneficiaries of this process are defendants who are innocent or against whom evidence is weak. These defendants will not appeal because at trial they generally are acquitted. Thus, as a practical matter, the only group of defendants who can be a "check" on the accuracy of the screening process are those against whom there is a strong case at trial. The harmless error rule would invariably apply to these defendants.

In affirming the principle of *Walker,* I do not propose that *any* error committed at a preliminary examination justifies automatic reversal after a ***629** defendant's subsequent trial conviction. If at the preliminary examination there is sufficient legally admissible evidence in addition to that which should have been excluded, the decision to bind over the defendant can stand. See *People v. Usher,* 121 Mich.App. 345, 349, 328 N.W.2d 628 (1982), and *People v. Johnson, supra* 427 Mich. at 116, 398 N.W.2d 219. However, wherethere is no other admissible evidence sufficient to bind over the defendant, I believe that such an improper bindover creates a travesty of justice and thwarts the purpose of the preliminary examination. We should not ignore the fact that:

> "[i]n modern criminal law pretrial procedure is for most defendants the only criminal procedure.... The core of pretrial procedure, in theoretical terms at the very least, is the preliminary hearing, at which police and prosecutorial discretion and the defendant's guilt are first subjected to judicial scrutiny." "For this reason, if no other, the criminal justice system must pay close attention to the functioning of pretrial procedure to ensure that it is providing the protections to which all accused persons are entitled."[6]

Thus, I would affirm the Court of Appeals reversal of defendant's conviction.

ARCHER and LEVIN, JJ., concur.

All Citations

435 Mich. 599, 460 N.W.2d 520

Footnotes

1 M.C.L. § 769.26; M.S.A. § 28.1096.

2 M.C.L. § 333.7401(1), (2)(a)(iii), 750.157a; M.S.A. § 14.15(7401)(1), (2)(a)(iii), 28.354(1).

3 MRE 801(d)(2) provides in pertinent part:

> "A statement is not hearsay if ... [t]he statement is offered against a party and is (A) his own statement ... or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy."

4 The Court of Appeals did not address the defendant's other allegations of error raised on appeal.

5 See M.C.L. § 766.1 *et seq.;* M.S.A. § 28.919 *et seq.*

6 In Michigan hearsay evidence may be presented to a grand jury. Our Rules of Evidence do not apply to grand jury proceedings. MRE 1101(b)(2).

7 In this preconviction setting, the standard for determining whether the error was harmless differed from that applied in *Mechanik:*

> "[D]ismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations. *United States v. Mechanik, supra* [475 U.S.] at p. 78 [106 S.Ct. at p. 945] [O'Connor, J., concurring]." 487 U.S. at p. 256, 108 S.Ct. at p. 2374.

8 The applicability of this standard in the present context has been recognized by this Court, albeit in dicta. In *People v. Johnson, supra,* the defendant argued that evidence of premeditation and deliberation at his preliminary examination was insufficient to justify binding the defendant over on an open charge of murder, thereby requiring reversal of his second-degree murder conviction. The *Johnson* Court (per Boyle, J.) disagreed, finding that there was evidence from which the magistrate could have inferred premeditation and deliberation. In a footnote, Justice Boyle discussed the issue of reversals for errors at preliminary examination:

> "While the opinion for reversal bases its result upon an admittedly nonconstitutional error, post, [427 Mich. at] pp. 137-138 [398 N.W.2d 219]; it errs in the standard it applies to determine whether the error is harmless. Certain constitutional violations require automatic reversal. See, e.g., *Gideon v. Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) (denial of counsel at trial). Other constitutional violations are measured by the standard that requires a court to be convinced 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *Chapman v. California,* 386 U.S. 18, 24; 87 S.Ct. 824 [828]; 17 L Ed 2d 705 (1967) (commenting on defendant's failure to testify at trial could be harmless error); *Rose v. Clark,* 478 U.S. [570]; 106 S.Ct. 3101; 92 L.Ed.2d 460 (1986) (jury instruction shifting the burden of proof to the defendant can be harmless error). Nonconstitutional violations, such as that alleged in the instant case, are measured by a third standard in the federal system: The defendant must show a reasonable probability that the error affected the outcome of the trial. See *United States v. Mechanik,* 475 US 66; 106 S Ct 938; 89 L Ed 2d 50 (1986) (no reversal for grand jury error unless the error affected the outcome of the trial)." 427 Mich. at p. 115, n. 14, 398 N.W.2d 219.

9 The *Elliot* case had held that where an accused is illegally bound over due to a material error at the preliminary hearing, the binding over is voidable, and, upon proper objection, the court has no jurisdiction to proceed. In overruling *Elliot,* the *Pompa-Ortiz* court rejected the prior cases' "uncritical use of the term 'jurisdiction' " and held that a trial court is not deprived of "jurisdiction" in the fundamental sense ("legal power to hear and determine a cause") in matters correctable by pretrial motions. 27 Cal.3d at pp. 528-529, 165 Cal.Rptr. 851, 612 P.2d 941.

> This Court likewise has held that the circuit court does not lose jurisdiction where a void or improper information is filed. See *People v. Johnson, supra,* 427 Mich. at p. 106, n. 7, 398 N.W.2d 219.

10 This Court has previously applied M.C.L. § 769.26; M.S.A. § 28.1096 in a number of contexts. See, e.g., *People v. Straight,* 430 Mich. 418, 424 N.W.2d 257 (1988); *People v. Beach,* 429 Mich. 450, 418 N.W.2d 861 (1988); *People v. Crawford,* 429 Mich. 151, 414 N.W.2d 360 (1987); *People v. Blue,* 428 Mich. 684, 411 N.W.2d 451 (1987); *People v. Cash,* 419 Mich. 230, 351 N.W.2d 822 (1984); *People v. Woods,* 416 Mich. 581, 331 N.W.2d 707 (1982), cert. den. 462 U.S. 1134, 103 S.Ct. 3116, 77 L.Ed.2d 1370 (1983); *People v. Weston,* 413 Mich. 371, 319 N.W.2d 537 (1982); *People v. Eady,* 409 Mich. 356, 294 N.W.2d 202 (1980); *People v. Richardson,* 409 Mich. 126, 293 N.W.2d 332 (1980); *People v. Wilkens,* 408 Mich. 69, 288 N.W.2d 583 (1980).

11 The trial commenced January 7, 1987, and defendant was found guilty on January 29, 1987.

12 An automatic reversal rule would contradict MCR 6.002, which provides:

> "These rules are intended to promote a just determination of every criminal proceeding. They are to be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."

13 The underlying assumption of the dissent's dismay at the result of this opinion is that short of a reversal of an error-free trial, we cannot depend on the magistrate who is bound to follow the rules of evidence, the circuit or Recorder's Court judge who is bound to quash a bindover where the rules of evidence are not followed, and the Court of Appeals which is required to correct error of this nature to maintain the applicability of the rules of evidence in preliminary examinations.

> We obviously do not share that skepticism.

14 In his dissent in *People v. Johnson, supra,* 427 Mich. at p. 127, n. 9, 398 N.W.2d 219, Justice Levin wrote:

> "Any other rule would deprive the accused of any remedy for a defect in the conduct of a preliminary examination. Manifestly, the accused cannot be convicted unless sufficient evidence is adduced at the trial; if the sufficiency of the evidence at the trial cured an insufficiency at the preliminary examination, there would be no remedy unless the circuit judge quashed the information or the Court of Appeals or this Court granted an interlocutory appeal from an adverse decision by the circuit judge. Interlocutory appeals are infrequently granted defendants in criminal cases, and, thus, if there is to be any review of the circuit judge's decision, it can occur only, in the ordinary case, after trial and conviction."

If a problem does exist because appellate courts do not grant applications of criminal defendants for interlocutory appeal in sufficient numbers or in appropriate cases, it is suggested that this Court could deal with the problem directly through the exercise of its supervisory authority, rather than by adhering to an arbitrary rule that automatically reverses otherwise valid convictions. For example, the rules of appellate procedure could be amended.

1 *Criminal Justice in Crisis,* American Bar Association, Criminal Justice Section, November, 1988.

2 Prosecutor's Brief, p. ----. Before this Court in oral argument, the prosecution also conceded that without the testimony of the undercover officer about Julia LeClair's statements, there would not have been enough evidence to connect defendant to the crime, or to even establish that a conspiracy had occurred.

3 This rule became effective October 1, 1989. The highlighted portions were contained in the proposed rule version, but were *not* adopted by this Court:

> "Motions to Dismiss; Harmless Error on Appeal. If on proper motion, the circuit court finds a violation of subrule (C), (D), (E), or (F), it shall must either dismiss the information or remand the case to the district court for further proceedings. Absent a showing of prejudice, a court may not reverse an otherwise valid conviction because of either a violation of these subrules or an error in failing to dismiss an information for violation of these subrules."

In the case at bar, there was a violation of Rule 6.110(C), which provides:

> "Conduct of Examination. Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. Except as otherwise provided by law, the court must conduct the examination in accordance with the rules of evidence. A verbatim record must be made of the preliminary examination."

4 "[T]he magistrate before whom any person is brought on a charge of having committed a felony shall set a day for a preliminary examination not exceeding 12 days thereafter, at which time a magistrate shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the accused, in regard to the offense charged and in regard to any other matters connected with the charge which the magistrate considers pertinent."

6 Note, *The function of the preliminary hearing in federal pretrial procedure,* 83 Yale L J 771, 805 (1974).

Defender Motions Book

2015

A publication of the Criminal Defense Resource Center
Michigan State Appellate Defender Office

The **Defender Motions Book**, 2015 edition,
was funded in part by a grant from the
Michigan Commission on Law Enforcement Standards, pursuant to 1982 PA 302.
Additional funding was provided by the State Appellate Defender Office.

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:

Marilena David-Martin
Administrator, Criminal Defense Resource Center
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
313-256-9833
mdavid@sado.org

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.

CDRC support services include:

- The Criminal Defense Newsletter, published monthly and distributed in hard and electronic copy, covering developing issues, new laws and court opinions, pleadings of interest, local successes and practice tips;

- The Defender Trial, Sentencing, Motions, and Habeas Books, comprehensive manuals that summarize, analyze and organize the law from arrest through appeal and beyond;

- 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 ;

- Multiple training events each year, throughout the state, using a small-group, hands-on format to teach computerized legal research and writing skills.

Additional information about these services is available at www.sado.org, the Criminal Defense Resource Center's newly renovated web site, or by phone at (313) 256-9833.

ACKNOWLEDGEMENTS

The 2015 edition of the **Defender Motions Book** was made possible through the efforts of many devoted and talented people. Special thanks to the project team of:

Neil Leithauser, principal author of the 2010 and subsequent editions;

Kelly J. McDoniel, for writing case summaries;

Justice Bridget M. McCormack and Attorney Andrea Lyon, co-authors of the original edition of the Defender Motion Book;

Attorneys **Joanne Vallarelli Adam**, **James W. Amberg, B.J. Belcoure, David Beneman, Steven C. Benson, Joshua A. Blanchard, Theodore E. Bratton, Mary Chartier-Mittendorf, Randy E. Davidson, Lynn B. D'Orio, Christine R. Dubois, Michael B. Dungan, Jose R. Fanego, Michael A. Faraone, Robyn B. Frankel, Stuart Friedman, Robert K. Gaecke, Jr., Elizabeth Jacobs, John D. Lazar, Thomas M. Loeb, Alfred Millstein, John R. Minock, Kathy H. Murphy, Timothy D. Murphy, Michael J. Nichols, Hon. Kirsten Nielsen Hartig, Mark D. Osterman, John B. Payne, Jr., Danielle Phillip, Barry F. Poulson, Paul Rinaldi, Nick Rine, Gail O. Rodwan, John F. Royal, Steven E. Scharg, John A. Shea, Sharon Smith, Michael L. Steinberg, Andis Svikis, F. Martin Tieber**, **Robert S. Whims, Elmer White, Paul C. Youngs, an unknown attorney** who drafted the original probation violation motion to dismiss, **Tracy L. Cowan** for pointing out a needed clarification in a sample and the **faculty of the Michigan Clinical Law Program**, for their contributions of ideas and motions;

Bill Moy, principal production manager, for research, cite-checking and layout;

Eric Buchanan, for database and flash drive publishing;

Heather A. Waara, for word processing, database maintenance, layout and distribution assistance;

Joanne Moritz, for fielding phone inquiries about the book;

Marilena David Martin, editor-in chief and administrator of the project; and

Dawn Van Hoek, Director of the State Appellate Defender Office and the Original Editor and Project Administrator of this Book, and invaluable source of information on the entire Defender Book Series.

The 2015 edition necessarily builds upon work done in prior years, and we thank also the following persons who contributed to earlier editions: Marla McCowan former editor and administrator, Chari Grove, Maria Sanchez, Karen Sandlin**,** Angela Clayton and John Powell.

Several organizations also were indispensable to this publication. Thanks to:

The **Michigan Commission on Law Enforcement Standards**, for funding principal costs of the project;

The **State Appellate Defender Office**, for funding staff, equipment, and overhead on the project; and

The **Michigan State Bar Foundation**, for prior funding of most printing costs of the project.

A note about the principal author of the Defender Motions Book:

Neil Leithauser is a Michigan attorney admitted to practice in 1982, currently specializing in criminal appeals as a solo practitioner He is qualified at the highest level to accept assigned criminal appeals from the Michigan State Appellate Assigned Counsel System, and admitted to practice in the US Eastern District Court. Mr. Leithauser has provided research attorney services to the State Appellate Defender Office since 2001, and has served as an Associate Editor for SADO's *Criminal Defense Newsletter* since 2007. He has trained criminal defense attorneys throughout Michigan on legal research techniques, and serves as a research attorney for criminal defense attorneys in Michigan's busiest court, the Wayne County Circuit Court.

TABLE OF CONTENTS