Pretrial Motion Practice

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C.A.Y.M.C. Auditorium

Moderator: James Schlaff

Speaker: Neil Leithauser

nleithauserattorney@comcast.net

Table of Contents

Overview

"Ain't too proud to beg."

-- Norman Whitfield and Edward Holland, Jr., for The Temptations, 1966.

"With every mistake we must surely be learning."

-- George Harrison, for The Beatles, 1968.

A motion is a request -- usually required to be written, but can be oral during a hearing or trial -- to the court for an order of specific relief.

General considerations:

- Know the facts. The judge may ask about them.
- Know the law. The judge will expect you to know it.
- Know the applicable local rules, and ascertain if your particular judge has specific requirements. Remember that there is a 20-page limit for the combined length of a motion and brief. Mich. Ct. R. 2.119(A)(2).
- Know what it is that you are seeking.
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- In short, be prepared.

There are many different motions possible -- you can be creative -- but there are some common motions that you will likely file. For example, common motions include motions to suppress evidence (e.g., evidence seized during a traffic stop, or your client's statements, or an identification), motions to quash, motion for reduction of bail, motion to preclude use of prior convictions, and motions to compel certain discovery or preserve evidence. Less common motions might include motions for separate trials and motions for change of venue.

Some motions are often referred to by a leading applicable case; for example, there are *Daubert*-hearings, *Giglio*-hearings, *Ginther*-hearings, *Stanaway*-motion hearings, *Wade*-hearings, *Walker*-hearings, etc. More on those below.

Consider the **"totality of the circumstances"** of your issue as you prepare; many areas of the law (e.g., identification, confessions, determining a conspiracy, police

officer's action at a traffic stop, reasonableness of searches) are viewed under the "totality of the circumstances."

You should file any motion for which you have a good-faith basis and that may benefit your client. You should do this not only because it is good practice to do so, and not only because you never know when you might succeed, but also because the motions you file may indeed lay the groundwork for a successful appeal. If you fail to move to suppress or preclude improper evidence, you will have forfeited or waived that issue for appellate purposes. Worse yet, if you fail to request relief in the right *way*, you almost certainly will have insulated the error from subsequent federal review. Raise as many bases for relief as are supportable; that is, provide alternative bases where appropriate. For example, potential testimony might violate both constitutional confrontation rights and evidentiary limitations on hearsay evidence. *People v. Carter*, 462 Mich 206, 215 (2000)("One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error," citing *United States v. Griffin*, 84 F.3d. 912, 924 (C.A. 7, 1996).

It is important to always cite the federal constitutional ground for your objections in addition to any state evidentiary and constitutional arguments you may make. A federal writ of habeas corpus may seem removed and relatively unimportant when you are preparing a case for trial, but defense attorneys must understand how important it is to create an appellate and a federal record by making objections. To do this, you must argue both the state and federal grounds for the objection at every stage of the litigation.

The National Legal Aid and Defender Association's (NLADA) Performance Guidelines for Criminal Defense Representation further encourage defense counsel to assume a vigorous motion practice. Performance Guidelines for Criminal Defense Representation, NLADA (4th Ed. 2006). Guideline 1.1 states that "[t]he paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients." Thus, counsel "should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant." Guideline 5.1(a). Further, counsel should withdraw or decide not to file a motion "only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default." Guideline 5.1(c). The Michigan Rules of Professional Conduct provide additional support for a robust motion practice by distinguishing the role of a criminal defense attorney from other attorneys. While the rules prohibit attorneys

from raising an issue absent good faith, a criminal defense attorney "may so defend the proceeding as to require that every element of the case be established." M.R.P.C. 3.1.

Notice Requirements and Burdens

Take these seriously.

Alibi: MCL 768.20(1); 768.21 [within 15 days after AOI, or at least 10 days before trial]. The trial court has discretion to direct a different time. The prosecutor must timely file, i.e., within 10 days, not less than 5 days before trial, any notice of rebuttal alibi witnesses. There is a continuing obligation on both parties to disclose potential witnesses when they become known.

Caution: if you fail to file a timely notice, then you run the risk that *any testimony* supporting an alibi defense *may be* [in the trial court's discretion] *excluded* from trial. For example, in the unpublished case of *People v Eric Smith*, decided 12/04/2014 (Docket #315991), the Court of Appeals held that the trial court did not abuse its discretion by requiring the defendant to file a notice with specific information about the alibi relating to his own proposed testimony: "The reference to "testimony" does not distinguish between testimony offered by a defendant and testimony offered by witnesses other than the defendant … [and] There is no suggestion that [the specificity requirement] does not apply when a defendant intends to "offer in his defense testimony to establish an alibi at the time of the alleged offense," but the defendant does not intend to call independent witnesses." The Supreme Court has held that trial courts – despite the language of the statute – have discretion to allow untimely alibi evidence. See *People v Travis*, 443 Mich 668, 679-680; 505 NW2d 563 (1993).

Caution: Nail down the facts of the alibi before you (timely) file and serve the notice; if the alibi changes, the prosecutor can use the earlier, inaccurate alibi notice for impeachment. See *People v Von Everett*, 156 Mich App 615; 402 NW2d 773 (1986).

Insanity: MCL 768.20a(1) [written notice at least 30 days before trial].

Duress in prison breaking: MCL. 768.21b [within 15 days of AOI, or at least 10 days before trial].

Rape Shield: MCL 750.520j(2) [within 10 days after AOI; written motion and offer of proof required]. **Note:** prior false allegations of the complaining witness *are not* included within the Rape Shield. *People v. Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984)("the defendant should be permitted to show

that the complainant has made false accusations of rape in the past"); *People v. Jackson*, 477 Mich 1019; 726 NW2d 727 (2007).

Entrapment: A hearing *is* necessary; no specific notice requirement. *People v. Pierce*, 272 Mich App 394; 725 NW2d 691 (2007), lv den 477 Mich. 1034 (2007). The defendant has the burden of establishing entrapment by a preponderance of the evidence.

Ensuring forensic technician testimony at preliminary examination. MCL 600.2167(4) [within 5 days after receiving technician's report].

Burdens

Always check the law to determine who has the burden relating to your specific issue. In some issues, the defense has the burden, while in others it belongs to the prosecution; in still other cases, the burden may shift from one side to the other.

The burdens in some common issues are:

Alibi: The defense must show some evidence to support an instruction.

Discovery requests: The burden in a request for additional or discretionary discovery is on the moving party. Further, if privileged information is sought the movant must show a good-faith basis grounded in articulable fact for the request. *People v. Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

Entrapment: The burden is on the defendant to show, by a preponderance of the evidence, entrapment.

Identification: If the defendant had counsel, then the defendant must show that the identification procedure was unduly suggestive. If the procedure was tainted/unduly suggestive, the prosecution must show, by a preponderance, that there is an independent basis for the identification; otherwise, the court may suppress an in-court identification of the defendant. See *People v. Gray*, 457 Mich 107; 577 NW 2d 92 (1998).

Insanity: Insanity is an affirmative defense; the burden is on the defense to show, by a preponderance, that the defendant is insane. E.g., MCL 768.21a. **N*ote:*** A defendant's failure to cooperate in a forensic evaluation bars testimony regarding the defense. *E.g., People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001).

***Miranda* rights/voluntariness of confession**: The burden is on the prosecution, by a preponderance, to demonstrate that the challenged

confession was voluntarily made, that rights were given before a custodial interrogation, and that the rights were properly waived. *Miranda*, *supra*, 384 U.S. at 475 ("a heavy burden rests upon the government to demonstrate that the defendant knowingly and intelligently waived his [rights]").

Quashing bindover: The defense must establish that the decision to bind over was an abuse of discretion. E.g., *People v. Plunkett*, 485 Mich 50; 780 NW2d 280 (2010); *People v. Goecke*, 457 Mich 442; 579 NW2d 868 (1998).

Self-defense: The defense must present some evidence to support the defense of self-defense; once presented, the prosecution must then disprove self-defense beyond a reasonable doubt. E.g., *People v. Dupree*, 486 Mich 693; 788 NW2d 399 (2010). **Note:** The common law governs acts committed prior to October 1, 2006, the effective date of the Self-Defense Act, MCL 780.961, *et seq*. **Note:** there is a current push in the Legislature to ease the prosecution's burden.

Suppression of evidence as "fruit of the poisonous tree:" The defendant must show that the evidence is tainted by illegality; the prosecution must show, by a preponderance, the illegality attenuated, or the evidence is admissible independent of the tainted action.

Some Motion Hearings by Common Name

***Daubert* hearings**. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). A threshold hearing to determine the admissibility of an expert's testimony. See also *Gilbert v. DaimlerChrysler Corp*., 470 Mich 749; 685 NW2d 391 (2004), and MRE 702 ["If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case"].

***Giglio* hearings**. *Giglio v. United States*, 405 S Ct 150; 92 S Ct 763; 31 L Ed 2d 104 (1972). Relating to the prosecution's failure to disclose a deal or agreement with a witness.

***Ginther* hearings**. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). A post-conviction hearing to establish the factual bases for challenges relating to the constitutional adequacy of an attorney's performance.

***Stanaway* motion hearings**. *People v. Stanaway*, 446 Mich 463; 521 NW2d 557 (1994); and see MCR 6.201(C)(1) and MCR 6.201(C)(2). When seeking privileged records or information, you must demonstrate to the trial court a good-faith basis, grounded in *specific, articulable facts,* that you believe such evidence material to the defense exists, the content of the anticipated evidence, that the information is necessary to the defense, and the way that it will favorably affect the defense case. If the proper showing is made, the trial court will then conduct an *in camera* inspection of the records.

***Wade* hearings**. *United States v. Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). A hearing relating to a claim of a tainted, or unduly suggestive out-of-court identification. Also, it may address a denial of a defendant's Sixth Amendment right to counsel at a lineup if charges had been initiated prior to the identification. **Note:** remember that your client's Sixth Amendment right does not attach until a criminal proceeding is initiated. See also *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977)(setting standards for determining if there is an independent basis for an identification after a pretrial identification was found invalid).

***Walker* hearings**. *People v. Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). A hearing to challenge the voluntariness of your client's confession. Involuntary statements are inadmissible. See also *People v Cipriano*, for a listing of some factors the court will employ.

Significant Cases, Statutes and Rules

Arrest:

People v. Hamilton, 465 Mich 526; 638 NW2d 92 (2002)(illegal, and citizen's).

People v. Hill, 282 Mich App 538; 766 NW2d 17 (2009). Complaint and warrant requirements.

Note: Courts have held that there is no constitutional right to be arrested; once a warrant issues, however, due diligence is required. If there is a delay between issuance of the warrant and the arrest, to obtain relief the defendant must establish actual and substantial prejudice.

Bad/other acts/MRE 404(b):

Note*: The prosecution must give notice; the defense need not give notice.*

People v. Denson, 500 Mich 385; 902 NW2d 306 (2017). 404(b) evidence purportedly admitted to rebut defendant's self-defense and defense of others claims, but was used to show defendant's temper, was not probative and was improperly admitted and not harmless error. "[W]e have warned that "a common pitfall in MRE 404(b) cases" is that trial courts tend to admit other-acts evidence merely because the proponent has articulated a permissible purpose … The "mechanical recitation" of a permissible purpose," without explaining how the evidence relates to the recited purpose[], is insufficient to justify admission under MRE 404(b)" … It is incumbent on a trial court to " vigilantly weed out character evidence that is disguised as something else."… In other words, merely *reciting* a proper purpose does not actually demonstrate the *existence* of a proper purpose for the particular other-acts evidence at issue and does not automatically render the evidence admissible. Rather, in order to determine whether an articulated purpose is, in fact, merely a front for the improper admission of other-acts evidence, the trial court must closely scrutinize the logical relevance of the evidence under the second prong of the *VanderVliet* test." 500 Mich at 400 (internal citations omitted).

People v. Knox, 469 Mich 502; 674 NW2d 366 (2004).

People v. Sabin (After Remand), 463 Mich 43; 614 NW2d 888 (2000).

People v. VanderVliet, 444 Mich. 52; 508 NW2d 114 (1993).

People v. Watkins, 491 Mich 450; 818 NW2d 296 (2012).

Confessions: A confession cannot be lawfully used against an accused unless the right against self-incrimination has been effectively and legitimately waived and the subsequently-obtained statements are voluntarily made. The "totality of the circumstances" must be examined.

Berkemer v McCarty, 468 US 420 (1984) [*Miranda* warnings *not* generally required in a traffic stop, as the person is not "in custody"]. See also *People v Steele*, 292 Mich App 308, 317 (2011).

Colorado v. Connelly, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986)(a waiver must be the product of a "'free and deliberate choice, rather than [as a result of] intimidation, coercion or deception."

Edwards v. Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

Miranda v. Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Missouri v. Seibert, 542 US 600; 124 S Ct 2601; 159 L Ed 2d 643 (2004) (end-runs around the Fifth Amendment are prohibited).

People v. Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965).

People v. Cipriano, 431 Mich 315; 429 NW2d 781 (1988); "totality" factors.

Rhode Island v. Innis, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980) ("Interrogation" includes both "express questioning" by police and its "functional equivalent", which includes words or actions by police that the police "should know" are likely to elicit an incriminating response.).

Confrontation: General rule: Testimonial hearsay to prove the truth of the matter asserted is prohibited at trial, unless the declarant is unavailable and defendant had a prior opportunity to cross-examine.

Crawford v. Washington, 541 US 36; 124 S Ct 1354; 159 L Ed 2d 177 (2004)("a defendant may engage in the most rigorous cross-examination to demonstrate a witness's bias or improper motivation to testify, or the witness's general or specific lack of credibility. This right of cross-examination constitutes the linchpin by which our criminal justice system facilitates the search for truth").

Davis v. Alaska, 415 US 308, 315-316; 94 S Ct 1105; 39 L Ed 2d 2347 (1974)("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested").

Holmes v. South Carolina, 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006).

Ohio v. Roberts, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980)(standard of reliability, for admission of non-testimonial hearsay). *Pennsylvania v. Ritchie*, 480 US 39, 51-52 (1987)("the right to cross examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable, " and the Confrontation Clause is "designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination").

People v Poole, 444 Mich 151; 506 NW2d 505 (1993).

People v Taylor, 482 Mich 368; 759 NW2d 361 (2008) (Court addressed MRE 804(B)(3) statements against interest made to a friend by non-testifying codefendant were non-testimonial, were admissible, and were to be evaluated under the standard set forth in *Poole*.

Defendant's right to polygraph in CSC prosecution. MCL 776.21(5): "A defendant who allegedly has committed a crime under sections 520b to 520e and 520g of Act No. 328 of the Public Acts of 1931, shall be given a polygraph examination or lie detector test if the defendant requests it."

Discovery: Governed by court rule (and some case-law). There is no general discovery power in criminal cases, and the ability to obtain discovery is not unlimited; to the contrary, the right is limited.

A party in a criminal trial must provide certain items of mandatory disclosure to each party who requests them. MCR 6.201(A)(1)-(6). A trial court has discretion to allow additional discovery beyond that expressly covered by the Rules. See, for example, *People v. Valeck*, 223 Mich App 48 (1997). In order to obtain discovery not provided for by the rules, you must show that the evidence or information to be discovered is "necessary to the preparation of his defense and in the interest of a fair trial." *People v. Johnson*, 356 Mich 619 (1959). Prosecutors and defendants must comply with a discovery request within 21 days unless otherwise ordered by the court. MCR 6.201(F).

See the following cases:

Brady v. Maryland, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Giglio v. United States, 405 S Ct 150; 92 S Ct 763; 31 L Ed 2d 104 (1972).

Kyles v. Whitley, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

Prosecution has duty to give exculpatory and favorable impeachment evidence. *United States v. Bagley*, 473 US 667; 105 S Ct 3375; 87 L Ed 2d 481 (1975).

Due Process right to present defense:

Chambers v. Mississippi, 410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

Davis v. Alaska, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974).

Holmes v. South Carolina. 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006).

People v. Stanaway, 446 Mich 463; 521 NW2d 557 (1994).

US Const., AM V, AM XIV; Const. 1963, art. 1, §17.

Experts:

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Gilbert v. DaimlerChrysler Corp., 470 Mich 749; 685 NW2d 391 (2004)(under MRE 702, all expert opinion testimony must be reliable).

Kumho Tire Co, Ltd. v. Carmichael, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

Experts (right to at public expense):

A defendant is entitled to the appointment of an expert witness at the state's expense if she or he cannot otherwise proceed safely to trial without that expert. MCL 775.15; *People v. Leonard*, 224 Mich App 569 (1997). To make this showing, assigned counsel must establish a "nexus between the facts of the case and the need for an expert." *People v. Jacobsen*, 448 Mich 639, 641 (1995); *see also* MRE 706; MCL 775.13a. The mere possibility that an expert might provide some unidentified assistance to the defense does not satisfy this burden. *People v. Tanner*, 469 Mich 437 (2003).

Habitual offender notice:

People v. Morales, 240 Mich App 571; 618 NW2d 10 (2000) [within 21 days of AOI].

Identification: **Note:** Sometimes a client will ask you to get a lineup; it is discretionary with the court. There is no constitutional right to a line-up, but it may be appropriate where there is a material issue of identification and a reasonable likelihood of a misidentification. Look at the older cases of *People v Lyles*, 100 Mich App 232 (1980); *People v Farley*, 75 Mich App 236, 238; 254 NW2d 853 (1977); and see *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000).

To challenge an identification you must meet the threshold of showing state action, or a trial court need not conduct an evidentiary hearing. That is, if there is no police action, due process is not implicated, and a witness's identification will proceed to the jury for determination of credibility. If there is no factual support for a challenge to an identification process, a trial court need not conduct a hearing on the constitutionality of the process. *People v. Johnson*, 202 Mich App 281, 285-287; 508 NW2d 509(1993)("where it is apparent to the court that the challenges are insufficient to raise a constitutional infirmity, or where the defendant fails to substantiate the allegations of infirmity with factual support, no hearing is required").

A single-photo identification by police is one of the most suggestive procedures possible. E.g., *People v. Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *People v Thomas*, below. A photographic-identification procedure violates a defendant's right to due process when it is so impermissibly suggestive that it creates a substantial likelihood of misidentification. *Gray*, 457 Mich. at 111; *People v. Kurylczyk*, 443 Mich 289, 302; 505 N.W. 2d 528 (1993). The totality of the circumstances governs whether not due process was violated. *Stovall v. Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967); *Kurylczyk*, 443 Mich at 306.

See the following cases:

Neil v. Biggers, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972).

People v. Gray, 457 Mich 107; 577 NW2d 92 (1998).

People v. Kurylczyk, 443 Mich 289; 505 NW2d 528 (1993).

People v. Kachar, 400 Mich 78; 252 NW2d 807 (1977).

People v Thomas, __ Mich __; 902 NW2d 885, order decided 11/01/2017 (Docket No. 155245); Supreme Court affirmed trial court's ruling that a single photograph shown to witness was unduly suggestive, illegal, and lacked an independent basis to purge the taint.

Perry v. New Hampshire, 565 US 228 (2012).

United States v. Wade, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Lesser offenses: Requested lesser included/inferior offenses supported by the record must be given; cognate offenses are prohibited. See MCL 768.32. **Note:** there is a limitation on permitted lesser offenses for major controlled substances offenses; the lesser must also be a major controlled substance offense. MCL 768.32(2).

People v. Cornell, 466 Mich 335; 646 NW2d 127 (2002).

People v. Mendoza, 468 Mich 527; 664 NW2d 685 (2003).

People v. Wilder, 485 Mich 35; 780 NW2d 265(2010).

Motion for Correction of Sentence. MCR 6.429. **Note**: *Only an invalid sentence may be corrected.*

Motion for Directed Verdict of Acquittal:

> The evidence is reviewed in the light most favorable to prosecution to determine whether a rational trier of fact could determine that all of the elements had been proven. *People v. Hampton*, 407 Mich 354; 285 NW2d 284 (1979). MCR 6.419. ***Note:*** The motion may be filed after the prosecution has rested the case-in-chief, or after the verdict. MCR 6.419(B).

Motion for New Trial. MCR 6.431. "On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B).

Nontestifying codefendants:

> *Bruton v. United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968)(confrontation right violated by unredacted nontestifying codefendant's incriminating statement).
>
> *People v. Banks*, 438 Mich 408; 475 NW2d 769 (1991).
>
> **But see:** *People v Taylor*, 482 Mich 368; 759 NW2d 361 (2008)

Preliminary examination: The preliminary examination process is not mandated by the Constitution; it is a statutory construct. MC. 766.1, *et seq*.

> A preliminary examination does not determine guilt or innocence as a resolution, so there is no *res judicata* bar to the prosecution seeking to bind a defendant over for trial more than once. E.g., *People v. Hayden*, 205 Mich App 412; 522 NW2d 336 (1994), lv. den. 447 Mich 1048; 527 NW2d 519 (1994).
>
> A prosecutor's burden at a preliminary examination is to establish probable cause, "which requires a quantum of evidence "'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief'" of the accused's guilt on each element of the crime charged." *People v. Yamat*, 475 Mich 49, 52; 714 NW2d 335 (2006)(a case construing "operating" in the Motor Vehicle Code); citing *People v. Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003), and *People v. Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652(1997); and see *People v. Plunkett*, 485 Mich 50, 57; 780 NW2d 280 (2010).

The judge must consider legitimate evidence and may make reasonable inferences from that evidence. However, if the judge allows admission of legally inadmissible evidence, there is necessarily an abuse of discretion. *Craig v. Oakwood Hospital*, 471 Mich 67, 76; 684 NW 2d 296 (2004); *People v. Katt,* 468 Mich 272, 278; 662 NW 2d 12 (2003).

Where the prosecution burden is met, the district judge *must bind over* the case to the circuit court for trial; where the burden is not met, the district judge *must dismiss* the case. MCL 766.13; MCR 6.110(E); *People v. Doss*, 406 Mich 90, 100-101; 276 NW 2d 9 (1979).

MCL 766.13 provides:

> If the magistrate determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, 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.

A district judge may conduct an evidentiary hearing on the admissibility of evidence and, where warranted, suppress evidence. MCR 6.110(D) provides, in part: "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." If an evidentiary

hearing on admissibility of evidence is conducted in the district court, the issue is not barred from being subsequently raised in the circuit court. MCR 6.110(D)(1).

The defense has the right to present witnesses at the preliminary examination. MCR 6.110(C); MCL 766.12 ("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").

See the following cases:

People v. Goecke, 457 Mich 442; 579 NW2d 868 (1998); jurisdiction in circuit court; amendment of charges.

People v. Yost, 468 Mich 122; 659 NW2d 604 (2003).

People v. Yamat, 475 Mich 49; 714 NW2d 335 (2006); bindover standards; witness credibility determination.

Searches: Generally, if a search is unreasonable, it is illegal. If there is no warrant, it is illegal. But there are multiple or numerous exceptions to the general rule.

The Fourth Amendment provides the following:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Michigan Constitution (Const. 1963, art. 1, §11) provides an analogous provision:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug...seized by a peace officer outside the curtilage of any dwelling house in this state."

Common Terms. A number of terms have special relevancy and significance in this area of the law. Included among them are:

"Bare report": A term also often used in tip-cases, it is the mere reporting of criminal activity or description of a defendant; it is not sufficient for reasonable suspicion; a broader context is needed. *Florida v J.L.,* 529 US.266; 120 S Ct 1375; 146 L Ed 2d 254 (2000).

Broader context: A term often used in tip-cases, that includes factors such as: 1) location (e.g., known high-crime area) and 2) extent of information. *Wardlow* at 1231; *Shabaz* at 57 and 59; *LoCicero* at 501-502; *United States v. Valentine*, 232 F. 3d 350 (CA3, 2000).

"Knock and talk": Investigative tactic where police have some information and suspicion -- but not enough for probable cause to support a warrant -- that a defendant is engaged in criminal activity. Police knock on door and ask for consent to search. Upheld as constitutional in *Frohriep*. See also *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041; 36 L Ed 2d 854 (1973). However, the knock-and-talk must be done reasonably; for example, multiple officers in tactical gear 'visiting' at 4:00 A.M. was not reasonable and were unconstitutional, warrantless searches. *People v Frederick*, __ Mich __ ; 895 NW2d 541 (2017), decided June 1, 2017 (Docket Nos. 153115 and 153117).

Pretext stop: There are older cases holding that, "When police lack the reasonable suspicion necessary to support a stop and use a minor violation to stop and search a person or place for evidence of an unrelated serious crime, the stop is a mere pretext," *People v. Haney,* 192 Mich App 207; 480 NW 2d 322 (1991), citing *United States v. Rivera*, 867 F2d 1261 (CA10, 1989), and, "An arrest may not be used as a pretext to search for evidence," *United States v. Lefkowitz*, 285 US 452, 467; 52 S Ct 420; 76 L Ed 877 (1932).

However, be very cautious about using the term "pretext stop." The subjective intent of an officer *is not relevant* to the legal inquiry, provided that the officer has an objective basis or legitimate ground(s) for the action. See *Whren, et al v. United States*, 517 US 806; 116 S Ct 1769; 135 L Ed 2d 89 (1996); *People v. Oliver*, 464 Mich 184; 627 NW 2d 297 (2001). In short, a pretext stop *is not, in-and-of-itself*, a basis for suppression of evidence.

Probable cause: a substantial basis for the conclusion there is a fair probability that a search will yield evidence of a crime. *Illinois v. Gates*, 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1982).

The probable cause standard applies when searches and/or arrests are challenged. *United States v. Pasquarille,* 20 F3d 682 (CA6, 1994), cert den 513

US 986; 115 S Ct 481; 130 L.Ed 2d 394 (1994).

Reasonable suspicion: ". . . more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *Terry*, at 27; *Champion.*

The 'standard' is [by design] not exactly defined, and remains "not finely tuned." *United States v. Cortez*, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). It is a "somewhat elusive concept." *Ornelas v. United States*, 517 U.S. 690, 695; 116 S. Ct. 1657; 134 L. Ed. 2d 911 (1996). "[T]he reasonable suspicion standard is less demanding than the probable cause standard in terms of both the quantity and quality of information." *People v. Faucett*. 442 Mich 153; 499 N.W. 2d 764 (1993).

The requisite level of suspicion "falls considerably short of satisfying a preponderance of the evidence standard." *U.S. v. Sokolow*, 490 U.S. 1, 7 (1989).

An officer's "particularized suspicion" is reasonable if based upon an objective observation by the officer, that, based upon the "totality of the circumstances" (including the officer's inferences and deductions) criminal activity is afoot; that is, that the person has been, is, or is about to be engaged in criminal activity. *Wardlow* at 123; *People v. Shabaz,* 414 Mich 42, 57, 59; 378 N.W. 2d 451 (1985); *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW 2d 498 (1996).

Seizure: Two categories are usually mentioned: 1) investigative; and 2) arrest-related. See, e.g., *United States v. Dixon*; 51 F. 3d 385 (CA 8, 1995); *Shabaz.* The Fourth Amendment applies to both, whether a brief detention or an arrest. *Shabaz*. There is a seizure only when an officer has restrained one's liberty, such that a reasonable person would think she or he was not free to leave. E.g., *People v. Frohriep*, 247 Mich App 692; 637 NW 2d 562 (2001), lv den 646 N.W. 2d 178 (2002).

***Terry* stop; stop-and-frisk:** A brief stop and search may be constitutional, even where done without a warrant and without probable cause, where the "officer observes 'unusual conduct' which leads him reasonably to conclude in light of his experience, that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . ." *Terry v. Ohio*, 392 US 1, 21-22, 30; 88 S Ct.1868; 20 L Ed 2d 889 (1968).

Terry "accepts the risk that officers may stop innocent people . . . ." *People v. Oliver*, 464 Mich 184, 202; 627 NW 2d 297 (2001), quoting *Illinois v. Wardlow*, 528 US 119, at 126; 120 S Ct 673; 145 L Ed 2d 570 (2000).

'Stop and frisk' has been extended from the *Terry* scenario to general investigative

stops. *Custer*, at 329, citing *Terry* at 20. The relevant inquiry to determine the validity of a pat down is "whether the officer's action was justified at its inception . . . ." For pat downs, generally, see *Terry*; *Custer*; *People v. Gevarges*, 176 Mich App 65; 439 NW.2d 272 (1989); *People v. Chambers*. 195 Mich App 118; 489 NW 2d 168 (1992); *People v. Champion,* 205 Mich App 623; 518 N.W. 2d (1994), rev'd 452 M 92 (1996), cert den 519 U.S. 1081; 117 S. Ct. 747; 136 L. Ed. 2d 685 (1997).

"A police officer may perform a limited pat down search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." See *Custer*, at 328.

Terry strictly limits the permissible scope of a pat down search to that reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be used to assault an officer. *Adams v. Williams,* 407 US 143, 146; 92 S Ct 1921, 1923; 32 L Ed 2d 612 (1972).

Significant Cases.

Arizona v. Gant, 566 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009)(limits on searches incident to arrest).

Brown v. Illinois, 422 US 590, 610; 95 S Ct 2254; 45 L Ed 2d 416 (1975).

Florida v. Jardines, 569 US __ ; 133 S Ct 1409; 185 L Ed 2d 495 (2013)(a dog sniff at the door of a residence held to be a search under the Fourth Amendment).

Florida v J.L., 529 US 266; 120 S Ct 1375; 146 L Ed 2d 254 (2000).

Payton v. New York, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980).

People v. Goldston, 470 Mich 523; 682 NW2d 479 (2004) (adopting good-faith exception in Michigan).

Terry v. Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Wong Sun v. United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963)('fruit of the poisonous tree' doctrine).

Discovery

Discovery in criminal cases is governed by the Court Rules.

There is no general discovery power in criminal cases, and the ability to obtain discovery is not unlimited; to the contrary, the right is limited.

A party in a criminal trial must provide certain items of mandatory disclosure to each party who requests them. MCR 6.201(A)(1)-(6). A trial court has discretion to allow additional discovery beyond that expressly covered by the Rules. See, for example, *People v. Valeck*, 223 Mich App 48 (1997). In order to obtain discovery not provided for by the rules, you must show that the evidence or information to be discovered is "necessary to the preparation of his defense and in the interest of a fair trial." *People v. Johnson*, 356 Mich 619 (1959). Prosecutors and defendants must comply with a discovery request within 21 days unless otherwise ordered by the court. Mich. Ct. R. 6.201(F).

Your client has no right to discovery of information or evidence that is protected from disclosure by constitutional or statutory privilege, including evidence protected by the right against self-incrimination, *unless* you demonstrate a good-faith belief, grounded in fact, that the privileged records have a reasonable probability of containing information material to the defense. MCR 6.201(C)(1). If the proper showing is made, the trial court will conduct an *in camera* inspection of the records. MCR 6.201(C)(2); *People v. Stanaway*, 446 Mich 643 (1994).

Keep in mind the following:

1. If the records are protected by absolute privilege and the privilege holder does not waive it for *in camera* inspection, the court *shall* suppress or strike this person's testimony. MCR. 6.201(C)(2)(a).

2. If the court is satisfied that the records reveal evidence necessary to the defense, it will make available to you such evidence as is necessary to your client or, if the privilege is absolute and the privilege holder refuses to waive the privilege, then it will suppress or strike the privilege holder's testimony. MCR 6.201 (C)(2)(b).

3. The good-faith belief for disclosure must be based on *specific, articulable facts*. Defense counsel must demonstrate that the information is necessary to the defense. Counsel must also show the good-faith basis for believing that such evidence exists, the content of the anticipated evidence, and the way that it will favorably affect the defense case. *Stanaway*, 446 Mich at 680-681.

A number of privileges are protected by statute; for example, any communications between attorneys and their clients, clergy members and their parishioners, and doctors and their patients, are privileged and confidential when those communications are necessary to enable attorneys, the clergy or doctors to serve in those capacities. MCL 767.5a(2). The records of psychologists, MCL 330.1750(f)(3), sexual assault or domestic-violence counselors, MCL 600.2157a, social workers, MCL 333.18513, and juvenile diversion officers, MCL 722.828-722.829, are also privileged.

Additionally, husbands and wives cannot be examined as witnesses for or against each other, without the consent of the testifying spouse, and communications made between them during the marriage are privileged. MCL 600.2162. This marital communications privilege also applies to communications made between former spouses during the marriage. *Id*. Exceptions to marital communications privilege are enumerated in MCL 600.2162(3)(a)-(f). In addition, work product of the prosecutor and defense counsel is privileged from discovery. *People v. Gilmore*, 222 Mich App 442, 452 (1997).

Counsel should be aware that "reciprocal" discovery allows prosecution access to certain defense information. MCL 767.94a. Since the mandatory disclosure provisions of MCR 6.201 apply to "a party" upon request, the prosecution may discover the names and addresses of certain defense witnesses, the nature of any defense to be established through those witnesses, and any expert witness's reports and statements. MCL 767.94a. Nevertheless, to the extent that a prosecution's discovery request under MCL 767.94(a) conflicts with Mich. Ct. R. 6.201, be sure to point out that Michigan court rules prevail over conflicting statutes governing criminal discovery. *People v. Pruitt*, 229 Mich App 82 (1998); Michigan Supreme Court Administrative Order No. 1994-10 ("[D]iscovery in criminal cases heard in the courts of this state is governed by Mich. Ct. R. 6.201 and not MCL 767.94(a).").

Further, misdemeanor cases are treated differently than are felony cases; for example, the mandatory reciprocal discovery provisions of MCR 6.201 apply to felonies. In *People v. Nickerson*, unpublished opinion of 03-13-07 (Court of Appeals #271459), *lv den* 478 Mich. 901 (2007) (where the Supreme Court noted it has declined to add a new Mich. Ct. R. 6.610(F) for discovery in district court), the prosecutor in a misdemeanor DUI case moved the court to compel disclosure of the defendant's witness list. The defendant argued that disclosure was not warranted because MCR 6.201 applies only to felonies; the trial court ordered the disclosure. The Court of Appeals reversed on the grounds that MCR 6.201 only applies to felony cases. The court emphasized that "the argument advanced by plaintiff, that a trial court has the inherent authority to order discovery even in the absence of a statute or court rule, is without merit." *Nickerson* at 3.

Make sure you get what is needed.

Pursuant to MCR 6.201(B), prosecutors must supply defendants with the following information, if requested by the defense:

1. any exculpatory evidence or information known to him or her;

2. police reports and interrogation records concerning the case, except parts of the report that concern continuing investigations;

3. written/recorded statements by the defendant, a co-defendant or accomplice pertaining to the case, even if they are not prospective witnesses at trial;

4. affidavits, warrants and returns pertaining to searches and seizures in connection with the case; and

5. plea agreements, grants of immunity or other agreements for testimony in connection with the case.

Additionally, the prosecution has the duty -- as recognized in case-law -- to disclose:

1. any deals made with prosecution witnesses, *People v. Atkins*, 397 Mich 163, 182 (1976); *Banks v. Dretke*, 540 US 668, 697-98 (2004);

2. copies of police reports, *People v. Denning*, 140 Mich App 331, 333-34 (1985)(finding that the prosecution must disclose copies of police reports when "fundamental fairness" requires it);

3. witness statements material to preparation, *People v. Hayward*, 98 Mich App 332 (1980);

4. juvenile, psychiatric, and social services reports of the complainant, *People v. Brocato*, 17 Mich App 277 (1969);

5. pre-sentence reports of accomplice witnesses, *People v. Hooper*, 157 Mich App. 669 (1987)(finding that MCL 791.229, a statute preserving confidentiality of presentence reports, must give way when it directly conflicts with a defendant's rights of confrontation or impeachment);

6. any statements of the defendant, his co-defendants, and any accomplices, whether or not they are witnesses at trial, *People v. Pruitt*, 229 Mich App 82 (1998);

7. the personnel files of testifying police officers, if material, *US v. Henthorn*, 931 F 2d 29, 30-31 (CA 9, 1991);

8. those records or documents from which a prosecution witness gives testimony, *People v. Robinson*, 41 Mich App 259 (1972); and

9. blood-typing results, when the evidence is material to guilt or punishment, *People v. Price*, 112 Mich App 791 (1982).

Your client has a Fifth and Fourteenth Amendment due process right to obtain evidence in the possession of the prosecution if it is favorable to him and material to guilt or punishment. *Brady v. Maryland*, 373 US 83, 87 (1963); *People v. Banks*, 249 Mich App 247 (2002). "Material" is defined as evidence that would raise a doubt about your client's guilt. *US v. Agurs*, 427 US 97 (1976). The prosecutor must disclose such evidence to your client whether or not it is requested. Evidence is also material under *Brady* if it tends to impeach the credibility of a key government witness. *US v. Bagley*, 473 US 667 (1985); *see also Smith v. Cain*, __ US __; 132 S Ct 627 ; __ L Ed 2d __ , decided 01-10-2012 (U.S.S.C. No. 10-8145)(a multi-count murder case was reversed because the prosecutor hid exculpatory evidence).

Whether undisclosed evidence is material must be determined on the evidence "considered collectively, not item by item." *Kyles v. Whitley*, 514 US 419, 436; 115 S Ct 1555; 131 L Ed 2d. 490 (1995). In addition to the constitutional obligations, the prosecutor also has an ethical obligation to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." ABA Formal Opinion 09-454, 07/08/2009. ***Note****: What is known by the police is attributable to the prosecutor. Kyles, supra.*

If a party fails to comply with a discovery request or order, the court has the discretion to order the exclusion of testimony or evidence relating to that discovery request or order. *People v. Paris*, 166 Mich App 276, 281-82 (1988)("A violation of a discovery order or agreement does not automatically entitle a defendant to exclusion of otherwise admissible evidence"); *People v. Turner*, 120 Mich App 23, 33 (1982), *overruled on other grounds by People v. Randolph*, 466 Mich 532 (2002). A court is entitled to order a number of remedies in addition to exclusion, including dismissing the case, *People v. Owens*, 74 Mich App 191 (1977), issuing sanctions, Mich. Ct. R. 6.201(J), and ordering a continuance, *id.*; *see*, *e.g.*, *People v. Gabriel Jackson*, unpublished opinion per curiam of the Court of Appeals, decided 01/29/2009 (No. 282141), upholding a trial court dismissal of a case due to prosecutorial failure to comply with discovery order and, as a result of the delay, the destruction of a police video.

Information may also be secured through the Freedom of Information Act (FOIA). 5 U.S.C. § 552; *see also* MCL 15.231.

Interlocutory Appeals

You have ably prepared and argued your pre-trial motion, and the judge has ruled. Now what? Appeal! (maybe)

Interlocutory appeals are appeals from nonfinal orders. They are "[s]omething intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." Black's Law Dictionary, Revised Fourth Edition, West Publishing Co, 1968, p. 952. The jurisdiction of the Court of Appeals to hear an interlocutory appeal arises from the State Constitution, statute, and court rule. Const. 1963, Art. VI, §10; MCL 600.308; MCR 7.203(B).

Defense counsel *is authorized* under MCR 6.005(H)(2) to file "interlocutory appeals the lawyer deems appropriate," and the trial lawyer *is obligated* to respond "to any preconviction appeals by the prosecutor. The defendant's lawyer *must either*: (i) file a substantive brief in response to the prosecutor's interlocutory application for leave to appeal, or (ii) notify the Court of Appeals that the lawyer will not be filing a brief in response to the application." MCR 6.005(H)(3).

When an issue is decided by interlocutory appeal, it generally cannot be raised again in a post-verdict appeal. *People v. Brown*, 173 Mich App 202 (1988), *rev'd on other grds* 439 Mich 34 (1991). On the other hand, some issues, for example, one relating to a circuit court denial of a motion to quash an improper bindover, *are waived if not appealed* prior to trial. *People v. Hall*, 435 Mich 599 (1990).

The 'law of the case' doctrine, which "holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue," *Sinicropi v. Mazurek*, 279 Mich App 455, 465; 760 NW2d 520 (2008), seeks to promote finality and to prevent forum shopping. *People v. Radowick*, 63 Mich App 734, 739; 235 NW2d 28 (1975)(circuit court suppression of defendant's statement binding on district court). However, "[p]articularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice," *People v. Phillips (After Second Remand)*, 227 Mich App 28, 33-34; 575 NW2d 784 (1997)(citing *People v. Herrera (On Remand),* 204 Mich App 333, 340-341; 514 NW2d 543 (1994), and *People v. Wells,* 103 Mich App 455*,* 463; 303 NW2d 226 (1981)).

There is no defined limit to the type of orders for which an interlocutory appeal may be appropriate, and the defense attorney should consider filing an interlocutory appeal from adverse significant pre-trial orders, i.e., those that may bear upon the final outcome of the case. For example, "dismissal-type" issues, including entrapment, speedy trial, and double jeopardy, may require an interlocutory appeal. Similarly, if a trial court denies a motion to suppress evidence key to the prosecution's

case, or there is a venue issue, or a denial of expert or investigative assistance, or an adverse other-acts ruling, for example, an interlocutory appeal should be considered by the attorney. [For a recent, published decision analyzing a venue issue in an interlocutory appeal, see *People v McBurrows*, __ Mich App __ (2017), decided December 19, 2017 (Docket #338552).

The prosecution has statutory authority to appeal, or to seek leave to appeal, provided that jeopardy has not attached, MCL 770.12, and successful interlocutory appeals by the prosecution are common. For example, one study showed that in 1989, there were 53 interlocutory appeals to the Court of Appeals. Fourteen of those were filed by the defense, and the lower court was reversed in seven of the appeals. Thirty-nine of the appeals were brought by the prosecution, and thirty-six of those resulted in reversal.

The pleading is a combined pleading; that is, a brief in support -- separate from the application -- is not required, but the pleading must conform as far as practicable with the general rule requirements for an appellant's brief. MCR 7.212(C).

The application, like a motion, is a request for action by the appeals court on a particular issue, and should be filed within 21 days of the issuance of the order being appealed. A notice of hearing is not required for filing in the Court of Appeals, and there is no oral argument. The application can be filed in any one of the four Court of Appeals' District Offices [the First District in Detroit, the Second District in Troy, the Third District in Grand Rapids, and the Fourth District in Lansing]. If a motion for immediate consideration is filed, for example, where a hearing is needed in less than 21 days, then the pleading should be, or, as a practical matter, *must be personally served* on the prosecutor. See MCR 7.205(E)[emergency appeals], MCR 2.107(D)[service of pleadings], and MCR 2.114(B)[verification of pleadings].

The primary burden on counsel in an interlocutory appeal is to demonstrate for the appeals court that the trial court committed error, and the appeals court should hear the issue at that point in time. As a practical matter, the burden is a high one. “It's a two-step process ... [t]o get leave granted in an interlocutory appeal, you better show me that the trial judge was stone-cold dead wrong. And then you have to tell me why I need to fix it *now*." Former Chief Justice of the Michigan Supreme Court, and then Chief Judge of the Court of Appeals, Maura D. Corrigan, in a 1997 interview for Michigan Lawyers Weekly.

If appealing a denial of bail, the appeal is not by right, but is by leave, and it is reviewed for an abuse of discretion. A filing fee is not required. See *People v Edmond*, 81 Mich App 734; 266 NW2d 640 (1978); MCR 7.209(D); MCR 6.101(G)(1) and (2).

The Court of Appeals may: 1) grant or deny the application; 2) enter a final decision; 3) grant other relief; 4) request additional information from the lower court

record; and 5) order production of a certified concise statement of facts and proceedings. MCR 7.205(D)(2). The certified statement procedure is described in MCR 7.205(G).

Checklist:

Counsel *must* file:

- an original (signed) copy, plus four additional copies of the application. The application must describe the nature of the judgment or order being appealed, must comply with the format requirements of MCR 7.212(C), and must, in an interlocutory appeal, set forth the "facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal." MCR 7.205(B).

- five copies of the judgment, order, or opinion of the lower court.

- five copies of the lower court docket entries/register of actions.

- the transcript necessary for review; if the transcript is not immediately available it must be ordered, and proof [e.g., a court reporter's certificate] it has been ordered filed with the court.

- proof of service.

- the entry/filing fee [by statute, MCL 600.321, currently $375.00 (per case number); a motion for immediate consideration, if filed, is an additional $200.00; a motion for a stay, if needed, is an additional $100.00]. If the defendant is indigent, then a copy of the assignment order should suffice in lieu of the fees.

Counsel *may need* to file:

- a motion for immediate consideration (with the fee -- unless waived -- and proof of personal service) of the application for leave to appeal. MCR 7.205(B).

- a motion for stay of proceedings in the trial court.

- a motion for stay of proceedings in the Court of Appeals (with the filing fee -- unless the defendant is indigent -- and a copy of the lower court relevant transcript). MCR 7.209(A)(3). An ex parte motion may be filed. MCR 7.209(I).

- a motion for immediate consideration (with the fee -- unless waived -- and proof of personal service) of the motion to stay proceedings. MCR 7.211(C)(6)

Record Retention

Record Retention Plan:

You should have a written record retention policy in your office. Here is an excerpt from a sample fee agreement provided on the State Bar website:

All of your original client materials will be returned to you, or you will have an opportunity to retrieve your original client materials, immediately upon the conclusion of the representation. If you do not pick up your original client materials within 12 months of receiving the notice that they are available, they may be destroyed without further notice to you. Your file may be destroyed by _____ [*month*] of 20___ without further notice to you. If any notification is sent to you, it will be to the last current address we have on file for you. You may obtain a copy of your file, not including the attorneys' and legal assistants' personal notes and memoranda, at a charge of ___ cents per page in addition to a retrieval fee of $_____.

Record Retention Kit from the State Bar:
http://www.michbar.org/opinions/ethics/RecordRetention/

State Bar Record Retention Plan article (with checklist):
http://www.michbar.org/pmrc/articles/0000105.pdf

Retaining Your File and Discovery Materials:

You must *keep the file and materials – including discovery – for at least five years* after the proceedings are concluded in the trial court. MCR 6.005(H)(5).

Access to File and Discovery Materials by Appellate Counsel

Multiple Choice Question:

Assume the following:

You represented your client through a conviction and sentence. Sometime later, you are contacted by your client's appellate counsel who is requesting discovery and file materials. You should:

A. Ignore the contact and hope the appellate attorney goes away and leaves you alone;

B. Ignore the contact for a while, but eventually respond, but then slow-drag providing anything to the appellate attorney; or,

C. Cheerfully respond in an expeditious manner and fully comply with the appellate attorney's requests.

The correct answer is "C".

There are several reasons why C is the best and correct answer, including: it is professional and the right thing to do, you can avoid explaining your non-compliance to the court when the appellate attorney files a motion to compel, and you will be in compliance with MCR 6.005(H)(5), which provides:

> "when an appellate lawyer has been appointed or retained, promptly making the defendant's file, including all discovery material obtained, available for copying upon request of that lawyer. The trial lawyer must retain the materials in the defendant's file for at least five years after the case is disposed in the trial court."

Additional Helpful Resources

SADO/CDRC: http://sado.org/

SADO has may publications (at nominal cost, usually) and the defense attorney Forum (a statewide listserv; among the publications are the annually updated Defender Books (Trial, Motions*****, Habeas, Plea and Sentencing), Annotated Sentencing Manual, and an Appellate Practice (soon to be published).

*****An excerpt of the Table of Contents from the Motions Book follow below this Helpful Resources section, to give you an idea of that book's contents).

US Supreme Court; constitutional issues:

http://supct.law.cornell.edu/supct/index.html

http://www.scotusblog.com/wp/

http://scotuswiki.com/index.php?title=Main_Page

http://www.capdefnet.org/

http://confrontationright.blogspot.com/

Wayne County Circuit Court:

https://www.3rdcc.org/

Mahoney Monograph on Right to Present Defense [Harrington and Mahoney]:

https://www.harringtonmahoney.com/publications

Websites for Federal Defenders:

http://www.rashkind.com/

https://fd.org/

http://www.capdefnet.org/

Forensics/Identification:

http://daubertontheweb.com/

https://www.nij.gov/topics/forensics/Pages/welcome.aspx

https://www.innocenceproject.org/

http://www.interpol.int/Public/Forensic/Default.asp

Michigan Legislature, Chapter Index:

http://www.legislature.mi.gov/%28S%281vvczauk03cqd545ts1rubys%29%29/mileg.aspx?page=chapterindex

Michigan Court Rules, Evidence Rules:

http://courts.mi.gov/courts/michigansupremecourt/rules/pages/current-court-rules.aspx

State Bar Ethics Opinions:

https://www.michbar.org/opinions/ethicsopinions#opinions

Legal objections [Ray Moses website]:

http://criminaldefense.homestead.com/condensedobjections.html

Michigan Judicial Institute (MJI) Benchbooks:

https://mjieducation.mi.gov/benchbooks

Driver Assessment and License Appeal offices:

http://www.michigan.gov/sos/0,1607,7-127-1627_8665-23975--,00.html

Sentencing related:

www.sentencing.typepad.com [Professor Douglas A. Berman's blog]

https://mjieducation.mi.gov/felony-sentencing-resources [Michigan Judicial Institute felony sentencing resources]

https://mjieducation.mi.gov/documents/sgm-files/94-sgm/file [Michigan Judicial Institute Sentencing Guidelines Manual, through 02/21/2018]

https://mjieducation.mi.gov/documents/benchbooks/7-distctsent/file

[Michigan Judicial Institute district Court Sentencing Manual]

Sex Offender Registry:

http://www.mipsor.state.mi.us/

Sex Offender Registration Act:

http://www.legislature.mi.gov/%28S%28anu0binrnokiuh555w2kyijo%29%29/mileg.aspx?page=getObject&objectName=mcl-Act-295-of-1994

OTIS/Department of Corrections Offender lookup:

https://mdocweb.state.mi.us/otis2/otis2.aspx

ICHAT/State Police Criminal Records lookup:

https://apps.michigan.gov/

Statutes:
http://www.legislature.mi.gov/%28S%28anu0binrnokiuh555w2kyijo%29%29/mileg.aspx?page=getObject&objectName=mcl-Act-372-of-1927

Michigan State Police publications and information:

http://www.michigan.gov/msp/0,1607,7-123-1591_3503_4654---,00.html

State Web Sites:

http://www.michigan.gov/som/0,1607,7-192-29929---A,00.html

Snitching Blog:

http://snitching.org/

Forums:

As noted above, SADO has a subscription-based Forum for criminal defense attorneys.

There is also the 'darrow-forum' through Google for criminal defense attorneys; contact the administrators, attorneys Joshua Blanchard and William Maze, for information about getting access.

Case-law updates:

Attorney F. Martin Tieber's website, Criminal Law Update:
http://tieberlaw.com/criminal_law.htm

Attorney Stuart G. Freidman's website/blog: http://crimapp.com/

Free and less-expensive research sites:

[State Bar log-in page to access Casemaker]:
https://e.michbar.org/eCommerce/login/login.aspx

http://www.michbar.org/opinions/opinionsearch.cfm

http://www.lexisone.com/caselaw/freecaselaw

http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=07-542

http://www.ilrg.com/forms/

http://scholar.google.com/schhp?hl=en&client=firefox-a&rls=org.mozilla%3Aen-US%3Aofficial&tab=ns

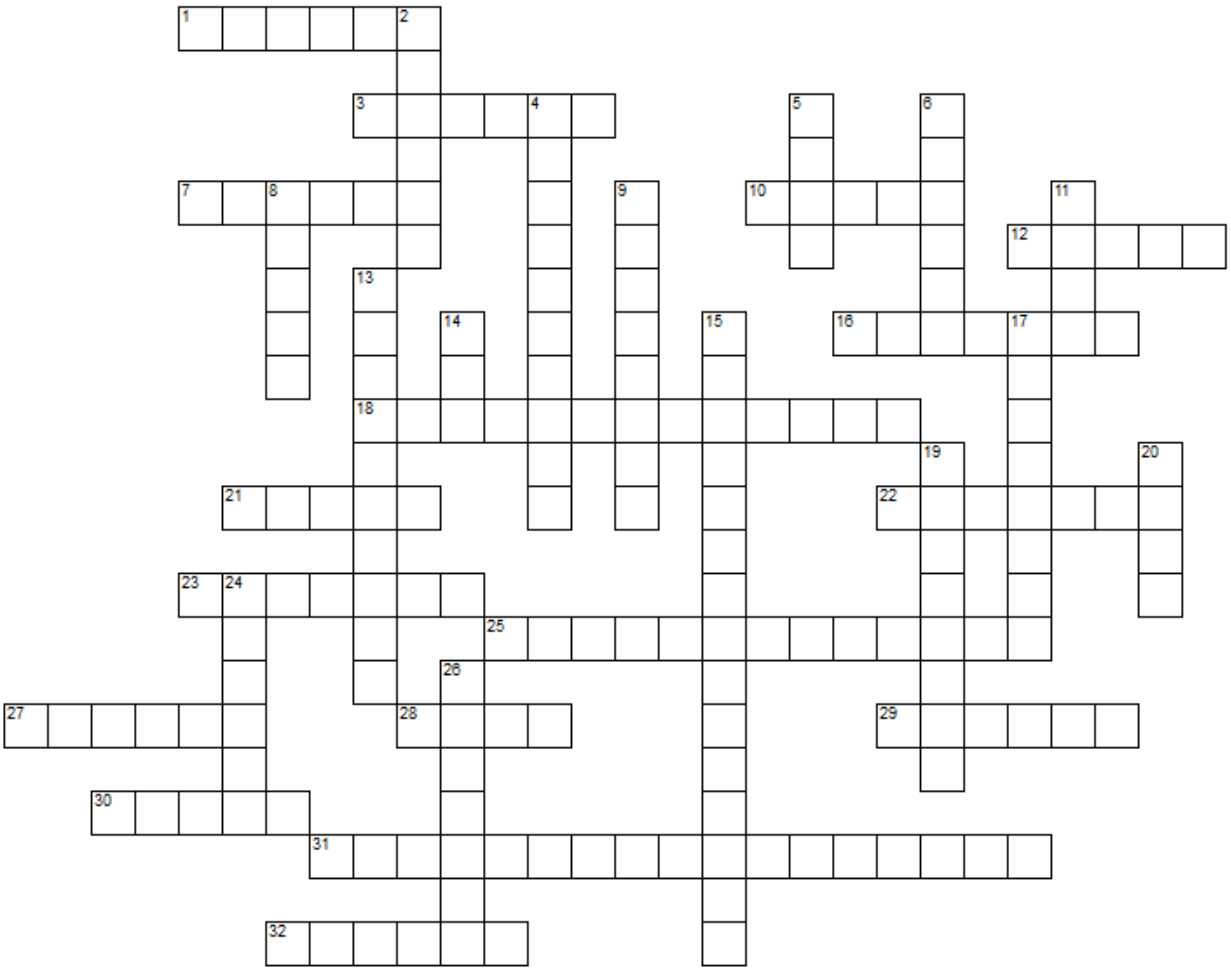
http://www.fastcase.com/ [free I-phone legal research app]

Motions Book Table of Contents (2016, excerpt)

(please excuse the odd formatting)

CHAPTER 12 Dismissal of Charges
Motions (continued)

CAP Seminar – March 9, 2018
Diversion #1



ACROSS

1 FMHJ Circuit Judge
3 One experienced FMHJ attorney (rhymes with grumpy)
7 The number of jurors required to decide a felony case in Michigan
10 FMHJ Presiding Judge
12 The right to compel the attendance of witnesses is found in this Amendment
16 Type of hearing a trial lawyer does not want
18 "fruit of the __ "
21 FMHJ Circuit Judge
22 Famous USSC case clarifying suspect's rights when interrogated

23 FMHJ Circuit Judge
25 An appeal before a final judgment
27 Right to be free from unreasonable searches is found in this Amendment [and found in Const. 1963, Art. 1 §11]
28 A registration act
29 3rd CC motion day
30 USSC case that allows police to conduct a brief investigatory st
31 One benefit of your WCCDBA membership [;)]
32 One reason attorneys go to the CLEC on Fridays

DOWN

2 You want this type of hearing to challenge the voluntariness of your client's statement(s).
4 Discretionary challenge to a potential juror
5 8TH Floor lounge
6 FMHJ Circuit Judge
8 FMHJ Circuit Judges (there are two with this last name)
9 USSC case construing right of confrontation and testimonial evidence
11 Number of years that a trial lawyer is required to keep the discovery and file materials
13 The right to present a defense stems from here
14 Arraignment hearing (abbr.)
15 'the thing speaks for itself'
17 Distinguished family name in the Wayne County judiciary
19 Case establishing principle of proportionality in Michigan
20 You want this type of hearing to challenge an identification
24 President of the WCCDBA
26 Michigan case prohibiting cognate offenses

CAP Seminar – March 9, 2018

Diversion #2

N Y X N M J L Z T N I L A W Y E R T D K
O E M Q Y U I Y T O N B F J T K J L J N
I R G E W R B P N I S A F X T N T T G Q
T E I D V Y E B D T A I I Y Q Y T W T J
U R L G U I R Z B P N L L Z Z M B N V O
C N E B H J T A G M I G I L V R E N B X
E A L P A T Y U S U T W A B L R M J V J
S R M A O I S M C S Y K B P R K E T W T
O R Y W I R R V Z E A J J U G C Z M N J
R E N J J R T A D R S U C M T N B A U Y
P S C B Z W T E V P R N L I P K D S B G
F T M N A W D M R E O M O T T N T T D D
F I Y M E R J T M C S N V C E I N S Y L
R W R G L T N D Y P R N I F C Q I Y A X
E I E E P K N R E R B D E E B L R R N T
E T B X A N N E M F R D K F E P C X I E
D N B N D R M X S E E Y T N F E M D M G
O E O Y D V M Q V Y L N C N N O E I K J
M S R V T X Y D R N B E S Y G R R X V Q
N S Y L Y G D R J Z D Q Y E C C W G N N

arrest assault bail bailiff concurrent consecutive credit crime defendant defense firearm freedom insanity judge jury justice larceny lawyer liberty objection offense variable plea presumption prosecution reporter rights robbery sentence silence trial verdict witness

BONUS COUPON

THIS COUPON ENTITLES THE BEARER TO TWO RESEARCH QUESTIONS ANSWERED FOR THE PRICE OF ONE.

REDEEMABLE 9:00 A.M. TO 1:00 P.M., MONDAY THROUGH FRIDAY, IN THE WCCDBA CLEC.

THIS OFFER DOES NOT EXPIRE