C.A.P. SEMINAR NOVEMBER 2, 2007

EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT PRETRIAL MOTIONS (BUT WERE AFRAID TO ASK).

By: JOHN F. ROYAL

Reference materials for Pretrial Motions in Criminal Cases in Michigan:

1. **DEFENDER MOTIONS BOOK** , Criminal Defense Resource Center, Michigan State Appellate Defender Office (SADO) (2006).

2. **POTENTIALLY DISPOSITIVE PRE-TRIAL MOTIONS**, Hon. Dennis Kolenda, Criminal Law Section, State Bar of Michigan (2007). A check for $17 can be sent to State Bar of Michigan, 306 Townsend St., Lansing, MI 48933; or pick up at the State Bar Building for $13.

Sample Pre-Trial Motions in Michigan Criminal Cases.

NOTE: I have tried not to duplicate the large selection of sample motions contained in the Defender Motions Book, supra. Attached are a hodge-podge of sample motions which I have drafted and/or filed in recent years in Michigan criminal cases.

STATE OF MICHIGAN

IN THE19th DISTRICT COURT FOR THE CITY OF DEARBORN

PEOPLE OF THE CITY OF DEARBORN,
Plaintiff,

Case No.

vs.

Hon.

,
Defendant.
_____/

JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
615 Griswold St., Suite 1724
Detroit, Michigan 48226
(313) 962-3738

Assistant City Attorney
13615 Michigan Avenue
Dearborn, MI. 48126
(313) 943-2035
_____/

MOTION FOR IMMEDIATE CONSIDERATION OF MOTION TO WITHDRAW AS RETAINED DEFENSE COUNSEL BASED UPON A BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP

MOTION TO WITHDRAW AS RETAINED DEFENSE COUNSEL BASED UPON A BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP

MOTION FOR IMMEDIATE CONSIDERATION OF MOTION TO

WITHDRAW AS RETAINED DEFENSE COUNSEL BASED UPON A BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP

NOW COMES attorney John F. Royal, who is presently the retained attorney representing Defendant in the above matter, and moves this Court to immediately consider his attached Motion to withdraw as counsel for the Defendant based upon a breakdown of the attorney-client relationship, for the following reasons:

1. For the reasons stated in the attached Motion to Withdraw, there is a serious and irreparable breakdown in the Attorney-Client relationship in this case.

2. This matter is set for trial on Thursday, August 25, 2005.

3. As stated in the attached Motion to Withdraw, this motion was not brought at an earlier time because undersigned counsel believed in good faith that another attorney was being retained who would be able to substitute for undersigned counsel, obviating the need to bring this motion and air the bad feelings between the Defendant and undersigned counsel before the Court. 4. If this motion is not heard immediately, the serious factual, legal and constitutional issues presented will be rendered moot.

WHEREFORE, for all the above reasons, and the reasons set forth in the attached motion to Withdraw, the Defendant and the undersigned counsel, request that the attached Motion to Withdraw be given Immediate Consideration.

Respectfully submitted,

JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
615 Griswold St., Suite 1724

Detroit, Michigan 48226
(313) 962-3738

DATED: August 23, 2005

MOTION TO WITHDRAW AS RETAINED DEFENSE COUNSEL BASED UPON A BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP

NOW COMES attorney John F. Royal, who is presently the retained attorney representing Defendant in the above matter, and moves to withdraw as counsel for the Defendant based upon a breakdown of the attorney-client relationship, for the following reasons:

1. The Defendant is charged with Operating While Intoxicated.

2. The Defendant initially retained attorney John F. Royal to represent her in this matter.

3. In preparing for trial in this matter, present defense counsel has engaged in a number of conversations with the Defendant in which he suggested that she think seriously about settling this case in lieu of going to trial. As a result, the Defendant has become increasingly hostile to undersigned defense counsel, accusing him of, among other things, not having her interests at heart; just trying to take her money; having betrayed her; being too lazy to try the case; and being generally incompetent. Undersigned defense counsel has attempted to provide calm and objective advice to the Defendant, but the heated responses from the Defendant has elicited angry responses from undersigned defense counsel. These conversations have been increasingly bitter and loud. As a result the Defendant recently informed undersigned defense counsel that she intended to retain an attorney who is an expert in the representation of drunk driving cases (which undersigned counsel does not hold himself out to be). The Defendant demanded a copy of her file from undersigned counsel, which was provided to her.

4. Approximately one week ago, the Defendant informed defense counsel that she was retaining attorney _____to represent her, and he would be taking over the case. She demanded, and received, a refund of the trial fee which had been tendered to undersigned defense counsel, based upon the Defendant's statement that these funds were needed to retain_____. Based upon

these events, undersigned defense counsel halted his efforts to prepare for trial in this case.

5. The delay in retaining_____ was caused only by the necessity for the Defendant to obtain additional funds from an out-of-state relative for that purpose; this was not a tactical maneuver to obtain an adjournment of the trial date.

6. Undersigned defense counsel was then contacted by attorney _____requesting authorization to place his signature on a Substitution of Counsel form. Undersigned defense counsel readily consented to this procedure, in light of the circumstances of this case.

7. On Tuesday, August 23, 2005, undersigned counsel received a telephone conversation from attorney ____informing him that Attorney____ had attempted to secure an adjournment of the trial date in this case, which had been denied. Therefore, _____ would not be filing the Substitution of Counsel form

8. Undersigned defense counsel is in no position to represent the Defendant in the trial of this case, presently scheduled for August 25, 2005.

9. There has been a complete and total break down in the attorney-client relationship in this case. The Defendant and undesigned defense counsel are completely unable to communicate with each other without a heated argument breaking out. The defendant clearly has no trust or confidence in undersigned defense counsel. The Defendant has declared in clear and unambiguous language her refusal to permit undersigned counsel to continue to represent her. Undersigned defense counsel is very upset at the unfounded accusations leveled at him by the Defendant such that he is no longer able to provided detached and objective legal advice to the Defendant.

10. The Defendant heartily concurs in the relief sought in this Motion.

11. This motion is supported by the attached Memorandum of Law, which is incorporated herein by reference.

12. For these reasons, undersigned defense counsel has no alternative but to request this Court to relieve him of further responsibility for the representation of the Defendant.

WHEREFORE, for all the above reasons attorney, John F. Royal moves to be permitted to withdraw as the retained counsel representing Defendant

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Attorney for Defendant

STATE OF MICHIGAN

IN THE19th DISTRICT COURT FOR THE CITY OF DEARBORN

PEOPLE OF THE CITY OF DEARBORN,
Plaintiff,

Defendant.
_____/

JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
615 Griswold St., Suite 1724
Detroit, Michigan 48226
(313) 962-3738

Assistant City Attorney
13615 Michigan Avenue
Dearborn, MI. 48126
(313) 943-2035
_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO WITHDRAW AS RETAINED DEFENSE COUNSEL BASED UPON A BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP

Statement of Facts

The facts are those stated in the attached Motion to Withdraw as Retained Defense Counsel. Additional facts will be referred to as necessary in the body of this Memorandum.

Arguments

I. THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW, AND HER RIGHT TO COUNSEL, WILL BE VIOLATED IF SHE IS COMPELLED TO GO TO TRIAL REPRESENTED BY AN ATTORNEY WITH WHOM THERE HAS BEEN A BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP, AND WHERE THIS COURT HAS DENIED THE DEFENDANT'S REQUEST FOR AN ADJOURNMENT SO THAT HER NEWLY RETAINED ATTORNEY CAN FILE AN APPEARANCE, HAVE AN OPPORTUNITY TO PREPARE FOR TRIAL, AND HAVE THE TRIAL SCHEDULED FOR A DATE ON WHICH HE IS AVAILABLE TO TRY THIS CASE.

B. UNDERSIGNED DEFENSE COUNSEL SHOULD

BE PERMITTED TO WITHDRAW WHERE
THERE HAS BEEN A CLEAR BREAKDOWN
IN THE ATTORNEY-CLIENT RELATIONSHIP.

As indicated in the attached motion, there has been a clear and irreversible breakdown in the attorney-client relationship in this case. Several discussions between the Defendant and undersigned defense counsel concerning whether to go to trial or to settle this case became heated and confrontational. The Defendant no longer has any trust or confidence in undersigned counsel, while undersigned counsel is so upset at the accusations hurled at him by the Defendant that he is no longer able to give the Defendant detached and objective legal advice.

The instant motion to withdraw presents issues distinct from the adjournment request which was presented to this Court by attorney_____

A criminal defendant is entitled to a reasonable opportunity to be represented by an attorney with whom he/she has a relationship of trust and cooperation. Where there has been a breakdown of the attorney-client relationship, an attorney should be permitted to withdraw. People v Charles O. Williams, 386 Mich 565, 574; 194 NW2d 337 (1972); People v Ginther, 390 Mich 436, 441-443 (1973); Donigan v Flinn, 95 Mich App 28; 290 NW2d 80 (1980); People v Bass, 88 Mich App 793, 800-803 (1979); People v Hooper, 82 Mich App 713 (1978); People v Wilson, 43 Mich App 459, 461-463 (1972); Wilson v Mintzes, 761 F2d 275, 278-280 (6th Cir 1985); Linton v Perini, 656 F2d 207, 209 (6th Cir 1981); U.S. Const., Ams. V, VI, XIV; Mich Const. 1963, Art. 1, Secs. 17,20.

As articulated by the Michigan Supreme Court in Williams, supra, at 574:

> We believe the basic right to representation by counsel, made so clear by Gideon v Wainwright, 372 US 335, 344, encompasses the right to the appointment of different counsel when a legitimate difference of opinion develops between a defendant and his appointed counsel as to a fundamental

> trial tactic. When this occurs, the defendant is entitled to a reasonable continuance in order to effectuate a change of attorneys and obtain the representation by counsel he it entitled to have under the Constitution.

The Supreme Court went on to state in Williams, supra, at 576:

> This right [the right to representation by counsel of one's choice] had been jealously protected by the courts and is of critical importance to any defendant in a criminal trial. Hence, whenever this right is asserted, the trial court must take special care to insure that it is protected.

Our Supreme Court in Williams, supra, then went on to specifically address the issue of delay caused by the need a criminal defendant to obtain another attorney, as follows, supra, at 576-577:

> We agree that the courts must do everything necessary to avoid delay. But, this cannot include interfering with a defendant's right to a fair trial. As the United States Supreme Court stated in Powell v Alabama, supra [287 U.S. 45,53 S.Ct. 55, 58, 77 L.Ed. 158 (1932)], p. 59:
>
> > "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."

These principles have been applied by the Michigan Court of Appeals, which has held that an attorney should be permitted to withdraw where there is a dispute between defense counsel and a criminal defendant over the use of a substantial defense, such as an alibi defense, at trial. Hooper, supra, at 715-716.

The Court of Appeals in People v Portillo, 241 Mich App 540, 543-543 (2000), pointed out:

> MCR 6.005(F) distinguishes between defendants who are indigent and those who can afford to retain their own counsel. A defendant who can afford to retain

> counsel on his own cannot have that right restricted by the courts. Such a defendant has a constitutional right to defend an action through the attorney of his choice. Const 1963, art. 1, Sec. 13; MCL 600.1430; MSA 27A.1430; People v Arquette, 202 Mich App 227, 231; 507 NW2d 824 (1993).

The United States Court of Appeals for the Sixth Circuit, which issues interpretations of the federal constitution which are binding on the state of Michigan, addressed an issue almost identical to the issue presented here in Linton v Perini, supra, at 209, as follows:

> The right to choose one's own counsel is an essential component of the Sixth Amendment because, were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut.

The United States Court of Appeals for the Sixth Circuit elaborated on these principles four years later in Wilson v Mintzes, supra, at 278-279:

> ...[A]lthough much sixth amendment jurisprudence has been concerned with the rights of indigent defendants, an accused who desires to and is financially able "should be afforded a fair opportunity to secure counsel of his own choice." Powell v Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932); Crooker v California, 357 U.S. 433, 439, 78 S. Ct. 1287, 1291, 2 L.Ed.2d 1448 (1958); Chandler v Fretag, 348 U.S. 3, 10, 75 S. Ct. 1, 5, 99 L.Ed. 4 (1954) ("[A] defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."); Glasser v United States, 315 U.S. 60, 75, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942) ("Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected."); Urquhart v Lockhart, 726 F2d 1316, 1319 (8th Cir 1984);United States v Burton, 584 F2d 485, 488-89 (D.C.Cir 1978), *cert. den.*, 439 U.S. 1069, 99 S.Ct. 837, 59 LEd2d 34 (1979) ("An essential element of the Sixth Amendment's protection of the right to the assistance of counsel is that a defendant must be afforded a reasonable opportunity to secure counsel of his own choosing."). *Contra*, Rubio v Estelle, 689 F2d 533, 535 (5th Cir 1982). Therefore, "[w]hen a court unreasonably denies a defendant counsel of choice, the denial can rise to the level of a constitutional violation." Birt v Montgomery, 725 F2d 587, 592 (11th Cir 1984)(*en banc*); United States v James, 708 F2d 40, 44 (2d Cir 1983). The denial of an accused's right to counsel of his choice "may so offend our concept of the basic requirements of a fair hearing as to amount to a

denial of due process of law contrary to the Fourteenth Amendment...."
Glasser, 315 U.S. at 70.

The United States Court of Appeals for the Sixth Circuit went on to conclude, in Wilson, supra, at 279-280:

> *Conceding that an accused has the right to assistance of counsel at trial as well as the fundamental and personal nature of that right, it is clear that when an accused is financially able to retain an attorney, the choice of counsel to assist him rests ultimately in his hands and not in the hands of the State."*
> Wilson, supra, at 279-280. (Emphasis supplied).

Based upon the above authorities, and the real and substantial breakdown in the attorney-client relationship which has occurred in the instant case, this Court should grant undersigned counsel's motion to withdraw as attorney of record for the defendant.

B. THE TRIAL COURT SHOULD GRANT THE DEFENDANT'S FIRST AND ONLY REQUEST FOR A CONTINUANCE OF THE TRIAL DATE SO THAT HER NEWLY RETAINED ATTORNEY CAN FILE AN APPEARANCE, HAVE AN OPPORTUNITY TO PREPARE FOR TRIAL, AND HAVE THE TRIAL SCHEDULED FOR A DATE ON WHICH HE IS AVAILABLE TO TRY THIS CASE.

As a result of the breakdown in the attorney-client relationship in this case, Defendant diligently began a search for new counsel, specifically for new counsel who specializes in the area of the defense of drunk driving cases. She found such an attorney,_____, and has retained him to represent her in this case. Based upon these developments, undersigned counsel believed in good faith that _____ would file a Substitution of Counsel, obviating the necessity of filing a Motion to Withdraw. However, due to unexpected developments, _____ has declined to file the Substitution of Counsel form, necessitating the filing of the instant motion.

Upon information and belief, on August 23, 2005, _____ appeared before this Court and requested an adjournment of the trial date so that he could have time to prepare for trial, and

also because he has a scheduling conflict which makes it impossible for him to try this case on August 25, 2005. When the adjournment was denied, _____ declined to file the Substitution of Counsel form which had been approved by undersigned counsel, leaving undersigned counsel in the position of having to represent a client who has declared in clear and strong language her contempt for undersigned counsel, and her absolute refusal to proceed with undersigned counsel as her attorney. Further, undersigned counsel is so upset at the abuse he has endured from the Defendant, that he is no longer able to provide detached and objective legal advice to her. Further, undersigned counsel is not prepared to try this case.

The delay in retaining_____ was caused only by the necessity for the Defendant to obtain additional funds from an out-of-state relative for that purpose; this was not a tactical maneuver to obtain an adjournment of the trial date. Further, this is the first request by the Defendant for an adjournment of the trial date. .

The Michigan Court of Appeals and the Michigan Supreme Court have on numerous occasions had to reverse trial court rulings denying reasonable requests for an adjournment of a trial date so that a defendant could retain counsel. An unpublished opinion of the Michigan Court of Appeals summarizes the state of the law on this question. People v Velez, unpublished opinion No. 132305, (April 23, 1993). Exhibit A, attached. In that case the Court summarized the applicable principles of law, Slip Opinion at 1, as follows:

> On appeal, defendant argues that the trial court committed error requiring reversal in denying defense counsel's motion to withdraw and defendant's motion for continuance to allow a substitution of counsel. We agree.
>
> .....
>
> In determining whether the trial court abused its discretion, an appellate court considers whether: (1) the defendant was asserting a constitutional right -- the right to counsel; (2) he had a legitimate reason for asserting this right; (3) he was

> not negligent in asserting it; (4) he did not cause prior adjournments; and (5) he has demonstrated prejudice resulting from the trial court's abuse of discretion. People v Wilson, 397 Mich 76, 80; 243 NW2d 257 (1976); [People v] Williams, [386 Mich 565,] 578 [(1972)] [People v] Sinistaj, [184 Mich App 191 (1990)].

The application of these five factors in the Velez case closely parallels their application in the instant case. In regards to the first factor, in both Velez and the instant case, the Defendant is asserting a constitutional right: the right to be represented by retained counsel of one's own choosing. In both cases, the Defendant wanted to replace the current defense attorney with an attorney in whom the Defendant had confidence. In Velez, the Court found as follows, Slip Opinion at 1-2:

> First, defendant was asserting a constitutional right to counsel of his own choice. Before the trial began, defendant's appointed counsel moved to adjourn the trial because defendant's family had retained counsel the night before. *Defendant,* facing charges carrying a mandatory life sentence without parole, *indicated that he would have greater confidence with retained counsel* hired by his family. Defendant was not asking for new appointed counsel. See People v Mack, 190 Mich App 7, 14; 475 NW2d 830 (1990). Rather, he requested the continuance to substitute appointed counsel with retained counsel of his own choice. (emphasis added).

Similarly, the application by the Velez Court of the second factor closely parallels its application to the instant case:

> Second, it is evident that he [the defendant] had a legitimate reason for requesting the adjournment. As a practical matter, a defendant or a defendant's family may have difficulty raising sufficient funds to retain an attorney, especially on short notice. Because a defendant has a constitutional right to counsel of his own choice, a trial court has a corresponding duty to give him a reasonable period of time in which to raise the money to pay for a retained attorney. Id.

Third, in Velez, as here, "the defendant was not negligent in asserting his constitutional right to counsel of his choice." Id. Here, _____ asserted her constitutional right just as soon as she received the necessary funds from an out-of-state relative.

Fourth, in Velez, Id., as here:

> [N]o prior continuances or adjournments had been requested or granted, and thus the trial court could not consider the motion to be a dilatory tactic.

Finally, in regards to the fifth factor, _____ position is stronger than that of Mr. Velez. Velez testified at a subsequent hearing that he was satisfied with the performance of his court-assigned lawyer. _____ , as discussed supra, and infra, is most assuredly not satisfied with the performance of undersigned counsel. In any event, in Velez, Id., as here, the following principles apply:

> In Williams, [supra] pp 575-576, the Court emphasized that the basic right to representation by counsel of one's own choice in a criminal case is a "precious constitutional right" and that "trial courts must take special care to ensure that it is protected." US Const, Am VI; Ungar v Sarafite, 376 US 75, 589; 84 S Ct 8411; 11 L Ed 2d 921 (1964); Const 1963, art 1, §20.
> ...
>
> [W]e are persuaded that the error, which deprived defendant of his basic constitutional right to be represented by counsel of his own choice, has resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096.

Upon information and belief, in the instant case, this Court denied _____ motion to adjourn because of docket considerations. In this respect, this case is similar to People v Battles No. 2, 109 Mich App 487, 490; 311 NW2d 779 (1981). In that case, the Defendant requested an adjournment on the day of trial so that he could replace his court-appointed attorney with a retained one. The defendant had just come into funds sufficient to retain an attorney shortly before the trial date. Id., at 489. The Court of Appeals reversed the Defendant's conviction, and remanded for a new trial, Id., at 490, because:

> Neither the defendant nor his counsel were negligent in informing the court of the change that defendant desired. No prior continuances or adjournments had been requested or granted and there is no indication that the change of attorneys was a delaying tactic. *The desire of the trial court to proceed is not a sufficient reason*

to deny a defendant an otherwise proper request for a continuance. People v Ferguson, 46 Mich App 331, 339; 208 NW2d 647 (1973), People v Charles O Williams, 386 Mich 565, 577; 1984 NW2d 337 (1972). (emphasis supplied)

Based upon these authorities, _____ contends that any conviction she receives in a trial in which she is represented by undersigned counsel would be a conviction obtained in violation of her right to counsel. U.S. Const. Ams. VI, XIV; Mich Const. Art. 1, §20. Therefore, this Court should reconsider its decision to deny the adjournment of trial date, and adjourn the trial, so that new counsel can appear proceed to represent the Defendant.

WHEREFORE, for all the above reasons attorney, John F. Royal moves to be permitted to withdraw as the retained counsel representing Defendant

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Attorney for Defendant

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
OAKLAND COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Defendant.

DEFENDANT'S MOTION IN LIMINE TO PERMIT EVIDENCE OF UNCHARGED MISCONDUCT OF WITNESS RICHARD McLAUCHLIN

NOW COMES the Defendant, by and through his attorneys, and respectfully move this Honorable Court In Limine, to Permit him to offer into evidence during the trial of this cause evidence of uncharged misconduct of prosecution witness, pursuant to MRE 404(b), for the following reasons:

1is charged with two counts of Solicitation to Commit Murder, in violation of MCLA 750.157b.

2. was bound over on these charges following a Preliminary Examination held in the 44th District Court before the

3. The Felony Information alleges that:

Between July 1, 2003, and August 5, 2003, at various times and locations in Oakland County, Michigan, Defendant did offer to pay to murder for approximately $5,000.00, therefore:

Count I

_____did solicit to murder contrary to MCL 750.157b.

Count II

_____ did solicit to murder contrary to MCL 750.157b.

4. The Defendant proposes to offer into evidence at trial, pursuant to MRE 404(b), certain evidence of uncharged misconduct of key prosecution witness_____. The proposed evidence is summarized in the attached Brief, which is incorporated herein by reference.

5. The legal arguments in support of this Motion are also contained in the attached Brief, which is incorporated herein by reference.

6. Resolution of the issues presented in this motion prior to trial will facilitate the trial itself, and will enable the parties to more appropriately focus their pre-trial preparation.

7. Motions in Limine are recognized as proper in this State to secure pre-trial litigation of important evidentiary issues. People v Harris, 86 Mich App 301 (1978).

WHEREFORE, for all the above reasons, Defendant respectfully requests that his Motion in Limine be granted.

Respectfully submitted.

_____

DATED: September 8, 2004

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
OAKLAND COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Defendant.

BRIEF IN SUPPORT OF MOTION IN LIMINE TO PERMIT EVIDENCE OF UNCHARGED MISCONDUCT OF WITNESS RICHARD McLAUCHLIN

STATEMENT OF FACTS

is charged with two counts of Solicitation to Commit Murder, in violation of MCLA 750.157b. was bound over on these charges following a Preliminary Examination held in the 44th District Court before the

The Attorney General alleges that committed the crimes of two counts of solicitation to commit the murder of , whom he had appeared in front of with respect to various alleged housing code violations. The allegations against are based almost exclusively on the credibility of a disgruntled former employee of _____

****

The instant motion in limine requests this Court to permit the admission into evidence of a variety of prior acts of uncharged misconduct, pursuant to MRE 404(b), which establish that _____actions in connection with the instant case are part of a common scheme and plan to defraud and con any and every one who can do anything for him, from helping him personally to giving him money.

The Defense proposes to prove the following acts of uncharged misconduct, which are relevant and admissible in this case. First, _____ was recently prosecuted in St. Clair Circuit Court Case No. 04-000246-FH with five counts of Larceny by Conversion Between $1,000 and

$20,000, and one count of Larceny by Conversion Between $200 and $1000. Oddly enough, he was only charged as a Second Offender, although, as will be seen, he was already successfully prosecuted as a fourth habitual felony offender in Oakland County in 1991, and has obtained more felony convictions since then.

_____ intends to call as witnesses in his defense the seven complaining witnesses from the recent St. Clair County prosecution:_____ According to the Amended Judgment of Sentence entered by the St. Clair Circuit Court, these seven individuals were defrauded of a total of $43,835.00 by _____. (Exhibit A).

In addition, _____ has also recently defrauded the following individuals of money:

_____

In Oakland Circuit No. _____pled guilty on October 28, 1987 as charged to one count of False Presenses over $100.00. He was sentenced to 2 to 15 years. His victims were _____. According to the preliminary examination transcript of April 14, 1987, _____ came to the _____ house in Pontiac and claimed to have a brother that worked in an appliance store in Ypsilanti. _____ said the store overbought merchandise and he can sell them a VCR for $60.00. _____ said she won't pay $60.00. So _____ asked to use the phone to call his brother in Ypsilanti. He warns her the call is going to cost her .80¢. He makes the call and then says that his brother will take $50.00. _____ said, "okay." Her husband _____then asked about a big screen TV. _____ makes another Ypsilanti call and then said he can get it for $200.00. _____agrees. ____ says he needs $150.00 of the money upfront. He assured them the stuff is not "hot", and says he will be back that night with the items. He gave them a receipt for the $150.00 and they never hear or see him again. The Ypsilanti calls never show up on the phone bill indicating the calls were never made.

In Oakland Circuit No. _____pled guilty on September 30, 1987. to false pretenses over $100.00 by representing he was the owner of a TV stored in Clarkston, Michigan.

On October 28, 1987, he was sentenced to 2 to 15 years. The three victims in this case were

____

In Oakland Circuit No. _____was sentenced on October 28, 1987 to 2 to 15 years. He was convicted of 4 Counts of false pretenses over $100.00 and 1 Count of false pretense under $100.00 because between July 1 and July 6, 1987, he represented that he was a surgeon employed at Detriot Children's Hospital and Beaumont Hospital and performed emergency surgery for the son of the owner of Highland Appliance Stores and was able to obtain appliances at 10% of the real price. There were 6 victims of this pattern of fraud and they are:_____

In case No. _____ was convicted following a jury trial of 4 Counts of Resisting and Obstructing a Police Officer and pled guilty to being a fourth habitual offender. On January 31, 1992 he was sentenced to 1 to 15 years in prison.

In _____was convicted of 1 Count of possession of less than 25 grams of cocaine and being a 4th habitual offender. On October 19, 1998 he was sentenced to 1 year in the County Jail consecutive to his parole violation sentence.

In case No. _____ ex-wife _____ filed for a PPO against _____. Her petition for the PPO indicates that she made a police report on January 19, 2003 and supplemented it on January 2003. She asserted that _____ physically blocked the door preventing her from leaving home and took the phone away. _____ then "chest checked" _____ up to the fireplace in a violent anger and a jealous rage. In another police report filed on January 5, 2003, _____ reported that _____ directed violent anger towards her. He "chest checked" her to the wall and blocked the door so that she could not leave. He was in a jealous rage and made verbal threats. _____ was served twice with this PPO, the first time by _____ in March or April of 2003 and the second time on August 12, 2003 by an Oakland County Jail Deputy. This is the incident referred to in paragraphs 11 and 12 of the prosecution's recently filed Motion In Limine.

The defense intends to subpoena and call as witnesses all the complainants in the above

criminal prosecutions to establish _____ common scheme and plan of fraudulent activity.

_____has admitted that by working with the State Police and the Attorney General in the prosecution of _____ , he is hoping for "favorable" action regarding his own legal situation. (PE 63). When _____ testified pursuant to an Investigative Subpoena on August ____, 2003, he was promised on the record by the Assistant Attorney General that a letter attesting to his cooperation would be placed in his prison file, and the authorities prosecuting _____ in any pending case would be notified of his voluntary cooperation. (8/___/03, at 6-8; Ex. B). While these issues were being discussed,. _____ asked for and received an off-the-record conference with the Assistant Attorney General that apparently related to outstanding fraud charges in St. Clair and/or Oakland County. (8/___/03, at 6-8; Ex. B).

The Oakland County situation referred to must be the attempt to defraud a Home Depot employee,_____, out of money on July 9, 2003, at the Madison Heights store. (Ex. C). This incident is referenced in parg. 9 of the prosecution's recently filed Motion in Limine, and is relevant to this case because _____ warned the employee that _____ intended to defraud him and set in motion the notification of the police that _____ would be at the store so that he could be arrested on an outstanding parole violation warrant. The defense intends to call the _____ as a defense witness for the reasons articulated in this Memorandum, infra.

_____has indeed profited from his cooperation in this misguided and unfounded prosecution of _____. The Attorney General wrote a letter on his behalf to the Judge in the_____ (See Attached Ex. D, This is_____ Brief in support of his Motion in Limine requesting this Court to permit the admission into evidence of the above identified prior acts of uncharged misconduct, pursuant to MRE 404(b),

Argument

I. The proposed MRE 404(b) evidence is relevant and admissible in this case.

MRE 401 defines "relevant evidence" as "evidence having any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The proposed 404(b) evidence is plainly relevant in this case, because it bears directly on the credibility of _____story. By demonstrating his life history of a pattern and practice of deception and fraud, this evidence will directly assist the jury in assessing _____ credibility, and in evaluating the defense theory that he first tried to con _____, and then has successfully conned the State Police and the Attorney General. Thus, this evidence clearly makes material disputed facts in this case more or less probable. Therefore, this evidence is "relevant evidence" as defined by MRE 401, and is admissible pursuant to MRE 402.

II. The proposed evidence is admissible pursuant to MRE 404 (b).

MRE 404(b)(1) reads as follows:

> **(b) Other crimes, wrongs, or acts.**
> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, However, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Typically, in a criminal case, it is the prosecution which seeks to offer evidence pursuant to MRE 404(b) against the Defendant. However, the rule applies to witnesses and victims, as well as defendants. People v Catanzarite, 211 Mich App 573, 579 (1995); People v Rockwell, 188 Mich App 405, 409-410 (1991); United States v McCourt, 925 F2d 1229, 1231-1232 (9th Cir 1991). Cf. People v VanderVliet, 444 Mich 52, 68, n. 19 (1993), modified, 445 Mich 1205 (1994).

VanderVliet, supra, at 60-67, and People v Engelman, 434 Mich 204, 211-217; 453 NW2d 656 (1990) adopted the "inclusionary" theory of 404(b) evidence which has been articulated by Professor Imwinkelried in his influential text: Uncharged Misconduct Evidence, West Group, (1999). Professor Imwinkelried in his text, at Section 2:32, page 173, summarizes his definition of rule 404(b) or, as he calls it, "Uncharged Misconduct Evidence", as follows:

> [M]any courts traditionally describe the uncharged misconduct doctrine as the rule allowing the plaintiff or prosecutor to introduce evidence of the defendant's prior, similar uncharged crimes to prove the defendant's motive, identity, absence of mistake or accident, intent, and common scheme or plan. [footnote omitted]. ...[This] description of the doctrine badly overstates the requirements of logical relevance: The act need not antedate the charged act; the act need not be similar to the charged act; the act need not be a crime; and the act is admissible to prove facts other than motive, identity, absence of mistake, intent, and common scheme.
>
> The litmus tests are logical relevance under Federal Rule of Evidence 401 [footnote omitted]. These tests require only an uncharged act by the defendant logically relevant on a theory other than using the defendant's subjective character as circumstantial proof of conduct. [Emphasis added].

The witnesses identified above who can testify to _____ prior history of fraudulent, deceitful and deceptive acts are clearly offering evidence of uncharged misconduct pursuant to MRE 404(b), because they offer evidence that accuses _____ of misconduct with which he is not being prosecuted in this proceeding. As such, the admissibility of this evidence must be analyzed pursuant to MRE 404(b).

This case presents a classic situation where the evidence is relevant to show ____ common scheme and plan to manipulate and trick individuals to do what he wants them to do, to assist him in some way, such as by giving him money, or other assistance. Analogously, numerous cases have held that, where a defendant is being prosecuted for fraud, evidence of other frauds which evidence a common scheme and plan, were relevant and admissible to show the intent to defraud with respect to the charges in the Information. The leading case is People v Perez-DeLeon, 224 Mich App 43 (1997), where the Court approved the admission into evidence pursuant to 404 (b), of 1,357 instances of erroneous billings from a doctor's office to establish the "knowing" element of filing false Medicaid claims and false health-care claims. The Court held that the number of erroneous claims demonstrated a persistent tendency to cause inaccuracies to be present in the billings, which tended to disprove the defense that the billing errors were innocent mistakes instead of a persistent fraudulent scheme. Accord: People v Williamson, 205 Mich App 592 (1994).

Similarly, in People v Aguwa, 245 Mich App 1 (2001), the Court upheld the admission of

evidence of the underlying credit card fraud in which the defendant allegedly participated, even though he was not charged with that conduct, because it was relevant and probative of the defendant's knowledge and fraudulent intent with respect to the charged offense of uttering and publishing.

Here as well, the testimony of the previous victims of _____ fraudulent schemes and plans will help the jury understand the theory of the defense: that _____ is once again manipulating people to his benefit. He has manipulated the law enforcement authorities to prosecute _____, and then _____ gets to pretend to "cooperate" in this phony prosecution, and then he gets the benefit by being prosecuted for lesser charges (habitual second instead of fourth in St. Clair Circuit Court), and letters in his support sent to the judges who sentence him, and the parole authorities who can release him (including letters authored by the two complainant who have been misled to believe _____ was plotting harm to them). This testimony clearly makes it more or less likely that _____is telling the truth in his accusations against _____, and is therefore admissible.

III. The testimony of the fraud victims meets the general test of admissibility of 404(b) evidence.

The Michigan Supreme Court demonstrated the application of 404(b) in VanderVliet, supra, which opinion drew upon both the analysis in Huddleston v United States, 485 US 681 (1988), and the general analysis of evidence of uncharged misconduct by Professor Imwinkelried. VanderVliet adopted the four-step analysis of 404(b) evidence promulgated in Huddleston, supra. The first issue is whether the proponent of the evidence has identified a proper purpose for the admission of the acts of uncharged misconduct. The Court discussed this very point in People v Sabin (after remand), 463 Mich 43, 61-676 (2000), as follows:

> In this case, the trial court apparently held that the evidence was relevant under a theory that I showed defendant's plan, scheme, or system in dong an act.... Today, we clarify that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common

plan, scheme, or system. [footnote omitted] See *People v Ewoldt, 7 Cal* 4th 380; 867 P2d 757 (1994). Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot.

General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts. 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249, explains:

> But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similarity, which suffices for evidencing intent....The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a pre-existing design, system, plan, or scheme, directed forwards to the doing of that act. In the former case (of intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior design or system which included the doing of the act charged as part of its consummation. In the former case, the result is to give a complexion to a conceded act, and ends with that; in the present case, the result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed.
>
> ***
>
> The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by general plan of which they are the individual manifestations.* [Emphasis in original]

***

In this case, we conclude that the trial court did not abuse its discretion in determining that defendant's alleged assault of the complainant and alleged abuse of his stepdaughter shared sufficient common features to infer a plan, scheme, or system to do the acts....

We acknowledge that the uncharged and charged acts were dissimilar in many respects....

This case thus is one in which reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. As we have often observed, the trial court's decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion. [citations omitted] Sabin, *supra*, at 61-67.

The second part of the Huddleston analysis is "logical relevance." In order to establish

"logical relevance" two components must be present: materiality and probative force. As explained in Sabin, supra, at 57:

> Relevant evidence thus is evidence that is material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence). *People v Mills*, 450 Mich 61, 66-68*;537* NW2d 909 (1995). Materiality, however, "does not mean that the evidence must be directed at an element of a crime or an applicable defense ." *Id.* at 67-68. A material fact is one that is "'in issue' in the sense that it is within the range of litigated matters in controversy." *Id*. at 68, quoting United States v Dunn, 805 F2d 1275, 1281 (CA 6, 1986) [footnote omitted]

In People v Crawford, 458 Mich 376 (1998), the Court analyzed the probative value of the evidence of uncharged misconduct pursuant to the "doctrine of chances," which is also called the "doctrine of objective improbability." This theory, which has been explicated by Professors Wigmore and Imwinkelried, is, as the Court noted, widely accepted. Crawford explained, at 393:

> Where material to the issue of mens rea, as here, it rests on the premise that "the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently." Imwinkelried, Uncharged Misconduct Evidence, §3:11, p 45. Consequently, the forbidden intermediate inference to defendant's subjective character is not implicated:
>
> > [T]his theory of logical relevance does not depend on a character inference. The proponent is not asking the trier of fact to infer the defendant's conduct (entertaining a particular mens rea) from the defendant's personal, subjective character. The intermediate inference is an objective likelihood under the doctrine of chances rather than a subjective probability based on the defendant's character. [Id., §5:05, p 12.]

Applying the "doctrine of chances" to the proffered evidence in this case, the evidence makes it more likely that _____ is acting deceitfully and fraudulently, and less likely that his behavior is innocent. Thus, there is an objective likelihood that his behavior in this case is fraudulent and deceitful, and this conclusion can be objectively drawn based upon his past misconduct, rather than subjectively based upon probability based upon _____ character.

Here, there is a clear and direct link between _____ proven actions in deceiving and defrauding people to his benefit over many years, and his actions in this case to win the support

of law enforcement authorities pursuant to a massive con job. Further, it will be very difficult for the jury to understand and appreciate the defense theory in this case, that one man can deceive so many hardened and cynical law enforcement professionals, unless the jury can see the many years of practice during which _____ has practiced and honed his skills.

Here, _____ is not seeking to produce this evidence to establish _____ bad character, or propensity to commit criminal acts. This evidence is relevant and material because it will help the jury to understand and evaluate the defense theory of the case, and demonstrate that it is indeed possible for one man to fool many people over many years. As President Lincoln said: "You can fool some of the people all of the time, and all of the people some of the time...." This evidence will help the jury realize that not even _____ can "fool all of the people all of the time."

IV. The proposed evidence clearly more probative than prejudicial.

The proposed evidence is admissible for a proper purpose, and is relevant and material, as argued supra. It is therefore clearly highly probative. Further, this probative value outweighs any minor prejudice which might accrue to the prosecution. In addition, the MRE 403 analysis is less stringent when a criminal defendant is offering MRE 404 (b) evidence against a witness. As United States v Stamper, 766 F. Supp 1396 (WDNC, 1991), affid. 959 F2d 231 (4th Cir 1992), citing United States v Aboumoussallen, 726 F2d 906, 911 (2nd Cir 1984) pointed out: "The standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword," because the ordinary risks of prejudice to the defendant are absent in such a situation.

As pointed out in Vandervliet, supra, at 81, and Sabin, supra, at 71, this is a fact-intensive evaluation. In Sabin, the Court explained, supra, at 71:

> In VanderVliet, *supra* at 81, this Court observed that the MRE 403 determination is "best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony." In this case, the defense contended that the complainant fabricated the entire incident to remove defendant from her life. The evidence was thus probative of a disputed element of the offense– that sexual penetration

> occurred. Although the potential for prejudice existed, the evidence was probative in showing a system that defendant may have used to sexually assault his daughters, and consequently, in rebutting defendant's claim of fabrication. Under these circumstances, the trial court did not abuse its discretion in determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

V. _____ constitutional rights to due process and to confront the evidence against him also support the relief sought in this motion.

In addition, _____contends that the failure to permit him to produce the proffered evidence of _____ uncharged misconduct will deprive him of his right to confront the witness against him, and to his due process right to a fair trial. US Const., Ams. V, VI, XIV: Mich Const. 1963, Art. 1, Secs. 17, 20. For these reason as well, ____motion in limine should be granted.

WHEREFORE, for all the above reasons, Defendant respectfully requests that his Motion in Limine be granted.

Respectfully submitted.

_____

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
OAKLAND COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,
Defendant.

DEFENDANT'S MOTION IN LIMINE TO ADMIT EVIDENCE OF OUT-OF-COURT STATEMENTS OF THE DEFENDANT AS EVIDENCE OF THEN-EXISTING STATE OF MIND AND INTENT

NOW COMES the Defendant, by and through his attorneys, and respectfully move this Honorable Court In Limine, to permit him to offer into evidence during the trial of this cause, evidence of out-of-court of statements of the defendant as evidence of then-existing state of mind and intent, for the following reasons:

1. _____ is charged with two counts of Solicitation to Commit Murder, in violation of MCLA 750.157b.

2. _____ was bound over on these charges following a Preliminary Examination held in the 44th District Court before the Hon..

3. The Felony Information alleges that:

Between June, 2003, and August 5, 2003, at various times and locations in Oakland County, Michigan, Defendant did offer to pay _____to murder _____ for approximately $5,000.00, therefore:

Count I

_____ did solicit _____to murder _____ contrary to MCL 750.157b.

Count II

_____ did solicit _____n to murder _____ contrary to MCL 750.157b.

4. The specific intent to cause the murder of the alleged victims is an essential element of the crime of Solicitation to Commit Murder. CJI2d 10.6(3); People v Chapman, 80 Mich App 583 (1978).

5. It is _____ defense in this matter that he did not, during the time period alleged in the Information, have the specific intent to cause the death of either of the alleged complainants and, further, the prosecution cannot prove beyond a reasonable doubt that he did.

6. The Defendant proposes to offer into evidence at trial evidence of out-of-court statements made by the defendant, _____ during time periods relevant to this prosecution, which support _____ position that he did not have the specific intent to cause the murder of either of the complainants during the time frame alleged in the Information. The proposed evidence is summarized in the attached Brief, which is incorporated herein by reference.

7. The legal arguments in support of this Motion are also contained in the attached Brief, which is incorporated herein by reference.

8. Resolution of the issues presented in this motion prior to trial will facilitate the trial itself, and will enable the parties to more appropriately focus their pre-trial preparation.

9. Motions in Limine are recognized as proper in this State to secure pre-trial litigation of important evidentiary issues. People v Harris, 86 Mich App 301 (1978).

WHEREFORE, for all the above reasons, Defendant espectfully requests that his Motion in Limine be granted.

Respectfully submitted.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
OAKLAND COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Defendant.

BRIEF IN SUPPORT OF MOTION IN LIMINE TO ADMIT EVIDENCE OF OUT-OF-COURT STATEMENTS OF THE DEFENDANT AS EVIDENCE OF THEN-EXISTING STATE OF MIND AND INTENT

STATEMENT OF FACTS

_____is charged with two counts of Solicitation to Commit Murder, in violation of MCLA 750.157b. _____ was bound over on these charges following a Preliminary Examination held in the 44th District Court before the Hon.

The Attorney General alleges that __)____committed the crimes of two counts of solicitation to commit the murder of , whom he had appeared in front of with respect to various alleged housing code violations. The allegations against _____ are based almost exclusively on the credibility of a disgruntled former employee of _____.

****

The instant motion in limine requests this Court to permit the admission into evidence at trial, for reasons set forth in the Argument section, infra, out-of-court statements made by the defendant, during time periods relevant to this prosecution, which support _____ position that he did not, during the time period alleged in the Information, have the specific intent to cause the murder of either of the complainants.

_____ tape recorded a number of relevant telephone conversations he had with various individuals. The tape recordings of these conversations are available and the defense proposes to offer them as exhibits at trial. For the convenience of the court and the parties in deciding the instant motion, copies of uncertified transcripts of these conversations are attached.

The first conversation took place on January 20, 2003 between _____ and

_____ . (Exhibit A). In this conversation, _____ bemoans the fact that she trusted _____ who tricked her out of $5,000. _____ repeatedly encourages _____to go to the authorities, to the police and to _____ parole officer in order to get ____ incarcerated and off the streets. (Exhibit A, pp. 3, 4, 5, 6, 9, 10, 11, 12).

The second conversation between _____ and _____ took place on January 24, 2003,. (Exhibit B). Between these two conversations, _____ had finally worked up the courage to report to _____ parole officer, _____, that she was afraid_____ was going to seriously harm or kill her. Instead of taking this complaint seriously, when_____ next came to visit the parole officer, she called _____ and had her repeat her allegations in front of_____ on the speaker phone without her knowledge. This clearly placed_____ life in jeopardy. _____immediately and firmly advised _____to stop dealing with _____and to go over her head to someone higher up in the Parole Office. (Exhibit B, pp. 1-3, 7-8).

The next conversation was on March 15, 2003 between _____ and_____. (Exhibit C). _____explained to _____he had given _____a deposit of $5,000.00 as down payment for a number of appliances which _____claimed he was going to purchase at a police auction in Houston. (Exhibit C, p. 1). _____ immediately began urging _____to make a police report, and pursue prosecution of_____ over this incident. (Exhibit C 2-3). _____also tried to put _____ in contact with another victim of _____ schemes who_____ had cheated out of $10,000. (Exhibit C, pp. 2-5). _____ emphasized the importance of putting _____ in prison for many years. (Exhibit C, pp. 4-6). _____ expressed his state of mind and intent in strong terms. _____said that he had done_____: "a lot of favors and he still hammered me, he just doesn't know any friends. He is just out to use whomever he can." (Exhibit C, p. 6).

The next telephone conversation took place on April 23, 2003, also between _____and _____ (Exhibit D). ******** At the conclusion of the conversation, _____again urged

_____ to call _____ parole officer and report the theft of his money. (Exhibit D, p. 7).

The next recorded conversation takes place on May 30, 2003, just before the time period charged in the Information, and is between _____ and _____, the supervisor of parole officers in Pontiac. **(**Exhibit E). In this conversation, _____ reports his dissatisfaction with the parole office because, in spite of all the complaints that have been made of illegal activity by _____, _____ was still at liberty (Exhibit E, pp.1-2). In this conversation, _____ specifically reports that_____ has threatened him, and has specifically said that if he goes back to prison, people are going to die. (Exhibit E, p. 2). ********

_____ concluded by offering to make efforts to find_____ and notify the parole office of his whereabouts so he could be arrested. . (Exhibit E, pp. 6-7)

The next conversation took place on July 31, 2003 between _____ and _____ of the Michigan Department of Corrections. (Exhibit F). In this conversation, _____ expresses his concern that _____, who had just been taken into custody, has apparently been released. Mr. _____repeatedly expresses his concern and lack of understanding as to how this can happen. (Exhibit F, pp. 1-2). *******

The final conversation took place between _____and _____ on July 12, 2004.

This is Mr. Javens' Brief in support of his Motion in Limine requesting this Court to permit the admission into evidence of the above-described out-of-court statements made by the defendant, during the trial of this case.

Argument

The Felony Information in this case alleges that between June and August 5, 2003, _____ solicited _____ to murder the two Complainants in this case. To prevail at trial, the prosecution must prove beyond a reasonable doubt that _____ had the specific intent to cause the murder of the two Complainants. The specific intent to cause the murder of the alleged victims is an essential element of the crime of Solicitation to Commit Murder. CJI2d 10.6(3);

People v Chapman, 80 Mich App 583 (1978).

It is _____defense in this matter that he did not, during the time period alleged in the Information, have the specific intent to cause the death of either of the alleged complainants and, further, the prosecution cannot prove beyond a reasonable doubt that he did.

The Defendant proposes to offer into evidence at trial evidence of out-of-court statements made by the defendant, _____ during time periods relevant to this prosecution, which support _____position that he did not have the specific intent to cause the murder of either of the complainants during the time frame alleged in the Information. The evidence of these out-of-court statements of _____ is highly reliable, because the actual tape recordings of the conversations will be offered into evidence as exhibits, and played for the jury. This evidence is clearly admissible pursuant to the Michigan Rules of Evidence for two reasons: first, the statements are not being offered to prove the truth of the matters asserted, and are therefore not hearsay by definition; second, even if they are hearsay, the statements are admissible pursuant to MRE 803(3).

Hearsay is generally not admissible as evidence in Michigan Courts. MRE 802. However, hearsay by definition is limited to out-of-court statements which are offered to prove the truth of the matter asserted. MRE 801(c). Here, the above described statements by are not hearsay, because they are not being offered to prove the intrinsic truth of any statement of fact contained within the statements; rather, they are offered to demonstrate *what* _____ *believed to be true at the time the statements were made*, and what his state of mind and intent was with respect to the facts, *as he believed them to be at the time the statements were made.* Therefore, the statements are be definition not hearsay, and the rule against hearsay does not bar their admission into evidence.

However, even if this Court should determine the statements are hearsay, they are admissible pursuant to one of the hearsay exceptions. The availability of the declarant is

immaterial to the admissibility of evidence of hearsay contained within the list of exceptions found in MRE 803. Therefore, For purposes of this particular hearsay exception, whether or not the declarant, _____ is available and intends to testify is immaterial. Specifically, MRE 803(3) reads as follows:

> **Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:...
>
> ***
>
> **(3) Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will (emphasis added).

This rule specifically provides that evidence of _____ "then existing state of mind" is admissible. This includes evidence which tends to establish a state of mind such as "intent." *Id.*

The hearsay exception found in MRE 803(3) is generally referred to as the "state of mind" exception. This exception has a long history of being used in criminal cases to support the admission into evidence of statements of murder victims as evidence of the state of mind or the intent of the victim, prior to their death. The United States Supreme Court approved the admission of this type of evidence in Mutual Life Ins. Co of New York v Hillmon, 145 US 285; 12 S Ct. 909; 36 L Ed 806 (1892). The Hillmon rule was specifically incorporated into the Federal Rules of Evidence, and, through the Federal Rules, into the Michigan Rules of Evidence, as was explained in People v Furman, 158 Mich App 302, 315-316 as follows:

> A common use of a victim's declarations of state of mind or emotion is to prove state of mind when state of mind is an issue in the case. See [People v]White, [401 Mich 482], *supra*, pp 502-504 [(1977)]. The hearsay exception provided by MRE 803(3) allows the admission of such declarations when state of mind itself is an issue. People v lucas, 138 Mich App 212, 220-221; 360 NW2d 162 (1984), lv den 421 Mich 854 (1985).
>
> Although the victim's state of mind [in Furman] was not directly as issue (as in a case where self-defense is asserted), her declarations, specifically, her intent to deliver an incomplete order to a male customer, could be admitted under MRE

> 803(3) to show subsequent conduct. It has long been held in Michigan that a homicide victim's declarations of where she intended to go and with whom are admissible. People v Atwood, 188 Mich 36, 51; 154 NW 112 (1915) (the decedent's statements that she intended to go for a walk with the defendant was admissible as a "verbal act," but it was for the jury to decide whether the statements truthfully explained her conduct and purpose.) People v Knight, 122 Mich App 584, 595; 333 NW2d 94 (1983).
>
> The leading case on this point is Mutual Life Ins. Co of New York v Hillmon, 145 US 285; 12 S Ct. 909; 36 L Ed 806 (1892), in which the exclusion of evidence of the victim's present intent which could show subsequent conduct was held to be error requiring reversal. The Hillmon rule was expressly left undisturbed by the hearsay exception established by FRE 803(3). Federal Advisory Committee Note, FRE 803(3). See, McCormick On Evidence, § 295, pp 847-848. For further discussion, see 6 Wigmore On Evidence, §§ 1725-1726, pp 129-142. MRE 803(3) is identical with Rule 803(3) of the Federal Rules of Evidence. See staff note to MRE 803. Furman, supra, at 315-316. (Emphasis added)

Similarly in People v Fischer, 449 Mich 441, 450 (1995), the Supreme Court approved the admissibility of statements made by the victim-wife to other witnesses prior to her death, *even concerning matters that were not known to the defendant-husband*. The Supreme Court held that such statements are admissible, as follows:

> The victim-wife's statements that were not known to the defendant about her plans to visit Germany to be with her lover and her plans to divorce the defendant upon her return are hearsay. They are admissible, however, because they satisfy the exception to the hearsay rule for "statement[s] of the declarant's then existing . . . intent, plan . . . [or] mental feeling . . . " MRE 803(3).

Further, the Michigan Court of Appeals has approved the admission into evidence of out-of-court statements of a declarant where the evidence established the intent of the declarant, which intent explained the subsequent actions of the declarant. For example, in People v Brownridge, 225 Mich App 291, 304-306 (1997), rev.'d. oth. grnds., 450 Mich 456 (1999), on remand, 237 Mich App. 210, the decedent was allegedly hired by the defendant to set fire to a house. The decedent died in the fire. The decedent allegedly made statements before the fire to two other witnesses indicating his intent to set fire to the house in question. The Court of Appeals held that some of the statements attributed to the decedent by these two witnesses would be admissible pursuant to MRE 803(3). The court held:

> Under this rule, hearsay statements are admissible to show that a declarant acted in accordance with his stated intention. Turner's declarations of intent to burn down defendant's house were certainly relevant, and, insofar as the statements had some bearing on the issue of defendant's conduct, they may properly be admitted. On retrial, therefore, the trial court should carefully examine each of the challenged hearsay statements and rule on the admissibility of each statement under MRE 803(3). Brownridge, supra, 225 Mich App, at 304-306. (emphasis added).

Further, it is also well settled that a party can offer his or her own statement into evidence under this hearsay exception. This issue has most commonly arisen in civil cases where the Plaintiff offers into evidence out-of-court statements of Plaintiff's decedent, where the state of mind of Plaintiff's decedent is a relevant issue in the case. In the leading case of Duke v American Olean Tile Co., 155 Mich App. 555, 571 (1986), the Plaintiff sued over an injury to the leg of Plaintiff's decedent suffered as a result of a slip and fall. Plaintiff's decedent was alive when the lawsuit was filed, but had died of cancer which was unrelated to the slip and fall, prior to trial. Nevertheless, the Plaintiff was permitted to offer into evidence at trial an out-of-court statement of Plaintiff's decedent, specifically a statement made by Plaintiff's decedent to medical personnel at the hospital. While the court held that the out-of-court statement of Plaintiff's decedent was admissible in its entirety pursuant to MRE 803(4), the Court specifically held that the statement of Plaintiff's decedent to hospital personnel "that he was in pain was admissible under MRE 803(3)..." Duke, *supra* at 571.

Duke was followed in McCallum v Department of Corrections, 197 Mich App. 589, 604-605, a lawsuit by the Plaintiff husband of a Michigan Correctional Officer, who had been sexually harassed by a supervisor, and who was then raped and murdered by a prison inmate. The Plaintiff offered into evidence various statements of Plaintiff's decedent:

> ...to various people indicating that she was afraid that if she did not accede to Rakowski's demands she would be "on her own" at the prison and that she was irritated at Rakowski for continuing in his demands and intended to report him are admissible under the hearsaw exception set for tin MRE 803(3).
>
> Such statements are admissible only when the state of mind of the declarant is at issue. See, e.g., Duke v American Olean Tile Co., 155 Mich App. 555, 571 (1986). In this case, McCallum's state of mind is at issue in determining whether

she was the subject of unwelcome sexual harassment and what her reaction to the harassment was. [citation omitted] McCallum, supra, at 605. .(emphasis added)

Thus, there is no suggestion in any of the case law interpreting MRE 803(3) that-out-of court statements by a criminal defendant are subject to any different legal treatment or analysis when offered into evidence pursuant to MRE 803(3). If in fact the defendant's state of mind, or intent are "at issue", and if the prior statements are relevant to that state of mind or intent, the statements are admissible.

Here, whether or not _____ the specific intent to cause the murder of the two complainants is necessarily an issue in this case. The statements are all offered to provide evidence in support of _____ position that he did not intend the murder of the two complainants; he did not intend to hire _____ to perform any more services for him, and that he intended for ____ to be re-incarcerated in prison, and the sooner the better. Since intent is an element of the crimes charged, evidence of _____ intent close to or during the relevant time period is relevant and admissible. Further, as stated in the above cases, when such statements are offered to prove intent, where that intent explains subsequent acts by the declarant, they are admissible. Brownridge, supra; Furman, supra. In addition, the statements are admissible whether or not _____decides to testify during the trial. Duke, supra; McCallum, supra.

These tape recording provide reliable and audible documentation of the text of the actual conversations and also provide a context to explain these statements, which are evidence of _____ then-existing state of mind and intent. These statements are all admissible into evidence in support of the defense position that _____ at no relevant time had any intent to solicit the murder of either the two complaining witnesses in this case. These statements also demonstrate that his intent during the conversations he had with _____ which were tape recorded by the State Police, were in fact part of an effort by _____ to secure _____ re-incarceration. _____ statements, as memorialized in these tape recordings, show that his intent was to secure the re-incarceration of _____ and to determine if there was anything that could be

done to obtain financial restitution for any of the victims whom _____ had stolen money from. These statements, as evidence of his then existing intent, explain his actions in meeting with _____ and stringing him along as _____ described at length all of his grandiose and schemes. These conversations also established that _____was at all times aware that_____was simply trying to get money from him and had no intention of carrying out any of the legal schemes that he was proposing.

In this case, a clear disputed issue is why _____ met with _____ after _____ was released by the Department of Corrections, and why _____ drove him around and conversed with him. The out-of-court telephone conversations which _____ is offering into evidence explain his state of mind and intent at that highly relevant period of time. In a variety of circumstances, to a variety of people, _____ expressed his state of mind that _____ was defrauding many people, including _____, out of a lot of money, and he had to be stopped. Further, _____ clearly expressed his intent that _____ be re-incarcerated as soon as possible; he even made statements indicating this intent to _____, the supervisor of _____parole officer, _____ Further, he made such statements to _____an official with the Michigan Department of Corrections. In this context, it is clear that _____ contact with _____ after his release by the correctional authorities was not intended to enter into any illegal schemes with him, but was intended to string him along, find out why _____ was released in light of all the allegations of illegal contact which had been made against him, and get him re-incarcerated again as soon as possible. This evidence is directly relevant to _____state of mind and intent, and explains his actions at a critical period of the prosecution's case. Therefore, based upon the above analysis, the prior out-of-court statements of _____are clearly admissible, either because they are not offered to prove the truth of the matter asserted and are therefore not hearsay at all, or because they fall within the hearsay exception regarding evidence of the state of mind of the declarant, pursuant to MRE 803(3).

WHEREFORE, for all the above reasons, Defendant respectfully requests that his Motion in Limine be granted.

Respectfully submitted.

_____

STATE OF MICHIGAN

IN THE 18TH DISTRICT COURT FOR THE CITY OF WESTLAND

PEOPLE OF THE CITY OF WESTLAND,

Plaintiff,

vs. Case Nos.
Hon.

,

Defendant.
_____/

JOHN F. ROYAL (P27800)
1724 Ford Building
Detroit, Michigan 48226
(313) 962-3738

MOTION TO AMEND CONDITIONS OF PRETRIAL RELEASE

NOW COMES the Defendant,, by and through his attorney, John F. Royal, and moves this Court to enter an Order amending the conditions of pretrial release in this matter for the following reasons:

1. The Defendant is charged in this matter with a violation of the Westland Stalking Ordinance.

2. On May 17, 2000, this Court entered an Order of conditional release setting a bond in the amount of $25,000 cash, and indicating that the Defendant should have no contact whatsoever with the complaining witness, either at her home or at her place of employment, shall not possess a firearm or other dangerous weapon, and can only be in the City of Westland for purposes of attending Court in this case. In addition, the Court set a bond in the amount of $25,000 cash.

3. The Defendant and his parents are contracted with A Bail Bond Agency for the purposes of complying with the bond in this case. The Defendant and his parents paid a premium of $2,500 so the bond could be issued and Mr. could be released. However, the $2,500 fee which was paid is, according to the Bail Bond Indemnity Agreement (BBIA) sets $2,500 as the fee "per annum." This bond was entered into on May 19, 2000 and is therefore due to expire.

4. The Defendant has been at liberty on this bond for a period of almost 11 months. During that time, no one has even alleged that he has in any way violated or fail to comply with any of the conditions of the bond.

5. To require the Defendant and his parents to post another $2,500 annual premium in this case would transform the instant bond into a bond which is excessive in violation of the Eighth Amendment of the United States Constitution, as well as in violation of the applicable statutes and constitutional provisions of the State of Michigan.

6. The Defendant requests that this Court amend the conditions of pretrial release in this case so as to impose either a personal recognizance bond or a reasonable 10% bond so that he will not have to lose an additional $2,500 fee to the bonding agency.

7. The Defendant has also been the subject of a Personal Protection Order obtained by the complainant. The Defendant has not been convicted of any violations of the PPO and no pending charges of violation are presently pending.

WHEREFORE, for all the above reasons, the Defendant requests that the conditions of pretrial release in this case be amended so that the bond that is required either be a personal recognizance or a 10% bond.

Respectfully submitted,

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, 1724 Ford Building
Detroit, Michigan 48226
(313) 962-3738

DATED: April 9, 2001

STATE OF MICHIGAN
IN THE 18TH DISTRICT COURT FOR THE CITY OF WESTLAND

PEOPLE OF THE CITY OF WESTLAND,
Plaintiff,
vs. Case Nos.
Hon.
,
Defendant.
_____/

Westland City Attorney
35330 Nankin Blvd., No. 702
Westland, Michigan 48185-7223
(734) 421-5510

JOHN F. ROYAL (P27800)
1724 Ford Building
Detroit, Michigan 48226
(313) 962-3738

MOTION TO AMEND THE DEFENDANT'S WITNESS LIST

NOW COMES the Defendant, , by and through his attorney, John F. Royal, and moves this Honorable Court to be permitted to amend the witness list previously filed in this matter for the following reasons:

1. The Defendant is charged with Stalking.

2. At a pretrial conference on November 9, 2000, this Court set a deadline of November 30, 2000 for the filing of a defense witness list. By stipulation of the parties, this Court subsequently approved an extension to December 7, 2000 as the date for the filing of the defense witness list.

3. The Defendant's original witness list in this case was timely filed on December 7, 2000.

4. At the same time, this Court entered a stay of proceedings on this case, which lasted

for several months. Eventually, the stay was lifted, and this matter was scheduled for trial on October 15, 2001.

5. On September 25, 2001, the Defendant filed his first Amended Witness List; on or about October 2, 2001, he filed his Second Amended Witness List.

6. On September 28, 2001, this Court issued a Memorandum Order stating that "the time for filing witnesses is over. The case has been deemed ready for trial. No new witness will be added to the list."

7. The Defendant maintains that there are exceptional circumstances in this case that justify the addition of witnesses to the witness list at this time. The circumstances involving the Defendant and the Complainant have changed considerably as a result of other ongoing litigation between them. The substance of testimony which some witnesses could provide was unknown when the original witness list was filed. Further, the Defendant's trial strategy has changed significantly in recent weeks. These reasons and others justify a decision by this Court to permit the Defendant to add witnesses to the witness list for good cause shown. Importantly, the prosecution has not claimed any prejudice from the addition of any of the witnesses who have been added to the list thus far. To refuse to allow Mr. to add the witnesses in question to his witness list would deprive him of his constitutional due process right to mount a defense against the allegations brought against him by the prosecution, and would deprive him of his constitutional right to the compulsory process of witnesses.

8. The prosecution never filed a witness list in this case. The first notice that the defense had of the witnesses whom the prosecution intend to call in this case was the "Notice to Appear" issued by this Court on September 4, 2001, which was received by counsel on or about

September 6, 2001. (Copy attached). To the surprise of the defense, the two arresting police officers for the incident alleged to have occurred on May 16, 2000 are not listed on the prosecution witness list. Therefore, the Defendant seeks to add arresting Police Officers __and __ to the defense witness list, as he considers them essential witnesses for his defense. These officers are still members of the Westland Police Department, are readily accessible for interviews by the prosecution, and the defense at all times anticipated they would be on the prosecution's witness list. No prejudice can be shown from the request by the defense to add these police officers as witnesses.

9. The Defendant also seeks to add as defense witnesses Westland Police Officer __ and __. These officers were assigned to conduct undercover surveillance of the Defendant, presumably at the request of the complainant. Their activities substantially support the defense theory that the Westland Police Department has exaggerated and embellished the evidence against the Defendant because of close personal ties between the complainant and members of the Westland Police Department. On September 18, 2000, both Officers __ and __, in plain clothes, came to the place of employment of the Defendant at the ____ and pretended to be interested in joining. They both claim they were members of the Westland __, an assertion which was not true. They addressed the Defendant by name, even though he had never introduced himself to them. The Defendant discovered they were police officers when a Westland Police Department badge fell out of the wallet of one of the two officers. Further, on October 16 and 25, 2000, Officer __ returned to the gym, continuing the charade of being a member of the Westland __ who was considering transferring his membership to __. These incidents demonstrate the breadth and extent to which the Westland Police Department is

marshaling its resources at the behest of the complainant in this case. The defense only recently made a strategic decision to demonstrate at trial the extent to which the Westland Police Department has embellished evidence and provided assistance to the complainant in this case which would not have been provided to an average citizen who did not have the connections to the Police Department that the complainant has in this case. Therefore, Officers __ and __ are essential witnesses for the defense in this case whose importance could not have been discovered by the defense by reasonable diligence prior to December 7, 2000. Their information has at all times been readily available to the prosecution, and no prejudice can be shown by adding them at this time.

10. The defense also requests to be allowed to add the Keeper of the Records of the Westland __ to the witness list because these records will show that Officers __ and __ falsified statements at the __, both when they claimed they were members of the Westland __ and when they pretended to be seriously interested in joining the __.

11. The defense requests permission to add __ to the witness list. Mr. __'s significance as a witness in this case only became clear in the context of Personal Protection Order litigation between Mr. and Mr. , (Wayne Circuit No.), which took place between March 30, 2001 and July 3, 2001. Statements made by Mr. during the course of that litigation are relevant and admissible in the course of the instant lawsuit. The statements were not available to the defense prior to the submission of the initial witness list on December 7, 2000. Mr. is a former boyfriend of the complainant who is still on friendly terms with her. The prosecution should have no problem interviewing him if it wishes to do so. No prejudice can be shown from adding his name to the defense witness list at this time.

12. The defense also seeks to add __. Ms. __ is a former close friend of complainant __. She was not located or interviewed by the defense until February 19, 2001, and the substance of her testimony was unknown until that time. Therefore, her information was not available to the defense at the time the original witness list was filed. She has information relevant and admissible with respect to the background of the relationship between the complainant and the defendant in this case, that corroborates the testimony of Mr. . No prejudice can be shown from adding her name at this time.

13. The Defendant also seeks to add __, the sister of the complainant, and __, the mother of the complainant. Although these two witnesses were known to the defense prior to December 7, 2000, it is only because of a recent change in the trial strategy of the defense that these two witnesses have become essential witnesses for the defense. The prosecution cannot show any prejudice based upon the close relationship these witnesses have with the complainant and they are readily accessible to the prosecution for interviews.

14. The defense also requests permission to add __ to the witness list. She is being called to testify as a character witness and also because she has information that corroborates the defense position that the complainant's mother sent a bar bouncer to the __ to assault Mr. . At the time the original witness list was filed, Ms. __ had not known Mr. very long. She has now known him considerably longer time and is in a position to testify as a character witness for him. Some of the other defense character witnesses are not available to testify in this trial and therefore the testimony of __ is replacement testimony for testimony that is otherwise unavailable. The prosecution cannot show prejudice from adding Ms. __ at this time.

15. The Defendant contends his due process right to a fair trial and to present a defense

to the charges brought, as well as his right to the compulsory process of witnesses, both support his motion to be allowed to add additional witnesses at this time. US Const., Ams. V, VI, and XIV; Mich Const. 1963, Art. 1, §§ 17 and 20. Late addition of witnesses to the witness list should be permitted where there is no unfair prejudice to the opposing party. People v Lino, 213 Mich App 89 (1995); People v Kulick, 209 Mich App 248 (1995). Accord: People v Burwick, 450 Mich 281 (1995).

WHEREFORE, for all the above reasons, the Defendant requests that this Court grant his motion and that he be allowed to add the above witnesses to his witness list as indicated above.

Respectfully submitted,

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, 1724 Ford Building
Detroit, MI 48226
(313) 962-3738

DATED: October 2, 2001

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No.
Hon.

,

Defendant.
_____/

Prosecuting Attorney of Wayne County
1441 St. Antoine, 12th Floor
Detroit, MI 48226-3202
(313) 224-5777

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, 1724 Ford Building
Detroit, MI 48226
(313) 962-3738
_____/

MOTION TO PERMIT ADMISSION INTO EVIDENCE OF A PHOTOCOPY OF BUSINESS RECORDS KEPT IN THE REGULAR COURSE OF BUSINESS

NOW COMES, Defendant , by and through his attorney John F. Royal, and requests that this Court issue an Order authorizing the admission into evidence of a photocopy of records kept in the regular course of business, once the identity of the records is established by a Certificate of the Records Custodian, for the following reasons.

1. Defendant is charged with attempt home invasion, discharge of a fire arm at a building, malicious destruction of property, possession of a firearm by a felon and felony firearm.

2. Trial in this matter is scheduled to begin on February 11, 2004.

3. The defense in this case is alibi.

4. During part of the time relevant to the defense of alibi in this case, the defendant was at a motel room at the _____ at __ Nine Mile Rd., in __, MI with his fiancé, __.

5. In support of his defense of alibi, the defendant proposes to offer into evidence certain business records of the __, copies of which are attached hereto.

6. The defendant is in the process of obtaining a Certificate of Records Custodian in compliance with MRE 803.6 and MCLA 600.2146 to establish the foundation for the admission of these records into evidence.

7. MCLA 600.2146 also authorizes this Court to issue an Order permitting the use of a reproduction of such records in lieu of the production of the actual records during the trial.

NOW, THEREFORE, for all the above reasons, the defendant requests that this Court issue an Order permitting the introduction of the attached reproduction of the business records of the __ into evidence based upon the submission of a proper Certificate of Records Custodian confirming that the reproduction is an accurate copy of the original records, which are in the possession of the__ .

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
615 Griswold, Suite 1724
Detroit, MI 48226
(313) 962-3738

DATED: February 4, 2004

STATE OF MICHIGAN
IN THE 17TH DISTRICT COURT FOR THE TOWNSHIP OF REDFORD

PEOPLE OF THE CITY OF LIVONIA,
Plaintiff,
vs.
_____/

Assistant Wayne County Prosecutor
1441 St. Antoine, 12th Floor
Detroit, Michigan 48226

JOHN F. ROYAL (P27800)
Attorney for Defendant Steiff
The Ford Building
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738
_____/

MOTION TO COMPEL SHOW-UP

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL SHOW-UP

NOTICE OF HEARING

PROOF OF SERVICE

STATE OF MICHIGAN
IN THE 17TH DISTRICT COURT FOR THE TOWNSHIP OF REDFORD

PEOPLE OF THE CITY OF LIVONIA,
Plaintiff,
vs.
_____/

Assistant Wayne County Prosecutor
1441 St. Antoine, 12th Floor
Detroit, Michigan 48226

JOHN F. ROYAL (P27800)
Attorney for Defendant Steiff
The Ford Building
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738
_____/

MOTION TO COMPEL SHOW-UP

NOW COMES Defendant,, by and through his attorney, John F. Royal, and moves this Honorable Court to Compel a live Show-Up identification procedure in the above-captioned cause, for the following reasons:

1. The Defendant, _____is charged with OUIL/UBAL-Second Offender; Reckless Driving; and Failure to Report an Accident.

2. One of the major issues at the trial will be the identification of the Defendant as the driver of the vehicle in question.

3. Upon information and belief, a witness,_____, will be asked during the trial to make an in-court identification of the defendant, and he has not yet attended any identification procedure to insure the reliability of his identification testimony.

4. According to the police report in this matter, _____ observed two men exiting the vehicle in question and fleeing on foot from the crash scene. However, _____ was only able to

give a very sketchy description of the two individuals when he spoke with the police shortly thereafter.

5. Due to the inherent unfairness of an initial in-court confrontation between the witness and the Defendant, it is in the best interests of justice to insure an impartial and untainted identification prior to trial.

6. The fairest and most appropriate method for securing a fair and accurate eyewitness identification is to hold a live show-up prior to trial.

WHEREFORE, the Defendant prays this Honorable Court compel the holding of a live show-up attended by _____.

Respectfully submitted,

_____
JOHN F. ROYAL (P27800)
Attorney for Defendant

STATE OF MICHIGAN
IN THE 17TH DISTRICT COURT FOR THE TOWNSHIP OF REDFORD

PEOPLE OF THE CITY OF LIVONIA,
Plaintiff,
vs.
Defendant.
_____/

Assistant Wayne County Prosecutor
1441 St. Antoine, 12th Floor
Detroit, Michigan 48226
(734) 466-2327

JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738
_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL SHOW-UP

The Supreme Court of the United States in United States v Wade, 388 US 218; 87 S Ct 1926; 18 LEd2d 1149 (1967) and Gilbert v California, 88 US 2631; 87 S Ct 1951; 18 LE2d 1178 (1967) recognized the possible unfairness inherent in identification procedures and sought to protect against possible injustice. As the Court noted, "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification." Wade, *supra*, at 228, and this as true with in-court identifications as with out-of-court identifications.

The Michigan Supreme Court has recognized that an in-court identification is highly suggestive and of slight probative value. In People v Kachar, 400 Mich 78 at 92, n. 16 (1977), the Court approvingly quoted from 4 Wigmore on Evidence (3d Ed., Supp), S 1130, as follows:

> Ordinarily, when a witness is asked to identify the assailant or thief, or other person who is the subject of his testimony, the witness's act of pointing out the accused (or other person,) then and there in the courtroom is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him. (Emphasis in original).

Consequently, it is vital that the courts guard against the introduction of such suggestive evidence without the use of safe-guards to insure the reliability of the identification testimony.

Michigan cases have held that a trial court may order a lineup upon the Defendant's request; however, the matter is within the Court's discretion. People v Watson, 52 Mich App 211, 215-216 (1974); see People ex rel Ingham County Prosecutor v East Lansing Municipal Judge (People v Maire), 42 Mich App 32. The court in East Lansing Municipal Judge, *supra*, expressly recognized the authority of a District Court Judge to order a line-up prior to conducting the Preliminary Examination, in order to insure the reliability of the identification testimony of witnesses.

The Michigan Courts have not dealt with the issue of whether a defendant has a right to compel a pre-trial live show-up where identification is an issue at trial.

The California Supreme Court, however, in Evans v Superior Court, 11 Cal 3d 617; 114 Cal Rptr 121; 522 P 2d 681 (1974); held that a defendant has a due process right to compel the discovery of identification evidence by way of pre-trial show-ups. The Evans decision was based, in part, upon the reciprocal right of discovery:

> Because the People are in a position to compel a lineup and utilize what a favorable evidence is derived therefrom, fairness requires that the accused be given a reciprocal right to discover and utilize contrary evidence. (See Wardius v Oregon, 412 US 470; 93 Sct 2208; 37 LEd2d 82 (1973). 522 P2d at 685.

The prohibition of the intentional suppression of material evidence was also an important part of the rationale in Evans:

> Should (the accused) be denied his right of discovery the net effect would be the same as if existing evidence were intentionally suppressed. It is settled that the intentional suppression of material evidence denies a Defendant a fair trial. (Brady v Maryland (1963) 373 US 83, 87; 83 SCt 1194, 10 LEd2d 215). 522 P2d at 686

To insure the fairness of the in-court identification testimony, and to afford the Defendant his right to discover evidence that may be used against him, this Court should compel a live show-up prior to trial to be attended by the witness, _____.

WHEREFORE, the Defendant prays this Honorable Court compel the holding of a live show-up attended by _____.

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Attorney for Defendant

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,.

Defendant.
_____/

Wayne County Prosecuting Attorney
1441 St. Antoine St., 12th Floor
Detroit, MI 48226
(313) 224-5777

JOHN F. ROYAL (P27800)
Co-Counsel for Defendant
The Ford Building
615 Griswold St., Suite 1724
Detroit, MI 48226
(313) 962-3738
_____/

MOTION FOR 30 DAY CONTINUANCE OF TRIAL DATE

NOW COMES Defendant, by and through his attorneys, JOHN F. ROYAL, and respectfully moves this Honorable Court to grant a 30 Continuance of the Trial Date in this matter, for the following reasons:

1. The Defendant _____is charged with three counts of Criminal Sexual Conduct in the Third Degree; three counts of Criminal Sexual Conduct in the Fourth Degree, and two counts of Child Sexually Abusive Activity.

2. The jury trial in this case is presently scheduled for Wednesday, October 18, 2006.

3. The prosecution's Witness List, when filed on September 8, 2006, contained the names of five individuals who were not mentioned at all in the Discovery materials, and who

were unknown to defense counsel. At that time, the Assistant Prosecuting Attorney informed defense counsel that the Officer-in -Charge of this case had agreed to get witness statements from each of these witnesses, and copies of the witness statements would be furnished to defense counsel as soon as they were available.

4. Defense counsel certainly believe that the Assistant Prosecuting Attorney provided these witness statements as soon as they were available to her; nevertheless, they were not FAXed to the law office of co-counsel John F. Royal until 3:00 p.m. September 28, 2006, less than three weeks before trial.

5. Unfortunately, attorney John F. Royal had left his law office for a three day trip out of state at about 2:00 p.m. on September 28, 2006, and he was not actually aware the witness statements had arrived until Monday, October 2, 2006.

6. After reviewing the newly discovered witness statements, defense counsel reached the conclusion that it would be necessary to assign the defense private investigator to conduct a further interview of these witnesses.

7. Unfortunately, in light of the number of other witnesses who also need to be interviewed, it will be impossible for the defense private investigator to interview all these new witnesses in time for the currently scheduled trial date of October 18.

8. Therefore, the Defendant respectfully requests a 30 day continuance of the trial date in this matter so that he can be fully prepared for trial, and so his attorneys can be able to provide effective assistance of counsel.

9. A motion for a continuance must be based on good cause, under all the circumstances of the case. MCR 2.503; MCL 768.2.

10. The Michigan Supreme Court held that the denial of a two week continuance

requested by the prosecution so it could locate the main prosecution witness was an abuse of discretion. People v Jackson, 467 Mich 272 (2002).

11. The circumstances in the case at bar are at least as compelling as the circumstances in Jackson., supra.

12. The prosecution's witnesses all live in this community, and will not be inconvenienced by a 30 day continuance. Nor will the prosecution be prejudiced if this motion is granted.

WHEREFORE, for all the above reasons, the DEFENDANT respectfully requests that his motion for a 30 day continuance of trial be granted.

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Co-Counsel for Defendant
The Ford Building
615 Griswold St., Suite 1724
Detroit, MI 48226
(313) 962-3738

Dated: October 6, 2006

STATE OF MICHIGAN
IN THE 18TH DISTRICT COURT FOR THE CITY OF WESTLAND

PEOPLE OF THE CITY OF WESTLAND,
Plaintiff,

vs. Case Nos.
Hon.

,
Defendant.

_____/

Westland City Attorney
35330 Nankin Blvd., No. 702
Westland, Michigan 48185-7223
(734) 421-5510

JOHN F. ROYAL (P27800)
1724 Ford Building
Detroit, Michigan 48226
(313) 962-3738

NOTICE OF REQUEST FOR ASSISTANCE IN LOCATION
AND SERVICE OF PROCESS UPON WITNESSES

TO:

Westland City Attorney
35330 Nankin Blvd., No. 702
Westland, Michigan 48185-7223

PLEASE TAKE NOTICE that the Defendant, , hereby requests the assistance of the prosecuting attorney and of law enforcement agencies in locating and serving process for appearance at trial on October 15, 2001 upon the following witnesses:

1. Police Officer __, c/o Westland Police Department, 36701 Ford Road, Westland, MI 48185;

2. Police Officer __, c/o Westland Police Department, 36701 Ford Road, Westland, MI 48185;

3. Police Officer __, c/o Westland Police Department, 36701 Ford Road, Westland, MI 48185;

4. Police Office __, c/o Westland Police Department, 36701 Ford Road, Westland, MI 48185.

This request is made pursuant to MCLA 767.40a(5).

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
615 Griswold, 1724 Ford Building
Detroit, Michigan 48226
(313) 962-3738

DATED: September 24, 2001

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff

vs. Wayne Circuit No.
Hon.

,

Defendant.
_____/

Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, MI 48226
(313) 224-8081

JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
615 Griswold St. , Suite 1724
Detroit, MI 48226
(313) 962-3738
_____/

MOTION FOR DISCOVERY OF THE PSYCHOLOGICAL COUNSELING RECORDS OF THE COMPLAINING WITNESS

NOW COMES Defendant, , by and through his attorney, JOHN F. ROYAL, and respectfully moves this Honorable Court to Order the Discovery of the Psychological Counseling Records of the Complaining Witness in the above entitled proceedings, for the following reasons:

1. Defendant has been convicted by jury of three counts of Criminal Sexual Conduct in the Third Degree upon the Complaining Witness, and is awaiting sentencing.

2. Both the Probation Department and the assistant prosecuting attorney have submitted proposed Sentence Guideline calculations to this Court with respect to Mr. 's upcoming sentencing hearing.

3. Both the Probation Department and the assistant prosecuting attorney have recommended the Court assess Mr. ten (10) points for Offense Variable 4 (OV 4), which is entitled: "Degree of Psychological Injury to a Victim." Ten points should be assessed for this variable only: "if the victim's serious psychological injury may require professional treatment. Whether the victim has sought treatment for the injury is not conclusive." Michigan Sentence Guidelines, Instructions to Offense Variable 4.

4. Defendant objects to he assessment of ten points for OV 4. The Defendant contends that the record does not support a conclusion that the complaining witness suffered "serious psychological injury" that "may require professional treatment" as a result of his alleged actions.

5. The record shows that the complaining witness suffered from serious psychological problems well before the incident in question.

9. There was conflicting testimony at trial as to the extent of and the reasons for the complaining witness' psychological counseling.

10. Most importantly, the complaining witness admitted that she had been receiving psychological counseling for her _____*for several months before the incident in question.* (II, 5-7).

11. The Presentence Investigation Report (PSIR) states that the mother of the complaining witness told the Probation Officer on August 4, 2005 that the complaining witness: "is in need of counseling and is currently attending counseling." (PSIR, at 3). However, the Report is silent as to whether the complaining witness is receiving counseling due to her long-standing problem with _____ or allegedly as a result of the incident at issue in this case.

12. The Prosecution's Sentencing Memorandum states, at p. 1, without reference to any facts which are part of the record in this case, that: "The People calculate the defendant's sentence guidelines...as follows: 10 points for Offense Variable (OV) 4, since the victim has received and further needs psychiatric counseling....."

13. The Defendant contends that this record is insufficient to support a conclusion that the complaining witness has suffered "serious psychological injury" that "may require professional treatment"

as a result of his alleged actions. Thus, OV 4 should be scored "0."

14. The Defendant maintains that discovery and disclosure of the counseling records of the complaining witness is necessary and essential in this case in order to determine whether 10 points are appropriately scored for OV 4. If the records show that the primary focus of the counseling is on the reasons why the complaining witness has been _____, and that the counseling is not primarily related to the alleged actions of the Defendant, then OV 4 should not be scored in this case.

15. The Defendant has a due process right to insure that his Sentence Guidelines are scored based upon reliable and verifiable information. U.S. Const. V, XIV; Mich. Const. Art. 1, Sec. 17.

16. The counseling records sought by this motion are relevant to the question of the appropriate sentence to be imposed upon the Defendant;

17. Without access to the counseling records, the Defendant will be denied effective assistance of counsel and due process of law since the ability to present a factual basis for his legal arguments with respect to sentencing will be restricted. U.S. Const. V, VI, XIV; Mich. Const. Art. 1, Secs.17, 20..

18. Discovery of the counseling records will make the truth easier for this Court to determine.

19. The requested counseling records cannot be examined by defense counsel other than by Order of this Court;

20. This Motion is made in good faith and not for the purposes of delay;

21. The Defendant is able to pay the costs of any ordered discovery.

22. This motion is supported by the attached Memorandum of Law, which is incorporated herein by reference.

WHEREFORE, the Defendant requests that an Order be entered compelling the prosecution to obtain, disclose, and submit for inspection, and provide copies at Defendant's expense of the counseling records of the complaining witness for the period of time both before and after the alleged incident of July 18, 2004.

Respectfully submitted,

JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
615 Griswold St., Suite 1724
Detroit, Mi. 48226
(313) 962-3738

Dated: October 19, 2005

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff

vs. Wayne Circuit No.
Hon.

,

Defendant.
_____/

Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, MI 48226
(313) 224-8081

JOHN F. ROYAL (P27800)
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_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DISCOVERY OF THE PSYCHOLOGICAL COUNSELING RECORDS OF THE COMPLAINING WITNESS

Statement of Facts

The facts are those set forth in the attached Motion for Discovery of the Psychological Counseling Records of the complaining witness. Further facts will be addressed in the Argument section, infra, as necessary.

Argument

Michigan Courts recognize that whenever the information sought is necessary to the preparation of an accused's case, discovery ought to be allowed. People v Walton, 71 Mich App 478, 481-82 (1976). This

policy flows from the understanding that a criminal prosecution is not a duel but a quest for truth: Broad discovery aids the truth-seeking process both by promoting the "fullest possible presentation of the facts", and by "minimiz[ing] opportunities for falsification of evidence." People v Wimberly, 384 Mich 62, 66 (1970). See also: People v Dellabonda, 265 Mich 486, 500, 501 (1933).

The focus of the test of precisely which materials are discoverable by the defense has shifted and expanded from the mere question of admissibility during a court proceeding, to one of whether the information requested is needed by the Defendant to prepare for court proceedings.

> Traditionally, information sought by a defendant is discoverable when the subject is admissible into evidence and the suppression if it might result in a failure of justice. People v Maranian, 359 Mich 361; 102 NW2d 483 (1969). But discovery has not been limited to whether the information sought was admissible at trial. Rather, the focus has shifted to whether fundamental fairness to the defendant, in preparing his defense, requires that he have access to the requested information.
>
> People v Walton, 71 Mich App 478 at 481-482.

In this case, discovery of the counseling records of the complainant will certainly reveal information which will be relevant for the sentencing hearing to shed light on just what issues are being addressed by the counseling; this is especially important where the complaining witness has received counseling both before and after the incident in question. Such records have been deemed to be discoverable, if the information within them is relevant for a court hearing. See People v Stanaway, 446 Mich 643 (1994), cert. den. 513 US 1121 (1995); People v Adamski, 198 Mich App 133 (1993), app. dsmsd. 442 Mich 936; People v Byrne 199 Mich App 674 (1993); People v McGrath, 31 Mich App 351 (1971); People v Brocato, 17 Mich App 277 (1969). The information sought in this Motion for Discovery will ensure that available information is properly utilized to ensure reliable fact-finding. This will certainly help this Court to properly score OV 4 in this case.

Seeking discovery of these materials may give rise to a claim by the prosecution that the materials are privileged. In response, the defendant contends first that the prosecution has no standing to assert an evidentiary privilege on behalf of any witness in a criminal prosecution. In fact, for the prosecution to in any way counsel or suggest to a witness that they should assert a privilege in opposition to a discovery

request by a defendant is an abdication of the prosecutor's well-established duty to see that justice is done.

Assuming arguendo that the complainant decides to assert a claim of privilege, this does not operate to completely bar discovery of the information. The Defendant has constitutional rights to both due process and to the effective assistance of counsel. U.S. Const., Ams. V, VI, XIV, Mich. Const., Art. 1, § 17, 20. In the circumstances of this case, these rights are paramount to and override any privileges asserted by the complainant.

The Defendant contends that his right to reliable fact-finding at sentencing and the complainant's interest in the confidentiality of her counseling records can be accommodated in a manner which protects both.

The Defendant proposes that the counseling records should be discovered pursuant to the issuance of a protective order, as authorized by MCR 6. 201(E) and 2.302(C). Under the terms of such a Protective Order, defense counsel would be allowed to obtain the requested records, and be allowed to use them to prepare for the sentencing hearing. However, the protective order would prohibit defense counsel from revealing the information in the records to anyone, including the Defendant himself, except to an expert employed by the defense to assist in the interpretation and evaluation of the records. Further, defense counsel would be prohibited from disclosing any information from the counseling records in open court without first asking for an in camera review of the material, and an advance determination by the Court of admissibility. This procedure protects the right of the Defendant to reliable fact-finding at sentencing, and also protects the complainant's right of confidentiality. The records in question are disclosed only to the extent absolutely necessary for the Defendant to prepare for and participate in the sentencing hearing.

The use of a Protective Order to limit disclosure of sensitive information in circumstances where legal rights are in conflict is well established. In the Federal system, the use of such protective orders is specifically provided for in Federal Rule of Criminal Procedure 16(d)(1). The use of this rule to limit disclosure of confidential material in criminal prosecutions is common. See, for example, United States v Fine, 413 F Supp 740, 744 (N.D. Miss 1976), in which the Court, in a fashion similar to that sought by the defendant here, limited the disclosure of investigative reports concerning attempts to apprehend fugitive

co-defendants to the law firm representing the defendant and to persons "engaged in or necessary to the preparation of the defense." Cf. United States v Richter, 488 F2d 170 (9th Cir 1973) (where the government believes that disclosure of information regarding prospective government witnesses will jeopardize their safety, proper procedure is to apply for a protective order).

Additionally, the Michigan Court of Appeals has affirmed the use of Protective Orders to relieve the trial courts of the necessity of sifting through confidential materials. In Briggs v The Unjohn Company, 200 Mich App 62 (1993), the Court upheld the following procedure employed in the trial court:

> Defendant moved for a protective order of confidentiality covering the documents plaintiffs requested from defendant during discovery. The parties ultimately agreed that, among other things, plaintiffs would be allowed full access to the documents without the necessity of individual review of each document by the judge; in return plaintiffs agreed that they would not divulge the contents of the documents, except as necessary for purposes of the law suit. Although counsel for plaintiffs were entitled to use discovered documents in their own related cases, it was agreed that when the case was over, plaintiffs would return the documents to Upjohn. A comprehensive protective order containing the terms of the agreement was entered on these terms. The order provided that its terms could be modified by the trial court during discovery upon a showing of "need and good cause".

Additionally, both the Michigan Supreme Court and the Court of Appeals have approved procedures to balance the right of the accused in a criminal prosecution to due process, with the right of a witness to the confidentiality of counseling records. Further, MCR 6.002, emphasizes that the purpose of the rules of criminal procedure is to advance the truth-seeking function of criminal prosecution. This Court and all the parties are here to seek the truth. Evidentiary privileges obstruct that search, and must be strictly construed.

The Michigan Supreme Court held in Stanaway, supra, at 680-684, that otherwise privileged counseling records which are reasonably necessary to the defense must be divulged. The Supreme Court recommended that the records be reviewed first by the trial court *in camera* so that the trial court can make an appropriate balancing between the defendant's federal and state constitutional to the discovery of relevant evidence, and the witness' interest in the confidentiality of the records. Of course, this court is not in a position to be able to evaluate the counseling records for relevancy without reviewing them.

Further, in Adamski, supra, the Court of Appeals specifically decided that a Defendant has a constitutional right to cross-examine a complainant with statements made to a mental health therapist which are inconsistent with the complainant's trial testimony. Adamski, like Stanaway, is a post-conviction case, and does not deal with pre-trial discovery. The Adamski opinion is important because of its discussion of the interplay between the right of confrontation and the evidentiary privileges during a criminal trial. The Court discussed this issue as follows:

> The prosecutor objected to defendant's use of any statement the complainant had made in connection with counseling, arguing that such statements were absolutely privileged under Michigan's statutory psychologist-patient privilege, MCL 330.1740; MSA 14.800(750).
>
> Id. at 136 [footnote omitted]
>
> * * *
>
> We agree ... that the complainant's prior inconsistent statements to her counselor were admissible for impeachment despite the bar of the statutory privilege. It appears well settled as a matter of constitutional law that common-law or statutory privileges, even if purportedly absolute, may give way when in conflict with the constitutional right of cross-examination. The failure of the trial court to allow defendant to cross-examine the complainant, at least with regard to her statement that defendant had not acted inappropriately with her [footnote omitted], denied defendant his Sixth Amendment right of confrontation by limiting cross-examination. U.S. Const. Am. VI; Const 1963, art 1, §20.
>
> Id. at 137-38.
>
> *** * *
>
> Privileges such as the one before us in this matter are intended to encourage society's interest in open discussion between persons in need and those from whom they seek help. At the same time, however, privileges impede a defendant's ability to present a defense by limiting the evidence available. Both this Court and our Supreme Court have not been hesitant to hold that confidential or privileged information must be disclosed where a defendant's right to effective cross-examination would otherwise be denied. See, e.g., [People v] Hackett, [421 Mich 338 (1984)], supra (evidence of the complainant's sexual conduct otherwise barred by the rape-shield statute, MCL 750.520j(1); MSA 28.788(10)(1), admissible to show the complainant's bias, ulterior motive, or prior false accusations); People v Hooper, 157 Mich App 699, 403 NW2d 605 (1987), and People v Rohn, 98 Mich App 593, 296 NW2d 315 (1980) (witness' prior inconsistent statements from presentence investigation admissible despite confidentiality statute, MCL 791.229; MSA 28.2299); People v Redmon, 112 Mich App 246; 315 NW2d 909 (1982) (impeachment of prosecution witness by conviction over ten years old permissible despite ten-year limit of MRE 609[b], now 609[c]).
>
> In the present case, we recognize the important policy underlying the statutory psychologist-patient privilege, MCL 330.1750; MSA 14.800(750). Weighing against this policy is defendant's interests in his liberty and

> receiving a fair trial. On its face, the privilege poses an absolute bar to the use of the complainant's statements for impeachment.

Id., at 138-139.

*****

> [W]e believe that the statute must yield to defendant's constitutional right of confrontation. See also State v Hembd, 305 Minn 120; 232 NW2d 872 (1975).

Id., at 139-140.

Clearly, pursuant to both Stanaway, supra, and Adamski, supra, the complaining witness' counseling records are relevant to determine the correct scoring of OV 4, notwithstanding the various privileges protecting the relationship of patients with psychiatrists, psychologists, and other counselors. The proposal for discovery made herein by the defendant is an adequate compromise between the rights of the defendant to a fair sentencing hearing, and the right of the complainant to confidentiality. Therefore, for these reasons, the discovery of the counseling records of the complainant ought to be granted.

WHEREFORE, the Defendant requests that an Order be entered compelling the prosecution to obtain, disclose, and submit for inspection, and provide copies at Defendant's expense of the counseling records of the complaining witness for the period of time both before and after the alleged incident of July 18, 2004.

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
615 Griswold St., Suite 1724
Detroit, Mi. 48226
(313) 962-3738

Dated: October 19, 2005

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Defendant.
_____/

Wayne County Prosecuting Attorney
1441 St. Antoine St., 12th Floor
Detroit, MI 48226
(313) 224-5777

JOHN F. ROYAL (P27800)
Co-Counsel for Defendant
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_____/

MOTION FOR SUPPLEMENTAL DISCOVERY

NOW COMES Defendant by and through his attorneys, JOHN F. ROYAL, and respectfully moves this Honorable Court to enter an Order of Supplemental Discovery in the above entitled proceedings for the following reasons:

1. The information sought is relevant to the question of the innocence or guilt of the Defendant

2. Without the matters requested, the Defendant would be denied effective assistance of counsel and due process of law since the ability to present a defense to the charges brought would be restricted;

3. Discovery makes the truth easier to determine;

4. The requested items and information are believed to be in the possession of the prosecution or its agents, and cannot be examined prior to trial other than by Order of this Court;

5. This Motion is made in good faith and not for the purposes of delay;

6. The Defendant is able to pay the costs of any ordered discovery.

WHEREFORE, the Defendant requests that an Order be entered compelling the prosecution to disclose and submit for inspection and provide copies at Defendant's expense of the following:

A. Copies of all police reports in the possession of the Detroit Police Department, pertaining to any prior charges of Criminal Sexual Conduct ever, if any, ever made by the Complainant,

B. Copies of all court records, criminal history records, rap sheets, CCH print-outs, computer print-outs, or other reports showing the adult criminal history, if any, and the juvenile delinquency record, if any, of the Complainant, and witnesses

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Co-Counsel for Defendant
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Dated: August 31, 2006

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Defendant.
_____/

Wayne County Prosecuting Attorney
1441 St. Antoine St., 12th Floor
Detroit, MI 48226
(313) 224-5777

JOHN F. ROYAL (P27800)
Co-Counsel for Defendant
The Ford Building
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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUPPLEMENTAL DISCOVERY

Michigan Courts recognize that whenever the information sought is necessary to the preparation of an accused's case, pretrial discovery ought to be allowed. People v Walton, 71 Mich App 478, 481-82 (1976). This policy flows from the understanding that a trial is not a duel but a quest for truth: Broad discovery aids the truth-seeking process both by promoting the "fullest possible presentation of the facts", and by "minimiz[ing] opportunities for falsification of evidence." People v Wimberly, 384 Mich 62, 66 (1970).

These comments are based upon policy considerations established by the Michigan Supreme Court as long ago as 1933:

> "The only legitimate object of the prosecution is to show the whole transaction as it was, whether its tendency is to establish the guilt or innocence of the accused. Hurd v People, 25 Mich 405 [1872]; People v Etter, 81 Mich 570 [1890]. A public prosecutor has no right to suppress testimony. Wellar v People 30 Mich 16 [1874]. It is the duty of the

> prosecuting attorney to furnish all the evidence within his power bearing upon the issue of guilt or innocence in relation to the main issue or to give some good excuse for not doing so
> People v Swetland, 101 Mich 485 [1894].
>
> People v Dellabonda, 265 Mich 486, 500, 501 (1933).

The trend in criminal cases is clearly in the direction of permitting extensive pretrial discovery of information in the possession of the prosecution and their agents, the various law enforcement agencies. The Michigan Court of Appeals has summarized the law as follows:

> "Discovery is becoming an increasingly important aspect of criminal trials. People v Thornton, 80 Mich App 746, 750; 265 NW2d 35 (1978); People v Aldridge, 47 Mich App 639, 644; 209 NW2d 796 (1973). A defendant's access to pre-trial discovery should be encouraged if it will aid in the ascertainment of the truth and will insure defendant's fundamental right to a fair trial. People v Walton, 71 Mich App 478, 481-482; 247 NW2d 378 (1976). When a prosecutor suppresses pre-trial statements that are material to defense preparation, non-disclosure will be considered at least prejudicial, Thornton, supra, at 750-752, and perhaps a violation of due process. See Brady v Maryland, 373 US 83, 83 S Ct 1194, 10 LEd2d 215 (1963).
>
> People v Hayward, 98 Mich App 332, 335-36 (1980).

The focus of the test of precisely which materials in the possession of the prosecutor are discoverable by the defense has shifted and expanded from the mere question of admissibility at trial to one of whether the information requested is needed by the Defendant to prepare for trial.

> Traditionally, information sought by a defendant is discoverable when the subject is admissible into evidence and the suppression if it might result in a failure of justice. People v Maranian, 359 Mich 361; 102 NW2d 483 (1969). But discovery has not been limited to whether the information sought was admissible at trial. Rather, the focus has shifted to whether fundamental fairness to the defendant, in preparing his defense, requires that he have access to the requested information.
>
> People v Walton, 71 Mich App 478 at 481-482.

The information sought in this Motion for Discovery may be admissible at trial. If the complaining witness has previously made charges similar to the charges she has made against Defendant which charges turned out to be untrue, this would be admissible at trial to impeach her credibility. The Court of Appeals in People v Mikula, 84 Mich App 108 (1978) held that it was relevant in a trial for criminal sexual conduct to question the complainant regarding prior false rape accusations and, if the

complainant denies having made the false charges, the defendant is entitled to prove that they were made. As the Court emphasized:

> In a case such as the one before the Court, where the verdict necessarily turned on the credibility of the complainant, it is imperative that the Defendant be given an opportunity to place before the jury evidence so fundamentally affecting the complainant's credibility. Mikula, Id., at 115.

The Michigan Supreme Court has expressly approved the decision in Mikula, holding that the rape shield statute would not bar the introduction of such evidence. People v Hackett, 421 Mich 338, 348-9 (1984).

Evidence of prior false rape charges, if in the possession of the Detroit Police Department, is relevant and discoverable so that defense counsel can make a proper offer to admit such evidence.

Further, the defense requests the disclosure of the prior adult criminal history and juvenile delinquency records, is any, of the complaining witness, and of the two other important prosecution witnesses.. Some felony and some misdemeanor convictions are relevant insofar as they shed light on a witness' credibility. See MRE 609 (a) and (d). Further, numerous Courts have held or accepted the fact that Juvenile Court delinquency records of witnesses are admissible in criminal cases under certain circumstances. People v Redmon, 112 Mich App 246 (1982); Davis v Alaska, 415 US 308 (1974); Burr v Sullivan, 618 F2d 583 (9th Cir 1980); United States v Burk, 470 F2d 432 (1972).

In addition, such information may lead to evidence admissible pursuant to MRE 404(b).

WHEREFORE, the Defendant requests that an Order be entered compelling the prosecution to disclose and submit for inspection and provide copies at Defendant's expense of the following:

A. Copies of all police reports in the possession of the Detroit Police Department, pertaining to any prior charges of Criminal Sexual Conduct ever, if any, ever made by the Complainant,

B. Copies of all court records, criminal history records, rap sheets, CCH print-outs, computer print-outs, or other reports showing the adult criminal history, if any, and the juvenile delinquency record, if any, of the Complainant, and witnesses

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Co-Counsel for Defendant

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No.
Hon.

,

Defendant.
_____/

Prosecuting Attorney
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MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL AND
ALTERNATIVE MOTION FOR EVIDENTIARY HEARING

NOW COMES Defendant, , by and through his attorney, John F. Royal, and respectfully moves this Honorable Court to dismiss this case for violation of the right of the Defendant to a speedy trial, or in the alternative, grant Defendant an Evidentiary Hearing, for the following reasons:

1. Defendant is charged in an Amended Felony Information with Owing a Fighting Dog that Caused Death Without Provocation, in violation of MCLA 750.49(10); MSA 28.244. The Information alleges that Defendant :

> Was the owner of an animal trained or used for fighting, or an animal that was the first or second generation offspring of an animal trained or used for fighting, that attacked __ [sic] without provocation and caused the death of that person; contrary to MCLA 750.49(10); MSA 28.244.

This is a statutory felony carrying a maximum penalty of up to 15 years in prison. Id.

2. The preliminary examination took place on November 3, 1998 before the Hon. , of the 30th District Court.

3. At the time of the arrest of Mr. in the instant case, he had been incarcerated in the Wayne County Jail for approximately three months in connection with Case No.. Mr. was arraigned on October 8, 1998, and was bound over following a preliminary examination. Mr. attended numerous pretrial hearings, and ultimately this case was dismissed on a defense motion on May 6, 1999. The prosecution filed a Claim of Appeal and undersigned counsel was appointed to represent Mr. on appeal. Mr. 's Brief on Appeal was filed on April 14, 2000. The Court of Appeals did not issue its Opinion in this case until December 26, 2000, more than eight months after the last brief was filed.

4. Subsequently, Mr. filed an Application for Leave to Appeal in the Michigan Supreme Court on April 26, 2001. The Supreme Court did not issue its Order denying Leave to Appeal until approximately five months later on September 25, 2001.

5. Despite the fact that the Michigan Supreme Court served its Order denying Leave to Appeal on both the defense and prosecution, the prosecution took no action to bring this case to trial until over ten months later in early August, 2002, when this matter was scheduled for a pretrial on August 19, 2002.

6. Mr. was not responsible for the delay in this case from the time his brief was filed in the Court of Appeals on April 14, 2000, until the Court of Appeals issued its decision on

December 26, 2000, a period of eight months. Mr. was also not responsible for the delay from the time he filed his Application for Leave to Appeal in the Supreme Court on April 26, 2001 until the Supreme Court issued its Order denying Leave to Appeal on September 25, 2001. Mr. is also not responsible for the delay from September 25, 2001 until early August, 2002, a period of over ten months. The total delay not attributable to Mr. is 23 months.

7. Under these circumstances, the Defendant has been deprived of his constitutional right to a speedy trial, a right which is protected by both the State and Federal Constitutions. U.S. Const. Ams. VI, XIV; Mich. Const. 1963, Art. 1, §20. This right is also protected by MCR 6.109.

8. Mr. relies upon the argument in the attached Memorandum of Law in support of this motion, which is incorporated herein by reference.

WHEREFORE, for all the above reasons, the Defendant requests that his Motion to Dismiss for Lack of Speedy Trial be granted, or, in the alternative, that an evidentiary hearing be scheduled.

Respectfully submitted,

JOHN F. ROYAL (P27800)
Attorney for Defendant

DATED: September 20, 2002

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No.
Hon.

,

Defendant.
_____/

Prosecuting Attorney
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_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL AND ALTERNATIVE MOTION FOR EVIDENTIARY HEARING

After the commencement of a criminal prosecution, an accused individual is protected by the speedy trial guarantees of both the State and Federal Constitutions. US Const, Ams. VI, XIV; Mich Const. 1967, Art. I, §20. This right attaches at the time of the original arrest, even when a long delay follows before indictment. Dillingham v United States, 423 US 64, 46 LEd2d 205, 96 S Ct 303 (1975). This right also attaches at the time an arrest warrant or an indictment is

issued, even if the defendant is unaware of the issuance of this warrant or indictment for a long period of time. Doggett v United States, 505 US 647, 120 LEd2d 520, 112 SCt 2686 (1992).

The United States Supreme Court has set forth a four factor balancing test to use to determine whether the speedy trial right has been violated. These factors are: the length of the delay, the reasons for the delay, the defendant's assertion of his right to a speedy trial, and the personal and legal prejudice to the accused. Barker v Wingo, 409 US 514; 92 S Ct 2182; 33 LEd2d 101 (1972); People v Hill, 402 Mich 272 (1978); People v Grimmett, 388 Mich 590 (1972).

In discussing the length of the delay, our Court of Appeals has held that a six month delay is sufficient to trigger a further investigation of the situation to determine if the right has been violated. People v Lowenstein, 118 Mich App 475, 487 (1982).

In looking at the reason for the delay in this case, it is clear that the delay is totally unjustifiable. Docket congestion does not excuse the delay of eight months in the processing of this case by the Court of Appeals, from April 14 through December 26, 2000. Similarly, docket congestion does not justify the five month delay between the date on which the Application for Leave to Appeal was filed in the Supreme Court on April 26, 2001 and September 25, 2002, the date on which the Supreme Court issued its Order denying Leave to Appeal.

Most egregiously, the prosecution took no action to bring this case to trial for over ten months after the Order was issued and mailed to the prosecution by the Michigan Supreme Court. Clearly, the dilatory handling of this case by the prosecution warrants close scrutiny by this Court.

With respect to the reason for the delay in this case, Mr. relies in part on Lowenstein, supra. In that case, most of the delay occurred when the prosecutor appealed an adverse ruling

from the District Court to the Oakland County Circuit Court. The Court of Appeals specifically pointed out that "excessive time on appeal can violate a defendant's right to a speedy trial. Atkins v Michigan, 644 F2d 543 (CA 6, 1981) cert den 452 US 964 . . . (1981); Day v United States, 390 A2d 957 (DC App 1978)." Lowenstein, supra, at 487. The Court further noted that delays which are attributable to Court docket congestion must be weighed against the prosecution rather than against the defense, citing Strunk v United States, 412 US 434, 436, 93 S Ct 2260, 37 LEd2d 56, 60 (1973). Lowenstein, supra, at 488.

Ultimately, the Court in Lowenstein concluded: "Although we [the Court of Appeals] believe that we have expeditiously handled this case, the delay has been increased through this appeal. Balancing the factors, we find that defendant's right to a speedy trial has been abridged." Lowenstein, supra, at 490-91.

Thus, the excessive delay in the time it took to process the appeal from this Court's earlier dismissal, as well as the prosecution's neglect of this file after the Supreme Court denied leave to appeal, has resulted in a clear deprivation of Mr. 's right to a speedy trial under both the state and federal constitutions.

Although the Defendant has not heretofore asserted his right to a speedy trial, the failure to assert the right does not waive the right. Barker v Wingo, supra; Grimmett, supra. The failure of an accused person to assert the right to a speedy trial should not weigh very heavily in the balancing of factors. People v Davis (after remand), 129 Mich app 622 (1983).

Turning now to consideration of the fourth factor, prejudice to the defendant, it is first necessary to note that this is only one factor to be considered. "[A]n affirmative demonstration of prejudice [is not] necessary to prove a denial of the constitutional right to a speedy trial."

Moore v Arizona, 414 Us 25, 26; 94 S Ct 188, 189, 38 LEd2d 183, 185 (1973). Generally, there are considered to be two types of prejudice. People v Collins, 388 Mich 680 (1972). The first is the public embarrassment an accused person suffers when he or she is facing unadjudicated charges.

Of greater significance, however, is the second type of prejudice: the actual damage to the ability of the accused person to defend himself against the prosecution's case. This is considered to be the most important consideration in determining whether the right to a speedy trial has been violated, People v Grandberry, 102 Mich App 769 (1980). In Michigan, prejudice to a defendant is presumed where, as here, the delay exceeds 18 months. People v Collins, 388 Mich 680 (1972); People v Lewandowski, 102 Mich App 358 (1980). In Lewandowski, Id., at 365, the Court quoted People v Bennett, 84 Mich App 408, 411 (1978), where the Court held that:

> [t]he presumption is conclusive unless the prosecutor is able to demonstrate lack of prejudice to the defendant. (emphasis added).

In 1992, the United States Supreme Court issued its seminal opinion in Doggett v United States, 505 US 647, 120 LEd2d 520, 112 S Ct 2686 (June 24, 1992) which addressed the prejudice prong of the speedy trial right. In Doggett, the defendant could not even claim that he suffered from anxiety or fear over the possible outcome of the prosecution, as he was not even aware that the warrant for his arrest was outstanding. In Doggett, unlike the instant case, the defendant was unable to identify precisely how the delay had prejudiced his ability to launch an effective defense to the charges. However, the Supreme Court found that it was not necessary that Doggett do so. The Court stated that: “Consideration of prejudice is not limited to the specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to

every speedy trial claim." Doggett, supra, at 655, citing Moore v Arizona, 414 US 25, 26, 38 LEd2d 183, 94 S Ct 188 (1973) and Barker v Wingo, 407 US 514, 533, 33 LEd2d 101, 92 S Ct 2182 (1972). The Doggett court went on the state:

> Barker explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.' 407 US, at 532, 33 LEd2d 101, 92 S Ct 2182. And though time can tilt the case against either side, see id., at 521, 33 LEd2d 101, 92 S Ct 2182; Loud Hawk, supra, at 315, 88 LEd2d 640, 106 S Ct 648, one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. (Doggett, supra, at 655).

The Doggett court then concluded:

> Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. It was on this point that the Court of Appeals erred, and on the facts before us, it was reversible error.
>
> Barker made it clear that "different weights [are to be] assigned to different reasons" for delay. Ibid. Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. (Doggett, supra at 656-57).

Thus, the United States Supreme Court in Doggett did not place the entire burden of proving prejudice upon the defense. In fact, in Doggett, the Supreme Court found a lesser degree of culpability on the part of the prosecution (negligent delay as opposed to intentional delay), and found no specific evidence of an impaired defense other than the normal deterioration of memory and evidence, as well as the myriad ways, which usually cannot be precisely identified,

whereby excessive delay undermines the ability of a trial to obtain a fair and just result.

In this case there is both presumed and actual prejudice in that the many of the witnesses who could have testified for the defense have moved or otherwise cannot be located to subpoena for trial.

In this case, in April, 1989, the prosecution undertook an appeal from the trial court's ruling that the statute under which Mr. is being prosecuted is unconstitutionally vague. Mr. 's Brief on Appeal in the Court of Appeals was filed on April 14, 2000. The Court of Appeals did not issue its opinion until December 26, 2000, eight months after the briefs were filed in this case. Further, the Application for Leave to Appeal was filed in the Michigan Supreme Court on April 26, 2001. The Supreme Court did not deny Leave to Appeal until September 25, 2001, five months later. The appellate proceedings were not concluded until the Michigan Supreme Court denied leave to appeal on September 25, 2001.

. Thus, 13 months of the delay caused by the appellate proceedings in this case was the direct result of the docket congestion in the Michigan Court of Appeals and the Michigan Supreme Court. This delay should be attributed to the prosecution. This delay, together with the delay since the appeal was concluded, has resulted in the deprivation of Mr. 's right to a speedy trial.

Applying the four factor Barker balancing test, there has clearly been sufficient delay here to trigger a serious investigation of this situation. The delay was unjustifiable and certainly not the fault of the defendant. Further, the delay was unreasonably long in light of the issue presented on appeal and this delay is attributable to the prosecution. It is appropriate to find a violation of the constitutional right to a speedy trial here based on delay on appeal caused by

docket congestion in the appellate courts, and based upon the prosecution's neglect of this file since the appeal concluded. Mr. has been living under the cloud of this serious accusation for the last four years. Most significantly, he is now unable to mount a strong defense to this charge as a direct result of the unjustifiable delay. For these reasons, this Court should find that Mr. 's right to a speedy trial has been violated. The only proper remedy for this violation is dismissal of the charge. Strunk v United States, supra.

WHEREFORE, for all the above reasons, the Defendant requests that his Motion to Dismiss for Lack of Speedy Trial be granted and this case be dismissed, or, in the alternative, that an evidentiary hearing be scheduled.

Respectfully submitted,

JOHN F. ROYAL (P27800)
Attorney for Defendant

DATED: September 20, 2002

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 36TH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No.
Hon.

Defendant.
_____/

Assistant Wayne County Prosecutor
1441 St. Antoine, Suite 1108
Detroit, Michigan 48226
(313) 224-5731

JOHN F. ROYAL (P27800)
Attorney for Defendant
One Kennedy Square, Suite 1930
Detroit, Michigan 48226
(313) 962-7210
_____/

MOTION TO DISMISS COMPLAINT AND WARRANT,
AND MOTION FOR EVIDENTIARY HEARING

NOW COMES the Defendant, , by and through his attorney, John F. Royal, and respectfully moves this Honorable Court to dismiss the Complaint and Warrant filed in this matter for the following reasons:

1. The Defendant is charged in the Complaint and Warrant with Assault and Battery, in violation of MCLA 750.81.

2. The incident charged in the Complaint and Warrant is alleged to have occurred on June 29, 1995.

3. At the time of the incident, the Defendant was taken into custody by officers of the Detroit Police Department Second Precinct.

4. During the course of illegally arresting and detaining Defendant , the arresting officers

inflicted a severe beating upon the Defendant causing serious injuries. As a result, instead of being taken to the police station, Defendant was taken immediately to Detroit Receiving Hospital for treatment. The police report of the transporting officer indicates that when he arrived Mr. was lying on the ground, handcuffed, and bleeding from the head area. According to the police reports, the doctor from Detroit Receiving Hospital can testify to treating Mr. for rib fractures, a nasal bone fracture, and numerous cuts. Present counsel can confirm from personal observation that four (4) days after the incident that Mr. 's face was still visibly swollen, discolored and bruised.

5. Defendant was discharged from Detroit Receiving Hospital on June 30, 1995, and was then taken to the Detroit Second Precinct in police custody.

6. Once Defendant arrived at the Second Precinct, he was interrogated about the instant case. He was then informed that he could post a $130.00 bond in regards to an unrelated traffic matter. His family promptly posted the bond and Mr. was released from custody without any action being taken in regards to the incident for which he had been arrested and beaten.

7. Defendant promptly contacted the law offices of attorney _____ to discuss the possibility of a civil lawsuit against the arresting police officers and the City of Detroit regarding this incident.

8. As part of his routine procedure for evaluating a potential case, on or about August 15, 1995, attorney of Mr. 's firm sent a Freedom of Information Act request, pursuant to MCLA 15.233, to the Detroit Police Department requesting copies of all police reports about this matter. A copy of this request is attached hereto as Exhibit A, and a copy of the Affidavit of Attorney is attached as Exhibit B.

9. Although this incident occurred on June 29, 1995, the official Court records show that the Investigator's Report was not presented to the Prosecutor's Office until October 4, 1995, and the Complaint and Warrant were not filed until October 4, 1995. See Exhibit C, attached, copy of Court computer print-out.

10. The timing of these events clearly indicates that this was a matter not thought worthy of prosecution by the Detroit Police Department. It was only the exercise of the Defendant's statutory right

to obtain copies of the police reports which triggered the initiation of prosecution in this case.

11. Obviously, the prosecution here was initiated, not for any good-faith reason, but out of a desire to short-circuit potential civil liability for the misdeeds of the arresting police officers.

12. A decision to prosecute based upon a desire to punish a Defendant for the exercise of protected statutory rights is a vindicative prosecution, and is in violation of the Respondent's right to due process of law. US Const, Ams. V, XIV; Mich Const, Art I, Sec. 17. See Memorandum of Law in Support of Motion, which is attached hereto and incorporated herein by reference.

13. Complaints and Warrants filed as a result of prosecutorial vindictiveness violate due process, and must be dismissed.

WHEREFORE, for all the above reasons, the Defendant respectfully requests that this Honorable Court dismiss the Complaint and Warrant in this case, or, in the alternative, grant an evidentiary hearing so that the Defendant may provide evidence in support of the factual allegations contained herein.

Respectfully submitted,

_____
JOHN F. ROYAL (P27800)
Attorney for Defendant

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 36TH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No.
Hon.

,

Defendant.
_____/

Assistant Wayne County Prosecutor
1441 St. Antoine, Suite 1108
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(313) 224-5731

JOHN F. ROYAL (P27800)
Attorney for Defendant
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_____/

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS COMPLAINT AND WARRANT
AND MOTION FOR EVIDENTIARY HEARING

The right to due process of law is violated where the government penalizes a person by prosecuting him in response to his exercise of constitutional or statutory rights. See, generally, Blackledge v Perry, 417 U.S. 21, 40 LEd2d 628, 94 S.Ct. 2098 (1971) and North Carolina v Pearce, 395 U.S. 711, 23 LEd2d 656, 89 S.Ct. 2072 (1969).

In Blackledge, supra, a defendant in a misdemeanor prosecution had asserted his right to a trial de novo on appeal. Before the new trial, the prosecutor obtained a felony indictment against the defendant. The court held that this tactic violated the defendant's due process rights and found that, if allowed, such a practice would deter defendants from asserting their procedural rights.

The due process value that defendants be freed of an apprehension of retaliatory motivation is so important a principal that the Blackledge court was careful to point out that the defendant need not

establish actual vindictiveness. The court said:

> There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rational of our judgment in the Pearce case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. 395 U.S. 725. We think it clear that the same considerations apply here.
>
> Id. at 28

Thus, the courts are empowered to dismiss charges where there exists the "realistic likelihood of vindictiveness" which cannot be rebutted by the government. United States v Andrews, 633 F.2d 449, 454 (1980); see, also, United States v Goodwin, 457 U.S. 368, 384, 102 S.Ct. 2485, 2494, 73 L.Ed. 2d 74 (1982).

In the instant case, the Defendant exercised his rights to consult with an attorney regarding a possible civil claim, and filed a request for documents pursuant to the Freedom of Information Act, each of which he is plainly entitled to do under the law. As the Supreme Court put it in United States v Goodwin, supra, at 372:

> To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." Bordenkircher v Hayes, 434 US 357, 363, 54 L Ed 2d 604, 98 S Ct 663. ... For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.[4]
>
> [4] "[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" Bordenkircher v Hayes, 434 US 357, 54 L Ed 2d 604, 98 S Ct 663 (quoting Chaffin v Stynchcombe, 412 US 17, 32-33, n 20, 36 L Ed 2d 714, 93 S Ct 1977).

It stands to reason that a prosecution which is based on actual vindictiveness should be dismissed. As stated in United States v Adams, 870 F.2d 1140, 1145 (6th Cir. 1989):

> It seems reasonably clear, however, that a prosecution which would not have been initiated but for government "vindictiveness" -- a prosecution, that is, which has an "actual retaliatory motivation" -- is constitutionally impermissible. Blackledge v Perry, 417 U.S. 21, 27-28, 94 S.Ct. 2098,

> 2102, 40 L.Ed.2d 628 (1974). The broad discretion accorded prosecutors in deciding whom to prosecute is not "unfettered," and a decision to prosecute may not be deliberately based upon the exercise of protected statutory rights.

Adams, supra, is directly on point and controls this case. There, the Sixth Circuit Court of Appeals held that a Defendant who presents evidence that a criminal prosecution was initiated by the United States Government in retaliation for the Defendant's lawsuit against the Equal Employment Opportunity Commission is entitled to an evidentiary hearing to determine whether or not the prosecution was initiated for vindictive reasons. Here, too, an evidentiary hearing should be held so that the Defendant can demonstrate that this prosecution at least has sufficient appearance of being retaliatory that it ought not to be allowed to proceed. Cf. United States v P.H.E., Inc., 965 F2d 848, 857-861 (10th Cir 1992).

The Michigan Courts have likewise clearly held that prosecutions brought to punish the Defendant for having prevailed in an earlier prosecution, or for refusing to plead guilty are vindictive prosecutions which must be dismissed. People v Turmon, 128 Mich App 417 (1983); People v Walls, 117 Mich App 691 (1982); People v George, 114 Mich App 204 (1982).

The above trilogy of cases from the Michigan Court of Appeals stand for the following proposition, as summarized by the Court in Walls, supra, at 695, quoting from George supra, at 214:

> "We believe that this Court in People v Lasio [78 Mich App 257; 259 NW2d 448 (1977], first acknowledged the power recognized in Jones v Oklahoma [481 PO2d 169 (Okla Cr, 1971)], and many other jurisdictions, to curtail the state's right to repeatedly proceed against the individual in those limited instances when the repeated prosecution clearly constitutes harassment."

As recognized by the above cases, the use of a criminal prosecution to take procedural or tactical advantage of an accused, or simply to harass him or punish him for the exercise of constitutional or statutory rights, violates the right to due process of law. Based upon the authorities presented, this prosecution cannot be allowed to proceed any further.

After an evidentiary hearing, the Defendant requests that this Court make appropriate findings of fact that this prosecution is either vindictive, or appears to be vindictive, and that the Complaint and Warrant must be dismissed.

WHEREFORE, for all the above reasons, the Defendant respectfully requests that this Honorable

Court dismiss the Complaint and Warrant in this case, or, in the alternative, grant an evidentiary hearing so that the Defendant may provide evidence in support of the factual allegations contained herein.

Respectfully submitted,

_____
JOHN F. ROYAL (P27800)
Attorney for Defendant
One Kennedy Square, Suite 1930
Detroit, Michigan 48226
(313) 962-7210

DATED: November 2, 2007

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Defendant.
_____/

Wayne County Prosecuting Attorney
1441 St. Antoine, 12th Floor
Detroit, MI 48226-2302
(313) 224-5777

_____/

MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL AND
ALTERNATIVE MOTION FOR EVIDENTIARY HEARING

NOW COMES Defendant,, by and through his attorney, and respectfully moves this Honorable Court to dismiss this case for violation of the right of the Defendant to a speedy trial, or in the alternative, grant Defendant an Evidentiary Hearing, for the following reasons:

1. The Defendant is charged with one Count of Possession with Intent to Deliver Cocaine Under 50 Grams; Resisting and Obstructing a Police Officer; Carrying a Concealed Weapon; and Felony Firearm, which are alleged to have occurred on January 12, 2001.

2. This case arose on January 12, 2001 when was arrested and taken into custody by the arresting officers following a traffic stop. All of the information necessary to prosecute for the charges contained in the Information was available to the police on the day of the arrest.

3. A warrant was subsequently issued for the Defendant charging him in connection with this case on February 11, 2002 on 36th District Court file number 02-56840.

4. The Defendant was arraigned on this warrant on May 22, 2002.

5. The Defendant was not responsible for any of the delay in the processing of this case.

6. As of the date of the hearing on this motion, 602 days, or almost 20 months have elapsed since the occurrence of the alleged crime.

7. There is no justifiable reason for this delay in the prosecution of this case.

8. Under these circumstances, the Defendant has been deprived of his constitutional right to a speedy trial, a right which is protected by both the State and Federal Constitutions. U.S. Const. Ams. VI, XIV; Mich. Const. 1963, Art. 1, §20. This right is also protected by MCR 6.109.

9. An Evidentiary Hearing is necessary in this case. The defense requests that the Officer-in-Charge,, be called to testify.

10. relies upon the argument in the attached Memorandum of Law in support of this motion, which is incorporated herein by reference.

WHEREFORE, for all the above reasons, the Defendant requests that his Motion to Dismiss for Lack of Speedy Trial be granted, or, in the alternative, that an evidentiary hearing be scheduled.

Respectfully submitted,

_____

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Defendant.
_____/

Wayne County Prosecuting Attorney
1441 St. Antoine, 12th Floor
Detroit, MI 48226-2302
(313) 224-5777

_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL AND ALTERNATIVE MOTION FOR EVIDENTIARY HEARING

After the commencement of a criminal prosecution, an accused individual is protected by the speedy trial guarantees of both the State and Federal Constitutions. US Const, Ams. VI, XIV; Mich Const. 1967, Art. I, §20. This right attaches at the time of the original arrest, even when a long delay follows before indictment. Dillingham v United States, 423 US 64, 46 LEd2d 205, 96 S Ct 303 (1975). This right also attaches at the time an arrest warrant or an indictment is issued, even if the defendant is unaware of the issuance of this warrant or indictment for a long period of time. Doggett v United States, 505 US __, 120 LEd2d 520, 112 SCt 2686 (1992).

The United States Supreme Court has set forth a four factor balancing test to use to determine whether the speedy trial right has been violated. These factors are: the length of the delay, the reasons for the delay, the defendant's assertion of his right to a speedy trial, and the personal and legal prejudice to the accused. Barker v Wingo, 409 US 514; 92 S Ct 2182; 33 LEd2d 101 (1972); People v Hill, 402

Mich 272 (1978); People v Grimmett, 388 Mich 590 (1972).

In discussing the length of the delay, our Court of Appeals has held that a six month delay is sufficient to trigger a further investigation of the situation to determine if the right has been violated. People v Lowenstein, 118 Mich App 475, 487 (1982).

In looking at the reason for the delay in this case, it is clear that the delay is totally unjustifiable. A review of the discovery indicates that the delay was simply negligence on the part of the Detroit Police Department in failing to process the case in accordance with normal procedures. Altogether it has now been approximately 602 days, or over 20 months, since the occurrence of the alleged crime in this case. There is no justifiable reason for the delay in the prosecution of this case. Clearly, the dilatory handling of this case by the police warrants close scrutiny by this Court.

Although the Defendant has not heretofore asserted his right to a speedy trial, clearly this was due to the failure of the police to obtain a warrant in a timely fashion. It is clearly unreasonable to expect the Defendant to demand the speedy trial of a warrant that has not been issued. In any event, the failure to assert the right does not waive the right. Barker v Wingo, supra; Grimmett, supra. The failure of an accused person to assert the right to a speedy trial should not weigh very heavily in the balancing of factors. People v Davis (after remand), 129 Mich app 622 (1983).

Turning now to consideration of the fourth factor, prejudice to the defendant, it is first necessary to note that this is only one factor to be considered. "[A]n affirmative demonstration of prejudice [is not] necessary to prove a denial of the constitutional right to a speedy trial." Moore v Arizona, 414 Us 25, 26; 94 S Ct 188, 189, 38 LEd2d 183, 185 (1973). Generally, there are considered to be two types of prejudice. People v Collins, 388 Mich 680 (1972). The first is the public embarrassment an accused person suffers when he or she is facing unadjudicated charges.

Of greater significance, however, is the second type of prejudice: the actual damage to the ability of the accused person to defend himself against the prosecution's case. This is considered to be

the most important consideration in determining whether the right to a speedy trial has been violated, People v Grandberry, 102 Mich App 769 (1980). In Michigan, prejudice to a defendant is presumed where, as here, the delay exceeds 18 months. People v Collins, 388 Mich 680 (1972); People v Lewandowski, 102 Mich App 358 (1980). In Lewandowski, Id., at 365, the Court quoted People v Bennett, 84 Mich App 408, 411 (1978), where the Court held that:

> [t]he presumption is conclusive unless the prosecutor is able to demonstrate lack of prejudice to othe defendant. (emphasis added).

In this case there is both presumed and actual prejudice in that the identifying information concerning an alleged passerby who was referred to in the police reports has apparently been lost. It is believed that this individual could have shed light on who, if anyone, was in possession of the cocaine which was allegedly found by the investigating officers.

Summarizing, there has been sufficient delay here to trigger a serious investigation of this situation. The delay was unjustifiable and certainly not the fault of the defendant. The Defendant did not assert his right because of lack of notification. He has been living under the cloud of this serious accusation for the last 20 months. Most significantly, he is now unable to mount a strong defense to this charge as a direct result of the unjustifiable delay. Under these circumstances, the Defendant has clearly had his constitutional right to a speedy trial, both State and Federal, violated. The only proper remedy for this violation is dismissal of the charge. Strunk v United States, supra.

WHEREFORE, for all the above reasons, the Defendant respectfully requests that his Motion to dismiss be granted, or, in the alternative, that an evidentiary hearing be held.

Respectfully submitted,

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
vs. Defendants.
_____/

Assistant Prosecuting Attorney
1441 St. Antoine, 12th Floor
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(313) 224-5777

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, 1724 Ford Building
Detroit, MI 48226
(313) 967-3738
_____/

DEFENDANT'S MOTION FOR
FRYE-DAVIS HEARING REGARDING
THE ADMISSIBILITY OF DNA EVIDENCE

NOW COMES Defendant, by and through his attorney, John F. Royal, and for his Motion for Frye-Davis Hearing Regarding Admissibility of PCR-STR DNA Testing, states as follows:

1. The Defendant is charged with one count of Assault With Intent to Murder, two counts of Armed Robbery, one count of First Degree Home Invasion, and one count of Assault With Intent to Commit Great Bodily Harm.

2. On August 2, 2001, the prosecution furnished the defense, for the first time, with a laboratory report dated July 12, 2001, containing the results of a comparison of DNA from the Defendant with DNA taken from saliva samples on a mask recovered at the crime scene. The prosecution also at that time notified the defense of the intent to add the forensic scientist who

authored the report to the prosecution witness list.

3. The Michigan State Crime Lab report indicated that its testing of the mixed match saliva sample resulted in the following conclusions:

1. The DNA types detected from the mask are consistent with a mixture of DNA from at least three individuals.
   a. _____cannot be excluded as a contributor to the DNA types detected.

4. In addition, the Michigan State Crime Lab report indicated that the combined probability of inclusion for a caucasian individual such as the Defendant _____is 1 in 2.5 thousand.

5. To be admissible, novel scientific evidence must have achieved general acceptance in the relevant scientific community. Frye v United States, 293 F 1013 (App DC 1923). People v Davis, 343 Mich 348 (1955).

6. Testimony in support of the scientific reliability must be by disinterested and impartial experts of the relevant scientific community. Disinterested means that their livelihood does not depend on the success of the technique. Frye v United States, 293 F 1013 (App DC 1923); People v Davis, 343 Mich 348 (1955).

7. The DNA testing performed by the Michigan State Crime Lab in the present case is a form of "polymerase chain reaction" ("PCR") testing known as multiplex "short tandem repeat" ("STR") testing. The Michigan State Crime Lab used the Profiler-Plus system manufactured by Perkins Elmer to perform their multiplex PCR/STR testing.

8. Multiplex PCR/STR testing involves the identification of repetitive DNA elements (or "base pairs") within the human genome. All human DNA is composed of the same collection of four base pairs, but all humans are different in the way those base pairs are arranged. It is this difference in the base pair composition that allows for PCR/STR testing identifying the unique

differences in individuals' DNA.

9. Multiplex PCR/STR testing tests for a broad range of multiple genetic loci during a single test, which differs from earlier DNA testing that focused on identifying only a single genetic locus for each test. In addition, the Profiler-Plus system of PCR/STR testing differs from prior forms of DNA testing in that it uses computer programs to "filter" and/or interpret the raw data generated by each test, which can skew the results reported by the law.

10. While Michigan law recognizes the admissibility of certain types of DNA testing, PCR based multiplex STR testing is a new and novel scientific technique, which requires scrutiny under the Frye-Davis test. People v Coy, 243 Mich App 283 (2001); People v Lee, 212 Mich App 228 (1995).

11. PCR based multiplex STR testing fails the Frye-Davis test because it has not achieved general acceptance in the relevant scientific community, and it has not been subjected to adequate validation. In fact, courts in three states, California, Colorado, and Vermont, have all held that PCR-STR test results are inadmissible for these reasons. Therefore, this Court must declare the Michigan State Crime Lab's DNA test results inadmissible at trial.

12. In addition, the Profiler-Plus system manufactured by Perkins Elmer has not been subjected to Frye-Davis scrutiny. Therefore, the Perkins Elmer Profiler-Plus system is a novel scientific technique, which requires scrutiny under the Frye-Davis test. Id.

13. The Perkins Elmer Profiler-Plus system fails the Frye-Davis test because it has not achieved general acceptance in the relevant scientific community, and it has not been subjected to adequate validation. The Perkins Elmer Profiler-Plus system has been widely questions by the relevant scientific community for the following reasons:

A. Perkins Elmer has refused to discuss the "primer sequences" used to create the genetic "chain reaction" that allows the DNA samples to be amplified,

tested and analyzed;

B. Perkins Elmer has refused to allow the Profiler-Plus system to be subjected to "true" peer review by disinterested and impartial experts in the relevant scientific community.

14. Even if the prosecution satisfies the scientific foundation requirements under Frye-Davis, it must demonstrate that the tests were properly conducted (i.e., that generally accepted laboratory procedures were followed). People v Lee, 212 Mich App 228 (1995); People v Chandler, 211 Mich App 604 (1995).

15. The prosecution cannot establish that the Michigan State Crime Lab followed generally accepted laboratory procedures in the present case. Significantly, these lapses in testing protocols at a minimum call into question the results reported by the State Crime Lab.

16. There are significant problems with the methodologies used, the actual testing performed, and the interpretation of the results that were generated by the Michigan State Crime Lab. These problems include, but are not limited to, the following:

A. Even though the testing failed to detect alleles at a majority of the tested loci, the lab reported a "partial match" contrary to generally accepted laboratory procedure;

B. Those alleles that were detected were at or near the limits of sensitivity for the instruments utilized, and possibly beyond the threshold for reporting pursuant to generally accepted laboratory procedure;

C. Even though the testing generated an incomplete or partial DNA profile, the lab reported a "partial match" contrary to generally accepted laboratory procedure;

D. A significant danger of contamination was created in the present case by the Lab's handling and testing all of the samples at the same time and place, contrary to generally accepted laboratory procedures;

E. The test in the present case initially failed due to the mechanical malfunction by the Profiler-Plus system, and the Lab simply restarted the test halfway through the process in clear violation of generally accepted laboratory procedure.

17. The prosecution cannot establish that the Michigan State Crime Lab followed generally accepted laboratory procedures in the present case. Therefore, this Court must declare the Michigan State Crime Lab's DNA test results inadmissible at trial.

WHEREFORE, Defendant ___ respectfully requests that this Court do the following:

A. Grant Mr. _____ motion;

B. Order a Frye-Davis hearing to determine the admissibility of PCR-STR DNA Testing at trial; and

C. Declare the State Crime Lab's DNA testing inadmissible at trial.

Respectfully submitted,

_____
JOHN F. ROYAL (P27800)
Attorney for Defendant

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff

vs

Case No.
Hon.

Defendant.
_____/

Assistant Prosecuting Attorney
1441 St. Antoine,
Detroit, Michigan 48226
(313) 224-5777

_____/

MOTION TO QUASH THE INFORMATION

NOW COMES the Defendant , by and through his attorney, __, and moves this Court to Quash the Information for the following reasons:

1. The Defendant is charged with the offenses of Assault with Intent to Murder; Assault with Intent to Commit Great Bodily Harm less than Murder; Felonious Assault, and Possession of a Firearm During a Felony.
2. The preliminary examination in this matter was held on September 19, 2003, before the Hon., Judge of the 36th District Court.
3. The evidence offered at the preliminary examination was insufficient to justify the decision to bind the Defendant over on the offenses charged, for the following reasons:
    i. Where the evidence offered at the examination did not establish good reason to believe that the Defendant was the perpetrator of the charged offenses, the

information should be dismissed.

4. The examination magistrate abused her discretion in binding the Defendant over on the charges in the Information, for the reasons set forth in the attached Memorandum of Law, which is incorporated herein by reference.

WHEREFORE, for all the above reasons, the Defendant respectfully requests that this Court grant his Motion to Quash the Information.

Respectfully submitted,

_____

DATED: November 2, 2007

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff

vs Case No.

, Hon.

Defendant.
_____/

Assistant Prosecuting Attorney
1441 St. Antoine,
Detroit, Michigan 48226
(313) 224-5777

_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH THE INFORMATION

Statement of Facts

The Defendant is charged with the offenses of Assault with Intent to Murder; Assault with Intent to Commit Great Bodily Harm less than Murder; Felonious Assault, and Possession of a Firearm During a Felony.

The preliminary examination in this matter was held on September 19, 2003, before the Honorable .

At the outset of the preliminary examination, defense counsel indicated to the Court that the Defendant was on Bond, and also informed the Court that there was an issue of identification in this case. Defense counsel noted that there had not been a line-up prior to the issuance of the Warrant in the case. He then asked the Court for permission to permit the Defendant to sit in the audience section of the Court room among other persons rather than to sit in a conspicuous position at the

defense table. Defense counsel also notified the Court that the prosecutor objected to this procedure. (PE, at 3-6). The prosecutor responded that, when he learned of the defense request for an identification procedure, he asked the detective why there was not a line-up in this case. The detective informed the prosecutor that the complaining witness had seen the Defendant the day before the incident in question. The prosecutor argued that there was therefore no issue of identification in this case. The prosecutor further alleged that the Defendant, , was a friend of the cousin of the Complainant, and that the Complainant was here from Chicago to visit the cousin. Therefore, there was no issue of identification. (*Id.* at 5).

The District Court Judge stated that she had no problem with adjourning the examination for a few days so a proper line-up could be conducted. (PE 6). The prosecutor objected to any adjournment because the complainant had come from Chicago for the examination. Defense counsel then renewed his proposal to have Mr. sit in the audience in the Courtroom in order to expedite matters. (PE 6-8). The District Judge then took a brief recess while the prosecutor conferred with the complainant about the possibility of attending a live line-up. (PE 8-9).

When Court resumed, Defense counsel brought the Defendant into the Court room and arranged for him to sit in the audience. The prosecutor then objected that the defense attorney was trying to arrange an in Court line-up by designating certain people sit next to the defendant. After further argument, the prosecutor withdrew his objection to the in-Court identification procedure. (PE 9-11).

The Complainant, __, was then brought into the Courtroom to begin his

testimony. He testified that on September 7, 2003 at around 9:15 a.m. he was near the front of __ Calvary in Detroit. He was with a friend named __. They were both asleep in a Mitsubishi Galant.

(PE 11-12, 41). Mr. claimed that the vehicle they were sleeping in was in front of the house where a friend lives. __ claimed they did not sleep in his friend's house because he had been waiting for his friend all night, and his friend never came home. (PE 12-13). The Complainant testified he was sleeping in the driver's seat when all of a sudden he was awakened by a knocking on the window of the car. (PE 12-13). He claimed that after he woke up, he looked and saw a male fact. He was then asked to look around the Courtroom to see if he could recognize the person that he saw that morning who knocked on the window of the vehicle. After looking around the Courtroom, he identified a man with a gray sweater over a black shirt as the person he saw when he was awakened in the vehicle on September 7. (PE 13-14) Upon inquiry from the prosecutor, the man who was pointed out in the courtroom by the complainant identified himself by the name "__ ;" a man who is not the defendant in this case. (PE 13-14).

With the Defendant, , sitting in the courtroom, the prosecutor then asked:

> Q. All right. You see anybody else in the courtroom that looks like him that you might be mistaken about?
> A. ***No.*** He just look -- he looks just like him. (P.E. 14). (Emphasis added).

The prosecutor then blatantly led the complainant by pointing directly at the Defendant , and asking the Complainant: "You see this person seated back there?" (P.E. 15). Defense counsel objected strongly to this outrageous tactic. The prosecutor then asked the complainant if he saw anyone else in the courtroom that he feels: "looks like the person that was standing outside the vehicle?" The complainant then responded that, on the day of the incident, the perpetrator "had facial hair"and was "a little puffed up." (P.E. 15-16). The complainant then focused on the Defendant, , who had just been improperly pointed out to him by the prosecutor, and said: "If you could put facial hair on him. And I know the eyes. They have the exact same eyes." (P.E. 16). The Complainant then said he was looking at the man in the black sweater in the second row. That

person was the defendant, and he stood and identified himself as "." (P.E. 16-17). The Complainant was then asked to choose between the two men he had identified, and he, of course, picked the person who had been improperly pointed out to him by the prosecutor: the Defendant, . (P.E.16-17).

The Complainant then testified that when he woke up, the friend who was in the car told him that someone was knocking on the window with a gun. However, the complainant did not see a gun at that time, all he heard was knocking. The complainant claimed he woke up and saw a face. He claimed he knew who it was, because it was the cousin of his friend, who is called "__." (PE 16-18).

******

The prosecutor then asked the Complainant why he had first identified another man in the Courtroom as the perpetrator. The Complainant responded:

> E. It just happened so quickly. And just the eyes. They have – that's really what I remember most; the eyes. If he had facial hair, I would have been able to, you know. But –
>
> .....
>
> Q. Did the person who shot you have facial hair?
> A. Yeah, at the time.
> Q. All right. Now, the person you identified; the Defendant out in the audience –
> A. Doesn't have facial hair.
> Q. Today he doesn't?
> A. Yeah; today he doesn't.
> Q. Did he on the day that you got shot?
> A. Yes.
> (PE 25-26)

****

The Complainant admitted *the only thing he could really see about the physical features of*

the perpetrator at the time of the shooting was his eyes. It was the eyes that he focused on and it was the eyes that he concentrated on in the Courtroom during his testimony. (PE 45). The Complainant then claimed that he recognized the facial hair on the perpetrator as well. *The facial hair was very significant to him.* However, the Complainant admitted *he did not tell the police that the perpetrator had facial hair*. The Complainant admitted he was interviewed by a police officer at the hospital. He answered questions. He signed a written statement. (PE 46-49). The Complainant was then asked about the description of the perpetrator which he gave the police in his statement, as follows:

> Q. Okay. Well, let me ask you if they read to you this part of the statement. "Let me ask you to identify the individual. What did the guy who shot you look like?" "Well, he's white male, early 20s – you can check it. Page 1; 5'9, 170 lbs., short, blondish-brown hair. He was wearing a wife beater, white tank top. I think he had tattoos. *I don't remember anything else about him.*" You said that; didn't you?
> A. Yes.
> Q. And the main thing is, "*I don't remember anything else about him*"; which you do recall; don't you?
> A. Yes.
> Q. What about that facial hair?
> A. That's what I remember.
> Q. Well, listen, you see facial hair in here?
> A. Once I –
> Q. Listen to my question?
> A. No, It's not in there.
> Q. Did that say anything about facial hair in what you told them?
> A. No, it's not in there.
> Q. But that's what you insisted upon here as being what, indeed, was identifiable to you associated with a victim and a perpetrator; isn't that right?
> A. Yeah.
> Q. Facial hair. And it's never in your statement at all; is it?
> A. No. (PE 49-50)

Based upon this testimony, the Defendant was bound over to stand trial on the charges in the Complaint and Warrant. (PE 53).

Argument

I. STANDARD FOR BIND-OVER

A preliminary examination is a critical stage of the proceedings against an accused person. Coleman v Alabama, 399 US 1, 90 SCt 1999, 26 LEd2d 387 (1970). People v Duncan, 388 Mich 489, 501-502 (1972). In order for the District Judge properly to bind Mr. over for trial, there must have been competent, legally admissible evidence presented at the examination from which the Judge could reasonably conclude that the crimes charged had been committed in fact, and that there exists probable cause to believe that Mr. committed these crimes. MCLA 766.13; MCR 6.110(E). For the reasons discussed herein, the evidence presented in this case is insufficient to support bindover in this case. The Information should, therefore, be dismissed.

Moreover, in order to constitute sufficient evidence to warrant a bind-over, the proof at the preliminary examination must have been adequate to create "'good reason to believe [the defendant] guilty of the crime charged.... [That is,] 'A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offense with which he is charged.'" People v Paille #2, supra, at 626, quoting People v Dellabonda, 265 Mich 486, 490 (1933). See also People v Justice, 454 Mich 334, 343-44, and n. 14, 562 NW2d 652 (1997).

While the evidence presented at examination need not be sufficient to find guilt beyond a reasonable doubt, "there must be evidence on each element of the crime charged or evidence from which those elements may be inferred." People v Downes, 168 Mich App 484, 487 (1987). Evidence creating a mere possibility that the defendant is guilty of the offenses is insufficient. The Michigan Supreme Court explained the scope of the inquiry which must be performed by the Magistrate in People v King, 412 Mich 145, 153 (1981), as follows:

> The magistrate "must have *** good reason to believe appellant guilty of the crime charged".[1] The magistrate has "the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses"[2] and may consider evidence in defense.[3]
> [1]. Dellabonda, supra, 265 Mich 490.
> [2]. People v Paille #2, 383 Mich 621, 627; 178 NW2d 465 (1970); People v Talley, 410 Mich 378; 301 NW2d 809 (1981).
> [3]. See, e.g. , Doss, supra, suggesting the magistrate may consider the defense of justification.
> King, supra, at 153, and n.'s 1, 2, and 3 (emphasis added).

Moreover, even if the prosecution has presented some evidence on each element, bind-over is not required if, on examination of the whole matter, the magistrate is not satisfied that there is probable cause to believe that the defendant committed the charged offenses. As the Supreme Court stressed in People v King, 412 Mich 145, 154; 312 NW2d 629 (1981):

> The inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. The magistrate is required to make his determination 'after an examination of the whole matter.[5] **Although the prosecution has presented some evidence on each element, if upon an examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he should not bind the defendant over on the offense charged.** [emphasis added].
> [5] People v Evans, 72 Mich 367, 387; 40 NW 473 (1888).

Thus, the examining magistrate must conduct an examination of the whole matter, pass judgment on the weight and competency of the evidence, including the credibility of the witnesses, and then determine if there is good reason to believe that the defendant is guilty of the crimes charged. In this case, Mr. was bound over based on insubstantial evidence that he committed the crimes charged in the Information. For the reasons that follow, therefore, the Information should be quashed.

II. WHERE THE ONLY EVIDENCE WHICH PURPORTEDLY IDENTIFIES THE DEFENDANT AS THE PERPETRATOR OF THE CHARGED OFFENSES IS OBJECTIVELY INCREDIBLE,

UNBELIEVABLE AND SELF-CONTRADICTORY, THE MAGISTRATE ABUSED HER DISCRETION IN BINDING THE DEFENDANT OVER FOR TRIAL.

The Michigan Supreme Court has recognized that one of the most important functions of the preliminary examination is to enable the criminal justice system to avoid spending time and scarce judicial resources on the prosecution of cases where the evidence connecting the defendant to the charged offenses is speculative and entitled to little weight. As the Michigan Supreme Court recognized in the case of People v Duncan, 388 Mich 489, 501 (1972), among the primary purposes of the preliminary examination is:

> to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial and of the deprivation of his liberty if there is no probable cause for believing that he is guilty of the crime. (emphasis added) Id. at 501.

The Michigan Supreme Court recently reiterated the responsibilities of a magistrate who presides over a preliminary examination in the case of People v Justice (after remand), 454 Mich 334; 562 NW2d 652 (1997), where the court stated:

> In a preliminary examination, a district court's function is to determine whether the evidence is sufficient to cause an individual marked by discreetness and caution to have a reasonable belief that the defendant is guilty as charged. People v King, 412 Mich 145, 152-153, 312 NW2d 629 (1981); People v Asta, 337 Mich 590, 60 NW2d 472 (1953).[14]

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[14]In King, supra at 153-154, 312 NW2d 619, we remarked:

The [district court] "must have ... good reason to believe [the defendant is] guilty of the crime charged." The [district court] has "the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the

> witnesses" and may consider evidence in defense. He or she should not, however, discharge "when evidence conflicts or raises reasonable doubt of [the defendant's] guilt," since that presents the classic issue for the trier of fact. [Citations

omitted].

Id. at 657 n. 14

As reiterated by the court in Justice, supra, it has long been the law in the state that an examining magistrate has:

> not only the right but, also, the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses. People v Paille #2, 383 Mich 621, 627 (1970) (emphasis added)

In this case a fair reading of the totality of the testimony presented at the preliminary examination clearly reveals that the Defendant was bound over on the charges based solely upon conjecture, speculation, and the mere possibility that he was responsible for the charged offenses. The testimony of the Complainant, the only witness called during the examination, fell woefully short of providing credible evidence of the guilt of Mr. of these offenses. He was plainly unable to identify the defendant as the perpetrator, which is understandable based upon the fleeting and traumatic nature of the incident in which he was shot.

First, the Complainant clearly did not have a sufficient ability to observe the incident to be able to make a positive identification (PE 44-45). Then, the complainant was unable to identify the Defendant, as the perpetrator until the prosecutor improperly pointed out Mr. in the courtroom. The Complainant clearly and positively identified another person in the courtroom as the perpetrator. Then, after the prosecutor over objection, pointed out the defendant, in the courtroom, the complainant completely changed his identification and said that the Defendant, was the shooter. When asked to explain this, the complainant said that he was basing his identification upon only two things: the eyes, and the facial hair. He then admitted that Mr. , sitting in the courtroom, did not have any facial hair. Further, in his police statement he did not describe the perpetrator as having

facial hair, and he did not say anything about facial hair being important to his description of the perpetrator. (P.E. 13-17, 46-50).

The charges in this case are extremely serious. Mr. does not seek in any way to minimize the seriousness of the charges. However, the Michigan courts have recognized that before someone should be held and compelled to stand trial on serious offenses, there must be some minimum quantum of credible evidence to support a conclusion that the Defendant is the perpetrator.

The magistrate in this case had a responsibility to evaluate the weight and competency of the evidence, and to also determine the credibility of the witness. Justice, supra; King, supra. The Complainant 's testimony that he was able to somehow wake up, and look outside his vehicle for a very brief time just before being shot, and then look at and identify Mr. is incredible by any definition of the term.

The examining magistrate abused her discretion in giving any weight whatsoever to the testimony of identification provided by the Complainant. There being no other evidence identifying Mr. as the perpetrator of these offenses, it necessarily follows that the examining magistrate abused her discretion in binding Mr. over to this Court, and in requiring Mr. to stand trial on these most serious charges.

It would be a gross injustice to require Mr. to stand trial on charges where the evidence offered in support is totally lacking in credibility and believability. At best, the Complainant's testimony of identification was based only on conjecture or speculation. This prosecution cannot be allowed to proceed based upon conjecture or speculation. This Court should recognize the abuse of discretion that occurred in the District Court, and prevent this unsubstantiated prosecution from proceeding any further by granting the Defendant's Motion to Quash.

WHEREFORE, for all the above reasons, the Defendant requests that his Motion to Quash

the Information, be granted.

Respectfully submitted,

_____

DATED: November 2, 2007

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No.
Hon.

,

Defendant.
_____/

Assistant Ingham County Prosecutor
303 W. Kalamazoo, 2nd Floor
Lansing, MI 48933
(517) 483-6218

_____/

MOTION TO QUASH COUNTS I AND IV OF THE INFORMATION

NOW COMES the Defendant, , by and through his attorney,, and moves this Court to quash Counts I and IV of the Information for the following reasons:

1. The Defendant is charged with the offenses of First Degree Premeditated Murder (Count I), three counts of Assault with Intent to Murder (Counts II through IV), and Possession of a Firearm During a Felony (Count V).

2. The preliminary examination in this matter was held on May 11, 2001, before the Hon. , Judge of the 54A District Court.

3. The evidence offered at the preliminary examination was insufficient to justify the decision to bind the Defendant over on the offenses charged in Counts I and IV, for the following reasons:

A. Where the evidence offered at the examination did not establish good reason to believe that the Defendant had premeditated the complainant's death, the charge of First Degree Premeditated Murder in Count I should be reduced to Second Degree Murder.

B. Where there is no evidence that the Defendant had any intent to kill complainant , and where she was not injured, there is insufficient evidence to support the charge of Assault with Intent to Commit Murder against her (Count IV).

4. The examining magistrate abused his discretion in binding the Defendant over on the charges in Counts I and IV, for the reasons set forth in the attached Memorandum of Law, which is incorporated herein by reference.

WHEREFORE, for all the above reasons, the Defendant respectfully requests that this Court grant his Motion to Quash Counts I and IV.

Respectfully submitted,

_____

DATED: September 21, 2001

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No.
Hon.

,

Defendant.
_____/

Assistant Ingham County Prosecutor
303 W. Kalamazoo, 2nd Floor
Lansing, MI 48933
(517) 483-6218

_____/

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO QUASH COUNTS I AND IV OF THE INFORMATION

Statement of Facts

The Defendant, , is charged with the offenses of First Degree Premeditated Murder (Count I), three counts of Assault with Intent to Murder (Counts II through IV) and Possession of a Firearm During a Felony (Count V).

The preliminary examination in this matter was held on May 11, 2001, before the Hon. ,

****

Based upon this evidence, the magistrate bound Mr. over on the crimes charged in the Information (PE, 116-117).

Argument

I. STANDARD FOR BIND-OVER

A preliminary examination is a critical stage of the proceedings against an accused person. Coleman v Alabama, 399 US 1, 90 SCt 1999, 26 LEd2d 387 (1970). People v Duncan, 388 Mich 489, 501-502 (1972). In order for the District Judge properly to bind Mr. over for trial, there must have been competent, legally admissible evidence presented at the examination from which the Judge could reasonably conclude that the crimes charged had been committed in fact, and that there exists probable cause to believe that Mr. committed these crimes. MCLA 766.13; MCR 6.110(E). For the reasons discussed herein, the evidence presented in this case is insufficient to support bindover on Counts I and IV. These Counts should, therefore, be dismissed or reduced.

The "probable cause" language of this standard refers only to the connection of to the alleged offenses. A higher standard is utilized to determine if the prosecution has proven the commission of the alleged offenses. MCLA 766.13. The Michigan Supreme Court pointed out in People v Asta, 337 Mich 590, 609-10 (1953):

> The matter of 'probable cause', as the expression is used in the statute [MCLA 766.13], has reference to the connection of the defendants with the alleged offense rather than to corpus delicti, that is, to the fact that the crime charged has been committed by some person or persons ... [T]he statute ... in terms ... necessitates something more than a finding of probable cause insofar as the commission of the crime charged is concerned. Id.

Mere probable cause to believe the offense charged was committed is not enough. People v Paille #2, 383 Mich 621, 178 NW2d 465, 468 (1970).

Although MCR 6.110(E) appears to create a lesser standard for bind-over, using language "that probable cause exists to believe that an offense not cognizable by the district court has been committed" rather than the language of MCLA 766.13 requiring a finding that "a felony has been

committed," the staff comment to the court rule explicitly states that "no substantive difference is intended." This interpretation was adopted in People v Fiedler, 194 Mich App 682, 692 (1992). See also People v Tower, 215 Mich App 318 (1996). The Supreme Court's decision in People v Justice, 454 Mich 334, 562 NW2d 652, 657 (1997), did not alter the statutory language which requires proof that the crime was committed.

Moreover, as this issue involves substantive rights, the statutory standard clearly governs. It is well-settled that where there is a conflict between a statute and a court rule on a matter of substantive law, the statute controls. Smith v Smith, 433 Mich 606, 619-20 (1989).

Finally, even if the lesser standard were to be applied in this case, the evidence was still insufficient to support the bind-over of Mr. on the charges contained in Counts I and IV.

Moreover, in order to constitute sufficient evidence to warrant a bind-over, the proof at the preliminary examination must have been adequate to create "'good reason to believe [the defendant] guilty of the crime charged.... [That is,] 'A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offense with which he is charged.'" People v Paille #2, supra, at 626, quoting People v Dellabonda, 265 Mich 486, 490 (1933). See also People v Justice, 454 Mich 334, 343-44, and n. 14, 562 NW2d 652 (1997).

While the evidence presented at examination need not be sufficient to find guilt beyond a reasonable doubt, "there must be evidence on each element of the crime charged or evidence from which those elements may be inferred." People v Downes, 168 Mich App 484, 487 (1987). Evidence creating a mere possibility that the defendant is guilty of the offenses is insufficient. The Michigan Supreme Court explained the scope of the inquiry which must be performed by the Magistrate in People v King, 412 Mich 145, 153 (1981), as follows:

> The magistrate "must have *** good reason to believe appellant guilty of the crime charged".[1] The magistrate has "the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses"[2] and may consider evidence in defense.[3]
>
> [1]. Dellabonda, supra, 265 Mich 490.
>
> [2]. People v Paille #2, 383 Mich 621, 627; 178 NW2d 465 (1970); People v Talley, 410 Mich 378; 301 NW2d 809 (1981).
>
> [3]. See, e.g., Doss, supra, suggesting the magistrate may consider the defense of justification.
>
> King, supra, at 153, and n.'s 1, 2, and 3 (emphasis added).

Moreover, even if the prosecution has presented some evidence on each element, bind-over is not required if, on examination of the whole matter, the magistrate is not satisfied that there is probable cause to believe that the defendant committed the charged offenses. As the Supreme Court stressed in People v King, 412 Mich 145, 154; 312 NW2d 629 (1981):

> The inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. The magistrate is required to make his determination 'after an examination of the whole matter.[5] **Although the prosecution has presented some evidence on each element, if upon an examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he should not bind the defendant over on the offense charged.** [emphasis added].
>
> [5] People v Evans, 72 Mich 367, 387; 40 NW 473 (1888).

Thus, the examining magistrate must conduct an examination of the whole matter, pass judgment on the weight and competency of the evidence, including the credibility of the witnesses, and then determine if there is good reason to believe that the defendant is guilty of the crimes charged. In this case, Mr. was bound over based on insubstantial evidence that he committed the crimes charged in Counts I and IV. For the reasons that follow, therefore, these Counts should be quashed.

II. WHERE THE EVIDENCE OFFERED AT THE EXAMINATION DID NOT ESTABLISH GOOD REASON TO BELIEVE THAT THE

DEFENDANT HAD PREMEDITATED THE COMPLAINANT'S DEATH, THE CHARGE OF FIRST DEGREE PREMEDITATED MURDER IN COUNT I SHOULD BE REDUCED TO SECOND DEGREE MURDER.

A. Introduction

The Defendant is charged in Court I with First Degree Premeditated Murder. However, the evidence offered at the examination was insufficient to establish the commission of this crime.

The sole distinction between all types of homicidal conduct is the state of mind with which the death is caused. In the case of Maher v People, 10 Mich 212 (1862), the Court states that:

> Homicide or the near killing of one person by another does not, of itself, constitute murder; It may be murder, or manslaughter or excusable or justifiable homicide, and therefore, entirely innocent according to the circumstances, or the disposition or act. It is not therefore the act which constitutes the offense or determines it's character; but the quo animo, the disposition, or state of mind with which it is done.
>
> Maher, at 217 (emphasis added).

The Michigan Supreme Court, in People v Vail, 393 Mich 460, 468-69 (1975), adopted the definitions of premeditation and deliberation which were provided by then Judge, later Justice, Levin in People v Morrin, 31 Mich App 301, 328-330 (1971):

> First-degree and second-degree murder are separate offenses, carrying vastly different penalties, distinguished only by the requirement that a homicide punishable as first-degree murder be committed with premeditation and deliberation. If premeditation and deliberation are ill-defined, the jury is left with no objective standards upon which to base its verdict.
>
> * * *
>
> Accordingly, it underscores the difference between the statutory degrees of murder to emphasize that premeditation and deliberation must be given independent meaning in a prosecution for first-degree murder. The ordinary meaning of the terms will suffice. To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. As a number of courts have pointed out, premeditation and deliberation characterize a thought process undisturbed

> by hot blood. While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a 'second look'. [footnotes omitted]

Also, in People v Martin, 392 Mich 553, at page 560 (1974), the Court stated that:

> ...premeditation and deliberation may be found to exist by the jury when a thought process, undisturbed by hot blood, and involving reflection upon a planned course of conduct, fully measuring and evaluating the consequences of a killing, is found to have been formed in the mind of the Defendant.

The case of People v Lynch, 47 Mich App 8, 19 (1973), quoted with approval the case of State v DiPaolo, 34 NJ 279, 294-95, 158 A2d 401, which states that:

> As settled by judicial construction, the first element is premeditation, which consists of the conception of the design or plan to kill. Next comes deliberation. The statutory word, "deliberate", does not mean "willful" or "intentional" as the word is frequently used in daily parlance. Rather, it imports "deliberation" and requires a reconsideration of the design to kill, a weighing of the pros and cons with respect to it. Finally the word "willful" signifies an intentional execution of the plan to kill which had been conceived and deliberated upon. [citations omitted]

The Court of Appeals, in People v Boose, 109 Mich App 455, 473 (1981), described the factors upon which the Courts have historically relied to find evidence of premeditation or deliberation:

> The factors to be considered in deciding whether there was sufficient evidence from which the jury could infer premeditation and deliberation area: (1) the previous relation of the parties; (2) the defendant's action prior to the actual killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. People v Johnson, 93 Mich App 667; 287 NW2d 311 (1979).

"The brutality of a killing does not itself justify an inference of premeditation and deliberation." People v Hoffmeiser, 394 Mich 155 (1975). Further, the use of a lethal weapon is

not in itself sufficient evidence to warrant a verdict of murder in the First Degree. Hoffmeister, supra; People v Vinuazo, 212 Mich 472, 475 (1920).

Significantly, the Courts have considered and decided in a number of cases that the length of time between the formation of the intent to kill and the actual killing was insufficient to have provided the defendant the opportunity to have taken "a second look" at his actions. Hoffmeister, supra; People v Oster, 67 Mich App 490, 497 (1976); People v Gill, 43 Mich App 598 (1972).

In Gill, at 606-607, the Court noted that:

> What is missing is the time factor between the threat and the fight and any showing that there was an opportunity for cool-headed reflection on Gill's part. Without such evidence, the sequence of events is as consistent with an unpremeditated killing - following hard on the outset of the argument - as it is with a premeditated killing after a interval during which there was an opportunity for cool-headed reflection.

The Court pointed out in People v Oster, 67 Mich App 490, 497, 241 NW2d 260 (1976), that evidence which is sufficient to support a finding that a homicide was premeditated and deliberated generally fall into three categories:

> Evidence which shows that the defendant had been engaged in planning the killing, evidence establishing a motive for the killing, and evidence that the nature of the killing was such that the defendant must have intentionally killed according to a preconceived design to take his victim's life in a particular way.

In this case, the prosecution presented absolutely no evidence to suggest that Mr. had the premeditated intent to cause the death of the decedent, . There was no evidence of any earlier confrontation between the deceased, and . Further, there was no evidence that Mr. had any motive or ax to grind with . The testimony of both and was consistent in that this shooting was completely spontaneous. No one claimed that there was any argument or prior dispute that led

up to this incident. did not know that the person sitting next to him had a weapon on him. The two cars were simply sitting next to each other, and two people who were riding in the car that was driving suddenly, spontaneously, started shooting. Therefore, there is no evidence that whoever fired the shots was acting with premeditation.

Further, there is no evidence that the person sitting in the front passenger seat of ’s car, as opposed to the rear passenger, was actually firing in the direction of the other motor vehicle or that any shots fired from the front actually took effect upon any person. never claimed that the shots fired by the front seat passenger, as opposed to the rear passenger, were fired at or in the direction of the other car. He simply stated repeatedly that he saw shots being fired from inside of his car. This testimony, therefore, does not rule out the totally reasonable conclusion that the shots that actually took effect in the car being driven by __ were fired from the man in the rear seat, as opposed to the man in the front passenger seat of the car was driving.

In Oster, supra, the Court found that the magistrate abused his discretion in binding the defendant over on a charge of first degree murder, even when the evidence showed that the deceased had thrown the defendant onto a stairway, leaving him "sprawled" on the stairs. Approximately five seconds then elapsed while the defendant got up, pulled out a knife, and stabbed the deceased several times. Id. at 494. In spite of this lapse of time, this Court held that the magistrate's decision to bind the defendant over on first degree murder was "clearly erroneous." Id., at 497.

Similarly, in this case, there was no evidence from which it could be inferred that the front seat shooter fired the gunshots with the premeditated intent to kill or murder anyone. The circumstances here indicate the spontaneous, unplanned discharge of a number of shots from inside the car was driving. Under these circumstances, the evidence that__ ’s death was in any

sense premeditated or deliberated is simply lacking.

Therefore, for these reasons, the evidence offered by the prosecution was insufficient to establish premeditation and deliberation. Count I should therefore either be quashed, or reduced to Murder in the Second Degree.

III. WHERE THERE IS NO EVIDENCE THAT __ WAS INJURED BY GUNFIRE, THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CHARGE OF ASSAULT WITH INTENT TO COMMIT MURDER AGAINST HER.

The evidence in this case is that at the time of the shooting, the decedent, , was in the front driver's seat and was in the front passenger seat. Two women, and , were in the rear. There is no evidence that either of the two women were the intended targets of the shooting in this case. was in fact struck by gunfire. , however, was uninjured in the exchange of gunfire.

The crime of Assault With Intent to Murder requires evidence that the perpetrator actually intended to cause the death of the complainant. This principle was reaffirmed in People v Taylor, 422 Mich 554, 568-569 (1985). Evidence of an intent to commit great bodily harm, or of actions taken in wilful or wanton disregard of the plain likelihood that death or great bodily harm will result do not meet the test.

There being no evidence that there was any intent to shoot or injure , the prosecution of Mr. for Assault with Intent to Murder of Ms. must necessarily rely upon the doctrine of transferred intent. The doctrine of transferred intent applies where shots are fired with the intent to kill or injure one person, and another person is hit by the gunfire either accidentally or by mistake. This doctrine was considered in People v Youngblood, 165 Mich App 381, 388 (1988) and was explained as follows:

> In the unintended-victim (or bad-aim) situation -- where A aims at B but misses, hitting C -- it is the view of the criminal law that A is just as guilty

> as if his aim had been accurate. Thus where A aims at B with a murderous intent to kill, but because of a bad aim he hits and kills C, A is uniformly held guilty of the murder of C. And if A aims at B with a first-degree-murder state of mind, he commits first degree murder as to C, by the majority view. So too, where A aims at B with intent to injure B but, missing B, hits and injures C, A is guilty of battery of C. [LaFave & Scott, Handbook on Criminal Law, ch 3, §35, pp 252-253, quoted in People v Lovett, 90 Mich App 169, 171; 283 NW2d 357 (1979) lv den 407 Mich 884 (1979).]

The doctrine of transferred intent has always been intended to permit the prosecution of a perpetrator who, during the attempt to kill or injure one party, instead causes an actual physical injury to another. It does not permit the prosecution of a perpetrator for assault to commit murder upon a person who is merely present and who was neither an intended nor an actual target. The doctrine does not make complainants of uninjured persons who were merely present during an assault.

The doctrine of transferred intent thus applies only where there is an intent to assault or murder a person and an innocent person is hurt or killed by mistake, not where an uninjured bystander is somewhere in the vicinity of the discharge of a firearm. Professors LaFave and Scott, in Criminal Law, 2d Edition, West (1986), explain as follows:

> These proper conclusions of law as to criminal liability in the bad-aim situation are sometimes said to rest upon the ground of "transferred intent:" To be guilty of a crime involving a harmful result to C, A must intend to do harm to C; but A's intent to harm B will be transferred to C; thus A actually did intend to harm C; so he is guilty of the crime against C. This sort of reasoning is, of course, pure fiction. A never really intended to harm C; but it is not necessary, in order to impose criminal liability upon A, to pretend that he did. What is really meant, by this round-about method of explanation, is that when one person (A) acts (or omits to act) with intent to harm another person (B), but because of a bad aim he instead [footnote omitted] harms a third person (C) whom he did not intend to harm, the law considers him (as it ought) just as guilty as if he had actually harmed the intended victim [footnote omitted]. In other words, criminal homicide, battery, arson and malicious mischief do not require that the defendant cause harm to the intended victim; an

> unintended victim will do just as well [footnote omitted]. LaFave and Scott, supra, at 284

As can be seen from this discussion, the doctrine of "transferred intent" is intended to provide criminal liability where actual physical harm has been caused to an unintended victim as a result of an assault on the intended victim. Essential to the doctrine is that actual harm had to have occurred to the actual victims. Thus, Professors LaFave and Scott repeatedly refer to "the harmful result to C," as a prerequisite to liability under the doctrine of transferred intent.

This requirement is demonstrated even more forcefully in Perkins and Boyce, Criminal Law, 3d Ed. Foundation Press, at 925, (1982). According to this treatise, the doctrine of transferred intent only applies where the unintended victim suffers the exact type of physical harm that the perpetrator intended to inflict upon the intended victim. Thus, the doctrine does not even apply where a shot is fired with an intent to kill, but inflicts a non-fatal injury upon an unintended victim. The professors explain:

> If, without justification, excuse or mitigation, D with intent to kill A fires a shot which misses A but unexpectedly inflicts a non-fatal injury upon B, D is guilty of an attempt to commit murder, -- but the attempt was to murder A whom D was trying to kill and not B who was hit quite accidentally. And so far as the criminal law is concerned there is no transfer of this intent from one to the other so as to make D guilty of an attempt to murder B [footnote omitted]. Hence an indictment or information charging an attempt to murder B, or (under statute) an assault with intent to murder B, will not support a conviction if the evidence shows that the injury to B was accidental and the only intent was to murder A [footnote omitted].

However, it is not necessary for the Court to adopt the Perkins and Boyce rule to grant the Motion to Quash Count IV in this case; it is simply enough to recognize the doctrine of transferred intent is intended to punish a defendant who inflicts actual physical injury upon an unintended victim when the intent existed to actually cause physical harm to an intended victim.

In this case, since the complainant in Count IV suffered no injury at all, the doctrine of transferred intent simply does not justify making her a complainant on a charge of Assault With Intent to Commit Murder.

The closest Michigan case to these facts is People v Cronk, 9 Mich App 606, 611-612 (1968). In that case the defendant was charged with one count of Assault With Intent to Commit Great Bodily Harm, and was found guilty of Assault With a Deadly Weapon. The defendant allegedly had a grudge against a woman, and fired a number of gunshots into her home at a time when the defendant believed the woman was in the home. In fact, the woman was not in the home at the time, but four other persons were present. The jury's verdict did not specify which of the four occupants of the home at the time of the shooting were the victim of the felonious assault of which the defendant was convicted. The Court of Appeals did not feel that Michigan law required that the jury verdict specify who the jury determined the person assaulted to be. However, the Court in important footnote 5 stated as follows:

> [5]Michigan, unlike California (see People v Plumlee [1960], 177 Cal App 2d 224, 2 Cal Rptr 84), does not take the view that "with respect to crimes against persons, including an assault, although there is but a single act or intent, there are as many crimes as there are persons affected as victims." 6 Am Jur 2d, Assault & Battery, §56, p 53. In this connection, see People v Ochotski (1898), 115 Mich 601, 610.

Thus, Michigan does not follow the rule that everyone who is merely present at the time of a shooting automatically becomes a complaining witness pursuant to the doctrine of transferred intent. The doctrine of transferred intent simply does not apply to , the complainant in Count IV, who was not injured in any way, and there was no evidence that any of the gunshots were discharged with the intent to hit or injure her. Since was not assaulted or injured, she does not qualify as a complainant. As to , the charge of Assault With Intent to Commit Murder must be

quashed.

WHEREFORE, for all the above reasons, the Defendant respectfully requests that this Court grant his Motion to Quash Counts I and IV.

Respectfully submitted,

_____

DATED: November 2, 2007

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs. Case No.
Hon.

Defendants.
_____/

Assistant Prosecuting Attorney
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_____/

MOTION TO QUASH THE INFORMATION

NOW COMES the Defendants , by and through their attorney, John F. Royal, and move this Honorable Court to Quash the Information, for the following reasons:

1. The Defendants are all charged with one count of Assaulting, Resisting, or Obstructing a Police Officer that the Defendants knew or had reason to know was performing his duties, contrary to MCLA 750.81d(1).

2. The Defendants were bound over on September 23, 2002, following a preliminary examination which was held before the Honorable of the 36th District Court.

3. The evidence offered at the preliminary examination was insufficient to justify the decision to bind the Defendant over on the offenses charged for the following reasons:

I. WHERE THE EVIDENCE OFFERED AT THE PRELIMINARY EXAMINATION FAILED TO ESTABLISH THAT THE

COMPLAINANT WAS PERFORMING A LAWFUL DUTY, OR THAT THE DEFENDANTS KNEW OR HAD REASON TO KNOW THAT THE COMPLAINANT WAS PERFORMING A LAWFUL DUTY AT THE TIME OF THE ALLEGED ASSAULT, RESISTING AND OBSTRUCTING, THE EXAMINING MAGISTRATE ABUSED HER DISCRETION IN FINDING PROBABLE CAUSE THAT THE OFFENSE OF ASSAULTING, RESISTING, OR OBSTRUCTING A POLICE OFFICER WAS COMMITTED.

4. The examining magistrate abused her discretion in deciding to bind the Defendants over on the charge contained in the Information.

WHEREFORE, for all the above reasons, the Defendants respectfully request that their Motion to Quash the Information be granted.

Respectfully submitted,

JOHN F. ROYAL (P27800)
Attorney for Defendants

DATED: November 8, 2002

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs. Case No.
Hon.

Defendants.
_____/

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MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO QUASH THE INFORMATION

Statement of Facts

The preliminary examination in this case was held on September 23, 2002 before the Honorable of the 36th District Court. Following the testimony, Judge bound all three Defendants over as charged on one count of Assaulting, Resisting, or Obstructing a Police Officer whom the Defendants knew or had reason to know was performing his duties, in violation of MCLA 750.81d(1). This statute is a new law which was enacted as Public Act 266 of 2002, and was only recently signed by the governor. In pertinent part, this statute reads as follows:

> Sec. 81d.
> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the

> individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

The prosecution called two Detroit Police Officers, __ and __, to testify at the preliminary examination. They testified they had instructions from Police Officer__ of the Detroit Police Department Carjacking Task Force to go to the location of Ferguson and West Eight Mile in the City of Detroit to arrest __ on a charge of Carjacking (PE, 4, 11-12, 32-34).

Officer claimed that when he tried to arrest __ in connection with the instructions of Officer , __ allegedly tried to run away by moving away from him (PE, 15-16). __ testified that several other officers joined in and tried to arrest __ and that as __ maced __, a group of several officers and __ all fell to the street (PE, 19-20). __ claimed that when he got up, he observed Defendant __ on the back of another police officer (PE, 22-23). __ claims he pulled away and that she offered no further resistance (PE, 23-24). __ claims that at that time Defendant __ struck him in the right side of his head (PE, 6-7). Officer claimed that __ jumped on his back and said that her brother was not going anywhere (PE, 33-34).

__ was arrested at the scene (PE, 8-9). Later, __ and __ arrived at the police precinct with a camera. After they began taking pictures of officers who had been involved in the earlier incident, they were also arrested and charged with the instant offense (PE, 10-11, 25-27, 44-45).

None of the police officers claimed that there was a warrant for the arrest of __ or that there was probable cause to arrest him on a charge of Carjacking.

Based upon this evidence, the District Judge bound the Defendants over on the charge in the Information.

Argument

I. STANDARD FOR BIND-OVER

A preliminary examination is a critical stage of the proceedings against an accused person. Coleman v Alabama, 399 US 1, 90 SCt 1999, 26 LEd2d 387 (1970). People v Duncan, 388 Mich 489, 501-502 (1972). In order for the District Judge properly to bind over for trial, there must have been competent, legally admissible evidence presented at the examination from which the Judge could reasonably conclude that the crime charged had been committed in fact, and that there exists probable cause to believe that each of these three Defendants committed this crime. MCLA 766.13; MCR 6.110(E). For the reasons discussed herein, the evidence presented in this case is insufficient to support bindover on this charge. This Information should, therefore, be quashed.

The "probable cause" language of this standard refers only to the connection of to the alleged offense. A higher standard is utilized to determine if the prosecution has proven the commission of the alleged offense. MCLA 766.13. The Michigan Supreme Court pointed out in People v Asta, 337 Mich 590, 609-10 (1953):

> The matter of 'probable cause', as the expression is used in the statute [MCLA 766.13], has reference to the connection of the defendants with the alleged offense rather than to corpus delicti, that is, to the fact that the crime charged has been committed by some person or persons...[T]he statute ... in terms ... necessitates something more than a finding of probable cause insofar as the commission of the crime charged is concerned. Id.

Mere probable cause to believe the offense charged was committed is not enough. People v Paille #2, 383 Mich 621, 178 NW2d 465, 468 (1970).

Although MCR .110(E) appears to create a lesser standard for bind-over, using language "that probable cause exists to believe that an offense not cognizable by the district court has been committed" rather than the language of MCLA 766.13 requiring a finding that "a felony has

been committed," the staff comment to the court rule explicitly states that "no substantive difference is intended." This interpretation was adopted in People v Fiedler, 194 Mich App 682, 692 (1992). See also People v Tower, 215 Mich App 318 (1996). The Supreme Court's decision in People v Justice, 454 Mich 334, 562 NW2d 652, 657 (1997), did not alter the statutory language which requires proof that the crime was committed.

Moreover, as this issue involves substantive rights, the statutory standard clearly governs. It is well-settled that where there is a conflict between a statute and a court rule on a matter of substantive law, the statute controls. Smith v Smith, 433 Mich 606, 619-20 (1989).

Finally, even if the lesser standard were to be applied in this case, the evidence was still insufficient to support the bind-over of any of these three Defendants on the crime charged .

Moreover, in order to constitute sufficient evidence to warrant a bind-over, the proof at the preliminary examination must have been adequate to create "'good reason to believe [the defendant] guilty of the crime charged.... [That is,] 'A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offense with which he is charged.'" People v Paille #2, supra, at 626, quoting People v Dellabonda, 265 Mich 486, 490 (1933). See also People v Justice, 454 Mich 334, 343-44, and n. 14, 562 NW2d 652 (1997).

While the evidence presented at examination need not be sufficient to find guilt beyond a reasonable doubt, "there must be evidence on each element of the crime charged or evidence from which those elements may be inferred." People v Downes, 168 Mich App 484, 487 (1987). Evidence creating a mere possibility that the defendant is guilty of the offenses is insufficient.

The Michigan Supreme Court explained the scope of the inquiry which must be

performed by the Magistrate in People v King, 412 Mich 145, 153 (1981), as follows:

> The magistrate "must have *** good reason to believe appellant guilty of the crime charged". [1] The magistrate has "the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses"[2] and may consider evidence in defense.[3]
>
> 1. Dellabonda, supra, 265 Mich 490.
> 2. People v Paille #2, 383 Mich 621, 627; 178 NW2d 465 (1970); People v Talley, 410 Mich 378; 301 NW2d 809 (1981).
> 3. See, e.g. , Doss, supra, suggesting the magistrate may consider the defense of justification.
>
> King, supra, at 153, and n.'s 1, 2, and 3 (emphasis added).

Moreover, even if the prosecution has presented some evidence on each element, bind-over is not required if, on examination of the whole matter, the magistrate is not satisfied that there is probable cause to believe that the defendant committed the charged offenses. As the Supreme Court stressed in People v King, 412 Mich 145, 154; 312 NW2d 629 (1981):

> The inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. The magistrate is required to make his determination 'after an examination of the whole matter.[5] **Although the prosecution has presented some evidence on each element, if upon an examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he should not bind the defendant over on the offense charged.** [emphasis added].
>
> [5] People v Evans, 72 Mich 367, 387; 40 NW 473 (1888).

Thus, the examining magistrate must conduct an examination of the whole matter, pass judgment on the weight and competency of the evidence, including the credibility of the witnesses, and then determine if there is good reason to believe that the defendant is guilty of the crimes charged. In this case, each of these three Defendants was bound over on this charge based on clearly inadequate evidence. For the reasons that follow, therefore, the Information should be quashed.

II. WHERE THE EVIDENCE OFFERED AT THE PRELIMINARY EXAMINATION FAILED TO ESTABLISH THAT THE COMPLAINANT WAS PERFORMING A LAWFUL DUTY, OR

THAT THE DEFENDANTS KNEW OR HAD REASON TO KNOW THAT THE COMPLAINANT WAS PERFORMING A LAWFUL DUTY, THE EXAMINING MAGISTRATE ABUSED HER DISCRETION IN FINDING PROBABLE CAUSE THAT THE OFFENSE OF ASSAULTING, RESISTING, OR OBSTRUCTING A POLICE OFFICER WAS COMMITTED.

The three Defendants are charged with a violation of MCLA 750.81d(1). This is a statute which was recently passed by the legislature as part of Public Act 266 of 2002. It was only recently signed by the governor. Therefore, there is no case law which interprets this statute. The relevant portion of the statute reads as follows:

> Sec. 81d.
> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both. MCLA 750.81d(1).

However, this new statute is obviously closely related to the crime of Resisting and Obstructing a Police Officer, which is MCLA 750.479. In pertinent part, the latter statutes reads as follows:

> Any person . . . who shall knowingly and willfully.... obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts, and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor. . . .MCLA 750.479.

The only real difference in language between the two statutes is that the older statute uses language stating that the complainant police officer must have been engaged in "lawful acts, attempts, and efforts to maintain, preserve and keep the peace. . ." The new statute, which Defendants are charged with violating, requires that the complainant police officer must be "performing his or her duties . . . ," and that the Defendants "knew or had reason to know" that

the officer was "performing his or her duties." MCLA 750.81d(1).

Although the word "duties" is not defined in the new statute, it must clearly refer to lawful duties. The legislature clearly did not intend to criminalize the acts of someone who acted to stop a police officer from acting illegally. And it clearly not be possible for it to be a part of the "duties" of a police officer to commit an illegal or improper act. Therefore, the case law which has developed in this state interpreting the elements of the older Resisting and Obstructing statute, which requires the prosecution to plead and prove that the complainant police officer was performing a lawful duty at the time of the incident, must necessarily apply to the new statute as well. That is, the prosecution has the burden to plead and prove that the complainant police officer was involved in a lawful duty at the time of the alleged Assaulting, Resisting, or Obstructing, and the specific lawful duty which the police officer was engaged in must be proven at the preliminary examination and specifically identified in the Information.

It is well settled in Michigan that an indictment or information alleging a violation of obstructing police officers "in their lawful acts . . . to . . . keep the peace," in violation of MCLA 750.479, cannot simply allege that the officers were carrying out their lawful duties. The indictment must allege the specific activity of the officers which was allegedly obstructed. People v Reed, 43 Mich App 51, 54 (1972); People v Hubbard, 141 Mich 96 (1905); People v Hamilton, 71 Mich 340 (1888).

In Hubbard, supra, the Court asserted, at 97-98:

> This statute requires that the officer resisted or assaulted must be engaged as such in the lawful performance of his duty. No specific allegations are made as to what such lawful performance of his duty was. The statement is made [in the indictment] that the officer was "then and there engaged in his lawful acts, attempts and efforts to maintain, preserve and keep the peace." This statement is a conclusion, and not a statement of facts of which respondent was entitled to be

informed. (Emphasis supplied).

Here, the Information is also worded in a conclusory fashion. The Information only states that the complainant was assaulted, resisted or obstructed by the defendants, and that the defendants : "knew or had reason to know [the complainant] was performing his or her duties...." The Information in this case, just as the one in Hubbard, supra, is fatally defective. Therefore, based upon the holdings of Hubbard, Reed, and Hamilton, supra, the Information must be quashed.

In this case, the Information must also be quashed because the prosecution failed to present any evidence at the preliminary examination that the complainant police officer was engaged in a lawful duty. Further, the record completely fails to identify what lawful duty the complainant was allegedly performing. The testimony at the exam was that __ was being arrested on a charge of Carjacking at the direction of Officer of the Carjacking Task Force. However, no evidence was offered that a warrant had been issued for __ for Carjacking. Nor could such evidence have been offered because no warrant had in fact been issued for the arrest of __ for Carjacking. Additionally, no evidence was offered that the police had probable cause to arrest __ for Carjacking. Nor could such evidence have been presented because __ was released on bond three days later after being arraigned on the instant charge of Resisting and Obstructing, without ever having been charged with Carjacking. To date, two months later, __ has still not been charged with any Carjacking crime. Therefore, the evidence at the preliminary examination completely failed to establish that Officer __ was carrying out a lawful duty at the time the three Defendants allegedly assaulted, or obstructed him, in that no evidence was offered to prove that the arrest of __ was lawful.

In addition, there is no evidence that any of these three Defendants knew or had reason to know that Officer was performing a lawful duty at the time they allegedly committed the acts which the prosecution claims constituted the assault, or obstruction of the complainant. No evidence was offered at the examination to establish that any of the three Defendants were ever informed by any of the police officers that they had a lawful reason to arrest __ and take him into custody. There is no evidence in this record to establish that anything was ever said to any of the three Defendants to give them the statutorily required knowledge or "reason to know" that the Officers were performing a lawful duty at the time of the alleged Assault, or Obstruction.

This defect in the proofs has also resulted in a defect in the Information. As set forth in Reed and Hubbard, supra, an Information charging an offense such as this offense must specify the alleged lawful "duties" which the officers were performing at the time of the incident in question.

Further, in this case, the Information must also allege facts which would support a conclusion that these Defendants "knew or had reason to know" that Officer was performing a lawful duty at the time of the incident. Absent such allegations, the Information is fatally defective and must be quashed, for the same reason the Information had to be quashed in Hubbard, supra. The allegation in the Information "is a conclusion, and not a statement of facts of which [the Defendants are] entitled to be informed." Hubbard, supra, at 97-98.

WHEREFORE, for all the above reasons, the Defendants respectfully requests that their Motion to Quash the Information be granted.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
vs. Defendants.
_____/

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JOINT MOTION TO SEVER DEFENDANTS, MOTION FOR SEPARATE TRIALS
AND ALTERNATIVE MOTION FOR SEPARATE JURIES

NOW COME the above-named Defendants, by and through their attorneys,, and move this Honorable Court to Order that the Defendants be Severed and granted separate trials in this matter, or in the alternative, receive separate juries, for the following reasons:

1. The Defendants are each charged in the Information with five counts, specifically, one count of Assault with Intent to Murder, two counts of Armed Robbery, one count of First Degree Home Invasion, and one count of Assault with Intent to Commit Great Bodily Harm.

2. It is apparent that the prosecution desires that these two Defendants be tried jointly in one trial.

3. Each defendant has made a lengthy video taped statement in connection with this case, as well as a handwritten statement. Each defendant has incriminated the other defendant in both his verbal and written statements.

4. Upon information and belief, the prosecution will seek to offer into evidence at trial

admissions of each of the two Defendants which are not admissible against the other Defendant.

5. In each instance, the statements attributed to one Defendant are not admissible against the other because use of the statements would violate the rule against hearsay, MRE 801 and 802, and would further violate each Defendant's right to confront the evidence against him/her. U.S. Const Ams VI, XIV; Mich Const 1963, Art 1, Sec. 20.

6. These statements cannot be effectively redacted so as to remove the incriminating inferences which can be drawn from them about the co-defendant.

7. The only effective way to prevent overwhelming prejudice to each Defendant from the admission of the statements of the other Defendant is to provide each with a separate trial.

8. A joint trial in this matter will deny each Defendant a fair trial and due process of law. U.S. Const. Ams. V, XIV; Mich. Const. Art. 1, Section 17.

9. The prejudice from a joint trial will permeate the entire trial process. Therefore, separate juries will be insufficient to cure the problems created in this case.

10. The authority to grant this Motion for Severance and Separate Trials is provided by MCR 6.121(C) and (D).

11. Alternatively, the defendants request that this Court impanel a separate jury for each defendant during the trial.

12. Defendants hereby incorporate by reference the Brief in Support of this Motion which is attached hereto.

WHEREFORE, for all the above reasons, the Defendants respectfully request that their motion for separate trials or, in the alternative, for separate juries, be granted.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
vs. Defendants.
_____/

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MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION
TO SEVER DEFENDANTS, MOTION FOR SEPARATE TRIALS, AND
IN THE ALTERNATIVE, FOR SEPARATE JURIES

This Court has the authority to sever these Defendants and grant separate trials in these matters pursuant to MCR 6.121(C), which provides in pertinent part that:

> On a Defendant's Motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

Additionally, authority is provided by MCR 6.121(D), which provides in pertinent part that:

> "On the Motion of any party, the court may sever the trial of Defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the Defendants."

In this Case, each Defendant made both verbal and signed statements which incriminate the co-defendant, and which are not susceptible to being challenged or cross-examined by the co-defendant.

I. DEFENDANTS ARE ENTITLED TO SEPARATE TRIALS WHERE ADMISSIONS ATTRIBUTED TO EACH WILL BE OFFERED INTO EVIDENCE, AND WHERE THESE ADMISSIONS CANNOT BE SUCCESSFULLY REDACTED TO ELIMINATE STATEMENTS PREJUDICIAL TO THE NON-DECLARANT, AND WHERE THESE ADMISSIONS CANNOT BE CROSS-EXAMINED BY THE NON-DECLARANT.

In this case, as described in the Motion for Separate Trials, each Defendant made statements which can properly be offered into evidence only against the defendant who made the statement. The prosecution plans to offer into evidence at trial in this case admissions attributed to each defendant which incriminate the co-defendant, and which cannot be cross-examined by the Co-defendant. Furthermore, it is anticipated that neither Defendant will be testifying during the trial in this case. Therefore there is no opportunity for either defendant to cross-examine any of the alleged admissions of the co-defendant. Further, these statements cannot be effectively redacted to delete references to the non-declarant, and they cannot be cross-examined by the non-declarant. Under these circumstances, severance should be granted.

The Michigan Supreme Court discussed the development of the law pertaining to the right of confrontation in the case of People v Banks, 438 Mich 408, 414-415 (1991), as follows:

> The Sixth Amendment of the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." This Sixth Amendment right is applicable to the states, Douglas v Alabama, 380 US 415; 85 S Ct 1074; 13 L Ed 2d 934 (1965), and the same right is guaranteed by Const 1963, art 1, §20.
>
> In California v Green, 399 US 149, 158; 90 S Ct 1930; 26 L Ed 2d 489 (1970), the United States Supreme Court explained that the Confrontation Clause
>
> (1) insures that the witness will give his statements under oath thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus

aiding the jury in assessing his credibility.

In Pointer v Texas, 380 US 400, 405; 85 S Ct 1065; 13 L Ed 2d 923 (1965), the Court observed:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.
>
> In Bruton v United States, [391 US 123, 88 S Ct 1620, 20 LEd2d 476 (1968)], the Court held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating unredacted confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant. In Bruton, defendants Burton and Evans were tried jointly for armed postal robbery. A postal inspector, the government's witness, testified regarding an oral confession allegedly made by Evans, which inculpated both Evans and Burton. Evans did not testify. The trial court instructed the jury to disregard the confession in judging Burton's guilt or innocence and to consider it only for the purpose of deciding Evans' culpability. The jury found both defendants guilty. The United States Court of Appeals for the Eighth Circuit affirmed, but the United States Supreme Court reversed, stating:
>
> > [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.. . . Such a context is presented here, where the power-fully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged

> accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. [Bruton, supra, pp 135-136].

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6 In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him . . . [Const 1963, art 1, §20.

The Michigan Supreme Court in Banks, supra, had to consider whether a process of redaction would suffice to protect the confrontation rights of a defendant who is incriminated by the out-of-court statements made by a non-testifying co-defendant. The Court, returning "to the basic tenets of Bruton", decided that:

> Because co-defendant statements are "inevitably suspect" because of the strong potential for blame shifting, Bruton, supra, p 136, even redacted confessions like the one challenged here should be clothed with a presumption of unreliability. If a "substantial risk" exists that the jury, despite cautionary instructions, will consider a co-defendant's out-of-court statement in deciding the defendant's guilt, the statement-even through redacted to delete the defendant's name-will be rendered inadmissible at a joint trial. Bruton, supra, p 126. Other independent evidence may, by necessity, have to be considered:
>
> > [T]he court must decide whether the statement incriminates the defendant against whom it is inadmissible in such a way as to create a "substantial risk" that the jury will look to the statement in deciding on that defendant's guilt. Such an assessment may require consideration of other evidence in order to determine whether mere deletion of the defendant 's name will be effective in making the statement non-incriminating as to him. But consideration of the weight of independent evidence is both improper and unnecessary to determination of the Bruton issue at the trial court level. [Hodges v Rose, 570 F2d 643, 647 (CA 6, 1978), cert den 436 US 909 (1978). See also Foster v United States, 548 A2d 1370 (DC, 1988) (and cases cited therein).

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8 Whether or not the codefendant's statement is crucial to the

> prosecution's case-i.e., has a "devastating" effect on the defendant-bears on the harmlessness of a Burton violation, not the existence of such an error. Cruz v New York, n 7 supra, pp 191-192.

The policies guaranteeing defendants a fair trial in these situations is so strong that the Court of Appeals has vacated a conviction where the trial judge in a bench trial inadvertently referred to a co-defendant's admission in making his findings of fact! People v Spearman, 195 Mich App 434, 440-442 (1992).

In this case, each defendant participated in an approximately one hour long video taped interrogation session, in which each made statements incriminating both himself and his co-defendant. Furthermore, each defendant signed a written statement which incriminated both the declarant and the co-defendant non-declarant. These statements cannot be effectively cross examined by the non-declarant. Admission of the admissions of one defendant against the non-declarant in a joint trial will result in overwhelming prejudice to the non-declarant.

A separate trial is the only way to insure that each defendant receives a fair trial.

Although the defendants feel the prejudice from the use of the statement of the co-defendant will so permeate the trial that dual juries will be insufficient to cure the prejudice, in the alternative, if this Court should feel that severance is not appropriate, the defendants request that two juries be impaneled.

WHEREFORE, for all the above reasons, the Defendants respectfully request that their motion for separate trials or, in the alternative, for separate juries, be granted.

Respectfully submitted,

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 30th JUDICIAL DISTRICT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No.

Hon.

Defendant.
_____/

Assistant Attorney General

JOHN F. ROYAL (P27800)
Attorney for Defendant
One Kennedy Square, Suite 1930
Detroit, Michigan 48226
(313 926-7210
_____/

JOINT MOTION TO SEVER DEFENDANTS AND MOTION FOR SEPARATE TRIALS

NOW COME the above-named Defendants, by and through their attorneys,, and John F. Royal for , and move this Honorable Court to Order that the Defendants be Severed and granted separate trials in this matter, for the following reasons:

1. The Defendants are each charged with one count of abuse, mistreatment, or neglect of a patient, in violation of MCLA 333.21771.

2. The Assistant Attorney General prosecuting these matters has indicated a desire that the two Defendants be tried jointly in one trial.

3. Upon information and belief, the Prosecution will seek to offer into evidence at trial admissions of each of the two Defendants which are not admissible against the other Defendant. (See Exhibit A, Statement of , and Exhibit B, Statement of , Attached).

4. In each instance, the statement attributed to one Defendant is not admissible against the other because use of it would violate the rule against hearsay, MRE 801 and 802, and would further violate each Defendant's right to confront the evidence against him/her. U.S.

Const Ams VI, XIV; Mich Const 1963, Art 1, Sec. 20.

5. The alleged admissions cannot be effectively redacted so as to remove the incriminating inferences which can be drawn from them about the Defendant who did not make each statement.

6. The only effective way to prevent overwhelming prejudice to each Defendant from the admission of the alleged statement of the other Defendant is to provide each with a separate trial.

7. Additionally, a joint trial in this matter will result in the type of unfairness prohibited by People v Hurst, 396 Mich 1 (1976). Specifically, it will be Defendant 's theory at trial that if any crime was committed, it was committed by co-defendant , and that Defendant was at all times working under the supervision and direction of co-Defendant and believed in good faith that her instructions were appropriate and lawful. (See Exhibit C, Affidavit of , Attached). Further, it will be Defendant 's theory at trial that if any crime was committed, it was committed by co-defendant , who acted on his own, outside the scope of any authority or supervision allegedly provided by Ms. . (See Exhibit D, Affidavit of Attorney John F. Royal, attached).

8. A joint trial in this matter will deny each Defendant a fair trial and due process of law. U.S. Const. Ams. V, XIV; Mich. Const. Art. 1, Section 17.

9. The prejudice from a joint trial will permeate the entire trial process. Therefore, separate juries will be insufficient to cure the problems created in this case.

10. The authority to grant this Motion for Severance and Separate Trials is provided by MCR 6.121(C) and (D).

11. Defendants hereby incorporate by reference the Brief in Support of this Motion which is attached hereto.

WHEREFORE, for all the above reasons, the Defendants respectfully request that their motion for separate trials be granted.

Respectfully submitted,

_____
JOHN F. ROYAL (P27800)
Counsel for Defendant

DATED: August 7, 1995

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 30th JUDICIAL DISTRICT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No.

Hon.

, and
,

Defendant.
_____/

Assistant Attorney General

JOHN F. ROYAL (P27800)
Attorney for Defendant
One Kennedy Square, Suite 1930
Detroit, Michigan 48226
(313 926-7210
_____/

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION
TO SEVER DEFENDANTS AND MOTION FOR SEPARATE TRIALS

This Court has the authority to sever these Defendants and grant separate trials in these matters pursuant to MCR 6.121(C), which provides in pertinent part that:

> On a Defendant's Motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

Additionally, authority is provided by MCR 6.121(D), which provides in pertinent part that:

> "On the Motion of any party, the court may sever the trial of Defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the Defendants."

In this Case, there are two reasons why severance and separate trials should be granted. First, the defenses of the two Defendants are antagonistic. Secondly, each Defendant allegedly

made admissions to the investigator from the Attorney General's Office which tend to incriminate the other Defendant, and which are not susceptible to being challenged or cross-examined by the other Defendant.

I. DEFENDANTS ARE ENTITLED TO SEPARATE TRIALS WHERE THEIR DEFENSES AND PROOFS ARE ANTAGONISTIC.

While a jointly charged Defendant has no absolute right to a separate trial, severance should be granted when the defenses are inconsistent or antagonistic. People v Hurst, 396 Mich 1 (1976); People v Espinosa, 142 Mich App 99 (1985).

When the defenses are inconsistent or antagonistic, a joint trial denies a defendant a fair trial because it permits the State to pit one defendant against the other, People v Hurst, 396 Mich 1 (1976). To be antagonistic, it is not necessary that the co-defendants directly accuse each other; it is sufficient if the "tendency" of one's testimony is to accuse the other. Id. at 9. See also People v Sargent, 124 Mich App 485, 489 (1983); People v Webb, 82 Mich App 182 (1978). An Antagonism exists if in order to believe the theory of one defendant, the jury must disbelieve the co-defendant's theory. United States v Berkowitz, 662 F2d 1127 (CA 5, 1981). The court should order separate trials if the proofs, combined with the defense theories, pit the defendants against each other. People v Muhammad, 170 Mich App 747, 759 (1988), 1v den 432 Mich 888 (1989).

Nor is it necessary that the co-defendant actually testify at trial. An antagonistic defense can be presented in the form of the theory argued by the co-defendant's counsel. People v Espinosa, 142 Mich App 99 (1985), 1v den 424 Mich 855 (1985); United States v Romanello, 726 F2d 173 (CA 5, 1984); United States v Gonzales, 804 F2d 691 (CA 11, 1986). As stated in People v Braune, 363 Ill 551; 2 NE2d 839, 842 (1936), quoted with approval in Hurst at 7:

> "Any set of circumstances which is sufficient to deprive a defendant of a fair trial if tried jointly with another is sufficient to require a separate trial."

Severance is required in this case.

As indicated by the affidavit of , attached as Exhibit C, his defense at trial will be that, if

any crime was committed it was committed by co-defendant , because he will claim that at all times he was acting under and pursuant to her authority, direction, and control. His claim will be that he had no intent to violate the statute, and was only following in good faith directives from his immediate supervisor.

On the other hand, the affidavit of John F. Royal, attorney for Defendant , (Exhibit D, Attached) indicates that her theory at trial will be that, if any crime was committed, it was committed by co-Defendant , as he was not working according to the directions and instructions which he received from her, and was not following the procedures and policies on which she had instructed him.

Under these circumstances, the Defendants can only receive fair trials with a severance.

II. DEFENDANTS ARE ENTITLED TO SEPARATE TRIALS WHERE ADMISSIONS ATTRIBUTED TO EACH WILL BE OFFERED INTO EVIDENCE, AND WHERE THESE ADMISSIONS CANNOT BE SUCCESSFULLY REDACTED TO ELIMINATE STATEMENTS PREJUDICIAL TO THE NON-DECLARANT, AND WHERE THESE ADMISSIONS CANNOT BE CROSS-EXAMINED BY THE NON-DECLARANT.

In this case, each defendant has allegedly made admissions to Investigator about the incident in question. These admissions are attached as exhibits A and B. The statements of each Defendant contain allegations which make reference to the other co-Defendant, and contain statements which tend to incriminate the non-declarant. These statements cannot be effectively redacted to delete references to the non-declarant, and they cannot be cross-examined by the non-declarant. Under these circumstances, severance should be granted.

The Michigan Supreme Court discussed the development of the law pertaining to the right of confrontation in the case of People v Banks, 438 Mich 408, 414-415 (1991), as follows:

> The Sixth Amendment of the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." This Sixth Amendment right is applicable to the states, Douglas v Alabama, 380 US 415; 85 S Ct 1074; 13 L Ed 2d 934 (1965), and the same right is guaranteed by Const 1963, art 1, §20.
>
> In California v Green, 399 US 149, 158; 90 S Ct 1930; 26 L Ed 2d

489 (1970), the United States Supreme Court explained that the Confrontation Clause

(1) insures that the witness will give his statements under oath thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

In Pointer v Texas, 380 US 400, 405; 85 S Ct 1065; 13 L Ed 2d 923 (1965), the Court observed:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

In Burton v United States, [391 US 123, 88 S Ct 1620, 20 LEd2d 476 (1968)], the Court held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially in-criminating unredacted confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant. In Burton, defendants Burton and Evans were tried jointly for armed postal robbery. A postal inspector, the government's witness, testified regarding an oral confession allegedly made by Evans, which inculpated both Evans and Burton. Evans did not testify. The trial court instructed the jury to disregard the confession in judging Burton's guilt or innocence and to consider it only for the purpose of deciding Evans' culpability. The jury found both defendants guilty. The United States Court of Appeals for the Eighth Circuit affirmed, but the United States Supreme Court reversed, stating:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.. . . Such a context is presented here, where the power-fully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. [Burton, supra, pp 135-136].

6 In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him . . . [Const 1963, art 1, §20.

The Michigan Supreme Court in Banks, supra, had to consider whether a process of redaction would suffice to protect the confrontation rights of a defendant who is incriminated by the out-of-court statements made by a non-testifying co-defendant.

The Court, returning "to the basic tenets of Burton", decided that:

> Because co-defendant statements are "inevitably suspect" because of the strong potential for blame shifting, Burton, supra, p 136, even redacted confessions like the one challenged here should be clothed with a presumption of unreliability. If a "substantial risk" exists that the jury, despite cautionary instructions, will consider a co-defendant's out-of-court statement in deciding the defendant's guilt, the statement-even through redacted to delete the defendant's name-will be rendered inadmissible at a joint trial. Burton, supra, p 126. Other independent evidence may, by necessity, have to be considered:
>
> > [T]he court must decide whether the statement incriminates the defendant against whom it is inadmissible in such a way as to create a "substantial risk" that the jury will look to the statement in deciding on that defendant's guilt. Such an assessment may require consideration of other evidence in order to determine whether mere deletion of the defendant 's name will be effective in making the statement non-incriminating as to him. But

consideration of the weight of independent evidence is both improper and unnecessary to determination of the Burton issue at the trial court level. [Hodges v Rose, 570 F2d 643, 647 (CA 6, 1978), cert den 436 US 909 (1978). See also Foster v United States, 548 A2d 1370 (DC, 1988) (and cases cited therein).

8 Whether or not the codefendant's statement is crucial to the prosecution's case-i.e., has a "devastating" effect on the defendant-bears on the harmlessness of a Burton violation, not the existence of such an error. Cruz v New York, n 7 supra, pp 191-192.

The policies guaranteeing defendants a fair trial in these situations is so strong that the Court of Appeals has vacated a conviction where the trial judge in a bench trial inadvertently referred to a co-defendant's confession in making his findings of fact! People v Spearman, 195 Mich App 434, 440-442 (1992).

In this case, the admission of Defendant 's statement into evidence at a joint trial that he was "being supervised by ....[that] did the evaluation....[and] that instructed him to do the moist hot

pack treatment," will have a devastating effect on Ms. 's right to obtain a fair trial. (Exhibit A).

Similarly, the admission of defendant 's statement into evidence that it was who applied the heating packs to the patient, that when the patient had complained, he had simply wrapped one more towel around the pack and re-applied it to the complainant's skin and kept it there for 5 to 6 minutes more, will have a highly prejudicial impact on Mr. 's right to a fair trial.

A separate trial is the only way to insure that each defendant receives a fair trial.

WHEREFORE, for all the above reasons, the Defendants respectfully request that their motion for separate trials be granted.

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Counsel for Defendant

DATED: August 7, 1995

STATE OF MICHIGAN

IN THE 35th DISTRICT COURT FOR THE TOWNSHIP OF PLYMOUTH

PEOPLE OF THE TOWNSHIP OF PLYMOUTH,

Plaintiff,

Defendant.
_____/

JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
615 Griswold St., Suite 1724
Detroit, Michigan 48226
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City Attorney
217 W. Ann Arbor Rd., Ste. 302
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(734) 453-7877
_____/

MOTION TO SUPPRESS THE RESULTS OF PRELIMINARY BREATH TESTING, MOTION TO DISMISS, AND MOTION FOR EVIDENTIARY HEARING

NOW COMES Defendant herein, by and through his attorney, JOHN F. ROYAL, and moves this Honorable Court to Suppress the Evidence of The Alleged Results of Preliminary Breath Testing, grant Defendant an Evidentiary Hearing, and dismiss this matter, for the following reasons:

1. The Defendant, is charged with one count of a violation of the Plymouth Township Ordinance prohibiting Minor in Possession of Alcohol.

2. The Defendant concedes that at the time of the incident in question, he was 20 and one-half years of age.

3. According to the police report, the prosecution intends to use as evidence during the

trial of this case the alleged results of a Preliminary Breath Test (PBT), which was allegedly administered to the Defendant at the scene, and which purportedly showed that the Defendant's blood alcohol was .018.

4. According to the police report, the Defendant was never observed, and there is no allegation, that the Defendant was at any relevant times operating a motor vehicle.

5. There are several reasons why the alleged results of the PBT cannot be used as evidence during the trial of this case.

A. First of all, Michigan statutes authorize the administration of a PBT only to a person who is suspected of operating a motor vehicle while either impaired or under the influence of alcohol. MCLA 257.625a(2). There is no statutory authorization to administer the PBT to any citizen under any other circumstances. For this reason, the administration of the PBT in this case was unlawful, and any alleged results must be suppressed.

B. Secondly, Michigan law specifically forbids the admission into evidence of the results of a PBT as part of the prosecution's case in chief. MCLA 257.625a(2)(b), and (6); People v Keskinen, 177 Mich App 312(1989). Results of a PBT can only be used by the prosecution as evidence to establish the legality of an arrest, or in rebuttal. Id. The policy behind these limitations on the admissibility of the PBT is that the PBT is a test which has not met the admissibility standards of Davis/Frye. People v Davis, 343 Mich 348 (1955), adopting Frye v United States, 293 F 1013 (DC Cir 1923). That is, the scientific reliability of the results of the PBT have not been sufficiently established to be scientifically reliable to have gained general acceptance in the relevant scientific field. Therefore, the alleged results of the PBT in this case cannot be used during the prosecution's case in chief.

C. Further, the Defendant contends that the alleged result of the PBT, .018, was

so low that it falls within the range of sampling error of the testing device because the instrument is not sensitive enough to reliably detect such minute amounts of blood alcohol as alleged in this case; in other words, the PBT result fails to reliably establish the actual presence of a measurable amount of alcohol within the body of the Defendant,

D. The Defendant also challenges the admission of the alleged PBT results into evidence in this case, and contends that the prosecution will not be able to establish the foundational elements necessary to support the admission of the PBT into evidence. Specifically, the Defendant alleges:

(i). The qualifications, training and certification of the person who administered the test were not in accordance with AC, R 325.2656(3);

(ii). The Plymouth Township Police Department has not sought or received approval from the Michigan State Police to use the PBT, as required by AC,R 325.2652.

(iii). The methods and procedures used in administering the PBT did not meet the standards as promulgated by the Michigan State Police for such tests. AC, R 325.2655(2)(1),(b)

(iv). The testing device used in this case was not properly inspected, certified, and checked for accuracy in accordance with the Rules of the Michigan State Police. AC R 325.2653(2); and AC R 325.2654(2).

(v). The defense requests that the prosecution be required to produce appropriate police PBT logs and records regarding the maintenance, verification, and repair to the PBT instrument used in this case, to substantiate the anticipated claim that the PBT in the case was performed properly and according to regulations.

E. The Defendant also contends that he was unlawfully compelled to take the

PBT by being told by the police officer that if he did not take it he would be arrested. He only took the test because of this coercion. Because his consent to take the test was not free and voluntary, the evidence obtained as a result was obtained in violation of _)____right to be free from unreasonable searches and seizures, and must be suppressed as a result. See attached Memorandum of Law, which is incorporated herein by reference.

6. An Evidentiary Hearing will be required to decide the issues asserted in this Motion. The Defendant requests that all police officers present at the scene be produced by the prosecution at the time and place set for an Evidentiary Hearing. especially any officers who can testify that they were in a position to observe the defendant during the fifteen minutes prior to the PBT.

7. According to the police report, other than the unlawfully obtained PBT results, there is no other evidence in this case to support the accusation that _____ committed the charged offense. Therefore, if the results of the PBT are suppressed, there remains no other admissible evidence establishing probable cause to prosecute _____ for MIP; this case must, therefore, be dismissed.

WHEREFORE, for all the above reasons, the Defendant requests that this Honorable Court grant his Motion to Suppress the Evidence of The Results of Preliminary Breath Testing (PBT),that an Evidentiary Hearing be scheduled, and that this matter be dismissed.

Respectfully submitted,

_____
JOHN F. ROYAL (P27800)

STATE OF MICHIGAN

IN THE 35th DISTRICT COURT FOR THE TOWNSHIP OF PLYMOUTH

PEOPLE OF THE TOWNSHIP OF PLYMOUTH,

Plaintiff,

Defendant.
_____/

JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
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Detroit, Michigan 48226
(313) 962-3738

City Attorney
217 W. Ann Arbor Rd., Ste. 302
Plymouth, Mi. 48170
(734) 453-7877
_____/

MEMORANDUM IN SUPPORT OF
MOTION TO SUPPRESS THE RESULTS OF PRELIMINARY BREATH TESTING,
MOTION TO DISMISS, AND MOTION FOR EVIDENTIARY HEARING

The Defendant contends, among other things, that he was unlawfully compelled to take the PBT by being told by the police officer that if he did not take it he would be arrested. He only took the test because of this coercion. Because his consent to take the test was not free and voluntary, the evidence obtained as a result was obtained in violation of_____right to be free from unreasonable searches and seizures, and must be suppressed as a result.

The conduct of the arresting police officers violated the Defendant's right to be free from unreasonable searches and seizures of his person and of a vehicle. U.S. Const. Ams. IV and XIV; Michigan Const. 1963, Art. 1. Sec. 11 The United States Supreme Court has made it emphatically clear that for a consent to search to be valid, it must be voluntary. In Florida v Bostick, 501 US 429, 115 LEd2d 389, 401, 111 S Ct 2382 (1991), the Court proclaimed:

> "Consent" that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse." Id.

Courts indulge every reasonable presumption against waiver of such a fundamental right. Cf., e.g., United States v Abbott, 546 F2d 883, 885 (10th Cir 1977).

In evaluating a police claim of consent, the court is to consider the totality of the circumstances. Schneckloth v Bustamonte, 412 US 218, 93 SCt 2041, 36 LEd2d 854 (1973). When the police claim an individual has consented to a warrantless search, the standard of proof is high:

> **[C]onsent must be proved by clear and positive testimony and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given... The burden for the prosecution is particularly heavy where the individual is under arrest.** Before a court holds that a defendant waived his protection under the Fourth Amendment "there must be convincing evidence to that effect."

People v Kaigler, supra, 368 Mich at 294, 295 (emphasis in original; cites omitted).

See also Bumper v North Carolina, 391 US 543, 548, 88 SCt 1788, 20 LEd2d 747, 802 (1968)("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given); Tillman, supra ("Consent must be proved by clear and positive testimony and must be unequivocally, specifically, and intelligently given, uncontaminated by any duress and coercion").

For all of these reasons, and for all of the other reasons set forth in the Motion to Suppress, the Defendant contends that the prosecution cannot establish the foundation required for the admission into evidence of the PBT results. He has a right to have an Evidentiary Hearing to support his contentions. People v Talley, 410 Mich 378, 389 (1981); People v Krulikowski, 60 Mich App 28 (1975).

WHEREFORE, for all the above reasons, the Defendant requests that this Honorable Court grant his Motion to Suppress the Evidence of The Results of Preliminary Breath Testing (PBT),that an Evidentiary Hearing be scheduled, and that this matter be dismissed.

Respectfully submitted,

_____
JOHN F. ROYAL (P27800)
Attorney for Defendant

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Defendant.
_____/

Assistant Prosecuting Attorney
1441 St. Antoine, 12th Floor
Detroit, MI 48226-2302
(313) 224-7753

_____/

MOTION TO SUPPRESS THE EVIDENCE INTENTIONALLY SEIZED PURSUANT TO A SEARCH WARRANT ISSUED BASED UPON AN AFFIDAVIT WHICH ON ITS FACE FAILED TO ESTABLISH PROBABLE CAUSE

NOW COMES the Defendant,, by and through his attorney, and moves this Honorable Court to Suppress the Evidence Intentionally Seized Pursuant to a Search Warrant Issued based Upon an Affidavit which on its Face failed to Establish Probable Cause, for the following reasons:

1. The Defendant is charged with one count of Possession With Intent to Deliver over 1000 Grams of Cocaine.

2. The conduct of the investigating police officers violated the Defendant's right to be free from unreasonable searches and seizures of his persons and of a residential premises. U.S. Const. Ams. IV and XIV; Michigan Const. 1963, Art. 1 Sec. 11 and MCLA 780.651 et seq.

3. The physical evidence in this case, specifically, eight plastic bags of suspected cocaine; several empty suspected narcotics wrappers; and proof of residency in the name of____, were seized by the investigating police officers, ostensibly pursuant to a combined Search Warrant and Affidavit, a copy of

which is attached hereto together with the Return, as Exhibit A. This Search Warrant was executed on November 29, 2005.

4. The Search Warrant in this case authorized the search of the premises described as follows:

> "The entire premises known as_____, Detroit, Michigan. Which is located in the City of Detroit, County of Wayne, and the State of Michigan."

5. The Search Warrant also authorized the search of a person described as follows:

"Seller's B/M, 30S, 5-10" 220-240 lb with a possible name of ____n."

6. The Search Warrant in this case authorized the officers to search for and to seize the following:

> "All Controlled substances, all monies, books, and records used in the connection with illegal Narcotic trafficking, all equipment and supplies used in the manufacture, delivery, sale or use of Controlled Substances, all firearms used in connection with the above described activities, all evidence of ownership, occupancy or control of the [sic]"

7. The Search Warrant and the supporting Affidavit were drafted, signed, and executed on November 29, 2006, by the affiant, Police Officer

8. The Search Warrant was purportedly authorized by Assistant Prosecuting Attorney and allegedly signed by 36th District Court Magistrate

9. The Affidavit submitted to obtain the Search Warrant consists of three paragraphs.

10. The first paragraph of the Search Warrant affidavit reads as follows:

> 1. On 11-28-2005 Affiant received information from a creditable and reliable informant. This CI stated to affiant that he/she knows there is a large amount of Cocaine at the above location which is being stored and sold at this location. The affiant has used this CI on over (3) occasion resulting in (3) arrest for VSCA with cases pending in 36th district and 3rd circuit court resulting in the confiscation of quantity's of Marijuana, Cocaine and firearms. Proving this CI is familiar with narcotics and its packaging. (**Exhibit A**, attached).

11. The second paragraph of the Search Warrant affidavit reads as follows:

> 2. On 11-29-2005 Affiant set-up a fixed surveillance on_____, and during the course of 20 minutes, Affiant observed at least 2 persons separately go to the above address, knock on the door engage in a short conversation with a person matching the above seller description, then the suspected buyer would stay outside and the above described seller returned and make a suspected narcotic transaction with the buyer in which money was exchanged for suspected Cocaine. Affiant has seen this type activity several times in the past, and finds this type of activity to be consistent with on going narcotic activity. (**Exhibit A**, attached)

12. The third paragraph of the Search Warrant affidavit reads as follows:

> 3. Based on the affiant's 11 years experience as a police officer in the City of Detroit, having been assigned to the narcotics division for 6 years, having been on the execution of over a hundred search warrant and being familiar with the narcotic trade and habits of its sellers and the above facts, wherefore the affiant having probable cause to believe that the above described items will be found on the premises by Narcotics Officer in the City of Detroit. (**Exhibit A**, attached)

13. The Search Warrant and the supporting Affidavit (Exhibit A) in this case fail to establish probable cause to search the premises in question, or to search the person of the Defendant; and failed to establish probable cause to believe that the items sought would be found in the premises identified to be searched. On its face, the Affidavit fails to allege sufficient facts within the knowledge of the Affiant to justify a conclusion that there is probable cause to believe that contraband is presently located in the premises to be searched, or on the person of the Defendant. The Affidavit contains unsupported conclusions and naked inferences drawn without specification of the underlying facts and circumstances, and therefore fails to establish probable cause for this search.

14. The Search Warrant and the supporting Affidavit (Exhibit A) fail to provide any significant information upon which the magistrate could determine the credibility and reliability of the Confidential Informant ("CI") . There is no allegation that any information previously provided by the CI had ever resulted in any convictions; and there is no allegation that any information previously provided by this CI

had been crucial in the arrest of any of the three people, or in the seizure of any of the alleged narcotics. There is no allegation concerning what experience supposedly qualifies the CI as "familiar with narcotics and its packaging." Given this paucity of information, the magistrate could only act as a "rubber stamp" for the conclusions of the Affiant, and could not perform the independent review of the Affidavit, which is crucial to his functioning as a Magistrate.

15. Further, the affidavit fails to allege how the CI supposedly "*knows* there is a large amount of cocaine at the above location which is being stored and sold at this location."(emphasis added)(Ex. A, parg. 1). There is no claim that the CI is repeating recently obtained information. There is no assertion as to whether the CI has personal knowledge, or is operating based on second or third hand rumors. The CI could merely be repeating triple hearsay, or a mere speculation in the street.

16. Further, the affidavit fails to allege any date or even a time frame within which the CI supposedly obtained the above information which was allegedly passed on to the affiant. By using the "present tense," the affiant obfuscates the issue of when he CI supposedly obtained this information; It could have been yesterday, last week, last month, or last year. (Ex. A, parg. 1).

17. Further, the allegations concerning the observations by the Affiant during one 20 minute surveillance of the target premises fails to substantiate the allegations of illegal drug trafficking, except that two people were supposedly seen going to the door of the premises and speaking to an occupant. There is no allegation that either of these two people was stopped to see if they had drugs on them after going to the target premises. (Ex. A, parg. 2).

18. . The officers executing this search warrant cannot claim to have relied upon it in "good faith" because the "good faith" doctrine is inapplicable to a search undertaken under the purported authority of a "bare bones" search warrant, which on its face fails to establish probable cause.

19.. The issuance and execution of the Search Warrant in this case violated U.S. Const. Ams. IV and XIV; Mich. Const. 1963, Art. 1, Sec. 11; and MCLA 780. 651 et seq.

20. The conduct of the affiant and the other investigating police officers was, on its face, clearly in violation of the constitutional rights of the Defendants. Suppression of all the physical evidence seized is mandated by law.

21. This Motion is supported by a Memorandum of Law in Support of Motion Suppress the Evidence Intentionally Seized Pursuant to a Search Warrant Issued based Upon an Affidavit which on its Face failed to Establish Probable Cause, which is attached hereto, and is incorporated herein by reference.

WHEREFORE, the Defendant requests that this Court grant his Motion to Suppress the Evidence, and that an Evidentiary Hearing be held at which the following witnesses should be called to testify: The CI; P.O.

Respectfully submitted,

_____

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Defendant.
_____/

Assistant Prosecuting Attorney
1441 St. Antoine, 12th Floor
Detroit, MI 48226-2302
(313) 224-7753

_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS THE EVIDENCE INTENTIONALLY SEIZED PURSUANT TO A SEARCH WARRANT ISSUED BASED UPON AN AFFIDAVIT WHICH ON ITS FACE FAILED TO ESTABLISH PROBABLE CAUSE

Statement of Facts

The facts are those stated in the attached Motion to Suppress the Evidence and Motion for Evidentiary Hearing, which is incorporated herein by reference.

This is Motion to Suppress all evidence allegedly obtained pursuant to the search of 14227 Corbett St., on November 29, 2006. Further facts will be referenced in the text of this Memorandum of Law, as needed.

Arguments

I. THE AFFIDAVIT SUBMITTED TO OBTAIN THE SEARCH WARRANT ON ITS FACE FAILED TO ESTABLISH PROBABLE CAUSE.

A. Introduction

Both the State and Federal Constitutions protect the right of the Defendant to be free from

unreasonable searches and seizures. U.S. Const., Ams. IV, XIV; Mich Const 1963, Art 1, Sec. 11. These protections are fundamental to preserve citizens' rights to privacy, and to protect the sanctity of the person, of the home, and of private property. The Honorable Damon J. Keith, writing for the United States Court of Appeals for the Sixth Circuit in United States v Radka, 904 F2d 357, 360-61 (6th Cir 1990) summarized the fundamental principles of search and seizure law:

> A central tenet of the fourth amendment is the requirement that searches and seizures be conducted pursuant to warrants issued, based on probable cause, by a neutral and detached magistrate. [citation omitted] ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.") A warrant issued by a neutral and detached magistrate guarantees individuals freedom from capricious governmental interference. [citation omitted]. ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable [people] draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."). The probable cause standard further protects against unjustified government intrusion. [citations omitted].

In Michigan, adherence to these principles is both constitutionally and statutorily required. People v Sloan, 450 Mich 160, 166-167 (1995). Further, information which is attributed to unnamed informants must meet a strict statutory standard. MCLA 780.653 states in relevant part:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains l of the following:
>
> ...
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

See also: People v Sherbine, 421 Mich 502, 508-512 (1984).

Probable cause to search consists of facts and circumstances that would warrant a person of reasonable prudence to believe that the items sought are in the stated place. People v Russo, 439 Mich 584, 606-607 (1992); People v David, 119 Mich App 289, 292-293 (1982); MCL 780.652; MSA 28.1259(s). In addition, a Michigan statute serves to clarify and enforce the constitutional

commands of US Const., Am. IV and Mich Const 1963, Art 1 §11, as follows:

> A search warrant shall be directed to the sheriff or any peace officer, commanding such officer to search the house, building or other location or place, where any property or other thing for which he is required to search is believed to be concealed. Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized. The [warrant or affidavit attached thereto] shall also state the *grounds or the probable or reasonable cause for its issuance*[.] MCLA 780.654; MSA 28.1259(4) (emphasis added).

Thus, a finding of probable cause must be warranted by the *facts* alleged in the affidavit. And in assessing a magistrate's conclusion that probable cause existed, so as to authorize the issuance of the search warrant, the reviewing court examines the warrant and underlying affidavit in a common sense and realistic manner. In so doing, the court is bound by the facts that were presented to the magistrate in the four corners of the affidavit. Sloan, supra, 450 Mich at 180; People v Sundling, l53 Mich App 277, 285-86 (l986); People v Gleason, 122 Mich App 482, 489 (1983). Upon review of the affidavit the court is charged with determining the sufficiency of the information and whether it amounts to probable cause. To enable the magistrate to determine probable cause, the affidavit must provide sufficient factual information from which the magistrate may personally draw the appropriate inferences and form the necessary conclusions. Giordenello v United States, 357 US 480 (1958). The affidavit may not be "conclusory" or "bare bones." United States v Weaver, 99 F3d 1372, 1379-80 (CA6 1996)(Exhibit B). That is, as then-Justice Rehnquist stated for the Court in Illinois v Gates, 462 US 213, 239, 103 S Ct 2317, 76 LEd2d 527, 549 (1983):

> Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.
>
> Moreover,
>
> In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. Id.

The affidavit must set forth sufficient information to justify a finding that "probable cause

exists," which means, as defined in People v Russo, 439 Mich 584, 606-607 (1992), "when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched. People v Sundling, [153 Mich App 277,] at 286 [(1986)]; MCL 780.652; MSA 28.1259(s)." The standard for review of a decision to issue a search warrant is whether there is "a substantial basis" for the conclusion of the issuing judge "that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" Russo, supra, at 604, quoting Gates, supra.

The information contained in the Affidavit in this case is wholly lacking in particularized facts and circumstances that would enable the magistrate to make an independent probable cause determination. The Affidavit in this case relies heavily on information from a CI, who allegedly supplied information regarding_____. However, the Affidavit fails to sufficiently establish the reliability of the alleged CI. Furthermore, the follow up investigation, which was ostensibly intended to corroborate the informant, was wholly inadequate.

B. The affidavit failed to allege sufficient facts to establish the credibility and reliability of the confidential informant.

Paragraph 1 of the Affidavit consists primarily of a recitation of information allegedly obtained from a CI. In analyzing information supplied by a CI, for the purpose of evaluating probable cause for the issuance of a search warrant, the Supreme Court in Gates, supra, decided to abandon the prior "two-pronged" approach, and substituted a "totality of the circumstances" analysis. However, the Court specifically noted, Id., at 230, that "...[A]n informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report."

The Michigan Supreme Court in Sherbine, supra, at 510, discussed the requirement that the informant's credibility be established by the affidavit:

> An informant's credibility must be shown by an assertion of facts tending to support a finding of credibility. While proof of credibility may be accomplished

> in different ways, [footnote omitted] facts tending to show credibility must appear on the face of the affidavit.

In evaluating the veracity of an informant, the courts usually look at either the inherent credibility of the informant (often established by a past track record of providing verifiable information) or the reliability of the information provided on a particular occasion (often established by an investigation which corroborates the information provided). Here, the Affiant sought to rely both on the alleged skimpy track record of the informant, and upon meager, additional investigation.

With respect to the informant's track record, the Affidavit only alleges as follows:

> The affiant has used this CI on over (3) occasion resulting in (3) arrest for VSCA with cases pending in 36th district and 3rd circuit court resulting in the confiscation of quantity's of Marijuana, Cocaine and firearms. Proving this CI is familiar with narcotics and its packaging. (Exhibit A, parg. 1)

Importantly, there is no allegation here that any one has ever been convicted based upon information from this CI. Further, there is no claim that the informant's information was important or critical to any of the prior arrests or seizures, or even that the informant was able to predict where the drugs would be found.

The Honorable Horace W. Gilmore of the United States District for the Eastern District of Michigan, in United States v Bryant, 951 F Supp 674, 679 (ED Mich 1997), (Exhibit C) evaluated and found wanting a search warrant containing considerably more detail about the "track record" of a known confidential informant than is present in the instant case. Judge Gilmore first determined that the allegations concerning the presence of contraband on the premises were lacking in sufficient detail, and noted that, in that case, there was no suggestion that there had been any attempt to conduct an investigation to corroborate the information allegedly supplied by the informant. The court then turned to the issue of the "track record" of the informant and held as follows:

> Given the lack of relevant detail and meaningful corroboration, the question thus becomes whether the affidavit will stand on the single fact that it states that the informant '"has on at least five (10) occasions provided information to the Detroit

> Police and ATF,'" that "'[i]n all instances the information provided by this source was investigated and found to be true,'" and that "'[t]he information that was provided by this source led to the seizure of firearms and narcotics.'" Although these statements as to the informant's reliability are more substantive than those in the affidavit reviewed in [United States v] Weaver, [99 F3d 1372 (6th Cir 1996)], this Court cannot find, under totality of the present circumstances, that such a statement provides a substantial basis for a finding of probable cause. The Sixth Circuit has shown that more must be required. Bryant, supra,. at 679

In so holding, Judge Gilmore followed the United States Court of Appeals for the Sixth Circuit decision in Weaver, supra, at 1375. (Exhibit B). There, the affidavit submitted in support of a search warrant made the following allegations concerning a known confidential informant:

> [A]ffiant received information from a reputable and reliable person, whose name and identity have been disclosed to the Judge to whom this application is made, that Affiant verily believes, and accordingly represents to the Court, that the said informer is truthful, reliable and credible, and that the information so given is accurate and reliable, because: (1) the said informer appears to have intelligence and unimpaired physical senses; (2) the said informer appears to affiant to have sufficient personal knowledge or familiarity or experience with the contraband substance herein mentioned to be able to identify the same by sight, smell and other senses, insofar as such identification can usually be made by the human physical senses unaided by laboratory analysis; (3) there has been a previous occasion, or occasions, on which the same informer has given information of violation of law of the state, which information thereafter was found to have been accurate and reliable; ... Affiant knows of no reason why said informer would falsify or fabricate any of the information given. Weaver, supra, at 1375-76

The information provided in the instant Affidavit is much more sparse concerning the track record of the informant than in either Weaver, supra, or Bryant, supra.. Since the more detailed information supplied to the magistrates in both of these cases was found insufficient by the federal courts to establish the reliability of the informants, so, too, the Affiant's attempt in the instant case to establish the credibility and reliability of the CI should be found wanting by this court.

The Affidavit in this case does not even meet the "totality of the circumstances" approach in its attempt to establish the credibility of the CI. The Affidavit alleges only that the CI has been "used on over than (3) occasions resulting in (3) arrest for VSCA with cases pending....resulting in the confiscation...." of illegal drugs. Importantly, nowhere does this Affidavit explain what is meant

by “used.” The Affidavit does not even claim that the CI’s information was necessary, essential, or critical on any of the prior occasions in which this CI was "used". Often, investigations involve the receipt of information from several sources. Just because a particular informant has been "used" on a couple of prior occasions, does not mean that the information provided by that informant was essential or necessary to any seizures which took place. Obviously, if the CI was only “utilized” on these other occasions in a minor capacity, or if the information leading to the actual confiscations was provided by other sources, then there would be no basis for the magistrate to conclude that this CI is a credible and reliable source of information.

The allegations in this Affidavit simply fail to rise above the level of the type of conclusory statements criticized in Sherbine, supra, in which the Court held, at 511, n. 16:

> Acceptance of such a conclusory statement by an issuing magistrate would be an abdication of his judicial function. In People v Zoder, 15 Mich App 118 (1968), the Court said"
>
> > "The vice of stating a 'mere conclusion' and in failing to state the underlying circumstances upon which the conclusion is based is that without a statement of the underlying circumstances the magistrate must accept the inferences drawn by the affiant rather than make his own independent evaluation." Zoder, supra, p 121.

In light of the failure in this Affidavit to even allege a causal link between the “use” of the CI, and the “confiscation” of unspecified “quantities” of drugs and firearms, the Affidavit here is not substantively different from that struck down in People v Atkins, 96 Mich App 672, 679 (1980), where there was no allegation that the previous information provided by the informant was helpful, or even accurate. For these reasons, the bare statement that there were narcotics seizures on a few prior occasions in which the informant was “used,” fails to provide the magistrate with the quality of information that would be needed to form an independent judgment as to the reliability and credibility of the informant. The use of this conclusory language turned the magistrate into a mere rubber stamp for the affiant.

A similar question was considered in People v Horton, 74 Ill App 3rd 293, 30 Ill Dec 191, 392 NE2d 946 (1979) (Exhibit D), where the search warrant affidavit said that "said confidential source in the past two weeks furnished information to your affiant which has led to two cases wherein arrests are pending." Id., 392 NE2d at 948. This vague language necessarily required the Court "to speculate whether the information given was verified or otherwise proved to be accurate." Id. Thus, the search warrant was invalid. Similarly, the statement in the instant Affidavit that the CI has been previously "used", resulting in three arrests and confiscation of drugs" is just the type of conclusory allegation which is insufficient to establish the reliability of the informant.

Where, as here, an informant's information leads to arrests, but not convictions, the Courts have found such allegations insufficient to establish the informant's reliability. In Commonwealth v Melendez, 407 Mass 53, 551 NE2d 514, 517-518 (1990) (Exhibit E), the informant had, according to the Affidavit, provided information which led to the arrests of two persons, which cases were still pending in Court at the time the Search Warrant was issued. The Supreme Judicial Court of Massachusetts found this allegation to be insufficient evidence of reliability:

> The fact that the informant gave information on one occasion in the past which led to the arrest of two individuals is insufficient to satisfy the veracity test. Commonwealth v Rojas, 403 Mass 483, 486, 531 N.E.2d 255 (1988).
>
> ...
>
> [w]e do not think that the affidavit sufficiently established the informant's veracity. Standing alone, the aforementioned information did not furnish an independent basis for deeming the informant reliable.

The Melendez decision followed the earlier decision of Commonwealth v Rojas, 403 Mass 483, 531 NE2d 255 (1988) (Exhibit F). In that case, an allegation that an informant's information had previously led to the arrest of one person was deemed insufficient to justify the issuance of a search warrant. The Court reasoned as follows:

> A naked assertion that in the past the informant had provided information which led to a prior arrest is insufficient by itself to establish an informant's veracity. Rojas, supra, at 257.

Subsequent to Melendez, the Supreme Judicial Court of Massachusetts decided Commonwealth v Mejia, 411 Mass 108, 579 NE2d 156 (1991) (Exhibit G). In that case, the Affidavit submitted in support of a request for a search warrant contained an allegation that a CI had previously given information leading to the arrests of three people, whose names were specifically identified in the affidavit. Mejia held that even three arrests of identified suspects, without convictions, did not create a sufficient level of self-verification to justify the issuance of the search warrant. Mejia, supra, at 579 NE2d 159. For these same reasons, the allegations in the instant affidavit are not sufficient to establish the credibility or the reliability of the CI.

Similarly, Commonwealth v Chatman, 418 A2d 582, 585 (Pa Super., 1980) (Exhibit H), discussed the rationale for disregarding arrests which have not resulted in convictions in determining the reliability of an informant:

> Instantly, we are of the opinion that the unadorned allegation that the informant's prior information led to arrests does not permit the magistrate to discharge his constitutional function of exercising an independent and informed judgment. See Commonwealth v Bailey, 460 Pa. 498, 333 A.2d 883 (1975).
>
> ...
>
> An affidavit, such as in the case at bar, which merely states that the informer supplied prior information leading to the arrest of two individuals, cannot suffice to establish credibility because there is no indication that the "information proved to be correct." In other words, as Professor LaFave has explained: "[t]he mere statement that the police decided to arrest because of what this informant said on a prior occasion does not indicate whether that decision was lawful or whether anything learned incident to or following the arrest verified what the informant had said." 1 W. R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.3 at 514 (1978).

The same conclusion was reached in United States v Davis, 387 A 2d 1091, 1094 (D.C. App 1978), (Exhibit I), where the Affidavit alleged that the CI had previously supplied information which had "led to the arrest of one perpetrator", whose case was "awaiting Grand Jury action."

Further, the Affidavit in this case does not mention whether or not this CI has ever provided

information which did not turn out to be accurate. Compare with: United States v Ayers, 924 F2d 1468, 1478 (9th Cir 1991) and United States v Morales, 923 F2d 621, 623 (8th Cir 1991), in each of which the Affiant was able to assert that the CI had never provided any incorrect information.

For these reasons, the allegations contained in the Affidavit purporting to establish the reliability and credibility of the CI, fall woefully short of constitutional and statutory standards. The alleged "track record" of this CI is simply insufficient to justify a determination that a residential premises should be searched based primarily upon this CI's word. Therefore, the Affidavit in question fails to establish the credibility and reliability of the informant. The magistrate erred in issuing a search warrant based upon the unsupported and conclusory statements of the Affiant as to the alleged reliability of this CI. For these reasons alone, the Motion to Suppress should be granted.

C. The investigation conducted by the Affiant to follow up on the information allegedly provided by the SOI was wholly inadequate to provide probable cause.

Assuming, arguendo, that this Affidavit was sufficient to establish the credibility of the CI, the Affidavit still failed to provide sufficient information to establish probable cause. The CI allegedly told the Affiant that s/he "knows there is a large amount of Cocaine" inside the target location "which is being stored and sold at this location."

The Sixth Circuit pointed out in Weaver, supra, (Ex. B), that "weak factual information" concerning an informant "may be bolstered if the authorities undertook probative efforts to corroborate an informant's claims through independent investigations." Id. at 1379 [citation omitted]. The Court then noted that, in Weaver, other than confirming that the electric account for the house was in the name of the defendant, the affiant in that case performed "no substantive independent investigative actions to corroborate his informant's claims...." Id. The Sixth Circuit deemed the discovery of the name of the electric account holder as insignificant, as it is simply an "innocent detail." Id. The Sixth Circuit then concluded as follows:

> Thus, even assuming the reliability of ... [the] informant, our review of this affidavit reveals a paucity of particularized facts indicating that a search of the Weaver residence "would uncover evidence of wrongdoing." Gates, 462 U.S. at 236, 103 S.Ct. at 2331. In sum, we hold that, when viewed in the totality of the circumstances, this "bare bones" affidavit failed to provide sufficient factual information for a finding of probable cause. Weaver, Id., at 1379-1380.

Judge Gilmore reached the same decision in Bryant, supra. (Exhibit E). In Bryant, as in Weaver, more independent investigation was needed to corroborate the information from the informant before a search warrant could properly issue. Judge Gilmore's Opinion in Bryant is particularly significant:

> [T]he facts provided with regard to possession are extremely bare. The only detail provided pertains to the types of firearms that were allegedly seen in Defendant's possession. Under Weaver, this degree of detail must be viewed as wanting. In Weaver, the affidavit simply stated that the informant observed the defendant in possession of marijuana. 99 F.3d at 1375-76. Again, the court held that the affidavit contained insufficient detail and could have provided, for example, a description "of the marijuana and how it was maintained, identifying aspects of the location in the residence where the marijuana or distribution paraphernalia was seen or kept. [or] a description of [the defendant]." 99 F.3d at 1378 n. 4. Given that, this court must find that the statement that the affiant in this case had observed Defendant "in possession of a .380 caliber handgun and a 9mm handgun at his home" is lacking in relevant detail. Bryant, supra, at 678-679.

In the instant case, the only independent investigation which is described indicates that the Affiant conducted a fixed surveillance of the premises for 20 minutes on November 29, 2005, earlier on the same day he obtained the Search Warrant and that the raid took place. The affiant claims he made the following observations during this surveillance:

> Affiant observed at least 2 persons separately go to the above address, knock on the door engage in a short conversation with a person matching the above seller description, then the suspected buyer would stay outside and the above described seller returned and make a suspected narcotic transaction with the buyer in which money was exchanged for suspected Cocaine. Affiant has seen this type activity several times in the past, and finds this type of activity to be consistent with on going narcotic activity. (**Exhibit A**, parg. 2,)

However, the Affidavit does not specify what the affiant actually saw which led him to

conclude he was observing narcotics transactions. The affiance claims he observed "suspected Cocaine." This is a conclusion. There is no factual description of exactly what the Affiance saw which led to this conclusion. Importantly, the Affidavit does not allege that the Affiant stopped any of the individuals who went to the house or their motor vehicles and searched them to determine whether or not they had illegal narcotics on them. The Affidavit does not even allege that the Affiant ran a check on the license plate numbers observed to see if any could be connected to persons with criminal histories for narcotics.

The law does not provide that residential premises may be searched simply because they have numerous visitors. There are many types of lawful casual commerce that law abiding citizens might engage in which would explain the observance of frequent visitors to a residential premises. A homeowner who sells Avon, Amway, or Shaklee, or similar products which are sold person to person instead of through stores, could easily have frequent traffic. A person who bakes and sells homemade goods, or trafficks in baseball cards or other collectibles, or who has frequent garage sales, might have frequent visitors. To accept the assertions in this Affidavit as sufficiently corroborative of the information allegedly provided by the informant would effectively eliminate the magistrate's discretionary role in favor of the overzealous police officer's unrestrained pursuit of illegality in the often competitive enterprise of ferreting out crime. The result is the invasion of residences and the humiliation of citizens because they have frequent visitors under circumstances that the police deem suspicious.

The Michigan Court of Appeals settled this issue in People v Broilo, 58 Mich App 547, 550-51 (1975). In that case, as in this one, the Affidavit alleged that the affiant had observed an unusual number of people going to and from the premises. The Court dismissed this allegation:

> This type of information in affidavits originated during the prohibition era and it is well settled that there must be something more than the mere fact people were coming and going in order to give reasonable cause to believe

> the criminal activity is continuing and presently occurring. Such additional evidence could be information or suspicious actions of the parties. But in the instant case there were no averred intervening facts establishing probable cause to believe that illicit drug deliveries were continuing when the search warrant was issued. People v Ziamkowski, 247 Mich 629 (1929); People v Wright, [367 Mich 611 (1962)]

The Colorado Supreme Court found insufficient probable cause in a search warrant affidavit considerably more detailed than the one at issue here in People v Titus, 880 P2d 148, 151-52 (1994) (Exhibit J). Among the allegations that the court found insufficient to establish probable cause for issuance of a search warrant were observations of many short visits to the house over a month-long period made by unknown individuals. In finding this information insufficient, the court followed the leading Michigan case of Broilo, supra, and noted that traffic to and from Titus' house did not establish probable cause in the absence of evidence linking Titus' visitors to prior drug offenses or other illegal activity. Id. At 151.

It is well-settled that "the affidavit must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or beliefs." People v Landt, 188 Mich App 234, 242 (1991), rev. oth. grnds., 439 Mich 866 (1991) quoting from People v Rosborough, 387 Mich 183, 199 (1972). In this case, the Affiant called upon the magistrate to accept his *suspicions* without giving the magistrate the necessary facts to make an independent assessment. Our Supreme Court has held:

> [A] magistrate abdicates his judicial function regarding search warrants when he only accepts the affiant's conclusory statements: "The vice of stating a 'mere conclusion' and in failing to state the underlying circumstances upon which the conclusion is based is that without a statement of the underlying circumstances the magistrate must accept the inferences drawn by the affiant rather than make his own independent evaluation [internal citations omitted.]"
>
> Sloan, supra, 450 Mich at 170.

In other words, the Affiant here offered nothing but suspicions. The Affiant thereby failed to satisfy the essential requirement of an affidavit and so the magistrate was forced to abdicate her

independent judicial function. To find that the allegations in this Affidavit support a belief that the contraband will probably be found in the place to be searched, would require the magistrate to make a leap of faith. As the Oregon Supreme Court aptly held in Oregon v Carter, 316 Or 6, 13, 848 P2d 599 (1990) (Exhibit K):

> A fact that merely supports an inference that some other fact is possible—as one among the range of many other and different possibilities—does not support an inference that any specific one of the possible facts is itself probable. Probable cause is necessary to support a warrant, not merely one possibility, among many.

Thus, where one possible inference from an observation of frequent foot traffic would be that criminal activity is afoot, that mere possibility does not suffice to establish probable cause. Cf. People v Young, 89 Mich App 753, 762-63, 282 NW2d 211 (1979).

In Paragraph 3 of the Affidavit (Ex A), the Affiant also describes his training and experience as a police officer, especially in the area of narcotics investigation. While an officer's experience can lend credibility to inferences he draws from facts lain out in an affidavit, his inferences do not carry water in the absence of a correlation made between his inferences and those facts. Thus, while it has been found that "an affiant's representations in a search warrant that are based upon the affiant's experience can be considered along with all the other facts and circumstances presented to the examining magistrate in determining probable cause," People v Darwich, 226 Mich App 635, 639, 575 NW2d 44 (1998), an officer is still "obliged to articulate how [what] he observed suggested, in light of his experience and training, an inference of criminal activity." People v LoCicero, 453 Mich 496, 505, 556 NW2d 498 (1996).

The Affiant in this case did not articulate how, if at all, his training and experience led to a belief that the observed frequent foot traffic necessarily indicated that narcotics trafficking was afoot. As in LoCicero, the Affiant here "did not explain how his previous training and experience led to this conclusion." Id. at 507. He did not allege expertise in the identification of narcotics, but

more importantly, *he did not allege to have actually seen any drugs*. Without an explanation of how his years of training and practice fortify these suspicions, the magistrate can at most conclude that the police officer in this case has been forming suspicions for many years, and has moreover been trained to do so. Further, because the facts *themselves* are missing together with the Affiant's analysis of them, this Affidavit attempts to meet its burden as if carrying water with a bottomless bucket.

By the same token, the affidavit cannot compensate for what it lacks in facts developed by investigation—namely, experience used to analyze facts for the purpose of drawing reasonable conclusions—by providing an isolated reference to the officer's experience. A magistrate may not be asked to defer to a hunch on the basis that the affiant is a police officer. It is the magistrate's evaluation of the facts, as opposed to a policeman's unsubstantiated beliefs, that may alone determine the existence of probable cause. People v Landt, supra. This Affidavit is inadequate because it asserts a *suspicion* that narcotics transactions were taking place. That is all. The Affiant's surveillance, which was supposed to attempt to corroborate the information from the CI, only succeeded in underlining that the Affiant suspects drugs will be found in the premises; it did not establish facts which the Magistrate could properly rely on.

In sum, the Affidavit in this case failed to supply the magistrate with the type of factual information he or she would need in order to form an independent judgment as to the credibility and reliability of the CI. The use of conclusory language and unsubstantiated assertions turned the magistrate into a mere rubber stamp for the police. The magistrate may not simply ratify the conclusions or beliefs of the Affiant. It is rather the responsibility of the affiant to set forth in detail the alleged observations that led to the formation of any conclusion or belief. That was not done here. Therefore, this search warrant was improperly issued upon mere speculation concerning the credibility and reliability of the CI, as opposed to probable cause. The magistrate was not justified

in relying on this Affidavit to issue a warrant for the search of 4832 Hurlbut. The Motion to Suppress must be granted.

D. The failure to specify when or how the CI obtained the information s/he provided to the Affiance fatally undermines the Search Warrant.

The CI allegedly told the Affiant that s/he "knows there is a large amount of Cocaine" inside the target location "which is being stored and sold at this location." There is no allegation as to how or when the CI came up with this information. There is no allegation the CI was inside the premises and has personal knowledge; there is no allegation this information was told to the CI by someone else. No time frame is alleged regarding when the CI obtained this information. These allegations are completely inadequate to support a finding of probable cause.

The information supplied by the confidential informant in Weaver, supra, (Exhibit B) was similarly vague and indefinite. The informant there allegedly had been inside the home of Mr. Weaver within three days prior to the submission of the affidavit to the magistrate, and had personally seen the defendant in possession and control of a quantity of marijuana. It was further alleged that this quantity of marijuana was there "expressly for the purpose of unlawful distribution." Weaver, supra, 1375-1376. The Sixth Circuit pointed out that very few facts were alleged to support these claims, and characterized the informant's report as providing "weak factual information" in support of probable cause. Id. at 1379. In rejecting this Affidavit as insufficient, the Court noted that it would have been easily possible for the affiant to provide more detailed factual information. The Court gave specific examples of additional information that could have been provided:

> For instance, a description of the marijuana and how it was maintained, identifying aspects of the location in the residence where the marijuana or distribution paraphernalia was seen or kept, a description of Weaver, information on the distribution operation, etc. could have been elicited from the informant, either at the time of this transaction or over the course of a surveillance.
> Weaver, supra, at 1378 n. 4

Further, the use of the "present tense" necessarily leads to uncertainty as to the time when

the CI allegedly obtained his/her information.Without any allegation of a time frame, the magistrate could not possibly have determined whether the information provided by the SOI was stale or not. The courts have frequently criticized such "present tense" search warrants. United States v Boyd, 422 F2d 791 (6th Cir 1970); Rosencranz v United States, 356 F2d 310 (1st Cir 1966); United States v Elliott, 576 FSupp 1579 (SDOh 1984). The Sixth Circuit in Boyd, supra, at 792, adopted the classic statement of the law on this point found in Rosencranz, supra, at 317.

> [S]uppose a commissioner, on the basis of an affidavit like that in this case, were to infer that both affiant's information and observation were recent, while at a hearing on a motion to suppress, affiant states that both information and observation were several months old. There would, in fact, have been no basis for issuing the warrant, and yet the affidavit would have been accurate and the affiant would be in no danger of prosecution for its falsity. To create the possibility of ancient information parading beneath the protective mask of a bland, 'present tense' warrant would not, in our opinion, be in the interests of proper law enforcement or justice."

For this reason alone, the information allegedly supplied by the CI should be completely disregarded in determining whether or not this Affidavit established probable cause.

E. The Affidavit failed to provide a reasonable basis for the belief that drugs or other contraband are presently located at the premises to be searched.

Probable Cause for the issuance of a search warrant must exist at the time the warrant is issued. Sgro v United States, 287 U.S. 206 (1932). Further, Maryland v Garrison, 480 US 79, 84, 94 LEd2d 72, 107 S Ct 1013 (1987), reiterated the long standing principle of constitutional law that: "the scope of a lawful search is 'defined by the ... places in which there is probable cause to believe that [the object of the search] may be found." Cf. People v Mackey, 121 Mich App 748 (1982). In this case, the affidavit failed to provide any reasonable basis for a belief that the sought after contraband can presently be found at the premises to be searched.

As argued supra, there are no allegations as to how or when the CI obtained the information supposedly supplied to the Affiant. It cannot be determined if the CI claimed to speak

from personal knowledge, or based on hearsay or rumor. Further, there is no allegation as to how recently the CI obtained his/her information. It could have been yesterday, last week, or last month. Further, as argued supra, there is no allegation of fact as to the observations supposedly made by the Affiant during his 20 minute surveillance which led him to conclude he was observing narcotics transactions. Without the alleged information from the CI, and without the alleged surveillance of the Affiant, no factual allegations remain.

The Sixth Circuit has held that where, as here, a warrant fails to provide particularized facts of alleged wrongdoing in a private home and substitutes "boilerplate" language, the warrant will be suppressed. Weaver, supra, at 1380. In this case, no concrete information was provided to the magistrate to support a reasonable belief that the items to be seized could be found inside the premises to be searched *at the time the Search Warrant was presented for authorization*. Thus, the Application completely failed to establish a temporal nexus between the sought after contraband and the premises to be searched. Here, as in Weaver, supra and in United States v Schultz, 14 F3d 1093, 1097 (6th Cir 1994), the search warrant on its face failed to establish probable cause, and was improperly issued and executed. For all these reasons, the Motion to Suppress should be granted.

II. THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT SAVE THIS SEARCH WHERE A REASONABLY WELL-TRAINED OFFICER WOULD HAVE KNOWN THAT THE SEARCH WARRANT AFFIDAVIT, ON ITS FACE, FAILED TO ESTABLISH PROBABLE CAUSE.

The "good faith" exception recently adopted in Michigan, People v Goldston, 470 Mich 523 (2004), does not save this search. The "good faith" exception does not apply where, as here, the officer's reliance on the warrant was not objectively reasonable. A reasonably well-trained officer would have known that this search warrant application failed to establish probable cause, and was therefore illegal, despite the magistrate's authorization. Thus, the officer could not have been acting in "good faith," and the exception does not save this search. Goldston recognizes and adopts the

limitations on the application of the "good faith" exception as set forth in United States v Leon, 468 US 897 (1984). Goldston supra, at 531, explains the limited scope of the doctrine:

> The U.S. Supreme Court [in Leon] concluded that the exclusionary rule should be employed on a case-by-case basis and only where exclusion would further the purpose of deterring police misconduct. The Court emphasized, however, that a police officer's reliance on a magistrate's probable cause determination and on the technical sufficiency of a warrant must be objectively reasonable....
>
> Further, the Court stated that the good-faith exception does not apply where the magistrate wholly abandons his judicial role or where an officer relies on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.. [footnote omitted]; [Leon] *Id.* at 923, quoting Brown v Illinois, 422 US 590, 610; 95 S. Ct 2254; 45 L Ed 2d 416 (1975) (Powell, J., concurring in part).

Because the "good faith" exception is new to Michigan, there is no case law applying the doctrine in this state. However, the Federal courts have had ample experience in examining various fact situations in order to decide when the "good faith" doctrine is, and is not, applicable. For example, both United States v Weaver, 99 F3d 1372, 1380-1381 (6th Cir 1996) and United States v Bryant, 951 F.Supp, 674, 679 (E.D. Mich 1997), refused to uphold the search warrants in question based upon the "good faith" doctrine, because, in each case, "a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization. .... Leon, [supra]." *Bryant*, supra, at 679. Therefore, the "good faith" exception as recently adopted in this State in Goldston, does not save this search.

Conclusion

Inconclusive allegations attributed to an unnamed informant of unknown credibility and reliability and an inconclusive investigation were thrown together by the affiant in this case. An insufficient basis was established for the conclusion that the contraband sought would probably be found in the place to be searched. This Search Warrant was issued based upon unsubstantiated allegations - upon an improper and inadequate Affidavit, and was issued without probable cause.

The State and Federal Constitutions, as well as state statutes, have been violated; the only appropriate remedy is to suppress the evidence obtained as a result.

The charges in this case are extremely serious -- to these Defendants as well as to the public. Given the nature of the charges there may be a temptation to view circumstances that were ambiguous at the time as suspicious in retrospect, or to compromise constitutional principles in the name of bureaucratic efficiency. This Court must guard against any such temptations, lest the law itself become a victim of our concerns about the problems of drug trafficking. As Judge Keith pointed out on behalf of the Sixth Circuit in an analogous context in United States v Radka, 904 F.2d 375, 361 (6th Cir. 1990):

> Presently, our nation is plagued with the destructive effects of the illegal importation and distribution of drugs. At this critical time our Constitution remains a lodestar for the protection that shall endure the most pernicious affronts to our society. The warrant requirement of the fourth amendment governs zealous law enforcement. The drug crisis does not license the aggrandizement of governmental power in lieu of civil liberties. Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the previous rights guaranteed by the constitution in an effort to fight the "War on Drugs".

For all the reasons stated above, the Defendant, submits that all the physical evidence seized in connection with this search must be suppressed.

WHEREFORE, the Defendant requests that this Court grant his Motion to Suppress the Evidence.

Respectfully submitted,

STATE OF MICHIGAN

IN THE 1ST JUDICIAL DISTRICT COURT FOR THE COUNTY OF MONROE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff, District Ct.Case No.
vs.
,
Defendant.

_____/

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_____/

MOTION TO SUPPRESS THE EVIDENCE AND
MOTION FOR EVIDENTIARY HEARING

NOW COMES the Defendant, , by and through his attorney, JOHN F. ROYAL, and moves this Honorable Court to suppress the evidence in this case, and grant the Defendant an evidentiary hearing, for the following reasons:

1. The Defendant is charged with Simple Possession of Marijuana.

2. The conduct of the arresting police officers violated the Defendant's right to be free from unreasonable searches and seizures. U.S. Const. Ams. IV and XIV; Michigan Const. 1963, Art. 1. Sec. 11.

3. The physical evidence in this case, specifically, suspected marijuana, was seized by the

arresting police officers pursuant to a warrantless stop and search of a vehicle and of the Defendant, which were conducted without probable cause to believe that contraband would be found, or that the Defendant had committed or was committing any offense. Further, there were no exigent circumstances justifying the failure to proceed without either an arrest warrant or a search warrant.

4. The arresting officer claims he received verbal consent from the Defendant, , before initiating a search of the vehicle in question, in which the contraband was allegedly found. The Defendant specifically denies that he ever provided verbal consent to conduct any search or inspection whatsoever of the vehicle in question.

5. The conduct of the arresting police officers was, on its face, clearly in violation of the constitutional rights of the Defendant. Suppression of all the physical evidence seized is mandated by law.

6. The Defendant requests production of arresting Police Officer Sgt. , and any other police officer who claims that s/he was present during the investigation of the Defendant on December 15, 2002, at approximately 5:00 p.m., on N. Harold Rd., near the state game area, at the evidentiary hearing.

WHEREFORE, the Defendant requests this Court grant his Motion to Suppress the Evidence, and that an Evidentiary Hearing be held in this matter, and that the following persons be called to testify: Sgt. , and any other police officer who claims that s/he was present during the investigation of the Defendant on December 15, 2002, at approximately 5:00 p.m., on N. Harold Rd., near the state game area.

Respectfully submitted,

STATE OF MICHIGAN

IN THE 1ST JUDICIAL DISTRICT COURT FOR THE COUNTY OF MONROE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff, District Ct.Case No.

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MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO SUPPRESS THE EVIDENCE AND
MOTION FOR EVIDENTIARY HEARING

The Defendant contends that the contraband that was allegedly found in this case was seized pursuant to an illegal search. Contrary to the allegation in the police report, Mr. contends, among other things, that he never at any time provided verbal consent to the arresting police officer to search the vehicle in which the contraband was allegedly found. Because Mr. did not freely and voluntarily consent to the search of the vehicle by the investigating police officer, the evidence obtained as a fruit of the search was obtained in violation of Mr. 's right to be free from unreasonable searches and seizures, and must be suppressed as a result.

I. WHERE THE OFFICERS HAD NO LEGAL BASIS TO STOP THE MOTOR VEHICLE ALLEGEDLY DRIVEN BY THE DEFENDANT, AND DID NOT RECEIVE ANY VALID CONSENT TO SEARCH THE VEHICLE, THE EVIDENCE ALLEGEDLY DISCOVERED INSIDE THE VEHICLE MUST BE SUPPRESSED.

A. Introduction

The Fourth Amendment and its Michigan counterpart guarantee to every individual "'[t]he security of one's privacy against arbitrary intrusion by the police.'" Coolidge v New Hampshire, 403 US 443, 453, 81 SCt 2022, 29 LEd2d 564, 575 (1971)(cite omitted). Toward this end, "[t]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable ... subject only to a few specifically established and well-delineated exceptions.'" Id., 403 US at 454-455, 29 LEd2d at 576; People v Blasius, 435 Mich 573, 582-583 (1990); People v Kaigler, 368 Mich 282, 288-292 (1962). U.S. Const., Ams. IV, XIV; Mich Const. 1963, Art. 1 Sec. 11.

The Framers' strong distrust of warrantless searches was deeply rooted in their own life experiences, leading to the Fourth Amendment's insistence that decisions permitting police intrusions into private places should be made "by a neutral and detached magistrate instead of the ... officer engaged in the often-competitive enterprise of ferreting out crime". Johnson v United States, 333 US 10, 14, 68 SCt 367, 92 LEd 436, 440 (1948).

At times, problems such as drugs may make these rights seem to some people to be, at best, esoteric or, at worst, unwise impediments to effective law enforcement. These rights were embedded into the basic law of the land as firmly as they are precisely to withstand such crises. The Sixth Circuit stressed this point in United States v Radka, 904 F2d 357, 361 (6th Cir 1990), where the court stated:

> Presently, our nation is plagued with the destructive effects of the illegal importation and distribution of drugs. At this critical time, our Constitution remains a lodestar for the protections that shall endure the most pernicious affronts to our society. The warrant requirement of the fourth amendment governs zealous law enforcement. The drug crisis does not license the aggrandizement of governmental power in lieu of civil liberties. Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the "War on Drugs."[1]

The need for ungrudging enforcement of Fourth Amendment rights grows also out of their elusiveness, and out of difficulties courts have had in detecting and redressing violations. As the Supreme Court stated in Elkins v United States, 364 US 206, 217-218, 80 SCt 1437, 4 LEd2d 1669, 1677-1678 (1960), adopting Justice Jackson's dissent from Brinegar v United States, 338 US 160, 181, 69 SCt 1302, 93 LEd 1879, 1893 (1949):

> "But the right to be secure against searches and seizures is one of the most difficult to protect... Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If

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[1]The same warning was sounded by Justice Stewart, speaking for the Court in Coolidge v New Hampshire, supra, 403 US at 455, 29 LEd2d at 576:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won - by legal and constitutional means in England, and by revolution on this continent - a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

> the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear."

It is within this context, with these values and experiences strongly in mind, that the instant arguments should be judged.

B. Burden and Standard of Proof

In part because of the importance in our jurisprudence of the values underlying the Fourth Amendment and its Michigan counterpart, Michigan law, like the law of a majority of states and the federal system, holds that when the police detain someone without a warrant or conduct a warrantless search, the burden of proof as to the legality of that activity is on the state. People v Oliver, 417 Mich 366, 380 (1983); People v Hilber, 403 Mich 312, 323 (1978); People v Reed, 393 Mich 342 (1975). See also United States v Tillman, 963 F2d 137, 143 (6th Cir 1992); LaFave, Search and Seizure (2d ed), sec 11.2(b) ("if the police acted without a warrant the burden of proof is on the prosecution").

Obviously, the legality of the search and seizure in question here must be determined based upon the information available to the police at the time the search and seizure was accomplished. People v White, 392 Mich 404, 418 (1974); "Events subsequent to the seizure may not" be considered in "passing upon the reasonableness of the search." People v Dunlap, 82 Mich App 171, 174 (1978). The fact that the search in this particular case happened to bear fruit cannot be used as an after-the-fact justification for the illegal actions of the officers.

C. Although traveling in an automobile on a public street, the Defendant possessed the right

to be free from unreasonable searches and seizures.

The United States Supreme Court made clear in Delaware v Prouse, 440 US 648, 662; 59 LEd2d 660; 99 SCt 1391 (1979) that an individual "...traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." [footnote omitted]. In New York v Class, 475 US 106, 106 SCt 960; 89 LEd2d 8 (1986) the Court reaffirmed its holding that the interior of an automobile falls within the protected realms of the Fourth Amendment, stating:

> While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police ... Cf. Delaware v Prouse, 440 US at 653, 99 SCt at 1395 ("[S]topping an automobile and detaining its occupants constitute a 'seizure' ... even though the purpose of the stop is limited and the resulting detention quite brief').

The Court further noted:

> [T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' (Footnotes omitted) And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, justifiably warrant that intrusion." Terry v Ohio, 392 US 1, 21, 88 SCt 1868, 1879-1880, 20 LEd2d 889 (1968) (footnote omitted) (brackets as in Terry). (Emphasis added)

In Carroll v United States, 267 US 132, 154, 45 SCt 280, 69 LEd 543 (1925), the Court held that citizens are entitled to use the highways and have “a right to free passage without interruption or search” except upon probable cause for believing the law has been violated. Additionally, an officer may not stop automobiles upon public highways promiscuously and

demand the production of a driver's license as a subterfuge for the purpose of searching the car and invading the driver's constitutional rights. People v Lansing Judge, 327 Mich 410, 424-25 (1950). In Sitz v Department of State Police, 443 Mich 744 (1993), quoting from Pinkerton v Verberg, 78 Mich 573, 584 (1889), the Court explained that each person is guaranteed personal liberty and the right of locomotion:

> Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion- to go where one pleases, and when and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law.

Thus, on the day in question, Mr. unquestionably possessed the right to travel freely upon the public highways, without being subjected to involuntary government intrusion.

D. The prosecution cannot prove the claim that Mr. provided free and voluntary consent to the search of the vehicle in question.

The arresting officer claims he received verbal consent from the Defendant, , before initiating a search of the vehicle in question, in which the contraband was allegedly found. Mr. specifically denies that he ever provided verbal consent to conduct any search or inspection whatsoever of the vehicle in question. The United States Supreme Court has made it emphatically clear that for a consent to search to be valid, it must be voluntary. In Florida v Bostick, 501 US 429, 115 LEd2d 389, 401, 111 S Ct 2382 (1991), the Court proclaimed:

"Consent" that is the product of official intimidation or harassment is not consent at all.

> Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse." Id.

Courts indulge every reasonable presumption against waiver of such a fundamental right. Cf., e.g., United States v Abbott, 546 F2d 883, 885 (10th Cir 1977).

In evaluating a police claim of consent, the court is to consider the totality of the circumstances. Schneckloth v Bustamonte, 412 US 218, 93 SCt 2041, 36 LEd2d 854 (1973). When the police claim an individual has consented to a warrantless search, the standard of proof is high:

> **[C]onsent must be proved by clear and positive testimony and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given... The burden for the prosecution is particularly heavy where the individual is under arrest.** Before a court holds that a defendant waived his protection under the Fourth Amendment "there must be convincing evidence to that effect."

People v Kaigler, 368 Mich 281, at 294, 295 (1962)(emphasis in original; cites omitted).

See also Bumper v North Carolina, 391 US 543, 548, 88 SCt 1788, 20 LEd2d 747, 802 (1968)("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given); United States v Tillman, 963 F2d 137, 143 (6th Cir 1992) ("Consent must be proved by clear and positive testimony and must be unequivocally, specifically, and intelligently given, uncontaminated by any duress and coercion"). Here, the prosecution cannot prove that Mr. provided free and voluntary consent, as required by the Fourth Amendment, to the search of the vehicle.

II. WHERE THE CONSTITUTION OF THIS STATE PROVIDES GREATER PROTECTION AGAINST WARRANTLESS SEARCHES OF AUTOMOBILES THAN DOES THE FEDERAL CONSTITUTION, EVEN IF THE SEARCH IN QUESTION IS PERMITTED BY THE FEDERAL CONSTITUTION, THE EVIDENCE SHOULD STILL BE SUPPRESSED PURSUANT TO THE MICHIGAN CONSTITUTION.

The Michigan Supreme Court has specifically interpreted the Michigan Constitution, Art. 1, Sec. 11, to provide a greater degree of protection to Michigan citizens from warrantless seizures and searches of automobiles, than is provided by the Federal Constitution. Sitz v Department of State Police, 443 Mich 744 (1993). See also: State v Brown, 63 Ohio St. 3d 349, 588 NE2d 113 (1992). In Sitz, the court reviewed the history of Art. 1, Sec. 11, and the history of the Supreme Court decisions which have interpreted it. Relying heavily on prohibition era cases applying Michigan constitutional protections to searches of automobiles for illegal alcohol, the Court demonstrated that the Michigan Constitution has always been construed to require reasonable suspicion before an automobile can be seized or searched. As pointed out by the Court, Id. at 764-65:

> What is legally required to seize and search an automobile is not a new question in Michigan. During Prohibition, [15] this Court had many opportunities to review the level of cause necessary to make such a stop or search.
>
> ---
>
> [15] On a full review of this turbulent period, one cannot help but be struck by the similarities of the arguments made for and against the rights of citizens versus the needs of law enforcement to the modern-day necessity of dealing with drug running and drunken driving.

Sitz noted that People v Case, 220 Mich 379, 388, 389 (1922) pointed out that the decision as to whether a warrantless search and seizure of an automobile in a public place is legal depends upon whether a review of "all of the circumstances under which it is made" shows that the search was reasonable or not. Case was expanded on in People v Kamhout, 227 Mich 172, 187-88 (1924), where the Supreme Court first set forth the standard which applied to automobile searches in this state for many years:

> There must be no misunderstanding on the part of officers as to the right of search and arrest under our holdings. They have no right to stop and search an automobile or other conveyance for the purpose of ascertaining whether it is being used as a means of transporting liquor illegally unless they have such reasonable grounds of suspicion as induce in them, and as would induce in any prudent man, an honest belief that the law is being violated. . . . What we do state to be the rule by which this court will be governed is, that if an officer, charged with the enforcement of the law, from the exercise of his own sense, or acting upon information received from sources apparently so reliable that a prudent and careful person, having due regard for the rights of others, would act thereon, has reasonable and probable cause to believe that intoxicating liquor is being unlawfully transported in an automobile in his presence, he may arrest the offender or search for and, if found, seize the contraband therein without a warrant to do so. (Emphasis added).

After quoting the above excerpt from Kamhout, the Court in Sitz, supra, at 766, pointed out:

> Kamhout's observation that "reasonable grounds" are required by the Michigan Constitution before the seizure or search of an automobile may occur, remain unmodified by precedent.

Summing up its review of Michigan precedent regarding automobile searches, the Court concluded in Sitz, supra, at 776:

> [T]he history of our jurisprudence conclusively demonstrates that, in the context of automobile seizures, we have extended more expansive protection to our citizens than that extended in [Michigan Department of State Police v] Sitz [496 US 444, 110 LEd2d 412, 110 S Ct 2481 (1990)]. This Court has never recognized the right of the state without any level of suspicion whatsoever, to detain members of the population at large for criminal investigatory purposes. Nor has Michigan completely acquiesced to the judgment of "politically accountable officials" when determining reasonableness in such a context. Sitz, 496 US 453 [footnote omitted]. In these circumstances, the Michigan Constitution offers more protection than the United states Supreme Court's interpretation of the Fourth Amendment. (emphasis supplied).

If the contraband in this case is not tainted fruit of the poisonous tree under federal law, then a different result is mandated by our state constitution. In the context of this case, the stop, detention, interrogation, and search of Mr. was not reasonable; neither was the search of the vehicle. Under Michigan law, the discovery of the contraband during the search of the vehicle is the fruit of the unlawful acts of the officer. Under the Michigan Constitution, the contraband was discovered as a fruit of the illegal stop, detention, and search. Therefore, the motion to suppress should be granted.

III. MOTION FOR EVIDENTIARY HEARING

The conduct of the arresting police officer violated Mr. 's right to be free from unreasonable searches and seizures of his person and of a vehicle. U.S. Const. Ams. IV, XIV; Michigan Const. 1963, Art. 1. Sec. 11 He has a right to have an Evidentiary Hearing to support his contentions. People v Talley, 410 Mich 378, 389 (1981);

IV CONCLUSION

The charge in this case is very serious – to Mr. as well as to the public. Given the nature of the charge there may be a temptation to view circumstances that were ambiguous at the time as suspicious in retrospect, or to compromise constitutional principles in the name of bureaucratic efficiency. This Court must guard against any such temptations, lest the law itself become a victim of our concerns about the problems of illegal drugs. Radka, supra at 361.

In asking this Court to suppress the evidence seized by the police in this case, Mr. is aware that such a decision will mean that this case will not be able to go forward. This Court may, naturally, be concerned about that prospect. It is axiomatic, however, that a search may not

be justified by what it discloses, Johnson v United States, supra, and the nature of what will be suppressed should not be a factor in the Court's consideration. Justice Brickley addressed this concern in his opinion for the court in People v Burrell, 417 Mich 439,459 (1983):

> We are not unmindful that the result of our decision today is the suppression of otherwise good and highly incriminating evidence that led to the defendants' convictions of breaking and entering a private dwelling, and that these convictions became the basis for fourth-offender convictions, resulting in substantial sentences. That painful consequences is balanced by the fact that it is only in difficult situations such as those presented here that we can draw the fine lines between the authority of the police to protect us from crime and the use by the police of governmental power to violate our constitutional rights.

RELIEF REQUESTED

WHEREFORE, the Defendant requests that this Court grant his Motion to Suppress the Evidence, and that an Evidentiary Hearing be held in this matter, and that the following persons be called to testify: Sgt. , and any other police officer who claims that s/he was present during the investigation of the Defendant on December 15, 2002, at approximately 5:00 p.m., on N. Harold Rd., near the state game area.

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Attorney for Defendants

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Defendant
_____/

Assistant Prosecuting Attorney
1441 St. Antoine, 12th Floor
Detroit, MI 48226-2302
(313) 224-5777

_____/

MOTION TO SUPPRESS STATEMENTS AND MOTION FOR WALKER HEARING

NOW COMES the Defendant, by and through his attorney, and moves this Honorable Court to Suppress the Statements made by the Defendant, and grant him a Walker Hearing, for the following reasons:

I. The Defendant is charged with five counts of premeditated Murder, five counts of felony Murder, five counts of Armed Robbery, one count of First Degree Home Invasion, one count of felony firearm and one count of felon in possession of a firearm.

II. Upon information and belief, the prosecution plans to introduce into evidence at the Defendant's trial statements allegedly obtained from the Defendant by of the Livonia Police Department.

III. Defendant was arrested without a warrant, and without probable cause on Tuesday, December 24, 2002, at approximately 8:20 p.m.

IV. The alleged statements of the Defendant are the product of an illegal detention

following an illegal warrantless arrest, made without probable cause.

V. After being illegally confined for a period of time at the Livonia Police Department, the Defendant was subjected to custodial interrogation while still located within the Livonia Police Department building.

VI. The illegal custodial interrogation of the Defendant was conducted in the absence of counsel.

VII. At no time did the Defendant waive his right to have an attorney present during his interrogation.

VIII. Based on the totality of the circumstances, the Defendant's decision to sign a form listing his Miranda rights was not a voluntary decision on his part.

IX. In addition, based on the totality of the circumstances, any alleged decision of the Defendant to make statements to the interrogating officers was not a voluntary decision on his part, and was not the product of an essentially free and unconstrained choice by the Defendant.

X. Before a confession can be admitted into evidence it must be established that:

I. The Defendant was advised of his constitutional right not to answer any questions put to him, and that any answers he might make could be used against him.

II. The Defendant was advised that before answering he was entitled to have an attorney present with him and that an attorney would be appointed for him at state expense if he could not afford to hire one. See, Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 LEd2d 694 (1966).

XI. The Miranda Warnings were not given to the Defendant properly, and the Defendant did not knowingly and voluntarily waive his Miranda rights.

XII. Therefore, the alleged statements should be suppressed as evidence.

XIII. In order to be admissible in evidence, a confession must be voluntary, i.e., "the product of a rational intellect and a free will"; and if the Defendant's will was overborne the confession is involuntary. Townsend v Sain, 372 US 293; 83 S Ct 745; 9 LEd2d 770 (1963).

XIV. The alleged statements of the Defendant were obtained by knowingly and intentionally providing false information to the Defendant about the evidence against him; and by knowingly and intentionally providing the Defendant with false information about his legal status in this case by intentionally misleading the Defendant to think that the police could decide what would be the appropriate charges; and by intentionally leading the Defendant to believe that if he was not the shooter, he could not be charged with murder, and by intentionally leading the Defendant to believe he would face lesser charges or not be prosecuted at all if he gave an incriminating statement; he statements were, therefore, involuntary.

XV. The alleged statements were made at a time of great stress, and under circumstances that were inherently confusing and coercive.

XVI. The alleged statements of the Defendant was not made voluntarily, and the Defendant did not knowingly and voluntarily waive his Miranda rights.

XVII. The conduct of the arresting police officers violated the Defendant's right to be free from unreasonable arrests, detentions, and seizures, US Const Ams IV and XIV; Mich Const 1963, Art 1, §11; his right against self-incrimination and his right to due process of law, US Const Ams V and XIV; Mich Const 1963, Art 1, §17; and his

right to counsel, US Const. Ams VI and XIV; Mich Const 1963 Art 1, Sec. 20.

XVIII. The Defendant was repeatedly questioned in lengthy interrogation sessions initiated by the Police on at least 4 separate occasions, beginning at approximately 2:00 p.m. on December 25, 2002, until almost 4:00 p.m. on December 26, 2002. As of that time, the Defendant had not made any significant incriminating statements.

XIX. On Thursday, December 26, 2002 at approximately 4:03 p.m., the Defendant was arraigned by video camera from his location in the Livonia Police Department. His arraignment was conducted in violation of applicable Michigan Court Rules MCR 6.005(A) and 6.104(E)(3). These rules require the court at the arraignment to explicitly question the Defendant as to whether he wants counsel to be appointed. This was not done. Where an arraigning judge informs a Defendant of his abstract right to counsel, but fails to inquire as to whether the Defendant is requesting court appointed counsel, it necessarily must be concluded, that the Defendant has asserted his right to counsel and has not waived his right to counsel. People v Parshay, 379 Mich 7 (1967).

20. Further, the standard operating procedure of the Livonia District Court and of the Assigned Counsel Service of the Wayne County Circuit Court is to treat the arraignment on the complaint and warrant of any defendant by video camera as a request for court appointed counsel and to begin the process of having counsel appointed. That procedure was followed in this case, resulting in the appointment of attorney_____

21. Therefore, both the Livonia District Court and the Wayne County Circuit Court recognize that the arraignment on the complaint and warrant of a Defendant who does not explicitly

state that he has retained counsel, constitutes a request for the appointment of counsel; and such a defendant has not waived his right to an attorney.

22. Based upon these legal principals, the arraignment of Defendant _____ on December 26, 2002, constituted his assertion of his right to counsel, his request for court appointed counsel, and in no way can be construed as a waiver of his right to counsel. Further, had the Defendant been asked at his Arraignment if he wanted court-appointed counsel, he would have requested appointment of an attorney.

23. Because the Defendant asserted his right to counsel at his arraignment on the complaint and warrant, law enforcement authorities were prohibited from interrogating him further unless he, the Defendant initiated the interrogation. Michigan v Jackson, 475 US 625 (1986); People v Paintman, 412 Mich 518 (1982), Cert. Den. 456 US 995 (1982).

24. In direct violation of the Defendant's Sixth Amendment right to counsel, the law enforcement authorities admittedly and intentionally initiated further interrogation of Defendant Lincoln, several hours after his arraignment, at approximately 8:00 p.m. on December 26. The interrogating officers claim that Defendant_____ made numerous incriminating statements over the course of the next several hours,

25. At approximately 11:00 p.m. on December 26, 2002, Defendant_____ had finished providing the interrogating officers with a lengthy verbal and incriminating account of the events leading to the charges in this prosecution. At that time, an attorney,_____, arrived at the Livonia Police Station and represented himself to be an attorney who was hired to inquire into the status of Mr._____

26. The intervention of attorney _____ did not, however, break the chain of events that

began with the legal interrogation of the Defendant beginning earlier that evening at approximately 8:00 p.m. From the point of view of the Defendant, the attorney appeared in the middle of the interrogation after the Defendant had made a lengthy incriminating statement. Therefore, to the Defendant, it appeared that he had already irrevocably committed himself to a course of action from which he could not retreat or waiver.

27. Additionally, attorney _____s provided constitutionally deficient representation in that he in no way clarified or corrected any of the misinformation, which had been provided to the Defendants by the interrogating police officers. Attorney _____ performance was far below the general standard of representation provided by reasonably well trained criminal defense attorneys and completely failed to provide the Defendant with the advice and guidance that he sorely needed at that particular time. Further, attorney _____ did not in any way effectively assert any of Mr. _____ rights with the interrogating officers and did nothing on behalf of the Defendant to try to disrupt the chain of events that has now resulted in his being bound over on these extremely serious charges. The Defendant was thus deprived of his constitutional right to the effective of assistance of counsel pursuant to US Const. Ams. VI and XIV; Mich Const 1963, Art 1, Sec. 20.

28. After attorney _____ left the Livonia Police Department without taking any effective action to protect the rights of Mr. _____, the interrogating officers once again initiated a further interrogation of Mr. _____ in direct violation of his right to counsel, and ultimately secured a lengthy signed incriminating statement which is the primary evidence upon which the Defendant has now been bound over for trial.

WHEREFORE, for all the above reasons, the Defendant requests that his alleged statements be suppressed at trial, or in the alternative that the police officers who spoke with him and took

statements from him testify at an Evidentiary Hearing to determine the voluntariness of any alleged statements or waiver of rights they took from the Defendant, and that they bring with them to that Evidentiary Hearing any notes, records, log sheets, or written transcriptions of those notes, statements, or any tape recordings that may have a bearing on the voluntariness of the alleged statements or waiver of rights. Specifically, Defendant requests the presence of:

Respectfully submitted,

Dated: January 31 2003

_____

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Defendant
_____/

Assistant Prosecuting Attorney
1441 St. Antoine, 12th Floor
Detroit, MI 48226-2302
(313) 224-5777

_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS AND MOTION FOR WALKER HEARING

Statement of Facts.

The facts that are set forth in the Motion to Suppress Statements, *supra*, and will be further presented to this Court during the evidentiary hearing.

Argument I.

THE INCRIMINATING STATEMENTS ALLEGEDLY MADE BY THE DEFENDANT WERE OBTAINED AS THE RESULT OF AN ILLEGAL DETENTION FOLLOWING AN ILLEGAL ARREST MADE WITHOUT PROBABLE CAUSE.

The Defendant contends that the statements that he allegedly made were obtained by the police during an illegal detention following an illegal arrest. The Defendant was illegally arrested without a warrant and without probable cause, was taken into custody, and involuntarily confined at the Livonia Police Department. Statements obtained during a custodial interrogation which takes place during a time when a Defendant has been arrested and is being held without probable

cause is the "fruit of the poisonous tree" and must be suppressed. Dunaway v New York, 422 US 200, 60 LEd2d 824, 99 S Ct 2248 (1978); Brown v Illinois, 422 US 590, 45 LEd2d 416, 95 S Ct 2254 (1975).

Statements made during a detention following an illegal arrest must be suppressed. Dunaway, *supra;* Brown, *supra*. Under these circumstances the illegal arrest and detention of Defendan t render his statements inadmissible as evidence against him.

Further, arrests which are not based upon probable cause or which are made purely for investigatory purposes have longed been recognized to be invalid. People v Bloyd, 416 Mich 539 (1982); People v Casey, 411 Mich 179 (1981), aff'g, 102 Mich App 595 (1980); People v Thomas, 191 Mich App 576 (1991).

_____ testified at the preliminary examination that _____was arrested based upon information provided by_____. However, the information provided to law enforcement authorities prior to the arrest of Defendant Lincoln failed to establish probable cause to charge him with any crime in connection with the incident in question.

****

None of this evidence either individually or collectively created probable cause to arrest _____ . While the circumstances were such that further investigation would have been justified, all of the information indicated that _____was simply merely present with _____. The police simply had no evidence that _____ knew or participated in any way in the events at the home of the decedents on the night in question. Therefore, the investigating officers did not have probable cause to believe that _____ was involved in the

homicides or any of the related crimes that took place. The conduct of the arresting police officers violated _____ right to be free from unreasonable arrests, detentions, and seizures. US Const Ams IV and XIV; Mich Const 1963, Art 1, §11; His arrest was therefore illegal and all statements which he provided were the fruit of his illegal arrest and incarceration, and must be suppressed.

II. THE INTERROGATING POLICE OFFICERS INTENTIONALLY PROVIDED FALSE INFORMATION TO _____ WITH RESPECT TO THE EVIDENCE THEY ALLEGEDLY HAD AGAINST HIM; INTENTIONALLY MISLEAD HIM TO BELIEVE THAT IF HE WAS NOT THE SHOOTER, HE COULD NOT BE CHARGED WITH MURDER ; INTENTIONALLY PROVIDED HIM WITH FALSE INFORMATION CONCERNING HIS LEGAL STATUS BY MISLEADING HIM TO THINK THAT THE POLICE COULD DECIDE WHAT WOULD BE THE APPROPRIATE CHARGES; AND INTENTIONALLY LEAD HIM TO BELIEVE HE WOULD FACE LESSER CHARGES OR NOT BE PROSECUTED AT ALL IF HE GAVE AN INCRIMINATING STATEMENT; THESE IMPROPER INDUCEMENTS COLLECTIVELY SERVED TO OVERRIDE _____ FREE WILL, AND RENDERED ANY ALLEGED WAIVER OF HIS MIRANDA RIGHTS, AND ANY ALLEGED STATEMENTS MADE DURING THE CUSTODIAL INTERROGATION INVOLUNTARY, UNDER THE TOTALITY OF THE CIRCUMSTANCES.

The interrogating officers used numerous strategies to override the free will of _____ and induce him to both give up his Miranda rights and to make a statement. The inducements employed were such as to render any purported waiver of his Miranda rights, and any incriminating statements that he allegedly made, involuntary under the totality of the circumstances.

After being illegally confined for a period of time at the Livonia Police Department, the Defendant was subjected to repeated custodial interrogations while still located within the Livonia Department building. These illegal custodial interrogations were conducted in the absence of

counsel, although at no time did the Defendant waive his right to counsel during the interrogations. Before a confession can be admitted into evidence it must be established that:

A. The Defendant was advised of his constitutional right not to answer any questions put to him, and that any answers he might make could be used against him.

B. The Defendant was advised that before answering he was entitled to have an attorney present with him and that an attorney would be appointed for him at state expense if he could not afford to hire one. See, Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 LEd2d 694 (1966).

In this case, the Miranda Warnings were not given to the Defendant properly, and the Defendant did not knowingly and voluntarily waive his Miranda rights. Based on the totality of the circumstances, the Defendant's decision to sign a form listing his Miranda rights was not a voluntary decision on his part. Therefore, the alleged statements should be suppressed as evidence.

In order to be admissible in evidence, a confession must be voluntary, i.e., "the product of a rational intellect and a free will"; and if the Defendant's will was overborne the confession is involuntary. Townsend v Sain, 372 US 293; 83 S Ct 745; 9 LEd2d 770 (1963). Here, the alleged statements were made at a time of great stress, and under circumstances that were inherently confusing and coercive. Therefore, based on the totality of the circumstances, any alleged decision by _____ to make statements to the interrogating officers was not a voluntary decision on his part, and was not the product of an essentially free and unconstrained choice by the Defendant.

The alleged statements of the Defendant were obtained by knowingly and intentionally providing false information to the Defendant about the evidence against him; by intentionally leading the Defendant to believe if he was not the shooter, he could not be charged with murder; by providing the Defendant with false information about his legal status in this case by intentionally misleading the Defendant to think that the police could decide what would be the

appropriate charges; and by intentionally leading Mr. Lincoln to believe he would face lesser charges or not be prosecuted at all, if he gave an incriminating statement; he statements were, therefore, involuntary.

Therefore, based on the totality of the circumstances, any alleged decision of _____ to make statements to the interrogating officers was done without a free and voluntary decision to waive his Miranda rights, was not a voluntary decision on his part under the totality of the circumstances, and was not the product of an essentially free and unconstrained choice by _____ . Therefore, _____ incriminating statements were obtained in violation of his right against self-incrimination and his right to due process of law, US Const Ams V and XIV; Mich Const 1963, Art 1, §17.

In order to be admissible into evidence, an admission must be voluntarily made, i.e., "the product of an essentially free and unconstrained choice by its maker." People v Cipriano, 431 Mich 315, 334 (1988), quoting Culombe v Connecticut, 367 US 568, 602, 6 LEd2d 1037; 81 S Ct 1860 (1961). If, however, the Defendant's "will has been overborne and his capacity for self-determination critically impaired ..." the admission is involuntary. Cipriano, supra, quoting from Culombe, supra. "The line of demarcation 'is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession'." Cipriano, supra, quoting Culombe, supra.

"These standards are applicable whether a confession is the product of physical intimidation or psychological pressure ..." Townsend v Sain, 372 US 293, 307; 9 LEd2d 770; 83 S Ct 745 (1963).

As stated in United States v Bautista-Avila, 6 F3d 1360, 1364 (9th Cir 1993)(quoting United

States v Leon Guerrero, 847 F2d at 1366, in turn quoting Hutto v Ross, 429 U.S. 28, 30 (1976), in turn quoting Bram v United States, 168 U.S. 532, 542-43 (1897)): "A statement is involuntary if it is extracted by any sort of threats or violence [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." Involuntary statements are inherently untrustworthy, and their use violates our fundamental sense of decency. Spano v New York, 360 U.S. 315, 320 (1959). Where, as here, the interrogating officers pose as a "false friend" of the suspect, leading him to believe that they are on his side and only trying to help him, incriminating statements obtained as a result are involuntary. Id., at 323.

Further, where as here, false promises of benefits or leniency, whether direct or implied, even if they are only slight in value, are impermissibly coercive. People v Conte, 421 Mich 704 (1984); Hutto, supra; Bram, supra. .

In determining whether a confession was voluntarily given, the trial court must look at the totality of the circumstances. In this case, a review of the totality of the circumstances clearly establishes that there were numerous improper inducements used to override _____ free will, and to coerce him to both waive his Miranda rights and to make involuntary statements.

First of all, _____ admitted at the preliminary examination that he gave _____ false information about the scope of the evidence they had against _____. _____ admittedly told ____ that they knew t_____ had been in the house where the five decedents had been found, and also told _____ that _____ had made a statement to the police and told them that _____ was involved in the shootings. _____ then admitted at the preliminary examination that, in fact, _____ had not made any type of statement implicating either himself or _____ in the robbery/murders. (PE 25). In fact, evidence at the evidentiary hearing will establish that the interrogating officers told

_____that _____ had told them that _____was the shooter in this case. This information was conveyed to _____ repeatedly in an intentional effort to coerce him to give up his Miranda rights, and to override his desire to remain silent and to not make any incriminating statements. During the repeated interrogations that took place, over a 36 hour period, _____ became convinced that had in fact made a statement to the police claiming that _____was the shooter, and this false information was a substantial inducement compelling him to make involuntary incriminating statements.

Additionally, the interrogating officers intentionally gave _____false information about his legal status. _____admitted during the preliminary examination that he used a diagram to discuss with_____ something that he referred to as a "continuum of culpability".

and his right to counsel, US Const. Ams VI and XIV; Mich Const 1963 Art 1, Sec. 20.

For these reasons,_____ requests this Court to determine that, under a "totality of the circumstances" analysis, the prosecution is unable to prove that his statements were legally obtained. For these reasons, his statements must be suppressed. The Defendant has a right to have an evidentiary hearing to support this factual allegations and contentions in this case. People v Walker, 374 Mich 311 (1965).

Respectfully submitted,

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 51ST JUDICIAL DISTRICT

PEOPLE OF THE TOWNSHIP OF WATERFORD,

Plaintiff,

vs. Case
Hon.

,

Defendant.
_____/

Waterford Township Attorney
2850 Dixie Highway
Waterford, MI 48328
(248) 674-2291

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, Suite 1724
Detroit, MI 48226
(313) 962-3738
_____/

MOTION TO VACATE CONVICTION AND DISMISS COMPLAINT

NOW COMES the Defendant by and through her attorney JOHN F. ROYAL, and moves to vacate the jury conviction that was entered in this matter and dismiss the Complaint, for the following reasons:

1. Defendant was charged in a Complaint issued on October 28, 2003 with the charge of "Attempted Larceny." (See Complaint, attached).

2. According to the Complaint, Defendant is charged in this case with a violation of Code 158, Section 11-101 of the Waterford Township Code of Ordinances. (See Complaint, attached).

3. Code 158, Section 11-101, by its terms, does not prohibit the crime of "Attempted

Larceny." This ordinance prohibits only the completed offense of "Larceny."

4. There is no general "attempt" ordinance found in the Waterford Township Code of Ordinances.

5. Therefore, Defendant has been convicted by the jury of conduct which is not prohibited by the Ordinance which she has been charged with violating. Further, her alleged conduct does not appear to be in violation of any ordinance found in the Waterford Township Code of Ordinances.

6. This Motion is supported by the attached Memorandum of Law which is incorporated herein by reference.

WHEREFORE, for all of the above reasons, Defendant requests that this Court grant her Motion to Vacate the Jury Verdict of Guilty which has been entered in this matter, and dismiss the Complaint with prejudice.

Respectfully submitted,

_____

JOHN R. ROYAL (P27800
Attorney for Defendant
Ford Building
615 Griswold, Suite 1724
Detroit, MI 48226
(313) 962-3738

DATED: July 29, 2004

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 51ST JUDICIAL DISTRICT

PEOPLE OF THE TOWNSHIP OF WATERFORD,

Plaintiff,

vs. Case No.
Hon.

,

Defendant.
_____/

Waterford Township Attorney
2850 Dixie Highway
Waterford, MI 48328
(248) 674-2291

JOHN F. ROYAL (P27800)
Attorney for Defendant
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Detroit, MI 48226
(313) 962-3738
_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE CONVICTION AND DISMISS COMPLAINT

I. Statement of Facts

Defendant is charged in a Complaint issued October 28, 2003, with the offense of "Attempted Larceny." (See Complaint, attached). Specifically, the Complaint alleges that on October 16, 2003 in the Township of Waterford:

> Defendant, , did commit the offense of Attempted Larceny by means to wit. Defendant did take keys belonging to from 's pocket without permission and with the intent to steal said keys from the rightful owner, in violation of Code 158, Section 11-101 of the Township Code of Ordinances. (emphasis added) (See Complaint, attached)

This Complaint alleges a violation of Code 158, Section 11-101 of the Waterford Township Code of Ordinances. This particular Ordinance Section reads as follows:

> **Sec. 11-101. Larceny of property valued up to one thousand ($1,000.00) dollars**. It is a violation of this code for any person within the township to steal, take, carry away, obtain by deceit, trick or conversion any money, goods, chattels, property or services of another person or entity of the value of one thousand ($1,000.00) dollars or less.

At all times during the Trial in this matter, the jury was informed that the charge against Mrs. was "Attempted Larceny." See for example, the pretrial jury instructions) (I, 7), and the final charge, (I, 303). Further, the jury was specifically instructed with the standard criminal jury instruction defining "attempt" found at CJI 2d 9.1 (I, 304). The prosecution emphasized the element of "attempt" in closing statement as follows: "she tried to take the property." (Emphasis added) (I, 271). Further, the verdict form which was given to the jury, as read on the record, stated that there were only two possible verdicts as to Defendant , either "not guilty," or "guilty of attempted larceny." (I, 305).

The jury subsequently returned a verdict of guilty as charged with respect to Defendant . (II, 4).

II. Argument.

Where the Waterford Township Ordinance prohibiting the offense of "larceny"(See 11-101) does not within its terms also prohibit the attempt to commit a larceny, the Defendant has been convicted of an offense which is not prohibited by the ordinance which she has been charged with violating.

Before any act or omission can be punished as a crime, it must clearly appear that the act or omission is one which has been recognized as a crime by a legislative enactment and for which some

punishment has been prescribed. A citizen cannot be prosecuted for violation of a criminal enactment when the citizen has only committed a civil injury that is not itself a crime. Alderman v People, 4 Mich 414, 430 (1857).

As stated in People v Goulding, 275 Mich. 353, 359-360 (1936):

> It is a well-settled rule of law that no one can be punished for doing an act unless it clearly appears the act sought to be punished comes clearly within both the spirit and letter of the law prohibiting it. *State of Oregon v Mann, 2 Ore. 238....*
>
> "No principle is more universally settled than that which deprives all courts of power to infer, from their judicial ideas of policy, crimes not defined by statute or by common-law precedents." Ware v Branch Circuit Judge, 75 Mich. 488.
>
> Defendant ought not to be convicted unless he is clearly and unequivocally within the language of a statute which by its terms covers his case. The statute may not be extended beyond its plain terms by judicial construction, and defendant convicted, by showing acts which ought to have been within the terms of the statute but are not. There are no constructive criminal offenses. (emphasis added).

Further, "nothing can be a crime until it has been recognized as such by the law of the land." Ware v Loveridge, 75 Mich 488, 491 (1889). To convict a person of a criminal offense where the alleged conduct is not prohibited by the statute is a violation of due process of law. U.S. Const. Ams. V, XIV; Mich Const. 1963, Art. 1, Sec. 17.

In this case, has been convicted of the alleged offense of "Attempted Larceny." (See Complaint, attached.) This alleged offense, however, is not prohibited by Waterford Township Ordinances, Sec. 11-101.. The Michigan Court of Appeals, in People v Johnson, 195 Mich App. 571, 572-576 (1992) discussed the relationship of the crime of "attempt" with the crime of the completed offense. In Johnson, the Court identified the issue before it as follows:

> The heart of the question is whether a conviction of an attempt to

> commit an offense constitutes a conviction of the substantive, underlying offense for which the attempt statute merely provides a different penalty, or whether an attempt is a separate, substantive offense. Johnson, *supra* at 573

The Court then pointed out that the crime of "attempt is an inchoate offense..." *Id* at 573. The Johnson opinion then quotes from the general state "attempt" statute, MCL 750.92. After the quotation from the statute, the Johnson opinion provider the following analysis:

> The wording of the statute indicates that the Legislature created the separate, inchoate crime of "attempt." The statute, in three locations, states that a person who is convicted of an attempt is guilty of a felony or a misdemeanor, depending on the nature of the attempt, and the statute proscribes a punishment. This is language that creates a substantive offense of "attempt," not merely one that modifies the punishment applicable to the completed offense where the defendant did not complete the underlying offense.
>
> In fact, the general view is that attempt is a lesser-included offense of the completed offense. In People v Adams, 416 Mich 53, 57, 61; 330 NW2d 634 (1982), the Supreme Court concluded that attempt is a cognate lesser-included offense of the underlying offense, overruling a prior case that held that attempt is a necessarily lesser-included offense. The Court reasoned that "the elements of an attempt are not duplicated in the completed offense." *Id.* at 56. See also 2A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 1072 p 736 (attempt is a necessarilly included offense in every charge of a crime). Moreover, the criminal jury instructions regarding attempt as a lesser offense refer to attempt as being a "less serious crime." CJI 2d 9.2. Johnson, *supra*, at 574-75.

Based upon this analysis, the Court of Appeals in Johnson, *supra* at 575 concluded:

> For these reasons, we conclude that attempt is a separate, substantive offense punishable under its own statute. [footnote omitted]. Thus, the crime of attempted larceny in a building is separate from the crime of larceny in a building. Johnson, *supra*, at 75.

It is certainly permissible for a statute prohibiting a completed offense to include within its terms the attempt to commit that offense. Waterford Township has done this on a number of

occasions. See, for example, Section 22-104, prohibiting breaking and prohibiting a coin box. This statute includes within its terms the attempt to break and enter a coin box. See also Section 11-105, prohibiting the breaking and entering of outside showcases. This ordinance by its terms prohibits the attempt to break and enter showcases. Further, Section 11-66, prohibiting assault and battery, prohibits the "attempt" to physically hurt someone. Thus, the legislative body of Waterford Township is well aware of the distinction between a completed offense, and the "attempt" to commit the completed offense. Where the legislative body felt it was appropriate to do so, it prohibited the attempt within the text of the ordinance prohibiting the completed offense. By ordinary rules of statutory construction where an ordinance prohibits the completed offense, and does not include within its terms the "attempt" to commit that offense, the omission must have been intentional. Such Ordinances do not prohibit the "attempt" to commit the completed offense.

As noted in Johnson, the State legislature has codified the crime of a "attempt" within a statute. MCLA 750.92. In most instances, the penalty for committing an "attempt" is less than the penalty for committing the completed offense. Under the State statute, the maximum penalty for the attempt to commit a 90 day misdemeanor would be 45 days. MCLA 750.92(3). However, Waterford Township has not seen fit to adopt a general statute prohibiting the "attempt" to commit a completed offense.

Therefore, the Complaint in this case charged with activity which is not a violation of Section 11-101 of the Waterford Township Code of Ordinances.

The jury in this case was never given the option of convicting Dr. of any offense other than "Attempted Larceny." was never charged with the completed offense of "larceny," and therefore cannot possibly be deemed convicted of an offense for which she was not charged. Therefore, was

charged with committing alleged conduct which, while it may be actionable in a civil proceedings, is not a violation of the ordinance of which Ms. has been charged with violating.

Therefore, the jury verdict convicting of conduct which is not prohibited by the ordinance which she has been charged with violating cannot stand. The jury conviction of must be vacated; the Complaint must be dismissed with prejudice for failure to state a violation of Waterford Township Ordinance, 11-101.

WHEREFORE, for all of the above reasons, Defendant requests that this Court grant her Motion to Vacate the Jury Verdict of Guilty which has been entered in this matter and dismiss the Complaint with prejudice.

Respectfully submitted,

_____

JOHN R. ROYAL (P27800
Attorney for Defendant
Ford Building
615 Griswold, Suite 1724
Detroit, MI 48226
(313) 962-3738

DATED: July 29, 2004

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs. Defendant.
_____/

Assistant Prosecuting Attorney
1441 St. Antoine, 12th Floor
Detroit, MI 48226-3202
(313) 224-5777

JOHN F. ROYAL (P27800)
Attorney for Defendant
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_____/

MOTION TO VACATE CONVICTION OF ACCESSORY AFTER THE FACT
AND TO ENTER JUDGMENT OF ACQUITTAL

NOW COMES Defendant by and through his attorney, John F. Royal, and moves this Honorable Court to vacate the conviction which has been entered for Accessory After the Fact, and to enter a Judgment of Acquittal, for the following reasons:

1. The Defendant was charged with one count of Assault with Intent to Murder.

2. The case against the Defendant proceeded to a trial before the Court, which took place on June 18th and 19th, 2002. At the conclusion of the proofs and arguments of counsel, the Court returned a Judgment finding the Defendant guilty of the offense of Accessory After the Fact to the crime of Assault with Intent to Commit Great Bodily Harm Less than Murder, which was committed by the co-defendant.

3. Essential to the conviction of the Defendant for the offense of Accessory After the Fact was the testimony of Police Officer_____, whose involvement in the case was not

disclosed to defense counsel until the day of trial, whose PCR was not disclosed to the defense until the day of trial, and who was not added to the witness list until the day of trial, over the objection of defense counsel.

4. The Defendant had no knowledge that he would be required to defend against the charge of Accessory After the Fact until the Court rendered its verdict.

5. Further legal research since the verdict in this matter has disclosed that the verdict entered by the Court must be vacated as the Court had no legal authority under the circumstances to enter the verdict of guilty of the offense of Accessory After the Fact.

6. Further, the double jeopardy doctrine of "Implied Acquittal" establishes that this Court, by its verdict, implicitly acquitted the Defendant of all other offenses of which he could have been convicted.

7. Therefore, a Judgment of Acquittal must be entered in this case.

WHEREFORE, for all the above reasons, the Defendant requests that this Court grant his motion to vacate the conviction of Accessory After the Fact, and to enter a Judgment of Acquittal..

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Attorney for Defendant

DATED: June 21, 2002

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs. Defendant.
_____/

Assistant Prosecuting Attorney
1441 St. Antoine, 12th Floor
Detroit, MI 48226-3202
(313) 224-5777

JOHN F. ROYAL (P27800)
Attorney for Defendant
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_____/

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO VACATE CONVICTION OF ACCESSORY AFTER THE FACT
AND TO ENTER JUDGMENT OF ACQUITTAL

Statement of Facts

The Defendant was charged with one count of Assault With Intent to Commit Murder, contrary to MCLA 750.83; MSA 28.278.

Following a bench trial, which took place on June 18 and 19, 2002, this Court found the Defendant guilty of the offense of Accessory After the Fact, MCLA 750.505; MSA 28.773, to the offense of Assault With Intent to Commit Great Bodily Harm Less than Murder, which the Court found was committed by the co-defendant. This matter has been scheduled for sentencing.

Critical to the Court's findings of fact with respect to the conviction of the offense of Accessory After the Fact was the testimony of prosecution witness Police Officer, who testified

that he arrested the Defendant on January 31, 2002 at the location of 2051 Prince Hall Drive, and that he located the weapon which was used by the co-defendant to shoot the complainant under a mattress in a bedroom inside that premises.

Defense counsel had no knowledge that Office_____ had anything to do with this case until the day of trial, when he was supplied with a copy of Officer's police report, and when the Court permitted Office__ to be added to the witness list over the objection of defense counsel. Defense counsel had no notice that he would be required to defend against the charge of Accessory After the Fact until the verdict was rendered by the Court. Under these circumstances, the conviction of the offense of Accessory After the Fact is not permitted by law.

I. THE PROSECUTION DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL AND STATUTORY RIGHT TO NOTICE OF THE EVIDENCE AND POSSIBLE CHARGES AGAINST HIM BY WAITING UNTIL THE DAY OF TRIAL TO INFORM THE DEFENSE OF ITS INTENT TO CALL A POLICE OFFICER WITNESS WHOSE POTENTIAL IDENTITY AND TESTIMONY WAS KNOWN TO THE PROSECUTION FOR OVER FOUR MONTHS, BUT WHOSE IDENTITY AND POSSIBLE TESTIMONY WERE NOT DISCLOSED TO THE DEFENSE UNTIL THE DAY OF TRIAL.

Both the state and federal constitutions protect the right of an accused criminal defendant to advance notice of the nature of the accusation against him. U.S. Const. Ams. VI, XIV; Mich Const. 1963, Art. 1, §20. Similarly, MCLA 767.45(1)(a) requires that Indictments and Informations state "the nature of the offense. . . in language which will fairly appraise the accused and the Court of the offense charged." Similarly, other legal provisions are intended to protect the right of a defendant to advance notice of the charges against which he must defend and to the discovery of the names of witnesses and of the evidence that will be used against him at trial. Thus, MCR 6.201 requires the prosecution to provide to the defense within 14 days of a

request both the names and addresses of all witnesses whom the prosecution intends to call, and copies of all police reports concerning the case. MCR 6.201(A)(1) and (B)(2). In addition, MCLA 767.40a requires the prosecuting attorney to file and serve a list of known witnesses "not less than 30 days before the trial. . . ." MCLA 767.40a(3). Additional witnesses can be added to the prosecution witness list only "upon leave of the Court and for good cause shown. . ." MCLA 767.40a(4).

In this case, the Defendant filed a Demand for Discovery on May 24, 2002. Therefore, all names and addresses of prosecution witnesses and all police reports should have been disclosed no later than June 7, 2002.

In fact, the prosecution never filed a witness list of any type in this case until the day of trial. Further, the witness list the prosecution originally attempted to file did not contain the name of Officer____ Only after the Court had called the case on the first day of trial and requested that preliminary matters be addressed did the prosecution notify the defense of the existence of Officer _____ and provide a copy of his police report. It is not disputed that Officer _____was not mentioned in any of the discovery that had previously been furnished to the Defendant and that defense counsel had no knowledge whatsoever of Officer _____existence, or of his alleged seizure of a weapon under a mattress in a bedroom at the location where the Defendant was arrested.

Further, there cannot possible be "good cause" for the late addition of Officer _____ to the witness list or to the late provision of discovery to the defense in this case. Officer _____ testimony and report related to events of January 31, 2002. His existence and information and report were available to the prosecution ever since that day, over 4 ½ months prior to the trial.

During the proceedings on the record, the prosecution suggested that because she personally was not aware of Officer_____ or his PCR, that somehow this excuses the gross violations of the Court rules, statutes, and constitutional provisions which occurred in this case. . However, the law squarely rejects this proposition. All courts which have addressed this issue have consistently held that the prosecution is responsible by law for all evidence and information which is in the possession of the investigating police agency.

Thus, in United States v Bagley, 427 US 97; 96 S Ct 2392; 49 LEd2d 342 (1976), the prosecution also claimed no knowledge of the suppressed exculpatory evidence. The Court nevertheless held that reversal would be required depending upon the significance of the evidence, not the bad faith of the prosecution. As pointed out by Professors LaFave and Israel, in Criminal Procedure, 2d Ed., Hornbook Series, 1992, at 893:

> In Brady and Agurs, the items not disclosed were within the prosecutor's files, and it is well established that the Brady obligations of the prosecutor's office are institutional and do not depend upon the knowledge of the individual prosecutor who is conducting the trial. In Bagley, the nondisclosed contracts apparently were in the files of the investigative agency that had been assisted by the security guards, but the Court saw no reason to even comment on that factor in discussing the prosecution's responsibility. Lower courts have regularly held that the prosecution's obligation under Bagley extends to the files of those police agencies that were responsible for the primary investigation in the case. They commonly include also material available to other members of the "prosecution team" in the particular case, including even case workers from social service agencies. (Emphasis added).

The prosecution is imputed with knowledge of facts about the investigation of a case which are known to the chief investigating officers. People v Cassell, 63 Mich App 226, 228-229 (1975); Kyles v Whitley, 514 US 419, 437; 115 S Ct 1555; 131 LEd2d 490 (1995).

Thus, the prosecution, in violation of the constitution, applicable Michigan statutes, and the Michigan Rules of Criminal Procedure, was permitted to disclose and add witnesses on the

day of trial, who were known to the Police Department for months before the trial. The prosecution was permitted to disclose police witnesses and their reports on the day of trial and then present evidence that the defense had no opportunity to prepare for. The prejudice could not be more apparent. It was precisely the testimony of Officer _____ as to the discovery of the firearm in the premises from which the Defendant was arrested which provided the testimony upon which this Court based its verdict of guilty of the offense of Accessory After the Fact. Because of the lack of notice, the defense had no knowledge prior to the day of trial that there was any evidence in existence which might in theory be used to try to support a conviction of the charge of Accessory After the Fact. Thus, the defense had no notice, was deprived of the opportunity to prepare, and came to Court for trial only to be blind-sided. The result is that the Defendant has been convicted on an offense that he and his attorney had no knowledge he should be prepared to defend against until the Court rendered its verdict.

The prosecution violation of the applicable constitutional provisions, statutes, and court rules regarding notice has made it a violation of due process for the Defendant to be convicted of Accessory After the Fact. For these reasons alone, the conviction for Accessory After the Fact must be vacated.

II. WHERE A DEFENDANT IS CHARGED WITH AN ASSAULTIVE CRIME, THE OFFENSE OF ACCESSORY AFTER THE FACT IS NOT A LESSER COGNATE OFFENSE, AND CONVICTION OF ACCESSORY AFTER THE FACT IS PRECLUDED BY LAW.

The Michigan Supreme Court recently addressed the issue of the status of the crime of Accessory After the Fact as a related or lesser offense in People v Perry, 460 Mich 55 (1999). The defendant in that case went to trial on charges related to an arson fire in which three people were killed. With respect to the three counts of First Degree Felony murder, the Court instructed the jury on the elements of Felony Murder, Second Degree Murder, and Involuntary Manslaughter. The defendant's defense was that he assisted the actual perpetrator in destroying evidence after the fire was set, but did not set the fire himself. The defendant requested that the jury be instructed in accordance with this theory with the elements of the crime of Accessory After the Fact. The trial court refused to instruct the jury on the offense of Accessory After the Fact. The Michigan Supreme court affirmed the conviction of the defendant, holding that the trial court properly refused to instruct the jury with respect to the charge of Accessory After the Fact because the crimes of Murder and Accessory After the Fact are not of the same "class or category."

One of the earlier seminal cases in Michigan with respect to the Michigan Supreme Court's doctrine as to the circumstances under which a finder of fact can consider lesser offenses is People v Ora Jones, 395 Mich 379, 388 (1975). In that case, the Court specificly discussed the notice problems that are created where a finder of fact is permitted to consider a cognate offense which is not a necessarily included lesser offense of the crime charged. The Court stated as follows:

> It is elementary that a defendant may not be convicted of a crime with which he was not charged. . . . The reason is apparent: The Sixth and Fourteenth Amendments give a defendant the right to know the nature and cause of the accusation against him.
>
> Thus, while there is comparatively little difficulty with the necessarily included

> lesser offenses, the cognate lesser included offenses are somewhat more difficult to ascertain, conceptually as well as practically. One guide to the minimal due process notice requirements in this area was set out in Paterno v Lyons, 334 US 314; 68 S Ct 1944; 92 L Ed 1409 (1948), wherein the [United States Supreme] Court said that due process notice requirements are met if the greater charged crime and the lesser included offense are of the same or of an overlapping nature. [Id., p 388 (citations omitted).]

To justify an instruction on a lesser cognate offense, the lesser offense must be "of the same class or category, or closely related to the originally charged offense. . . ." Ora Jones, supra, at 388; People v Hendricks, 446 Mich 435, 442-43 (1994).

Following up on the analysis of Ora Jones, supra, and Hendricks, supra, the Michigan Supreme Court in Perry, supra, pointed out that the crimes of Murder and Accessory After the Fact are not of the same "class or character." As the Court stated in Perry, supra, 62:

> In light of that analysis, it inevitably follows that the common-law offense of accessory after the fact is not in the same class or category as murder. Plainly, the purpose of the murder statute is to protect human life and prohibit wrongful slayings. By contrast, an accessory after the fact is "one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment." Perkins, Criminal Law (2d ed), p 667, quoted in People v Lucas, 402 Mich 302, 302; 262 NW2d 662 (1978). The crime of accessory after the fact is akin to obstruction of justice. United States v Brenson, 104 F3d 1267 (CA 11, 1997). Laws forbidding the obstruction of justice clearly serve a different purpose than those that forbid the taking of a life.

Similarly, the crime of Assault With Intent to Murder and all of its lesser included offenses are intended to protect citizens from the infliction of injury or the threat of the infliction of injury. These offenses are much more similar to the crime of murder. They are not at all similar to the crime of Accessory After the Fact.

In reaching the conclusion that the finder of fact determining a verdict for a defendant charged with Murder should not be permitted to consider the offense of Accessory After the Fact, the Court discussed a number of cases from the Court of Appeals which arguably adopted a

different approach. In particular, the Court of Appeals in the case of People v Usher, 196 Mich App 228, 231-34 (1992) concluded that the crime of Accessory After the Fact was a lesser cognate offense of the crime of Murder. However, in Usher, the defendant was well aware of the evidence supporting the conviction of Accessory After the Fact based upon the previous trial which had taken place in that case and based upon the facts and theories of the case, which provided constructive notice to the defendant. Further, in Usher, supra, the defense counsel not only agreed that Accessory After the Fact was an appropriate cognate lesser included offense, but indicated that he intended to request the instruction on that offense. Usher, supra, at 230-31. However, Usher and a host of other Court of Appeals cases which reached similar conclusions, were all overruled by Perry, supra at 64-65, to the extent their holdings are inconsistent with the holding in Perry. For all these reasons, the Michigan Supreme court in Perry, supra, at 66, concluded that "the common law offense of Accessory After the Fact is not a cognate offense of murder. . . ." (Emphasis added).

In this case, in contravention of Perry, this Court convicted the Defendant of Accessory After the Fact under circumstances where the Defendant had no knowledge of the witness or evidence which would be used to establish the facts upon which this Court rested its verdict until the day of trial, as argued supra in Issue I, and where the Defendant in fact had no knowledge that he needed to defend against the charge of Accessory After the Fact until the Court rendered its verdict. Thus, defense counsel did not aggressively pursue a cross examination of Officer _____, asking him only approximately one question, not believing that his testimony was particularly significant to the overall case against the Defendant, and did not refer to his testimony in argument at all.

The Michigan Supreme Court decision in Perry precluded this Court from convicting the Defendant of the offense of Accessory After the Fact. Therefore, the conviction of this offense must be vacated.

III. THE DOUBLE JEOPARDY DOCTRINE OF "IMPLIED ACQUITTAL" ESTABLISHES THAT THE COURT'S VERDICT IMPLICITLY ACQUITTED HIM OF ASSAULT WITH INTENT TO COMMIT MURDER AND ALL LESSER INCLUDED OFFENSES; THEREFORE, A JUDGMENT OF ACQUITTAL MUST BE ENTERED.

This Court found the Defendant guilty of the offense of Accessory After the Fact to the crime of Assault With Intent to Commit Great Bodily Harm Less than Murder. In doing so, principles of double jeopardy require a determination that this Court implicitly acquitted the Defendant of Assault with Intent to Commit Murder and all lesser offenses. The doctrine of "implied acquittal" was set forth in Green v United States, 355 US 184; 78 S Ct 221; 2 LEd2d 199 (1957). This doctrine holds that where a defendant is convicted of a lesser charge, he is implicitly acquitted of all other charges of which he could have been convicted but was not. In this case, the Defendant was charged as an Aider and Abetter with the offense of Assault With the Intent to Commit Murder. This Court had a reasonable doubt as to his complicity as an Aider and Abetter in the charged offense of Assault With Intent to Murder and all of its related lesser offenses. This Court found that the Defendant's criminal complicity only arose after the conviction of the assaultive crime. This Court convicted the Defendant of Accessory After the Fact based upon a finding that he, at some point after the shooting, assisted in concealing the weapon that was used by the co-defendant to shoot the complainant. In so finding, this Court implicitly acquitted _____ of being an Aider and Abetter with respect to Assault With Intent to Murder or any lesser assaultive offenses. This doctrine has been repeatedly recognized in

Michigan Courts. See for example, People v McMiller, 389 Mich 425, 430-31 (1973); People v Charles Jackson, 71 Mich App 395, 400 (1976).

Directly on point to the instant case is the unusual case of People v Lewis, 91 Mich App 542, 543-46 (1979). In that case, as in this case, the defendant went to trial on a charge of Assault With Intent to Commit Murder. The Court did not instruct the jury as to any lesser included offenses or related offenses as to that count. Despite not having been instructed on any lesser offenses, the jury returned a verdict finding the defendant guilty of the offense of Assault With Intent to Do Great Bodily Harm Less than the Crime of Murder. No explanation is provided in the Opinion as to how in the world the jury was aware of the existence of the crime of which they convicted the defendant. In any event, the trial court accepted the verdict of the lesser assault crime and sentenced the defendant accordingly. Because the jury convicted the defendant of an offense which they were not entitled to consider, the Court of Appeals held that the jury had implicitly acquitted the defendant of the only offense available to them, which was Assault With Intent to Murder. Therefore, the Court vacated the conviction of Assault With Intent to Do Great Bodily Harm Less than Murder and entered a Judgment of Acquittal.

Similarly, in the instant case, neither of the parties ever requested that the Court consider the offense of Accessory After the Fact. The defense had no knowledge that it should be prepared to argue or defend against such an offense until the Court rendered its verdict. In light of Perry, supra, the conviction offense of Accessory After the Fact is not an offense which this Court was legally entitled to consider under the circumstances of this case. Therefore, the remedy in the instant case is the same remedy as in Lewis. The conviction of offense of Accessory After the Fact must be vacated, and a Judgment of Acquittal must be entered.

WHEREFORE, for all the above reasons, the Defendant respectfully requests that this Court grant his motion to vacate the conviction of Accessory After the Fact, and to enter a Judgment of Acquittal.

Respectfully submitted,

JOHN F. ROYAL (P27800)
Attorney for Defendant

DATED: June 21, 2002

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Defendant.
_____/

Wayne County Prosecuting Attorney

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, 1724 Ford Building
Detroit, MI 48226
(313) 962-3738
_____/

MOTION TO SUPPRESS EVIDENCE OF IN-COURT IDENTIFICATION TESTIMONY OBTAINED BY IMPROPERLY SUGGESTIVE AND UNLAWFUL PROCEDURES, AND MOTION FOR WADE HEARING

NOW COMES Defendant, by and through his attorney, John F. Royal, and moves this Honorable Court to conduct an evidentiary hearing and to suppress the evidence of in-court identification testimony of two prosecution witnesses, including the complainant, of the Defendant which in-court identification testimony was obtained by improperly suggestive and unlawful procedures, and where there is no independent basis for an in-court identification of the Defendant by either witness, for the following reasons:

1. The Defendant is one of four co-defendants in this case. The Defendant is charged with one count of Armed Robbery, in violation of MCL 750.529. The incident is alleged to have occurred on September 6, 2005, and the complainant is___

2. The day after the robbery in question, both the Complainant, and ____, the victim of an

unrelated robbery which took place at a different time and place, came to the Detroit Police Department 5th Precinct, and viewed a series of four photo show-ups for the purpose of attempting to identify perpetrators in each respective incident.

3. At the time these photo show-ups were conducted, the Defendant was a prisoner in the custody of the Detroit Police Department. Upon information and belief, the Defendant was incarcerated in the lock-up at the 5th Precinct. He was therefore readily available and willing to stand in a live line-up.

4. The Michigan Courts have firmly taken the position that where, as here, a defendant is in custody, and is readily available and willing to cooperate with a live line-up, then it is improper to conduct photo show-ups. This violation alone is sufficient to suppress evidence of the procedures used during the improperly conducted photo show-up, as well as any subsequent in-court identification which is based upon the improperly conducted photo show-up. People v Franklin Anderson, 389 Mich 155, 186-87, n 22 (1973); People v Kachar, 400 Mich 78 (1977); People v Kurylczyk, 443 Mich 289 (1993); People v McKenzie, 205 Mich App 466 (1994); People v Green, 131 Mich App 232, 239-40 (1983).

5. . The photo show-ups in this case were improperly and suggestively conducted in violation of the Defendant's Constitutional rights. U.S. Const. Ams. V, VI, XIV; Mich. Const. 1963, Art. I, Secs. 17 and 20. United States v Wade, 388 US 219 (1967); Gilbert v California, 388 US 263 (1967); Anderson, supra, 389 Mich at 169. Photo show-ups that are improperly and suggestively conducted violate the Defendant's rights under the US Const, Ams. V, VI, XIV; and under the Constitution of the State of Michigan, Art. 1, Secs., 17 and 20. United States v Wade, 388 US 219 (1967); Gilbert v California, 388 US 263 (1967); and People v Anderson, 389 Mich 155, 169 (1973).

6. Where the police conduct improper, illegal, and/or unnecessarily suggestive photo show-

ups, which lead to a later in-court identification, the in-court identification must be suppressed. Where identification procedures are improper or unnecessarily suggestive, the in-court identification by a witness who was involved in a suggestive confrontation may be tainted. Both the United States and Michigan Supreme Courts have agreed that a witness "is not likely to go back on his word later on, so that in practice the issue of identify may . . . for all practical purposes be determined there and then, before the trial." People v Kachar, 400 Mich 78, 92 (1977), quoting Wade, supra, 388 US at 229. Consequently, the prosecutor must show by clear and convincing evidence that an in-court identification will have a basis independent of any improperly conducted or suggestive pretrial confrontation. People v Anderson, 389 Mich 155, 169; 205 NW2d 461 (1973).

7. At the photo show-ups, the Complainant _____ completely failed to pick-out or identify the photograph of the Defendant in any way whatsoever. He did, however, pick out the photo of co-defendant____, and identified ____ as the perpetrator who was in possession of an object that looked like a handgun during the Robbery.

8. Despite Complainant inability to identify the Defendant during the photo show-ups, the prosecution was permitted, during the preliminary examination, and over strenuous defense objection, to elicit testimony from the Complainant in the form of an in-court identification of the Defendant in which the Complainant identified the Defendant as the perpetrator who was in possession of a suspected handgun.

9. At the photo-show-up, the witness,____ pointed to the picture of the Defendant and said only that he: "looks familiar." What she meant by this phrase was uncertain until the preliminary examination. At the preliminary examination, explained that when she saw the Defendant's photo in the photo show-up, she thought he looked familiar, but she did not know if he looked familiar from the incident in which she was robbed, or from some other contact with him. (PE II, 70-71).

10. Nevertheless, during the preliminary examination in the instant case, of the robbery of ___, ____was permitted to identify the Defendant as the perpetrator who was in possession of a suspected handgun during the incident she was involved in.

11. The In-Court identifications of the Defendant at the preliminary examination, by both Complainant and by the witness _____, were both the product of the improperly conducted photo show-ups, which were illegally conducted even thought the Defendant was in Detroit Police custody.

12. The In-Court identifications of the Defendant, at the preliminary examination, by both Complainant and by the witness _____-were both the product of the suggestive in-court confrontation which the prosecution was permitted to conduct, over defense objection, in the courtroom at the 36th District Court during the preliminary examination, which was a highly suggestive in-court identification procedure because all four defendants were seated directly behind each of the four defense attorneys, who were seated at the defense table, and there were no other people in the courtroom who resembled the perpetrators or the Defendants. .

13. The In-Court identifications of the Defendant at the preliminary examination, by both Complainant ____and by the witness _____ were both the product of the improperly conducted and unnecessarily suggestive photo show-ups which were conducted in this case.

14. Absent the improper and unnecessarily suggestive procedures described above, there is no independent basis for an in-court identification by either the Complainant _____or the witness ___. People v Kachar, 400 Mich 78 (1977); People v Kurylczyk, 443 Mich 289 (1993)

WHEREFORE, the Defendant requests that an evidentiary hearing be conducted to determine the admissibility of the in-court identification testimony of the Complainant ____ and the witness _____, and that the following persons be called to testify:

Respectfully submitted,

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Defendant.
_____/

Wayne County Prosecuting Attorney

JOHN F. ROYAL (P27800)
Attorney for Defendant

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE OF IN-COURT IDENTIFICATION TESTIMONY OBTAINED BY IMPROPERLY SUGGESTIVE AND UNLAWFUL PROCEDURES, AND MOTION FOR WADE HEARING

Statement of Facts

The facts are those set forth in the attached Motion to Suppress, and in the Defendant's Motion to Quash the Information, which is being filed simultaneously with the instant Motion. Both of these documents are incorporated herein by reference.

Legal Authorities

The Michigan Courts have firmly taken the position that where, as here, a defendant is in custody, and is readily available and willing to cooperate with a live line-up, then it is improper to conduct photo show-ups. This violation alone is sufficient to suppress any identification made during the improperly conducted photo show-up, or any subsequent in-court identification which is based upon the improperly conducted photo show-up. People v Franklin Anderson, 389 Mich 155, 186-87, n 22 (1973); People v Kachar, 400 Mich 78 (1977); People v Kurylczyk, 443

Mich 289 (1993); People v McKenzie, 205 Mich App 466 (1994); People v Green, 131 Mich App 232, 239-40 (1983).

Further, the photo show-ups in this case were improperly and suggestively conducted in violation of the Defendant's Constitutional rights. U.S. Const. Ams. V, VI, XIV; Mich. Const. 1963, Art. I, Secs. 17 and 20. United States v Wade, 388 US 219 (1967); Gilbert v California, 388 US 263 (1967); Anderson, supra, 389 Mich at 169. Photo show-ups that are improperly and suggestively conducted violate the Defendant's rights under the US Const, Ams. V, VI, XIV; and under the Constitution of the State of Michigan, Art. 1, Secs., 17 and 20. United States v Wade, 388 US 219 (1967); Gilbert v California, 388 US 263 (1967); and People v Anderson, 389 Mich 155, 169 (1973).

Where the police conduct improper, illegal, and/or unnecessarily suggestive photo show-ups, which lead to a later in-court identification, the in-court identification must be suppressed. Where identification procedures are improper or unnecessarily suggestive, the in-court identification by a witness who was involved in a suggestive confrontation may be tainted. Both the United States and Michigan Supreme Courts have agreed that a witness "is not likely to go back on his word later on, so that in practice the issue of identify may . . . for all practical purposes be determined there and then, before the trial." People v Kachar, 400 Mich 78, 92 (1977), quoting Wade, supra, 388 US at 229. Consequently, the prosecutor must show by clear and convincing evidence that an in-court identification will have a basis independent of any improperly conducted or suggestive pretrial confrontation. People v Anderson, 389 Mich 155, 169; 205 NW2d 461 (1973).

The In-Court identifications of the Defendant at the preliminary examination, by the Complainant and by the witness_____, were both the product of the suggestive in-court confrontation which the prosecution was permitted to conduct, over defense objection, a highly

suggestive in-court identification procedure, where the four defendants were the only people in the courtroom who resembled the perpetrators. It is well recognized that a suggestive in-court identification at the Preliminary Examination can taint all further proceedings in the case, including the trial. It is also well-settled that the Defendant's right to non-suggestive identification procedures applies at the Preliminary Examination. People ex rel Ingham County Prosecutor v East Lansing Municipal Judge (People v Maire), 42 Mich App 32, 35-45 (1972); See also: People v Solomon, 391 Mich 767 (1974), adopting without amendment the dissenting opinion of Lesinski, C.J., in People v Solomon, 47 Mich App 208, 216-221 (1973); People v Leverette, 112 Mich App 142 (1982).

The In-Court identifications of the Defendant, by both Complainant and by the witness _____, were both the product of the improperly conducted photo show-ups, which were illegally conducted even thought the Defendant was in Detroit Police custody.

The In-Court identifications of the Defendant, by both Complainant and by the witness ____, were both the product of the improperly conducted and unnecessarily suggestive photo show-ups which were conducted in this case.

The Defendant has a right to an Evidentiary Hearing to support his factual contentions in this case. United States v Wade, supra; People v Williams, 412 Mich 926 (1982); People v Childers, 20 Mich App 639 (1969).

WHEREFORE, the Defendant requests that an evidentiary hearing be conducted to determine the admissibility of the in-court identification testimony of the Complainant and the witness____, and that the following persons be called to testify:

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)

STATE OF MICHIGAN
IN THE 18TH DISTRICT COURT FOR THE CITY OF WESTLAND

PEOPLE OF THE CITY OF WESTLAND,
Plaintiff,
vs. Case Nos.
Hon.
,
Defendant.
_____/

JOHN F. ROYAL (P27800)
1724 Ford Building
Detroit, Michigan 48226
(313) 962-3738

MOTION TO ADJOURN SCHEDULED TRIAL DATE
OF OCTOBER 0, 2001

NOW COMES Defendant, by and through his attorney, John F. Royal, and respectfully moves this Court to adjourn the scheduled trial date of October __, 2001 for at least one week, for the following reasons:

1. Mr. __ is charged in this cause with Stalking.

2. This matter is presently scheduled for trial on October __, 2001.

3. The original witness list provided by the Defendant in this matter listed as witness number __ Mr. __, CLI, of __ and __ Associates in __, Michigan. Mr. __ is a former Detroit Police Officer and currently a private investigator who has done extensive work in assisting the defense to prepare for trial in this matter. He has interviewed numerous witnesses, conducted extensive background investigation of individuals relevant to this case, and has retraced the route of Mr. __ through the City of Westland on the evening of May __, 2000, one of the three dates on which Mr.__ is accused of committing the charged offense. Importantly, Mr. __ retraced Mr.__ 's route through Westland exactly one year after the actual incident, on May __,

2001. Mr. __ can testify to the lighting and traffic patterns that evening. He is also able to identify photographs and sketches made that will demonstrate that the prosecution version of Mr.__ 's route through __Westland on the night of May __, 2000 could not possibly be correct. Because of Mr. __'s background in law enforcement and his experience as a private investigator, and because of the extensive work he has done particularly with respect to the incident of May __, 2000, he is a vital witness for the defense.

4. Mr. __ has just notified defense counsel that he and his wife have non-refundable and expensive reservations for a nine day trip to __ from October __ - __, 2001. It would be an extreme financial hardship for Mr. __ to have to cancel these reservations at this time. Therefore, he is not available to testify on the trial date scheduled for October __, 2001. Documentation of Mr. __'s travel reservations is attached.

5. Mr. __ would be available to testify the following week on any day except Wednesday, October __, 2001.

6. Therefore, Defendant requests this Court to adjourn the scheduled trial date of October __, 2001 to October __, 2001, or any mutually convenient date thereafter on which all witnesses can be present.

7. Alternatively, Defendant requests this Court to permit a continuance of the trial in progress from the week of October __ to Monday, October __, 2001 so that the jury will be able to hear and benefit from Mr. _'s testimony prior to commencing deliberations in this case.

8. Defense counsel has filed this motion promptly upon learning of the travel plans of Mr. ____.

9. This motion is filed pursuant to the Defendant's constitutional right to the compulsory process of witnesses. US Const. Ams. VI, XIV; Mich Const. 1963, Art. 1, § 20. See also People

v Williams, 386 Mich 565 (1972); People v Wilson, 397 Mich 76, 80 (1976); People v Battles No. 2, 109 Mich App 487, 490 (1981); People v Ferguson, 46 Mich App 331, 339 (`973).

WHEREFORE, for all the above reasons, the Defendant requests that this Court adjourned the scheduled trial date in this matter to October __, 2001 or to a mutually convenient date thereafter; alternatively, Mr. __ requests a continuance of the trial in progress to October __, 2001 so that witness __ would be able to testify on that date.

Respectfully submitted,

_____

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, 1724 Ford Building
Detroit, MI 48226
(313) 962-3738

DATED: