



# Criminal Jury Instructions Committee

## Agenda

Saturday, February 26, 2011

10:00 a.m.

Cooley Law School, Room 911

300 S. Capitol Avenue, Lansing

Criminal Jury Instructions Committee

**AGENDA**

Saturday, February 26, 2011

10:00 AM

Cooley Law School – Room 911

Lansing

- [1] **Minutes** of the last committee meeting held September 11, 2010 **Pgs 1 - 10**
- [2] **CJI 2d 11.4** - Definition of Dangerous Stabbing Weapon & **CJI 2d 11.5** – Definition of Dirk, Dagger, and Stiletto **Pgs 11- 32**
- [3] **Medical Marijuana Defense** **Pgs 33 - 62**
- [4] **New Chapter Creation – “Telecommunications and Computers”** **Pgs 63 - 64**
- [5] **CJI 2d 17.21** – Child Abuse Third Degree Amended Instruction **Pgs 65 - 70**
- [6] **CJI 2d 25.5** – Possession of Burglar’s Tools Addition to Commentary **Pgs 71 - 73**
- [7] **CJI 2d 18.2** – Robbery Amended Instruction **Pgs 74 - 88**
- [8] **CJI 2d 18.3** – Assault with Intent Robbery Armed Use Note **Pgs 89 - 96**
- [9] **CJI 2d 15.11** – OWI Causing Death Addition to Commentary **Pgs 97 - 102**
- [10] **TOP 50 CRIME CATEGORIES** **Pgs 103 - 105**
- [11] **Old Business**
  - a. CJI 2d 18.1 & 18.3 Robbery Armed & Robbery Unarmed
  - b. Juror Manual
  - c. Common Law and Statutory Presumptions
- [12] **New Business**
- [13] **Next Meeting**
- [14] **Adjournment**

CRIMINAL JURY INSTRUCTIONS COMMITTEE

**MINUTES**

SATURDAY, SEPTEMBER 11, 2010

LANSING

**1. Minutes of the last committee meeting, held May 15, 2010, were reviewed and adopted with the following corrections:**

- Numbering and typographical errors to CJI2d 17.23 Child Abuse, Fourth Degree (Unreasonable Risk of Harm or Injury)

**CJI2d 17.23 Child Abuse, Fourth Degree (Unreasonable Risk of Harm or Injury)**

- (1) The defendant is charged with the crime of fourth-degree child abuse. To establish this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:

[Choose (2) or (3):]

- (2) First, that [name defendant] is the [parent/guardian] of [name child]
- (3) First, that [name defendant] had care or custody of or authority over [name child] when the abuse happened.

[Choose [4] or [5]:]

- (4) Second, that the defendant knowingly or intentionally committed an act that under the circumstances posed an unreasonable risk of harm or injury to [name child]. Actual injury is not necessary.
- (5) Second, that the defendant's omission or reckless act caused physical harm to [name child].

- (6) Third, that [name child] was at the time under the age of 18.

### **Use Note**

For conviction, jurors need not all agree on paragraphs (4) or (5) as long as they unanimously agree either paragraphs (4) or (5) were proven beyond a reasonable doubt. The statutory language indicates this is a general intent crime.

The jury should be instructed on parental discipline, [CJI2d 17.24](#), when this is raised as a defense.

### **History**

CJI2d 17.23 was CJI 17:8:04B.

### **Commentary**

See commentary to [CJI2d 17.18](#)

## **2. CJI2d 11.38 & 11.38a Felon in Possession of a Firearm.**

The committee approved adding language to the Commentary that pursuant to [People v Dupree](#)

- a. Self defense is a defense, and
- b. “temporary possession” of a firearm is not a defense to felon in possession of a firearm

## **3. CJI2d 15.11 Operating While Intoxicated Causing Death**

In [People v Feezel](#) (case no. 1380301, June 8, 2010), the Supreme Court cautioned trial courts against giving inadequate causation instructions. The committee decided to table any action on possible amendment of CJI2d 15.11 until it could review the causation instruction given at trial. Feezel’s trial counsel, Douglas Mulkoff, will be contacted.

## **4. CJI2d 25.2a - Home Invasion First Degree**

The committee approved an additional use note to read:

“The jury may return guilty verdicts based upon multiple theories, but the trial court may impose only one judgment of sentence for home invasion in the first degree.”

## **5. CJI2d 25.2a - Home Invasion First Degree**

The committee approved an additional use note to read:

“Home Invasion Third Degree is a lesser included offense of Home Invasion First Degree only if supported by the evidence.”

## **6. CJI2d 23.5 – Larceny from a Motor Vehicle**

The committee approved an addition to the commentary indicating MCR 750.36a does not require the stolen item to be permanently affixed to the vehicle.

## **7. CJI2d 18.1 & 18.3 – Robbery Armed & Unarmed Robbery**

In light of the pending application for leave to appeal in the Michigan Supreme Court in People v Williams, the committee voted to table any action until the February 5, 2011 meeting.

## **8. Proposed Polygraph Instruction**

The committee decided not to include a standard polygraph instruction, but rather leave the solution to trial judges to create curative instructions.

## **9. Juror Manual**

Committee member Mark Cooney agreed to prepare a proposed final version of the juror manual for the February 5, 2011 meeting. He will incorporate changes proposed by committee chair, Judge Caprathe.

## **10. CJI2d 15.6 – Operating While Intoxicated “Supper Drunk” – Instruction**

The committee approved a modification of the existing instruction and verdict form in order to accommodate the “super drunk” driving penalties and to eliminate any Apprendi v New Jersey appellate issue.

The instruction and verdict form reads:

CJI2d 15.6a – Verdict Form – Operating While Intoxicated/Operating While  
Visibly Impaired

CJI2d 15.6 Possible Verdicts

[Use for Acts Occurring On or After October 31, 2010]

There are three possible verdicts:

- (1) not guilty, or
- (2) guilty of violating section 625 of the Michigan Vehicle Code [ordinance] by
  - (a) operating a motor vehicle while under the influence of alcohol, [and / or]
  - (b) operating a motor vehicle with an unlawful bodily alcohol level.

If you all agree that the defendant violated section 625, do you find the defendant had a blood alcohol level of 0.17 grams or more?

\_\_\_\_\_Yes

\_\_\_\_\_No

[If you all agree that the defendant either operated a motor vehicle while under the influence of alcohol or with an unlawful bodily alcohol level, it is not necessary that you agree on which of these violations occurred. However, in order to return a verdict of guilty, you must all agree that one of the two violations did occur.] \*

- (3) guilty of operating a motor vehicle while impaired.

## **Use Note**

\*Use the bracketed paragraph only if the defendant is charged with both OUIL and UBAL. This paragraph specifically states that the jury need not be unanimous on an OUIL or UBAL theory as long as all jurors agree that the defendant violated section 625 in at least one of these two fashions. See *People v Nicolaides*, 148 Mich App 100, 383 NW2d 620 (1985).

## **History**

CJI2d 15.6 was CJI2d 15.7. Amended October, 1993; June, 1995, to reflect the changes in 1994 PA 449 and 450; May, 2010, to reflect changes in 2008 PA 463

## **Commentary**

A prosecutor is not required to elect between charging the defendant with operating a motor vehicle under the influence of liquor or operating while having an unlawful bodily alcohol level. A prosecutor may proceed on alternative theories for the same count. *People v Nicolaides*, 148 Mich App 100, 383 NW2d 620 (1985).

This instruction was adopted in 1993 when chapter 15 was revised.

### **11. CJI2d 5.4 – Witness as Undisputed Accomplice**

The committee approved a modification of the existing instruction to more accurately reflect that the immunity granted by MCL 767.6 is use immunity.

The new instruction reads:

#### CJI2d 5.4 – Witness as Undisputed Accomplice

(1) [Name witness] says [he/she] took part in the crime that the defendant is charged with committing.

[Choose as many of the follow as apply:]

[(a) [Name witness] has already been convicted of charges arising out of the commission of that crime.]

[(b) The evidence clearly shows that [name witness] is guilty of the same crime the defendant is charged with.]

[(c) [Name witness] has been promised that [he/she] will not be prosecuted for the crime the defendant is charged with committing based upon any information derived directly or indirectly from the witness' truthful testimony. The witness may be prosecuted if the prosecution obtains additional, independent evidence against the witness.] (Use immunity)

[(d) [Name witness] has been promised that [he/she] will not be prosecuted for the crime the defendant is charged with committing.)] (transactional immunity)

(2) Such a witness is called an accomplice.

### **Use Note**

This instruction is to be followed by the instruction on weighing testimony of an accomplice, CJI2d 5.6

This charge should be given automatically where the witness has admitted his guilt or has been convicted of the crime, or where the evidence clearly indicates his complicity. Strike out whichever of the bracketed statement is inapplicable. Of course, more than one may apply.

In certain classes of cases (e.g. consensual statutory rape), the victim as a matter of law is not considered to be an accomplice. In those cases, the defendant is not entitled to the charge on accomplice testimony.

Although MCL 767.6 provides for "use immunity", the prosecution can offer a witness/accomplice "transactional immunity".

### **History**

CJI2d 5.4 was CJI 5:3:01; amended January, 1991.

## **Commentary**

People v Pettiford and People v Brown 2010 Mich App Lexis 813 (2010) recognize the prosecutor's ability to expand immunity from MCL 767.6 (use immunity) to transactional immunity.

See commentary following CJI2d 5.6

This instruction was revised by the committee in January 1991, to eliminate gender-biased language.

### **12. Moving Violation Causing Death (new instruction)**

The committee approved the following new instruction language:

#### Moving Violation Causing Death

(new offense)

- (1) [the defendant is charged with the crime of]/You may consider the lesser charge of committing a moving traffic violation that causes the death of another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
- (2) First, that the defendant committed a moving violation. [Define the moving violation]
- (3) Second, the moving violation of [describe] was a cause of the death of [name deceased]. To "cause" the victim's death, the defendant's operation of the vehicle must have been a factual cause of the death, that is, but for the defendant's operation of the vehicle the death would not have occurred. In addition, operation of the vehicle must have been a proximate cause of death, that is, death or serious injury must have been a direct and natural result of operating the vehicle

## **Commentary**

The Michigan Supreme Court held in People v Tims, 449 Mich 83, 534 NW2d 675 (1995), that the defendant's conduct must be **a** and not **the** proximate cause of death.

**13. The committee voted to table discussion on this issue until the February 5, 2011 meeting.**

### **Add-on Issues**

#### **14. CJI2d 15.3a - “Zero Tolerance” Instruction**

The committee approved the following instruction:

1. The defendant is charged with the crime of operating a motor vehicle with a controlled substance in [his/her] body. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
2. First, that the defendant was operating a motor vehicle. Operating means driving or having actual physical control of the vehicle.
3. Second, that the defendant was operating the vehicle on a highway or other place that was open to the public [or generally accessible to motor vehicles, including any designated parking area].
4. Third, that while operating the vehicle, the defendant had any amount of [state specific schedule 1 or 2 controlled substance alleged] in [his/her] body.

#### **15. Telephone Interference – (New Instruction)**

The committee approved the following instruction:

Proposed New Instruction – Telephone Interference (MCL 750.540)

- (1) The defendant is charged with the crime of interfering with an electronic communication. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant prevented, obstructed, or delayed by any means, the sending of an authorized communication through [telephone line or any electronic medium of communication / the internet / a computer, computer program, computer system, or computer network /any electronic medium of communication]. [It does not matter whether the communication was actually sent or received.]

(3) Second, that the defendant did this willfully and maliciously. This means that the defendant did the act on purpose and with the intent to prevent, obstruct, or delay the communication

[Use the following paragraph only if applicable.]

(4) Third, that the incident to be reported by [name complainant] resulted in [injury / death] to any person. [The injury does not have to be serious or last for any specific length of time.]

The instruction applies to a violation of MCL 750.540(4). If necessary, the statute contains further definitions of computer, computer network, computer program, computer system, and the internet.

## **16. CJI2d 3.10a – Time and Place (Venue) Criminal Sexual Conduct Cases**

The committee approved the following instruction and commentary:

CJI2d 3.10a Time and Place (Venue) – Criminal Sexual Conduct Cases  
The prosecutor must also prove beyond a reasonable doubt that the crime occurred within \_\_\_\_\_ County.

Time, however, is not an element of the crime of criminal sexual conduct. The prosecutor does not have to prove the date or time of the offense beyond a reasonable doubt.

PROPOSED ADDITION TO COMMENTARY OF CJI2D 3.10

Failure to prove an element of a crime is always a prejudicial error requiring reversal and precluding further prosecution under the double jeopardy clause. In People v Houthoofd, 2010 Mich. LEXIS 1659 (July 31, 2010) (Docket Nos. 138969), the Supreme Court held that although venue was improper, any error was harmless. If venue was an element of the crime, then reversal would have been required.

**17. The following committee members have volunteered to work on the CJI 2d Vol. 1 revisions:**

Gerald Surowiec  
Anica Letica  
Judge Annette Berry  
Chris Smith  
Mark Cooney  
Opolla Brown  
Judge Brian Sullivan  
Bill Vaillencourt  
Larry Shulman  
Judge John T. Hammond

**The CJI Standing Committee's next meeting is: February 5, 2011**

Submitted:

Judge Timothy M. Kenny  
Presiding Judge – Criminal Division  
The Third Judicial Circuit Court of Michigan  
Reporter, Criminal Jury Instruction Committee

## AGENDA ITEM # 2

### **CJI 2d 11.4 Definition of Dangerous Stabbing Weapon** **CJI 2d 11.5 Definition of Dirk, Dagger, and Stiletto**

Request revision to the instructions

Defense counsel, Peter O'Rourke has written to Judge Caprathe requesting the committee amend the jury instructions dealing with knife offenses. Mr. O'Rourke's letter is attached as are the jury instructions (CJI 2d 11.4, 11.5, and 11.19), statutes (MCL 750.226 and 750.227), and the case cited in his letter. Mr. O'Rourke has also supplied recent knife definitions from The American Knife and Tool Institute.

Query whether this committee is the appropriate body to resolve Mr. O'Rourke's concern. Judge Caprathe has indicated to him that the legislature or the appellate courts may be the most appropriate forum.

Honorable William J Caprathe  
1230 Washington Ave.  
Suite 251  
Bay City , MI 48708-5742

December 2, 2010

Dear Judge Caprathe,

I am writing in furtherance of our recent phone conversation during which I requested a prompt review and change of new CJI2nd 11.5, and 11.4.

Section 11.5 purports to define the words "Dirk, Dagger, and Stiletto."  
You advised me that the definitions came from a Webster's Dictionary.

While doing some recent pro-bono work for a young client charged with possession of an illegal knife, a felony, I became well-informed about the distinctions between these knives, and with the applicable statutes, MCL 750.226 and 227. The subject words are not defined in the statutes. However, in *People v. Lynn* 459 MI 53 (1998), the court did recognize that these knives are distinguishable by having "Cross Guards", (also known as "Hand Guards").

I have asked a major USA knife manufacturer, Cold Steel, Inc., to provide for your attention, and hopefully insertion in the Jury Instructions, a true and accurate description of the subject words. It is attached, along with their letter shedding more light on the word "stiletto". \*\*

A large number of men in rural areas, such as where I now live, carry knives with them on a daily basis, as well as do residents of urban areas who need to use knives as tools in their daily routine. I have carried a pocket knife for most of my life and use my knife daily. A spoon (as may be mandated by the cited language) just would not do the job!

Many tradesmen, including carpenters, plumbers, electricians, as well as postal carriers, hunters, fishermen, contractors, sailors, artists, cobblers, foresters, woodsmen, horsemen, and others, carry knives and use them as necessary tools. The non-harmful use of a knife goes back to primitive days. A folding, singled edge knife is part of work and outdoor life and should not be made the basis of a felony finding by inapplicable descriptions in Jury Instructions. It is logical to put limits on so-called "stabbing instruments, non-folding, double-edged knives" such as the subject ones, but not to include all knives. I believe that the statutes are not as clear as they should be, but that is another issue.

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A jury would have little choice but to find a felony conviction against those knife carriers listed above, who carry a knife as a tool, (and stopped for a traffic violation, with the officer claiming fear for his safety and conducting a search), under the new definitions. Unfortunately, some prosecutors and law enforcement officers would seek and charge such felony counts with glee! It is not my intent to paint them all with the same brush.

I have four grandsons, all of whom receive a pocket knife from me when they turn eight years old, with a lesson in how to use it and how to avoid injury. They are potential felons in Michigan ? Under the new Jury Instructions – YES!

The new and current Jury Instructions/ definitions which would make possession any knife a felony must be banned from practice ASAP. A true definition of the subject words should be adopted ASAP, to avoid miscarriages of justice related to this matter.

I also recommend that CJI2d 11.4 and 11.19 be looked at for inconsistency with each other and with other sections. One section says the purpose in carrying the weapon does not matter and others suggest otherwise. It is bound to confuse a juror. The words “The way” in 11.4 (2) are vague. What does that mean?

Thank you and the committee for reviewing this matter. I deem it to be urgent and of paramount importance.

\*\* I am awaiting the Cold Steel definitions and a copy of their “Stiletto” letter, both of which will be forwarded to you upon receipt.

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Cc:  
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Current with changes issued by the committee through 09/30/10

## Michigan Criminal Jury Instructions

Prepared by the Michigan State Bar Standing Committee on Standard Criminal Jury Instructions

### CJI2d 11.4 Definition of Dangerous Stabbing Weapon

- (1) A dangerous stabbing weapon is any object that is carried as a weapon for bodily assault or defense and that is likely to cause serious physical injury or death when used as a stabbing weapon.
- (2) Some objects, such as guns or bombs, are dangerous because they are specifically designed to be dangerous. Other objects are designed for peaceful purposes but may be used as dangerous weapons. The way an object is carried determines whether or not it is a dangerous weapon. If an object is carried for use as a stabbing weapon, and is likely to cause serious physical injury or death when used as a stabbing weapon, it is a dangerous stabbing weapon.
- (3) You must decide from all of the facts and circumstances whether the evidence shows that the \_\_\_\_\_ in question here was a dangerous stabbing weapon.

#### History

CJI2d 11.4 was CJI 11:1:04.

#### Commentary

See MCL 750.227; MCL 750.231; and MCL 750.231a in “Statutes” at the end of this chapter.

This instruction uses three tests: (1) the “purpose” test of *People v Vaines*, 310 Mich 500, 17 NW2d 729 (1945), and *People v Morris*, 8 Mich App 688, 155 NW2d 270 (1967); (2) the “injury” test of *People v Goolsby*, 284 Mich 375, 279 NW 867 (1938); and (3) the “stabbing” test of *People v Smith*, 393 Mich 432, 225 NW2d 165 (1975).



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## Michigan Criminal Jury Instructions

Prepared by the Michigan State Bar Standing Committee on Standard Criminal Jury Instructions

### CJI2d 11.5 Definition of Dirk, Dagger, and Stiletto

- (1) A dirk is a straight knife with a pointed blade.
- (2) A dagger is a knife with a short, pointed blade.
- (3) A stiletto is a small dagger with a slender, tapering blade.

#### Use Note

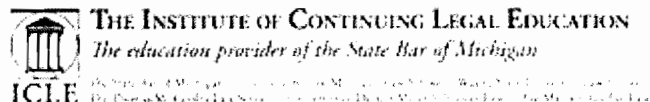
Choose appropriate definition.

#### History

CJI2d 11.5 was CJI 11:1:06–11:1:08.

#### Commentary

These definitions are paraphrased from *Webster's Ninth New Collegiate Dictionary* (1987).



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## Michigan Criminal Jury Instructions

Prepared by the Michigan State Bar Standing Committee on Standard Criminal Jury Instructions

### CJI2d 11.19 Definition of Dangerous Weapon

- (1) A dangerous weapon is any object that is used in a way that is likely to cause serious physical injury or death.
- (2) Some objects, such as guns or bombs, are dangerous because they are specifically designed to be dangerous. Other objects are designed for peaceful purposes but may be used as dangerous weapons. The way an object is used or intended to be used in an assault determines whether or not it is a dangerous weapon. If an object is used in a way that is likely to cause serious physical injury or death, it is a dangerous weapon.
- (3) You must decide from all of the facts and circumstances whether the evidence shows that the \_\_\_\_\_ in question here was a dangerous weapon.

#### History

CJI2d 11.19 was CJI 11:2:04.

#### Commentary

This instruction uses two tests: (1) the “purpose” test of *People v Vaines*, 310 Mich 500, 17 NW2d 729 (1945), and *People v Morris*, 8 Mich App 688, 155 NW2d 270 (1967); and (2) the “injury” test of *People v Goolsby*, 284 Mich 375, 279 NW 867 (1938).



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3 of 6 DOCUMENTS

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CHAPTER 750 MICHIGAN PENAL CODE  
THE MICHIGAN PENAL CODE  
CHAPTER XXXVII. FIREARMS

**Go to the Michigan Code Archive Directory**

*MCLS § 750.226 (2011)*

MCL § 750.226

§ 750.226. Firearm or dangerous weapon; carrying with unlawful intent.

Sec. 226. Carrying firearm or dangerous weapon with unlawful intent-Any person who, with intent to use the same unlawfully against the person of another, goes armed with a pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length, or any other dangerous or deadly weapon or instrument, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years or by a fine of not more than 2,500 dollars.

**HISTORY:** Act 328, 1931, p 624; eff September 18, 1931.

Pub Acts 1931, No. 328, Ch. XXXVII, § 226, eff September 18, 1931.

Prior codification:

Pub Acts 1927, No. 372, eff September 5, 1927; CL 1929, § 16752.

**NOTES:**

*Michigan Digest references:*

*Criminal Law and Procedure §§ 97, 97.35, 97.60, 128, 464, 575, 696, 959*  
*Former Jeopardy § 24*

LEXIS Publishing Michigan analytical references:

*Michigan Law and Practice, Criminal Law and Procedure § 1294*  
*Michigan Practice - Criminal Law §§ 3.37-3.42*

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*459 Mich. 53, \*; 586 N.W.2d 534;  
1998 Mich. LEXIS 3190, \*\**

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JOHN LYNN, Defendant-Appellee.

No. 112014

SUPREME COURT OF MICHIGAN

459 Mich. 53; 586 N.W.2d 534; 1998 Mich. LEXIS 3190

December 8, 1998, Decided

December 8, 1998, Filed

**SUBSEQUENT HISTORY:** [**\*\*1**] Updated Copy December 14, 1999.

**PRIOR HISTORY:** Kalamazoo Circuit Court, John F. Foley, J. Court of Appeals, MCDONALD, P.J., and SAWYER and HOEKSTRA, JJ. (Docket No. 196912). 229 Mich App 116; 580 N.W.2d 472 (1998).

**DISPOSITION:** Judgment of Court of Appeals reversed and defendant's conviction reinstated for carrying dangerous weapon in vehicle.

### CASE SUMMARY

**PROCEDURAL POSTURE:** The state challenged a judgment of the Court of Appeals, which set aside defendant's conviction for carrying a dangerous weapon in a motor vehicle in violation of Mich. Comp. Laws § 750.227(1) (Mich. Stat. Ann. § 28.424(1)). The judgment was based on a ruling that the jury instructions failed to require the jury to consider and decide whether defendant's knives were dangerous weapons.

**OVERVIEW:** Defendant was convicted of several offenses, including carrying a dangerous weapon in a motor vehicle, Mich. Comp. Laws § 750.227(1) (Mich. Stat. Ann. § 28.424(1)). The court of appeals set aside the weapons conviction on the ground that the jury instructions did not require the jury to determine whether defendants' knives were dangerous weapons. Under the statute, a person could not carry a double-edged non-folding stabbing instrument of any length, or any other dangerous weapon, except a hunting knife, concealed on or about his or her person, or whether concealed or otherwise in any vehicle operated or occupied by the person, except in his or her dwelling house, place of business or on other land possessed by the person. The trial court told the jury in part that in order to find defendant guilty, it had to find there was a double-edged, non-folding stabbing instrument that was in a vehicle with defendant. The judgment was reversed and the conviction was reinstated because the instruction did not impliedly assume the element. Rather, it told the jury that it had to consider whether the knives were in fact within the

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double-edged non-folding stabbing instrument category.


**OUTCOME:** A judgment setting aside defendant's conviction for carrying a dangerous weapon in a motor vehicle was reversed and the conviction was reinstated because the trial court's instruction did not preclude jury consideration of defendant's theory that the throwing knives in question were not stabbing weapons.


**CORE TERMS:** knives, stabbing instruments, double-edged, nonfolding, dangerous weapon, weapon, carrying, throwing, per se, stiletto, dirk, prosecutor, handle, dagger, knife, marijuana, jury instructions, dangerous instruments, concealed, impliedly, threshold, occupied, machete, following elements, jury's consideration, motor vehicle, officer testified, stabbing weapon, concealed weapon, reasonable doubt


### LEXISNEXIS® HEADNOTES


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Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > General Overview 

**HN1**  See Mich. Comp. Laws. § 750.227(1) (Mich. Stat. Ann. § 28.424 (1)). *Shepardize:* Restrict By Headnote


Contracts Law > Negotiable Instruments > Enforcement > Joint & Several Instruments 


Criminal Law & Procedure > Criminal Offenses > Weapons > Definitions 


Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > General Overview 

**HN2**  Mich. Comp. Laws § 750.227(1) (Mich. Stat. Ann. § 28.424(1)) in effect provides that several categories of knives and stabbing instruments are dangerous weapons per se. If the jury finds that the object is a dagger, dirk, stiletto, or a double-edged non-folding stabbing instrument, no further inquiry is required regarding whether the item is within the class of weapons the carrying of which in a vehicle is prohibited. If an item does not fall within one of those categories, the prosecution must proceed on the theory that it falls within the other dangerous weapon category. *More Like This Headnote* | *Shepardize:* Restrict By Headnote

Contracts Law > Negotiable Instruments > Enforcement > Defenses > General Overview 

Criminal Law & Procedure > Criminal Offenses > Weapons > Definitions 

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > Elements 

**HN3**  Where a defendant is charged with carrying a "dangerous weapon" contrary to Mich. Comp. Laws 750.227 (Mich. Stat. Ann. 28.424), the burden is on the prosecution to prove that the instrument carried by the defendant is a dangerous weapon per se or that the instrument was used, or intended for use, as a weapon for bodily assault or defense. The fact that a pointed instrument, such as a machete, has great potential as a dangerous weapon does not render it a dangerous weapon per se. *More Like This Headnote* | *Shepardize:* Restrict By Headnote

**COUNSEL:** Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, James J. Gregart, Prosecuting Attorney, and Judith B. Ketchum, Assistant Prosecuting Attorney, Kalamazoo, MI, for the people.,

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James Bonfiglio, Okemos, MI, for defendant-appellee.

**JUDGES:** Chief Justice Conrad L. Mallett, Jr., Justices James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor. MALLETT, C.J., and BRICKLEY, CAVANAGH, BOYLE, WEAVER, KELLY, and TAYLOR, JJ., concurred.

## OPINION

### [\*54] PER CURIAM

Following a jury trial, the defendant was convicted of carrying a dangerous weapon in a motor vehicle, <sup>1</sup> possession of marijuana, <sup>2</sup> and operating a motor vehicle without security. <sup>3</sup> On appeal, however, the Court of Appeals set aside the weapons conviction **[\*\*2]** on the ground that the jury instructions failed to require the jury to consider and decide whether the knives in question were dangerous weapons. We conclude that the instructions were not erroneous, and reverse.

## FOOTNOTES

<sup>1</sup> MCL 750.227(1); MSA 28.424(1).

<sup>2</sup> MCL 333.7403; MSA 14.15(7403).

<sup>3</sup> MCL 500.3102; MSA 24.13102.

I

The arresting police officer testified that she stopped the defendant's vehicle because of a loud exhaust, and that when she asked him for his license, registration, and proof of insurance, he acknowledged that his license was suspended. She placed him under arrest and conducted an inventory search, finding two fourteen-inch knives in the vehicle, as well as a bag of marijuana.

The two knives were double-edged and in sheathes, one with a leg strap. The officer testified that a person could be stabbed with the knives, and that she thought they were stabbing instruments because they were large. She said that she **[\*\*3]** did not know anything about throwing knives.

**[\*55]** Defendant testified that he had owned the two knives for six or seven months and used them as "throwing" knives. He said that although he could stab somebody with them, he did not consider them "stabbing instruments." He acknowledged that the knives did not fold and were double-sided.

The defense also called a witness who was qualified as an expert in knife-making. He testified about the characteristics of throwing knives. After examining defendant's knives, the witness stated that they were throwing knives because they were heavily weighted in the front, so that they would travel point first. The handle was made of a composite material and riveted into the blade. The blade runs through the handle and protrudes from the handle to protect the handle if it strikes the target butt first. These knives were unlike a dirk or stiletto because those instruments have cross guards. The witness testified that throwing knives are not built or made for stabbing. However, the witness admitted that a throwing knife, like any knife, could be used as a weapon and could be used to stab someone.

II

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The statute under which the defendant was charged [\*\*4] provides:

**HN1** A person shall not carry a dagger, dirk, stiletto, a *double-edged nonfolding stabbing instrument of any length*, or any other dangerous weapon, except a hunting knife adapted and carried as such, concealed on or about his or her person, or whether concealed or otherwise in any vehicle operated or occupied by the person, except in his or her dwelling house, place of business or on other land possessed [\*\*56] by the person. [MCL 750.227(1); MSA 28.424(1) (emphasis supplied).]

The prosecutor argued that the knives were double-edged, nonfolding stabbing instruments, which the defendant admitted he knew were in the car. Defense counsel responded that the issue was not whether the knives *could* be used as stabbing instruments, but rather they *were* stabbing instruments. He claimed that because they were throwing knives, they were not stabbing instruments under the statute.

The trial court instructed the jury as follows on the elements of the CCW offense:

The defendant is charged with the crime of carrying a concealed weapon.

To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that there [\*\*5] was a double-edged, nonfolding stabbing instrument which was in a vehicle that the defendant was in.

I'll read that again. First, that there was a double-edged, nonfolding stabbing instrument which was in a vehicle the defendant was in.

Second, that the defendant knew the weapon was there.

Third, the defendant took part in carrying or keeping the weapon in the vehicle.

The defense did not object to this instruction.

The jury found the defendant guilty as charged. <sup>4</sup> The circuit judge sentenced him to three years probation, with the first 180 days to be served in the county jail and other conditions.

#### FOOTNOTES

<sup>4</sup> At trial, the defense conceded the defendant's guilt of the charges of marijuana possession and failure to have insurance for his car.

[\*\*57] The defendant appealed, raising several issues. The Court of Appeals rejected defendant's constitutional challenge to the statute and his contention that the trial court impermissibly limited defendant's voir dire. However, the Court ruled that the instructions unfairly [\*\*6] prejudiced defendant by preventing the jury from considering his theory that the knives were designed for a peaceful purpose. The Court ordered the defendant a new trial, at which the trial court was directed to use instructions that specifically required the jury to consider and decide as a separate element whether the knives in question were designed to be dangerous weapons per se within the meaning of the statute because they are double-edged nonfolding stabbing instruments. <sup>5</sup>

#### FOOTNOTES

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weapons. However, it did not do so.

The Court **[\*\*10]** of Appeals found fault with the jury instructions on the ground that they did not "specifically require the jury to consider and decide whether the knives in question were dangerous instruments as 'double-edged nonfolding stabbing instruments.'" 229 Mich. App. at 120-121.

We find this an incorrect characterization of the instruction. The trial court told the jury in part that in order to find the defendant guilty, it would be necessary to find "there was a double-edged, nonfolding stabbing instrument which was in a vehicle that the defendant was in." Contrary to the Court of Appeals suggestion, this instruction does not "impliedly assume" the element. 229 Mich. App. at 121. Rather, it tells the jury that it must consider whether the knives **[\*60]** were in fact within the double-edged nonfolding stabbing instrument category.

If there is anything to criticize about the instruction it is that it combines two elements into a single statement: (1) that the items in question were double-edged nonfolding stabbing instruments, and (2) that they were in the vehicle occupied by the defendant. <sup>6</sup> It might be well if the trial courts were to heed the direction by the Court of Appeals **[\*\*11]** that the instructions should require the jury

## FOOTNOTES

<sup>6</sup> The same criticism is applicable to CJI2d 11.2 on which the trial court's instruction was based. Indeed, the CJI is more subject to the criticism that it removes an element from the jury's consideration than the instruction given in this case. The CJI reads:

(1) The defendant is charged with the crime of carrying a concealed weapon. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

\* \* \*

[Use the following if defendant is charged with carrying a weapon carried in vehicle:]

(4) First, that this [dagger / dirk / stiletto / double-edged, nonfolding stabbing instrument / dangerous stabbing weapon] was in a vehicle that the defendant was in.

(5) Second, that the defendant knew the weapon was there.

(6) Third, that the defendant took part in carrying or keeping the weapon in the vehicle.

In the instant case, the trial court's modification of paragraph (4), stating, "*that there was a double-edged, nonfolding stabbing instrument which was in a vehicle that the defendant was in,*" more clearly requires the jury to consider whether the item was a dangerous weapon.

**[\*\*12]** to consider and decide as a separate element whether the knives in question are designed to be dangerous weapons within the meaning of the statute because they are double-edged nonfolding stabbing instruments. [229 Mich. App. at 121-122.] **[\*61]**

However, given the lack of defense objection to the form of the instruction, reversal is not required. The trial court's instruction did not preclude jury consideration of the defendant's theory--that these throwing knives were not stabbing weapons. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the defendant's conviction for carrying a dangerous weapon in the vehicle.

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MALLET, C.J., and BRICKLEY, CAVANAGH, BOYLE, WEAVER, KELLY, and TAYLOR, JJ., concurred.







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## American Knife & Tool Institute

### AKTI APPROVED KNIFE DEFINITIONS

(Adopted August 2005, Revised January 2011)

#### INTRODUCTION

Numerous laws exist in the United States of America which provide that it is a crime to possess certain types of knives. These laws often provide that the crime has been committed upon the mere possession of a knife of the prohibited type, and no proof of criminal intent or incipient crime is required. Other prohibitions as to knives are typically based on blade length and/or mechanical movement of the blade (for example, a switchblade).

It is the position of AKTI that knives are inanimate objects, and remain so regardless of various characteristics, such as length of blade, shape or style, the presence or absence of a hand guard, the label or name that has been applied to the knife, etc. There are no "good knives;" there are no "bad knives."

This concept, (that it is the criminal, and not the tool, that causes the crime), is long established and well recognized in the history of our law and culture. For instance, in the *Torah* it is stated:

"The sword is not the cause of murder, and there is no sin upon him who made it." Rambam, Commentary on Beresheis 4:23.

The labels of very commonly prohibited styles or types of knives, such as "dirk," "dagger" or "stiletto," had meaning several hundred years ago. But the historic distinctions have become largely meaningless due to, among other factors, advances in metals technology; developments in weapons technology; and other cultural changes.

For instance, a style of knife, which came to be known as the "stiletto," was developed approximately 500 years ago. The name "stiletto" derives from the Latin word "stylus." These knives featured a relatively long blade in comparison to the triangular or rectangular cross section of the blade which tapered to a point. Although these knives were made of iron or steel, the latter being a derivative of iron, metals technology was in a rather primitive state in those

times. The triangular, or occasionally rectangular, cross section was necessary to give the blade or stylus strength or rigidity.

A stiletto did not have a cutting edge.<sup>2</sup> Rather, a stiletto was intended purely as a thrusting or stabbing instrument. The edge of a stiletto blade was not suitable for slashing or cutting, although the tip might be capable of inflicting a shallow wound if used in a raking manner.

The objective of the stiletto was to provide a weapon that could exploit the openings or interstices of armor plate, or perhaps pierce body armor composed of layers of leather and/or chain mail. A stiletto was a pointer that could be used to stab. The stiletto was often used as a companion to the sword, with the stiletto being held in the non-dominant (typically the left) hand. The stiletto was fitted with a cross guard so that it could be used to parry the opponent's sword. One could stab a watermelon with a stiletto and easily push the blade completely through the mid-section of the fruit. However, one could not slice a watermelon with a stiletto.

***Vague laws fail to provide persons targeted by the law or statute with guidance so that they may know exactly what conduct is prohibited and so that they may adjust, or act, accordingly.***

Advances in metallurgy have made possible relatively flat-bladed, but equally strong, "kitchen knives" that can accomplish the same offensive purpose of the stiletto. A knife that we would now use to slice sections of a watermelon, and which would be found in the typical kitchen, would also be suitable for thrusting through the melon. Similarly, a modern fisherman's fillet knife would also be effective for inflicting a stabbing wound, perhaps through 16th century body armor. These typical, everyday kitchen knives and sports-

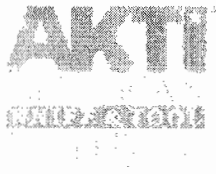
men's knives were not designed to be weapons, despite the fact that they could be readily used as such and still be useful for everyday common and lawful purposes.

Over the years, there has been a tendency to apply the label "stiletto" to knives with a relatively flat or shallow wedge-shaped cross section, and which would have a sharpened cutting edge capable of being used for slicing. The label "stiletto" has also been applied to a type or style of woman's shoe. A large segment of the population is more likely to associate stiletto with a type of woman's footwear than as a type of weapon. Moreover, a very small percentage of the population can be expected to have any appreciation for the type of weapon which came to be known in 16th century Italy as the stiletto.

In 2008, the U.S. Supreme Court held that the Second Amendment to the United States Constitution guarantees an individual right rather than a collective or militia-only right.<sup>1</sup> In other words, individuals or ordinary citizens have the right to keep and bear arms. *Heller* also established that for purposes of

the Second Amendment arms was not confined to "firearms" but rather within the common 18th century understanding of that word, "anything that a man wears for his defense, or takes into his hands or useth in wrath to cast at or strike another."

In 2010, the U.S. Supreme Court held that the provisions of the Second Amendment to the United States Constitution are incorporated into the Fourteenth Amendment to the United States Constitution and apply to state and local governments as well.<sup>2</sup> In other words, the



ability of state and/or local governments to infringe or restrict the possession and carrying of arms, which includes knives, is also limited by the Second Amendment to the United States Constitution.

The United States Constitution provides, and has been interpreted to require, that laws must not be so vague that persons of common intelligence must necessarily guess at their meaning and might differ as to their application.<sup>5</sup> Vague laws fail to provide persons targeted by the law or statute with guidance so that they may know exactly what conduct is prohibited and so that they may adjust, or act, accordingly. Moreover, vague laws, by failing to provide explicit standards for those who apply them, "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."<sup>6</sup>

A vague law is especially problematic where "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights."<sup>7</sup> The Second Amendment to the United States Constitution creates a constitutional right to keep and bear arms, which includes arms in the classic traditional sense, meaning weapons, along with a subset of arms referred to as "firearms."

A common pattern in knife legislation has been to prohibit the carrying of certain specified types of knives or weapons, such as a "stiletto" or "dagger," without a definition of the prohibited type. In a world or culture where the word "stiletto" has so substantially deviated from its original meaning, there is too much potential that a criminal conviction for possessing a "stiletto" could be the result of an arbitrary and/or discriminatory application or process of law. An otherwise law-abiding citizen should not be adjudged a criminal simply because what may once have been a commonly recognized label is now widely misunderstood. Similarly, an otherwise law-abiding citizen should not be exposed to arbitrary or discriminatory action by law enforcement who may be applying an expansive and very flexible definition of

what constitutes stiletto or dagger.

*AKTI suggests that law-abiding citizens should be able to carry knives and cutting tools without arbitrary and ineffective restrictions as to blade shape, style, length or other such characteristics.* Although it may be prudent to prohibit weapons of any type from being introduced into certain settings such as court facilities.

*AKTI further suggests that to the extent there are existing laws which prohibit the possession or carrying of certain types of knives, these laws must be construed narrowly and with deference to the United States Constitutional requirement of due process, as well as the right reserved to the citizens by the United States Constitution and the Constitutions of various states to keep and bear arms.* AKTI encourages those involved in law enforcement and the administration of criminal justice to be guided by these definitions. People in these roles typically take an oath to uphold the United States, as well as the applicable State Constitution.

**It must be noted that although these definitions are approved by AKTI, AKTI cannot require any particular officer or court to observe them. Accordingly, AKTI cannot be responsible for any adverse consequences deriving from the misapplication or failure to apply these recommended definitions.**

**Various laws concerning knives involve a blade length. However, there is an extremely wide variety of blade shapes and handle shapes. In the absence of an objective and standardized method for determining blade length, there is the possibility of inconsistent enforcement. AKTI has developed a Protocol for Measuring Knife Blade Length.**

## APPROVED KNIFE DEFINITIONS

**ARKANSAS BOWIE KNIFE** – A fanciful name for a large, straight-bladed knife. See "Bowie Knife" below.

**BALLISTIC KNIFE** – A device by which a blade becomes separated from the handle and is propelled or becomes a missile, utilizing energy stored by some mechanism within the device. A ballistic knife does not include a crossbow, spear gun, or archery bow. Further, the term ballistic knife does not include an implement described or labeled as a "throwing knife" unless the blade of such throwing knife becomes separated from the handle during the intended and normal use of the device.

**Comments:** Among those states which currently prohibit "ballistic knives" are Colorado, Florida, Georgia and Virginia. Examples of a practical ballistic knife are unknown. It is not inconceivable, however, that prohibitions as to ballistic knives might inappropriately be applied to a knife designed to be thrown.

The distinguishing feature of a ballistic knife is that the blade can be launched or propelled as a projectile or missile separate from the handle. The AKTI suggested rule of thumb is that if the blade is not separated and propelled from the handle mechanically, it is not a ballistic knife.

A version of a ballistic knife was produced in limited quantities for the Soviet-era military. These devices utilized a blank firearm-type cartridge to propel the blade.

Other variations of propelled-blade knives have been produced in limited quantities utilizing spring action to separate and propel the blade. The notion of a ballistic knife is more chimerical and fanciful than realistic or practical. AKTI suggests that it would be a misnomer to classify any such device as a knife.



**BOWIE KNIFE** – It is the position of AKTI that the term “Bowie Knife” is too vague and cannot be satisfiedly defined with sufficient precision. Accordingly, any law which provides an offense has been committed by one who possesses or carries a “Bowie Knife” is constitutionally defective.

**Comments:** “Bowie” knives are prohibited in such diverse states as Texas, Rhode Island, Illinois and Idaho. There is, however, no definitive criteria as to what exactly constitutes a Bowie knife.

In September of 1827, a small group of individuals gathered on a sand bar along the river at Natchez, Mississippi for the purpose of fighting a duel. The members of this group included James Bowie, who was actually a “second” rather than one of the two principals to the duel. At some point, the orderly conventions of the duel were abandoned, and a melee developed, during which Bowie sustained three separate gunshot wounds, several edged-weapon wounds, and other trauma. Using a knife of some type, Bowie inflicted fatal wounds on two opponents.

There is no known definitive description or drawing of the knife that Bowie used in the 1827 Natchez sand bar fight. The whereabouts or disposition of the knife is similarly unknown.

Bowie’s success in that encounter caused him to achieve considerable celebrity, and the term “Bowie Knife” quickly entered the lexicon. Everyone wanted a knife like that of Bowie, although few knew exactly what it looked like.

In the late 1820s and early 1830s, schools of knife fighting were established in and around New Orleans, Louisiana to teach the technique of fighting with the “Arkansas Toothpick” and/or “Bowie Knife.”<sup>28</sup> Concurrently, states in the lower Mississippi drainage acted to outlaw such knives. Typical of these was the Tennessee Law at Chapter 137 of the Acts of 1837-38, which provided as follows:

“Any person who carries under his cloths, or concealed about his person, a Bowie Knife, Arkansas Toothpick, or other weapon of like form, shape, or size, is guilty of a misdemeanor. . . .” Section 6630 of Shannon’s Code (Tennessee).

While these laws have been kept “on the books” by legislative inertia in the intervening 170 or so years, the label “Bowie

Knife” has been applied to a wide variety of styles. No agreement exists among historians as to exactly what constitutes a Bowie Knife. Given this uncertainty and a lack of agreement among people who have exhaustively studied and researched the topic, AKTI suggests that “Bowie Knife,” and for that matter “Arkansas Toothpick,” are terms simply too generalized and vague, and about which there would be too much potential for inconsistent application as to be enforceable under the United States Constitution.

If historians who have studied and researched the topic are incapable of agreeing on a definition of a Bowie Knife, then ordinary persons are not given sufficient guidance so that they may know exactly what is or is not prohibited.

**DAGGER** – A knife-like object having a fixed blade uniformly suitable for inflicting a stabbing wound; lacking an effective cutting edge; and not having some common lawful purpose.

**Comments:** There is a long list of American jurisdictions where daggers are prohibited. Among those states are Hawaii, Massachusetts, Minnesota, Missouri, New Mexico and Iowa. However, there is no definitive basis as to why governments should prohibit daggers. Moreover, there is no guidance as to whether any given object is or is not a dagger. The California statutory definition is illustrative.

As used in this section, a ‘dirk’ or ‘dagger’ means a knife or other instrument with or without a hand guard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. A non-locking folding knife, a folding knife that is not prohibited by Section 653K, or a pocketknife is capable of ready use as a stabbing weapon that may inflict great bodily injury or death only if the blade of the knife is exposed and locked into position.

West’s Annotated California Penal Code, Section 12020(c)(24).

The California law provides that any person who “carries concealed upon his or her person any dirk or dagger” is subject to punishment by imprisonment for a period not exceeding one year. Section 12020(a)(4).

There is obviously a problem where a fundamental right reserved to the people under the Constitution is infringed by such an arbitrary and indefinite state law. We have the right to keep and bear arms. If the state must, for some compelling reason, restrict this right, then it must do so in the least restrictive manner and with specificity.

The answer to the question of whether an item is or is not a dagger should not be determined on the basis of the identity of the person possessing the object nor, for that matter, the whim of a law enforcement officer. It should not turn on whether the person is wearing a biker vest or a vested suit. Moreover, a citizen should not need to seek expert advice from a military historian.

It is suggested that the AKTI Definition provides sufficient clarity and allows all concerned to make an informed decision as to whether possession of a given knife is legal.

Many knives which have a point, or even what would be recognized as a sharp point, nevertheless have a common, lawful purpose because the knives also have an effective cutting edge. Similarly, there is a large universe of tools which would be suitable for inflicting a stabbing wound and lack an effective cutting edge. Some typical examples would include ice picks, awls, scribes, carpenter’s chisels or gouges, engraver’s tools, screwdrivers, etc. Accordingly, the clauses within the definition are joined with a conjunctive (and) rather than a disjunctive (or). A knife or knife-like object having the elements of this definition would be primarily useful as a weapon for either offensive or defensive purposes.

AKTI notes that Section 5.07 of the Model Penal Code, captioned “Prohibited Offensive Weapons,” provides:

... “Offensive Weapon” means any bomb, machine gun, sawed-off shotgun, firearm specially made or specially adapted for concealment or silent discharge, a blackjack, sandbag, metal knuckles, **dagger**, or other implement for the infliction of serious bodily injury that **serves no common lawful purpose** (Model Penal Code Section 5.07 - emphasis supplied).

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Obviously, a bomb is an offensive weapon. However, the Model Penal Code essentially outlaws **all** bombs. The authors of the Model Penal Code do not define dagger, and offer no explanation as to why this type of knife would be suitable **only** for offensive uses and why it would have no other common, lawful purpose. AKTI suggests that a knife with an effective cutting edge, or even two cutting edges, can be a useful tool for innumerable lawful and especially defensive purposes. Similarly, there are numerous cutting or carving tasks which require a sharp point. A definition of dagger which would criminalize knives with one or more effective cutting edges, simply because it would also be capable of inflicting a stabbing wound, is overly broad and ignores the reality that almost any cutting tool can be used as a weapon.

The AKTI suggested rule of thumb is that if it folds, has an effective cutting edge, or a common lawful purpose, it is not a dagger.

**DIRK** – a knife-like object having a fixed blade uniquely suitable for inflicting a stabbing-type wound; lacking an effective cutting edge; and not having some common lawful purpose.

**Comments:** Various states, including California (see above), Connecticut, Maine, Ohio, Georgia, New Mexico, Minnesota and Idaho prohibit dirks.

Dirk is often used interchangeably with dagger, stiletto or other weapons of the same general category, such as baselard, quillon, main gauche, etc. It is the position of AKTI that the definition of stiletto, dagger and dirk should effectively be the same.

A modicum of research will reveal that what is now understood to be the “classic” or historically correct example of a “dirk” developed in mid-17th century Scotland.<sup>9</sup> This type of knife generally had one cutting edge with perhaps an opposing “swedge” near the tip. The English government passed “Disarming Acts” in 1716 and 1725 in response to Scottish uprisings. These Acts focused on, among other things,

Scottish swords and dirks. After another Scottish uprising in 1745-1746, the government outlawed kilts, clan tartans and other *indicia* of Scottish culture. It may be that there is a historical “anti-dirk” bias in Anglo-American law.

In the first half of the 19th century, a type of short sword, labeled the “**naval dirk**,” began to appear.<sup>11</sup> The naval dirk seems to have been more ceremonial than practical and was issued to or carried by mid-shipmen or young officers in training. This short sword was abandoned as the 19th century came to a close. In any event, the naval dirk bears almost no resemblance to the Scottish dirk which developed 200 years earlier. It is mentioned here to show that labels are often adopted or applied to different types of knives.

### GRAVITY KNIFE

1. A specific type of knife, as issued to World War II German paratrooper (*Fallschirmjäger*) units.

2. A folding knife in which the blade is held in the closed position by a latch mechanism releases by a button on the handle of the knife and lacking some function, such as a detent, spring over-center or other such mechanism which creates a bias toward closure.

**Comments:** Gravity knives are prohibited in such diverse states as Alaska, Connecticut, Colorado, Maine, North Dakota and New York. AKTI is not aware of any cutlery manufacturer producing and manufacturing a so-called gravity knife.

The 1958 Federal Switchblade Act defines “switchblade” knife as any knife having a blade which opens automatically-

1. By hand pressure applied to a button or other device in the handle of the knife, or
2. By operation of inertia, gravity, or both.<sup>12</sup>

The term “gravity knife” occurs in a number of places within the legislative record concerning the 1958 Federal Switchblade Act. In those instances, there are specific references to the World War II German knife.<sup>13</sup>

Two alternative definitions are offered for the simple reason that there are essentially two different gravity knives.

There was perhaps a time in the post-World War II period extending into the mid-

1950s, when souvenir German military paratrooper’s knives, brought back to this country, were routinely carried. These knives are rare and have long since become highly sought after by collectors.

In normal use, the gravity knife was held in a vertical alignment with the front of the handle in the down position. Depressing a small lever or switch on the handle of the knife released the blade, and the gravitational force of the earth pulled it down and into a position where it mechanically latched or locked into the open position. As an alternative to gravity, the user could generate centrifugal force by a flourishing movement of the arm, along with a coordinated release of the lever, and the blade would move into the open and locked position by means of inertia. This more flamboyant method was preferred by teens of the late 1950s (see below discussion as to Switchblades) and explains why many of the laws dating from the mid-to-late 1950s, which proscribed switchblade knives, also apply to so-called “inertia knives.” The intent was to include the Fallschirmjäger knife.

*Fallschirmjäger* knives are, of course, limited in number and typically command prices in the range of \$500.00 to \$750.00. Detailed photographs and additional information as to *Fallschirmjäger* knives is available on the internet, and there is a certain commerce in these knives through on-line auction services.

It should be noted that this paratrooper’s knife was not designed as a weapon, but rather as a tool to be used by an unfortunate paratrooper who became entangled in a tree during a descent. The blade could be exposed with only one hand and could be used to cut the shroud lines, the harness, or perhaps small branches.

**The 1950’s Gravity Knife:** An alternative version of the gravity knife evolved, most likely due to state switchblade laws. Most of the switchblades popular with teenagers and young adults in the 1950’s were imported from Italy. When prohibitions against spring-activated switchblade knives were put into effect, the Italian manufacturers simply removed the spring, which was compressed by the act of closing the blade and which supplied the energy to open it when the button on the handle was depressed. Outwardly, these knives resembled the switchblades. They did not have the spring action. Rather, the user would simply hold the knife in the horizontal posi-

tion and depress the button or latch on the handle, which would release the blade. The force of gravity would cause the blade to pivot. A simple wrist movement continued the movement of the blade to the fully open position, whereas in the case of the switchblade, it would lock. Alternatively, centrifugal force could be substituted for gravity.

While the gravity knife prohibitions were enacted to address an alternative to the switchblade, the gravity knife statutes are routinely applied to knives which cannot be opened by gravity and were never intended to be the subject of those 1950 era laws.

In 2009, the Federal Switchblade Act was revised so the gravity or inertia provisions would not be misapplied. The effect of the 2009 change is that the prohibitions of the Federal Switchblade Act do not apply to:

A knife that contains a spring, detent or other mechanism designed to create a bias toward closure of the blade and that requires exertion applied to the blade by hand, wrist or arm to overcome the bias toward closure to assist in opening the knife.<sup>14</sup>

Several states, notably Texas and Kansas, have enacted similar changes.

The AKTI suggested rule of thumb is that if it does not have a button or latch on the handle which releases the blade, if it cannot be opened by gravity alone, or if it does have a spring, detent or other mechanism providing bias toward closure, it is not a gravity knife.

**INERTIA KNIFE** – See discussion and Comments relative to Gravity Knife.

**SWITCHBLADE**—A knife with a blade that is exposed in an automatic way and moved from the closed position to the open position exclusively by the release of a gas-pressure spring. A switchblade lock cannot include a mechanism which must be hand-wielded, inflicting thumb pressure applied to the blade or to a control stud or reactivity on the blade, nor does a switchblade include a knife with a blade that can be opened by means of inertia or other such force produced by hand, wrist, and/or other bodily movement, provided that the knife has a detent or other system that pro-

vides resistance which must be overcome in opening the blade, or that provides a bias or spring load toward the closed position. (Also described as self-opening knife or spring knife)

**Comments:** States where switchblades are not prohibited are in the minority. Among them are Alabama, Arizona, and Oregon. Approximately one quarter of the states resisted the impulsive rush of the 1950 decade to outlaw switchblades. Several states, South Dakota and New Hampshire, have repealed switchblade prohibitions. Interestingly, an examination of Uniform Crime Report data does not suggest a relationship between crime levels including knife / cutting instrument crime and switchblade prohibitions.

**Blackboard Jungle**, a movie set in an urban high school, was released in March of 1955. The movie generated an extraordinary level of excitement among American youth.

Glenn Ford was cast in the role of an ethical, well-intentioned teacher named Richard Dadier, where he was opposed by the switchblade-wielding gang leader, Artie West, played by Vic Morrow. West derisively referred to Dadier as "Dadio," a name which quickly entered the teen lexicon as a term of disrespect for teachers or adult authority figures.<sup>15</sup>

In October of 1955, **Rebel Without a Cause**, featuring James Dean in the role of a disaffected teenager, was released. This movie included a knife confrontation scene, which came to be a common feature in youth movies of that era. Teenagers adopted not only the language, but the clothing and props of the movie figures, which included switchblades.

The response was similar to that of the English government in reaction to the Scottish uprisings of the early 1700s—Disarming Acts (see above Comments as to Dirk). Many states moved quickly to outlaw switchblades with the Federal government enacting legislation in 1958, banning the production of switchblades for interstate commerce or sending switchblades through the mail.

Switchblade knives had been manufactured and widely sold since the early 20th century. Until these knives were stigmatized by movies such as **Blackboard Jungle**, they were commonly used by farmers and blue-collar workers throughout the first half



of the 20th century who wanted a convenient way to open a pocketknife for some everyday task. Beginning in the mid-to-late 1950s, the switchblade took the place of the black handlebar mustache as a mark of the theatrical villain. In retrospect, the switchblade laws of the 1950s were an expediency of questionable constitutionality hurriedly passed to address a problem greatly magnified, if not created, by the movie industry.

Switchblades are also sometimes referred to as "Automatics." It is the position of AKTI that a "Switchblade" or "Automatic" is a knife in which the blade is open or exposed solely by means of stored mechanical energy released by a switch or the triggering mechanism, typically a button located on the handle of the knife. Accordingly, a knife in which there is some spring or mechanical assist would be excluded from this definition, provided that there is some bias or a spring load to the closed position and which must be overcome by thumb, finger or other manual movement applied to the blade.

**STILETTO**—A knife like a dagger having a fixed blade uniquely suitable for inflicting a stabbing-type wound; lacking an effective cutting edge; and not having a recognized lawful purpose.

**Comments:** Stiletos are prohibited in, among other states, Connecticut, Iowa, Missouri, North Dakota and New Mexico. See Comments relative to Dagger above.

## ADDITIONAL DEFINITIONS

**BIASTOWARD CLOSURE**—The tendency to remain in the closed or latched position, opposed by a spring or mechanical force, unless acted upon by manual force.

(continued page 6)

Comments on 'Bias Toward Closure'

(See Drawings on pages 7 and 8.)

**EFFECTIVE CUTTING EDGES** An edge capable of performing ordinary routine cutting tasks associated with activities such as food preparation or food service, or other common uses, including but not limited to farming, animal husbandry, gardening, building trades, hunting, fishing, or any trade or crafts.

See Appendix and Drawings that follow.

<sup>1</sup>The Book of the Sword. Richard F. Burton, Shatto and Windus, London 1884.

<sup>2</sup>Daggers & Fighting Knives of the Western World, Harold L. Peterson, Walker & Company, New York, 1968, page 50.

<sup>3</sup>District of Columbia v Heller, 128 S Ct 2783 (U S 2008).

<sup>4</sup>McDonald, et al v City of Chicago, et al, 130 S Ct 3020. (U S 2010).

<sup>5</sup>Smith v Gogan, 415 US 5666 (1974).

<sup>6</sup>Garyned v. City of Rockford, 408 US 104 (1972).

<sup>7</sup>Colautti v. Franklin, 439 US 379 (1979).

<sup>8</sup>The Complete Book of Knife Fighting, William L. Cassidy, Paladin Press, 1975.

<sup>9</sup>Daggers & Fighting Knives of the Western World, Harold L. Peterson, Walker & Company, New York, 1968, page 60.

<sup>10</sup>A swedge is typically beveled, as if to form a cutting edge, but is not finished or ground to form an actual effective cutting edge.

<sup>11</sup>Daggers & Fighting Knives of the Western World, Harold L. Peterson, Walter & Company, New York, 1968, page 67.

<sup>12</sup>15 U.S.C Section 1241(b).

<sup>13</sup>House of Representatives, Subcommittee and Commerce and Finance Meeting of April 17, 1958.

<sup>14</sup>15 U.S.C Section 1244(5).

<sup>15</sup>"...who walks into the classroom cool and slow, who calls the English teacher Daddy-O..." Lines from a popular song: "Charlie Brown," by the Coasters, circa 1958-1959.

In the typical folding knife, the blade swings or pivots in an arc of approximately 180° from the closed position (within the handle) to the open position. Without some means of providing a bias or lock to the closed position, the knife could swivel open, or at least partially open, unexpectedly or unintendedly.

There are a few folding knives in production which do not incorporate some sort of mechanical bias toward closure feature.

An example of this type of knife is the Opinel knife, produced in France for over 110 years. The blade is kept in the closed or folded position by a friction fit with the wooden handle piece. A rotating collar can be turned to provide a mechanical lock when the blade is in the open position.

An old-fashioned "Straight Razor" is another example of a folding knife-like device with no bias or other such mechanism to hold it in either the closed, or for that matter, the open position. (See Figure 1)

A common design for providing a spring-loaded bias to both the closed and fully open position utilizes a bar spring, which applies pressure, or a spring load, against the base of the blade near the pivot point. This design is referred to as the "Slip Joint Knife." (See Figure 2) The direction of the spring load is from the outer edge of the blade toward the center of the pivot hole. When the blade is in the fully open position, the force or load of the spring tends to keep the blade in that fully opened position. Folding or closing the knife requires a certain amount of exertion to overcome that bias and pivot the blade into the handle.

When the blade is in the fully closed position (Figure 2C), the pressure of the back spring similarly tends to hold the blade closed within the handle of the knife.

Opening the blade requires a force to overcome the camming action created by the eccentric tang or base end of the blade. For the first 45° (approximately) of pivot, there is a bias toward the closed position. After this 45-degree rotation, there is friction resistance until the blade is pivoted in an arc of approximately 135°. At approximately that point the bias is often capable of moving the blade to the fully open position.

The slip joint design has been in use for well over a century and has the advantage of providing both bias toward closure and bias toward the fully open position. In short, it is a time-tested, simple design that is reasonably effective in keeping the blade in either the fully open or fully closed position.

(Figure 3) shows a type of knife frequently referred to as the lock back. This design utilizes the same type of bar spring to provide the bias toward opening, as well as the bias toward closure. In that respect, it is similar to the slip joint design. It does have a design feature intended to enhance user safety by providing a positive lock mechanism to the fully open position. The lock back design utilizes a notch or mortise at the base of the blade into which a tenon or projection of the back spring locks when the blade is pivoted to the fully open position. Closing of the knife requires the user to depress the spring and release the lock.

Another method of providing a bias to the closed position utilizes a leaf-type spring, which provides lateral pressure, rather than a back spring. This design is generally referred to as the liner lock and is attributed to knife designer Michael Walker, who developed this design in the 1970's.

The liner lock features a small depression or detent on the blade near the pivot hole. When the blade is in the fully closed position, this detent is engaged by a ball partially embedded or set in the liner, which is sandwiched between the blade and one side of the handle when the knife is in the folded or closed position. The leaf spring is anchored or fixed at the rear end of the handle. The lateral spring load of the liner pushes the ball into the detent and tends to keep the blade in the closed position.

Opening the blade requires sufficient force to overcome the spring load, and by camming action, force the ball against the load and out of the detent. As the blade swings or pivots in the arc toward the fully open position, the spring load continues to exert pressure, and accordingly friction, which must be overcome to move the blade.

Once the blade is moved to the fully open position, the spring-loaded liner moves laterally into a position which keeps

the blade from closing.

The liner with the ball detent design provides bias toward closure and a means of locking the blade in the fully opened position.

A common variation of this ball detent mechanism simply utilizes the frame or handle of the knife as the leaf spring. Such knives are typically known as "frame lock knives." The ball detent mechanism is more easily observed in the frame lock design, as opposed to liner lock knives. Figure 4 shows a typical frame lock design.

There are other methods of achieving bias toward closure. The 2009 Amendment to the Federal Switchblade Act, 15 U S C § 1244(5) and the laws of several states, including California, Kansas and Texas, which incorporate the concept of bias toward closure, do not require or prescribe a particular mechanism. Rather, all that is required is that the design provide bias toward closure. Moreover, none of these laws specify a minimum measure of bias.

### STRAIGHT RAZOR

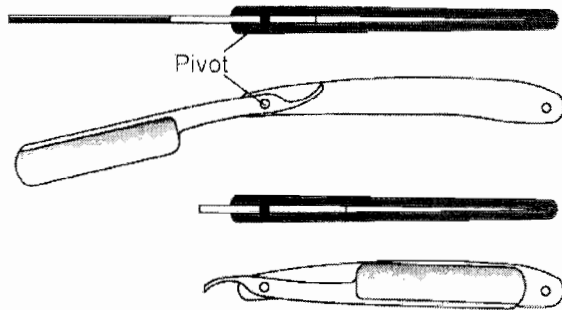


Figure 1

### Straight Razor - No Bias

In the typical folding knife the blade swings or pivots in an arc of approximately 180° from the closed position to the open position. Without some means of providing a bias or lock to the closed position, the knife could simply swivel open unexpectedly—for instance, while in the user's pocket exposing the blade and creating a potential for injury.

An old-fashioned "straight razor" is an example of a folding knife-like device with no bias or other such mechanism to hold it in either the closed, or for that matter, the open position. (See Figure 1)

Drawings provided by Buck Knives and are the property of AKTI.

### SLIP JOINT KNIFE

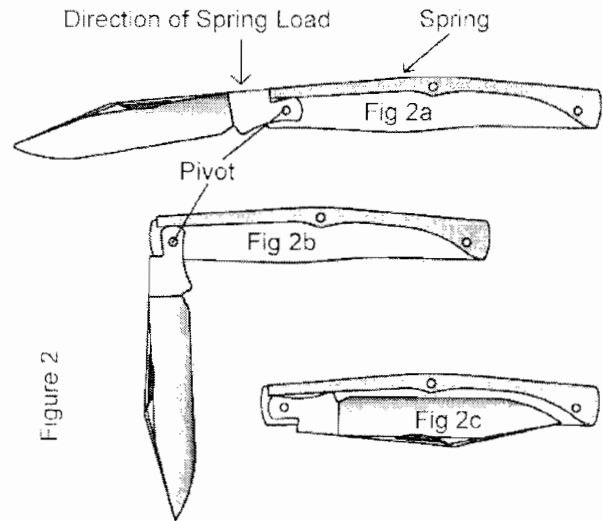


Figure 2

A common design for providing a spring-loaded bias to both the closed and fully open position utilizes a spring which applies pressure against the base of the blade near the pivot point. This is referred to as the "slip joint knife." (See Figure 2) The direction of the spring load is from the outer edge of the blade toward the center of the pivot hole. (See Figure 2)

When the blade is in the fully open position, the force or load of the back spring tends to keep the blade in the fully open position. (See Figure 2A)

When the blade is in the fully closed position (Figure 2C), the pressure of the back spring similarly tends to hold the blade closed within the handle of the knife.

Opening the blade requires a force to create a camming action. For the first 45° of pivot, there is a bias toward the closed position. After the blade has been pivoted toward the open position in an arc of approximately 135°, there is a bias toward the fully open position. Such bias toward the open position, which begins at approximately 135°, is often capable of moving the blade to the fully open position.

**FOLDING KNIFE with LOCK FEATURE**

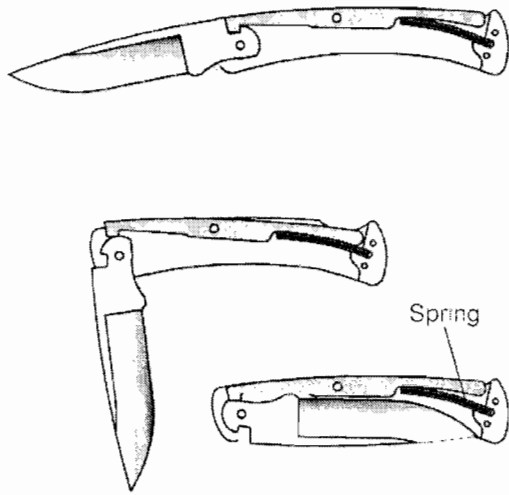


Figure 3

**Folding Knife with Lock or Lock Back**

Figure 3 is a simple variation which utilizes a notch or mortise at the back of the blade into which a tenon or projection of the spring locks when the blade is pivoted to the fully open position.

Another method of providing a bias to the closed position and/or resistance which must be overcome to manually open the blade of a folding knife utilizes a spring load applied against the side of the blade.

**FOLDING KNIFE WITH BALL DETENT**

(frame lock design)

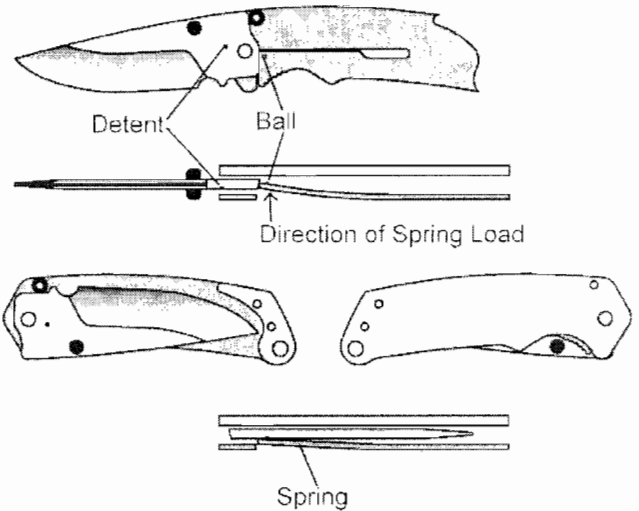


Figure 4

**Folding Knife with Ball Detent**

Typically, there is a small depression or detent on the blade near the pivot hole. When the blade is in the fully closed position, this detent is engaged by a ball partially embedded or set in the spring. (See Figure 4)

Opening the blade requires sufficient force to overcome the spring load, and, by camming action, force the ball against the load and out of the detent. As the blade swings or pivots in the arc toward the fully open position, the spring load continues to exert pressure, and accordingly, friction, which must be overcome to move the blade.

**In Appreciation**

A special thanks to Daniel C. Lawson, Esquire, of Meyer, Darragh, Bucker, Bebenek & Eck, P.L.L.C. Pittsburgh, PA, for his authorship and revisions of the AKTI APPROVED KNIFE DEFINITIONS.

## AGENDA ITEM #3

### **MEDICAL MARIJUANA DEFENSE**

I recommend we review the medical marijuana act and the other attached materials to arrive at an affirmative defense instruction.

Given the murkiness of the statute, I believe we will need to spend some time at our meeting trying to arrive at a consensus for the instruction.

Thursday, December 9, 2010 4:35 PM

**Jury Instructions**

**From:** "Jennifer Walker" <jwalker@co.jackson.mi.us>  
timothymkenny@yahoo.com

**To:**

Add  
sender  
to  
Contacts

Dear Judge Kenny,

I am writing to inquire if the Criminal Jury Instructions Committee of the State Bar of Michigan would consider proposing jury instructions for possession of marijuana cases involving the Medical Marijuana Act.

We currently have a case in Jackson County that looks like it will be going to trial, requiring such jury instructions. Here are the basic facts of the case:

Defendant was pulled over for speeding and the officer found there was a warrant for Defendant's arrest. During the arrest, the officer found marijuana in Defendant's pocket and Defendant is charged with possession of marijuana. Defendant is asserting the affirmative defense under Section 8 of the Medical Marijuana Act. Defendant did not actually have his Medical Marijuana Card, but the application was filled out, dated nine days prior to being stopped, and it looks like he did apply for a card in that time frame. We are challenging whether there was a bona-fide physician-patient relationship and if there is in fact a serious or debilitating medical condition.

Thank you for your time and consideration of this matter. Feel free to contact me if you have any further questions.

Sincerely,

Jennifer Walker

Jennifer

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TOC: Michigan Statutes Annotated &gt; / . . . / &gt; MICHIGAN MEDICAL MARIHUANA ACT &gt;

**§ 333.26424. Qualifying patient or primary caregiver; arrest, prosecution, or penalty prohibited; conditions; presumption; compensation; physician subject to arrest, prosecution, or penalty prohibited; marihuana paraphernalia; person in presence or vicinity to medical use of marihuana; registry identification issued outside of department; sale of marihuana as felony; penalty.**Citation: **Mich. Comp. Laws @ 333.26424***MCLS § 333.26424*

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CHAPTER 333 HEALTH  
MICHIGAN MEDICAL MARIHUANA ACT

**Go to the Michigan Code Archive Directory***MCLS § 333.26424 (2011)**MCL § 333.26424*

§ 333.26424. Qualifying patient or primary caregiver; arrest, prosecution, or penalty prohibited; conditions; presumption; compensation; physician subject to arrest, prosecution, or penalty prohibited; marihuana paraphernalia; person in presence or vicinity to medical use of marihuana; registry identification issued outside of department; sale of marihuana as felony; penalty.

**Sec. 4. Protections for the Medical Use of Marihuana.**

(a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.

(b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege,

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including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:

(1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and

(2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and

(3) any incidental amount of seeds, stalks, and unusable roots.

(c) A person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.

(d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:

(1) is in possession of a registry identification card; and

(2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.

(e) A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation shall not constitute the sale of controlled substances.

(f) A physician shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by the Michigan board of medicine, the Michigan board of osteopathic medicine and surgery, or any other business or occupational or professional licensing board or bureau, solely for providing written certifications, in the course of a bona fide physician-patient relationship and after the physician has completed a full assessment of the qualifying patient's medical history, or for otherwise stating that, in the physician's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition, provided that nothing shall prevent a professional licensing board from sanctioning a physician for failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions.

(g) A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana.

(h) Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited.

(i) A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana.

(j) A registry identification card, or its equivalent, that is issued under the laws of another state, district, territory, commonwealth, or insular possession of the United States that allows the medical use of marihuana by a visiting qualifying patient, or to allow a person to assist with a visiting qualifying patient's medical use of marihuana, shall have the same force and effect as a registry identification card issued by the department.

(k) Any registered qualifying patient or registered primary caregiver who sells marihuana to

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§ 333.7401. Manufacturing, creating, delivering, or possessing with intent to manufacture, create, or deliver controlled substance, prescription form, or counterfeit prescription form; dispensing, prescribing, or administering controlled substance; violations; penalties; consecutive terms; discharge from lifetime probation; "plant" defined.

Citation: Mich. Comp. Laws @ 333.7401

MCLS § 333.7401

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CHAPTER 333 HEALTH
PUBLIC HEALTH CODE
ARTICLE 7. CONTROLLED SUBSTANCES
PART 74. OFFENSES AND PENALTIES

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MCLS § 333.7401 (2011)

MCL § 333.7401

Legislative Alert: LEXSEE 2010 Mi. ALS 352

§ 333.7401. Manufacturing, creating, delivering, or possessing with intent to manufacture, create, or deliver controlled substance, prescription form, or counterfeit prescription form; dispensing, prescribing, or administering controlled substance; violations; penalties; consecutive terms; discharge from lifetime probation; "plant" defined.

Sec. 7401. (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and:

(i) Which is in an amount of 1,000 grams or more of any mixture containing that substance

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**§ 333.26428. Defenses.**

Citation: **Mich. Comp. Laws @ 333.26428**

*MCLS § 333.26428*

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CHAPTER 333 HEALTH  
MICHIGAN MEDICAL MARIHUANA ACT

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MCLS § 333.26428 (2011)

MCL § 333.26428

§ 333.26428. Defenses.

Sec. 8. Affirmative Defense and Dismissal for Medical Marihuana.

(a) Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:

(1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;

(2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and

(3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

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(b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

(c) If a patient or a patient's primary caregiver demonstrates the patient's medical purpose for using marihuana pursuant to this section, the patient and the patient's primary caregiver shall not be subject to the following for the patient's medical use of marihuana:

- (1) disciplinary action by a business or occupational or professional licensing board or bureau; or
- (2) forfeiture of any interest in or right to property.

**HISTORY:** Act 1 Initiated Law of 2008, p --; eff December 4, 2008.

2008, Initiated Law 1, § 8, eff December 4, 2008.

**NOTES:**

Editor's notes:

2008, Initiated Law 1, § 10, eff December 4, 2008, provides:

"Sec. 10. Severability.

"Any section of this act being held invalid as to any person or circumstances shall not affect the application of any other section of this act that can be given full effect without the invalid section or application."

Statutory references:

Section 7, above referred to, is § 333.26427.

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**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ALEXANDER EDWARD KOLANEK,

Defendant-Appellee.

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FOR PUBLICATION

January 11, 2011

9:00 a.m.

No. 295125

Oakland Circuit Court

LC No. 2009-DA9016-AR

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

This case requires us to consider an issue of first impression involving the interpretation of the Michigan Medical Marihuana<sup>1</sup> Act (MMMA), MCL 333.26421 *et seq.*, namely when a physician must provide the statement required under MCL 333.26428(a)(1). Because we conclude that the statement must occur after the enactment of the MMMA, but prior to arrest, we reverse the circuit court's reversal of the district court's denial of defendant's motion to dismiss and remand to the circuit court for reinstatement of the charges against defendant and other necessary proceedings.

I. BACKGROUND

On April 6, 2009, defendant was involved in an altercation that ultimately resulted in a search of defendant's vehicle and the seizure of eight marijuana cigarettes from the trunk of defendant's vehicle. On April 7, 2009, defendant was charged with possession of marijuana, pursuant to MCL 333.7403(2)(d). Although defendant originally filed a motion to suppress evidence, he withdrew his motion on June 3, 2009, and instead asserted an affirmative defense under the MMMA, moving to dismiss on those grounds on June 10, 2009. An evidentiary hearing was held on defendant's assertion of the defense on June 17, 2009.

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<sup>1</sup> Although the statute spells it "marihuana," unless used in a direct quote, we have spelled it throughout as "marijuana."

Defendant admitted that he had eight marijuana cigarettes in his possession at the time of his arrest, but testified that he used them for relief from pain and nausea caused by his Lyme disease. Defendant offered the testimony of Dr. Ray Breitenbach, who had been treating defendant for nine years. Breitenbach testified that defendant has chronic Lyme disease, which causes symptoms such as chronic severe pain, arthralgia, fatigue, and malaise. Breitenbach stated his opinion that defendant is “likely to receive therapeutic benefit from the medical use of marijuana.” This opinion was memorialized in a document signed by Breitenbach on June 9, 2009. Breitenbach testified that, in his opinion, defendant would have been eligible to use marijuana on April 6, 2009. He further testified that it would have been reasonable for defendant to use two grams or less per day to treat his Lyme disease, that defendant’s possession of one and a half ounces would be “very reasonable,” and that his possession of 2 ounces would not be unreasonable.<sup>2</sup>

Defendant requested that Breitenbach authorize medical marijuana on April 12, 2009, after the law permitting medical use became effective. Breitenbach testified that he and defendant had previously discussed the potential for defendant to use medical marijuana, but that defendant did not make his actual request until April 12, 2009. According to defendant, he had an appointment with Breitenbach on July 14, 2008, during which they discussed the upcoming vote on the use of medical marijuana, and Breitenbach indicated to defendant that he would support defendant using medical marijuana.

When defendant finally made the request of Breitenbach in April 2009, he did not inform Breitenbach that he had been arrested and charged with possession of marijuana; Breitenbach did not learn this until later. Breitenbach testified that the timing of defendant’s request was irrelevant, however, because in his opinion, defendant is “totally eligible and capable and in need of medical marijuana,” and he would have given defendant the authorization regardless of whether defendant had been charged or convicted.

Defendant completed the affidavit in support of his assertion of the MMMA for the purpose of his affirmative defense and motion to dismiss on June 9, 2009. In that affidavit, he stated that he uses marijuana for chronic pain and nausea caused by the Lyme disease. Also on June 9, 2009, defendant prepared an affidavit of qualifying patient, indicating that he was a patient qualifying for the medical use of marijuana. Defendant represented that Breitenbach had diagnosed defendant with a debilitating medical condition, Lyme disease, and that in Breitenbach’s opinion defendant would likely “receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate that debilitating medical condition or symptoms associated with that debilitating medical condition.”

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<sup>2</sup> Although there seemed to be some confusion in the questioning such that Breitenbach appeared to say defendant needed to use one and a half ounces per day, we believe that this is the more reasonable interpretation of his testimony based on what was asked and answered.

Defendant offered into evidence his qualifying patient certificate, which indicated that his illness qualified him as eligible to use medical marijuana. He also provided his application form for registering for a medical marijuana card, which he prepared on April 12, 2009. The Michigan Department of Community Health issued him a certification card two weeks later. Defendant explained that he did not register for medical marijuana use certification before April 12, 2009, because the application form was not available online until April 8, 2009, two days after his arrest.

The district court issued its opinion on July 1, 2009, and found that defendant had not satisfied the requirements for stating the defense. It noted that defendant did not provide evidence to show that a physician had approved his use of medical marijuana *before* his arrest or that he had “seriously discussed the use of marijuana as a therapeutic benefit” with Breitenbach between December 2008, when the MMA was enacted, and April 6, 2009, the date of his arrest. The court focused on the language of § 8(a)(1) that “A physician *has stated* that . . . the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana . . . .” It construed that language as requiring a determination by the physician regarding the matter before a patient is arrested for an offense.

Defendant appealed to the circuit court. The circuit court interpreted the statute differently than did the district court, reasoning:

This Court finds that the District Court’s interpretation of “has stated” is at odds with the nonuse of the defined term “qualifying patient” and the use, instead, of the undefined term “patient.” A qualifying patient is a person who has been diagnosed by a physician as having a debilitating medical condition. MCL 333.26423(h). The statute does not limit the use of the defense stated in MCL 333.26428(b) to qualifying patients, but more broadly offers the defense to all patients. Since the authors of the statute did not require that the person asserting the defense have been previously diagnosed by a physician as having a debilitating medical condition, it seems unlikely that they intended that the defense be limited to persons who had previously discussed the use of medical marijuana with their physician, or to persons who had obtained some statement from their physician before arrest. Giving the words used their plain and ordinary meaning, the Court cannot assign any further meaning to the words, “has stated,” than that the following subject matter was expressed by a physician. The statute does not require the physician have stated this before the defendant’s arrest. It merely requires that the physician has stated it. In this case, the physician stated it at the hearing. The statute simply does not require that the physician have stated it at some other time or in some other context.

Based on its interpretation, the circuit court reversed the district court’s denial of defendant’s motion to dismiss.

The prosecution filed an application for leave to appeal the circuit court’s October 27, 2009 opinion and order, which this Court granted. *People v Kolanek*, unpublished order of the Court of Appeals, entered March 29, 2010 (Docket No. 295125).

## II. STANDARD OF REVIEW

This issue presents a question of statutory interpretation. We review issues of statutory interpretation de novo. Generally, the primary objective in constructing a statute is to ascertain and give effect to the Legislature's intent. The MMMA was enacted as a result of an initiative adopted by the voters. The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters. We presume that the meaning as plainly expressed in the statute is what was intended. [*People v Redden*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2010), slip op at 6-7 (internal quotation marks and citations omitted).]

## III. ANALYSIS

### A. REGISTRY CARD

The prosecution first argues that a valid registry card is required to assert a defense under § 8 of the MMMA. This issue is easily resolved, as this Court held to the contrary in *Redden*, \_\_\_ Mich App at \_\_\_, slip op at 11. Accordingly, the fact that defendant did not have a valid registry card at the time of his arrest did not preclude him from asserting his defense.

### B. TIMING OF PHYSICIAN STATEMENT

We must next consider the specific issue ruled on by the courts below: when a physician must provide his professional opinion under MCL 333.26428(a)(1) in order for a defendant to assert the § 8 defense.

MCL 333.26428 provides in relevant part:

(a) Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marijuana as a defense to any prosecution involving marijuana, and this defense shall be presumed valid where the evidence shows that:

(1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

(2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marijuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and

(3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

(b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

## 1. AFFIRMATIVE DEFENSE

As an initial matter, we reject the prosecution's assertion that the very nature of an affirmative defense requires that it not be retroactive because it is a legal justification for the conduct that exists at the time the crime is committed. Certain affirmative defenses, such as the statute of limitations, see MCL 767.24 and MCR 2.111(F)(3)(a), simply cannot exist at the time the conduct is committed. Additionally, nothing in the definition of an affirmative defense contains such a requirement: "'An affirmative defense is one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it[.]'" *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997) (citation omitted). An affirmative defense does not negate selected elements or facts of the charged crime. *Id.* An affirmative defense essentially concedes the facial criminality of the conduct and presents a basis to avoid conviction. *People v DuPree*, 284 Mich App 89, 99-100; 771 NW2d 470 (2009), *aff'd* 486 Mich 693 (2010), quoting *People v Pegenau*, 447 Mich 278, 319; 523 NW2d 325 (1994)(opinion by BOYLE, J.). Accordingly, simply because the initiative labeled the § 8 defense an affirmative defense does not resolve the question of whether a physician recommendation that is acquired subsequent to arrest is sufficient.

## 2. "HAS STATED"

The primary substantive question in this case is how to interpret the requirement in MCL 333.26428(a)(1), that "[a] physician *has stated*" the medical benefit to the patient. We conclude that "has stated" requires that the physician's opinion occur prior to arrest. First, because the term is past tense, the initiative must have intended that the physician's opinion be stated prior in time to some event. That event would reasonably be "any prosecution involving marihuana," MCL 333.26428(a), for which the defense is being presented. Thus, because the arrest begins the prosecution, the physician's opinion must occur prior to the arrest.

Furthermore, § 8(a)(1) speaks of a physician stating that "the patient *is likely to receive* therapeutic or palliative benefit from the medical use of marijuana." (Emphasis added.) Thus, the language contemplates a situation where a physician, at the time of providing the statement, is envisioning the future possession and use of marijuana and rendering an opinion that it will benefit the patient when it is later used.

This interpretation is also consistent with the fact that the right to bring a motion to dismiss as provided for in § 8(b) requires a showing at an evidentiary hearing of "the elements listed in subsection (a)." It would not make sense to permit someone to "show the elements in

subsection (a),” which requires that a physician “has stated” the benefits, by bringing a physician to the motion hearing to state, for the first time, that the defendant would receive such benefit.

Our interpretation is also consistent with both California and Oregon’s interpretation of their medical marijuana initiatives.

Under California’s Medical Marijuana Program (MMP), Cal Health & Saf Code § 11362.7 *et seq.*, “qualified patients,” as well as persons with identification cards, are provided a defense at trial to criminal liability for certain marijuana-related crimes. CHSC 11362.765. A “qualified patient” is defined as “a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article.” CHSC 11362.7(f). Section 11362.5 is the Compassionate Use Act of 1996 (CUA), which is the voter-approved initiative,<sup>3</sup> section (b)(1)(A) of which provides:

To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana in the treatment of [a variety of listed illnesses], or any other illness for which marijuana provides relief.

California courts determined that to be a “qualifying patient” under the MMP, a person need only meet the elements set forth in section 11362.5(b)(1)(A). See *People v Wright*, 40 Cal 4<sup>th</sup> 81, 94; 146 P3d 531 (2006). California courts concluded that “[i]n order to present a CUA defense . . . a defendant must have obtained a recommendation to use medical marijuana prior to his or her arrest.” *People v Windus*, 165 Cal App 4<sup>th</sup> 634, 643; 81 Cal Rptr 3d 227 (2008). The interpretation is consistent with the language of the CUA, which requires that the physician “has determined,” implying that the determination occur prior to the assertion of the defense. See also *People v Rico*, 69 Cal App 4<sup>th</sup> 409, 414-415; 81 Cal Rptr 2d 624 (1999) (Holding that “postarrest approval is insufficient to allow application of the compassionate use statute” because “[t]o sanction the use of marijuana under the facts presented herein would encourage the use of marijuana for any idiosyncratic problem, whether medically valid or not, with an ensuing attempt to seek medical approval after an arrest intervened.”).

Oregon’s statute, which was also a voter initiative, is similar, although not identical to Michigan’s, and provides, in relevant part:

(1) Except as provided in ORS 475.316 and 475.342, it is an affirmative defense to a criminal charge of possession or production of marijuana, or any other criminal offense in which possession or production of marijuana is an element, that the person charged with the offense is a person who:

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<sup>3</sup> The MMP was passed by the California Legislature “to address issues not included in the CUA so as to promote the fair and orderly implementation of the CUA.” *People v Wright*, 40 Cal 4<sup>th</sup> 81, 85; 146 P3d 531 (2006).

(a) Has been diagnosed with a debilitating medical condition within 12 months prior to arrest and been advised by the person's attending physician that the medical use of marijuana may mitigate the symptoms or effects of that debilitating medical condition; [ORS § 475.319(1)(a).]

In *Oregon v Root*, 202 Ore App 491, 493-494; 123 P3d 281 (2005), the defendant challenged the trial court's refusal to permit him to assert the medical marijuana defense based on the trial court's conclusion that the post-arrest physician certification was insufficient under the statute. The Oregon Court of Appeals looked at the text and context of the statute and determined that the intent was that "the doctor's advice must come *before* a citizen is free to use marijuana without fear of civil or criminal penalties" based on the past tense language requiring that a defendant "has . . . been advised." *Id.* at 495-497 (emphasis in original).

We find these cases persuasive, particularly because they involve interpretation of past tense language found in similar medical marijuana voter initiatives. Moreover, it is reasonable to assume that the affirmative defense created in § 8 was intended to protect those who actually had a medical basis for marijuana use recognized by a physician prior to said use and was not intended to afford defendants an after-the-fact exemption for otherwise illegal activities. The law generally denies defendants the ability to remedy a criminal violation post-arrest. Thus, defendants cannot escape prosecution for a violation of the concealed weapon statute by seeking a permit after arrest, or escape prosecution for violations of the Controlled Substances Act by seeking a prescription for the substance from a physician after arrest. Furthermore, the very fact that the law creates the ability to legitimately have a defense to certain actions that would otherwise be illegal would indicate that persons must fulfill those requirements prior to any arrest. Otherwise, there is no incentive for anyone to utilize their time and money to go through the process; everyone would simply engage in the illegal activity, rolling the dice that they will not get caught, with the understanding that, if they do get arrested, they can subsequently receive a retroactive exemption. Accordingly, we hold that the language in MCL 333.26428(a)(1) that "[a] physician has stated" requires that a physician's statement of the benefit of medical marijuana occur prior to arrest.

This determination does not resolve the case before us, however, because defendant provided testimony that, although he did not receive an affidavit from Breitenbach prior to his arrest, he had previously discussed his potential for medical marijuana with Breitenbach, who indicated that he would support defendant using medical marijuana. The district court concluded that this testimony was insufficient because it did not occur after the enactment of the MMMA and prior to defendant's arrest (between December 4, 2008 and April 6, 2009). Rather, the evidence indicates that the discussion occurred on July 14, 2008, and was related to the upcoming vote. Thus, the next question we must answer is whether a discussion that occurred prior to the enactment of the MMMA is sufficient to establish a defense under § 8(a)(1).

Looking again at California law, California permits pre-enactment physician determinations for the assertion of the defense. See *Rico*, 69 Cal App 4<sup>th</sup> at 414 (concluding that defendant's argument that "it was impossible to obtain authorization to cultivate marijuana prior to the effective date of the Act because physicians had no legal authority to recommend or approve the use of marijuana" was without merit because it had, in fact, occurred in other cases). However, this result appears to be necessary based on California caselaw that the defense

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contained in the CUA could be asserted retroactively, so that a defendant's arrest prior to the Act's passage does not preclude his assertion of the defense. See *id.* at 412. Because California permits retroactive assertion of the medical marijuana defense, a defendant in California would have to have had a discussion with his physician prior to the passage of the voter initiative in order to assert the defense retroactively. Unlike California, however, Michigan has held that there is no retroactive application of the medical marijuana defense. *People v Campbell*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2010), slip op at 2. Accordingly, we conclude that California caselaw is inapplicable to this specific question.

Looking at *Campbell*, this Court noted that "MCL 333.26428 creates a new right in that it provides an affirmative defense to a criminal defendant facing prosecution for crimes related to the use of marijuana that did not exist prior to the enactment of the MMA." *Id.* Because the affirmative defense did not even exist prior to December 4, 2008, it seems counter-intuitive to permit prior physician statements to satisfy the affirmative defense requirements. While people may have spoken with their physicians about whether a medical marijuana law would be enacted and whether the physician might then take action to assist them in qualifying for medical use, until the MMMA was actually enacted, such discussions were speculative. We are not convinced that such discussions prior to the enactment of the MMMA are sufficient to support a defense that did not yet exist.<sup>4</sup> The more reasonable conclusion is that it was not until the passage of the MMMA that the required patient-physician discussions about eligibility for medical marijuana could occur. This interpretation provides protection to those who actively sought physician approval after the defense actually became available, while requiring more than just a speculative discussion about whether a person might possibly be eligible should the measure actually pass.

Consequently, we hold that in order to meet the requirement that a physician "has stated" a benefit to a patient from medical marijuana use, the physician's statement must have occurred after the enactment of the MMMA, but prior to arrest.

### 3. APPLICATION TO DEFENDANT

Given our conclusion that the discussion with the physician must have occurred after the enactment of the MMMA, but prior to arrest, neither defendant's post-arrest affidavit, nor his pre-MMMA enactment discussion with his physician, is sufficient to meet the requirements of MCL 333.26428(a)(1).

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<sup>4</sup> We also note that, as indicated above, the statement under § 8(a)(1) must provide that "the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana," and here defendant testified that Breitenbach simply stated that he would support defendant's use of marijuana. There is no testimony or evidence that in July 2008 Breitenbach expressly made the required statement found in § 8(a)(1).

Accordingly, the circuit court on appeal erred in concluding that the charge against defendant should have been dismissed by the district court and we remand for reinstatement of the charges. As the statute does not provide that the failure to bring, or to win, a pre-trial motion to dismiss deprives the defendant of the statutory defense before the factfinder, defendant's failure to provide sufficient proofs pursuant to his motion to dismiss does not bar him from asserting the Section 8 defense at trial nor from submitting additional proofs in support of the defense at that time.

We do not retain jurisdiction.

/s/ William B. Murphy  
/s/ Patrick M. Meter  
/s/ Douglas B. Shapiro

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LARRY STEVEN KING,

Defendant-Appellee.

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FOR PUBLICATION

February 3, 2011

9:00 a.m.

No. 294682

Shiawassee Circuit Court

LC No. 09-008600-FH

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

SAAD, J.

The prosecutor appeals the trial court's order that dismissed two counts against defendant for the manufacture of a controlled substance – marijuana, MCL 333.7401(2)(d)(iii). For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

**I. NATURE OF THE CASE**

Defendant, who was arrested for illegally growing marijuana, possesses a registry identification card under the Medical Marihuana Act (MMA), MCL 333.26421 *et seq.*, and claims that he is entitled to the limited protections of the MMA because he complied with its statutory provisions. The trial court ruled that the charges against defendant must be dismissed because he satisfied the elements of the affirmative defense outlined in § 8 of the MMA. MCL 333.26428. Though defendant timely raised a § 8 defense, he did not fulfill the requirements of § 8. Clearly, by its reference to § 7, § 8 required defendant to comply with other applicable sections of the MMA, which includes the growing requirements set forth in § 4. MCL 333.26427; 333.26424. Furthermore, as a registered cardholder, defendant must comply with the growing provisions of § 4. MCL 333.26424(a). Also, defendant maintains, and the trial court erroneously ruled, that defendant complied with § 4 by growing the marijuana in an “enclosed, locked facility.” We disagree that defendant adhered to the requirements of § 4 of the MMA and therefore hold that defendant is not entitled to the benefit of the protections of the MMA. The trial court abused its discretion when it dismissed the charges against him.

**II. FACTS**

The Michigan State Police received an anonymous tip that someone was growing marijuana in the backyard of a house at 710 Grace Street in Owosso. On May 13, 2009,

Detective Sergeant Brian Fox and Deputy Jed Eisenberger drove to the address and saw a chain-link dog kennel behind the house. Though the sides of the kennel were covered with black plastic, some areas of the kennel were uncovered and, using binoculars, Deputy Eisenberger could see marijuana plants growing inside.

Detective Fox and Deputy Eisenberger went to the door of the house and spoke to defendant, who produced a medical marijuana card that was issued on April 20, 2009. The officers asked defendant to show them the marijuana plants and defendant unlocked a chain lock on the kennel. The kennel was six feet tall, but had an open top and was not anchored to the ground. Defendant disclosed that he had more marijuana plants inside the house. After they obtained a search warrant, the officers found marijuana plants growing inside defendant's unlocked living room closet.

As noted, defendant was charged with two counts of manufacturing marijuana. After the prosecutor presented his proofs at the preliminary examination, defendant moved to dismiss the charges under the affirmative defense section MMA. The district court denied defendant's motion and bound defendant over for trial. In the circuit court, defendant filed a motion to quash the bindover or to suppress evidence obtained during the search. He also sought to dismiss the charges on various grounds. Among other arguments, defendant maintained that the search warrant was invalid because it was based on hearsay. Defendant also sought to assert an affirmative defense under the MMA. In response, the prosecutor argued that the search warrant was valid and that defendant failed to comply with the MMA because he did not keep the marijuana in an enclosed, locked facility pursuant to MCL 333.26424(a).

The trial court issued an opinion and order on September 30, 2009. The court ruled that, because defendant had a medical marijuana registry identification card and kept "a legal quantity" of marijuana in an enclosed, locked facility, there was no probable cause to support the issuance of the search warrant for his home. Nonetheless, the court ruled that the evidence seized during the search should not be suppressed because the officers acted in good faith reliance on the warrant. However, the court held that the officers should not have seized the marijuana because defendant complied with the requirements of the MMA. For the same reason, the court ruled that defendant was entitled to assert an affirmative defense under the MMA and it granted defendant's motion to dismiss the charges.

### III. ANALYSIS

"We review a trial court's decision to grant or deny a motion to dismiss charges for an abuse of discretion." *People v Kevorkian*, 248 Mich App 373, 383; 639 NW2d 291 (2001). The prosecution contends that the trial court incorrectly interpreted the meaning of "enclosed, locked facility" under MMA subsections MCL 333.26424(a) and MCL 333.26423(c) and that it erred when it ruled that defendant complied with the statute. We review questions of statutory interpretation de novo. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010). "When interpreting statutes, our goal is to give effect to the intent of the Legislature by reviewing the plain language of the statute." *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005).

Again, the prosecutor charged defendant with violating Michigan's controlled substances act by growing marijuana, but defendant maintains that he is entitled to the protections from

prosecution laid out in the recently-enacted MMA. By passing statutes that criminalize the possession, use, and manufacture of controlled substances, including marijuana, our state and federal Legislatures have determined that such substances are harmful and prohibited.<sup>1</sup> As Judge O'Connell observed in his concurrence in *People v Redden*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2010) (O'CONNELL, J, concurring):

[T]he [MMA] does not create any sort of affirmative *right* under state law to use or possess marijuana. That drug remains a Schedule 1 substance under the Public Health Code, MCL 333.7212(1)(c), meaning that "the substance has a high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision," MCL 333.7211. The [MMA] does not repeal any drug laws contained in the Public Health Code, and all persons under this state's jurisdiction remain subject

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<sup>1</sup> The statute at issue here, MCL 333.7401, provides, in relevant part:

(1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

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(d) Marihuana or a mixture containing marihuana is guilty of a felony punishable as follows:

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(iii) If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years or a fine of not more than \$20,000.00, or both.

to them. Accordingly, mere possession of marijuana remains a misdemeanor offense, MCL 333.7403(2)(d), and the manufacture of marijuana remains a felony, MCL 333.7401(2)(d).

By its terms, the MMA does not abrogate state criminal prohibitions on the manufacture of marijuana. Rather, the MMA “merely provides a procedure through which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law.” *Redden*, \_\_\_ Mich App \_\_\_ (O’CONNELL, J. concurring). Although these individuals continue to violate the Public Health Code by using marijuana, the MMA sets forth narrow circumstances under which they can avoid criminal liability. In other words, the MMA constitutes a determination by the people of this state that there should exist a very limited, highly restricted exception to the statutory proscription against the manufacture and use of marijuana in Michigan. As such, the MMA grants narrowly tailored protections to qualified persons as defined in the act if the marijuana is grown and used for certain narrowly defined medical purposes. Further, the growing of marijuana is tightly constrained by specific provisions that mandate how, where, for what purpose, and how much marijuana may be grown.

Section 8 of the MMA provides a defendant with an opportunity to assert a defense to the controlled substance laws if the conditions set forth in § 8 are followed. MCL 333.26428. Moreover, § 8 incorporates by reference other provisions of the MMA with which a defendant must comply. Section 8 specifically states that a patient may assert a medical purpose defense to any marijuana prosecution, “[e]xcept as provided in Section 7 . . . .” Section 7(a) provides that “[t]he medical use of marihuana is allowed under state law *to the extent that it is carried out in accordance with the provisions of this act.*” (Emphasis added.) In *Redden*, this Court held that the statute permits an unregistered patient to assert the affirmative defense under § 8 if he or she meets the requirements of § 8. *Redden*, \_\_\_ Mich App \_\_\_. We hold that § 8 permits a “registered qualifying patient” to raise an affirmative defense under § 8, just as an unregistered defendant may under *Redden*. We further hold that the express reference to § 7 and § 7(a)’s statement that medical use of marijuana must be carried out in accordance with the provisions of the MMA, requires defendant to comply with the growing provisions in § 4. And, in any case, § 4 applies to defendant because he grew marijuana under a claim that he is a qualifying patient in possession of a registry identification card.<sup>2</sup> We hold that, because defendant did not comply with § 4, he also failed to meet the requirements of § 8 and therefore, he is not entitled to the affirmative defense in § 8 and he is not entitled to dismissal of the charges.

Section 4, MCL 333.26424(a) provides, in relevant part:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any

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<sup>2</sup> This holding is supported by the ballot proposal itself, Proposal 08-1, which stated that certain registered patients would be permitted to cultivate marijuana within certain restrictions. The proposal specifically provided that the law would “[p]ermit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility.”

manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility.

The MMA defines “enclosed, locked facility” as follows:

“Enclosed, locked facility” means a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient. [MCL 333.26423(c).]

We hold that the trial court incorrectly interpreted and applied the phrase “enclosed, locked facility.” As this Court recently opined in *Redden*:

This issue presents a question of statutory interpretation. We review issues of statutory interpretation de novo. *People v Stone Transport, Inc.*, 241 Mich App 49, 50; 613 NW2d 737 (2000). Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature’s intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The [MMA] was enacted as a result of an initiative adopted by the voters. “The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters.” *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory, and “[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme.” *People v Williams*, 268 Mich App 416, 425-426; 707 NW2d 624 (2005).

As noted, the phrase “enclosed, locked facility” is defined by the MMA to mean “a closet, room, or other enclosed area equipped with locks or other security devices . . . .” MCL 333.26423(c). As described above, defendant grew several marijuana plants in his backyard, within a chain-link dog kennel that was only partially covered on the sides with black plastic. The kennel had a lock on the chain-link door, but had no fencing or other material over the top and it could be lifted off the ground. Defendant maintains that the kennel constitutes an “enclosed area” within the definition of “enclosed, locked facility” and, therefore, he complied with the statute. The trial court simply based its interpretation of “other enclosed area” on the

definition of “enclose” in Black’s Law Dictionary, and concluded, without analysis, that the kennel complied with this definition.<sup>3</sup>

The trial court’s interpretation and application of the phrase “enclosed, locked facility” is contrary to settled rules of statutory construction. The statutory reference to “other enclosed area” within the definition of “enclosed, locked facility” is a general phrase that follows the words “closet” and “room,” both of which have specific, limited meanings and which have the common characteristic of being stationery and closed on all sides. It would frustrate the intent of the MMA to read the definition of “enclosed, locked facility” to mean something akin to a moveable fence based simply on a dictionary definition when the enumerated examples that precede “other enclosed area” suggest a much greater level of protected confinement.

Our courts must give effect to the language in the statute and to elucidate the intent of the voters by considering not only the words themselves, but their placement and purpose in the statutory scheme. To that end, it is appropriate here to apply the doctrine of statutory construction *ejusdem generis*, which provides that “the scope of a broad general term following a series of items is construed as including ‘things of the same kind, class, character, or nature as those specifically enumerated . . . .’” *People v Thomas*, 263 Mich App 70, 76; 687 NW2d 598 (2004), quoting *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 349; 656 NW2d 175 (2003), and *Huggett v Dep’t of Natural Resources*, 464 Mich 711, 718-719; 629 NW2d 915 (2001). Under the doctrine, “other enclosed area” would, thus, be limited to things of the same kind or character as a closet or room. An open, moveable, chain-link kennel is not of the same kind or character as a closet or room. We further observe that the examples given in the statutory definition are followed by the additional requirement that the closet, room or other enclosed area be equipped with locks or other security devices that permit access only by the registered caregiver or qualifying patient. In context, the clear purpose of specifying that the marijuana be kept within a secure facility to ensure that it is inaccessible to anyone other than a licensed grower or a qualifying patient, as defined in the MMA for the limited purpose set forth in the MMA. Moreover, these provisions are obviously meant to prevent access by the general public and, especially, juveniles. This reading of the MMA is consistent with its limited protections for a narrowly defined group of medical users of a controlled substance, the general cultivation and use of which remains illegal under both state and federal law. Reading the statute broadly as the trial court did to permit marijuana to be kept in the type of space used by defendant would, quite simply, undermine the plain language and purpose of the statutory provisions.

We further hold that, though the plants inside defendant’s home were kept in a closet, which is the type of enclosure specifically enumerated in the statute, it is undisputed that there was no lock on the closet door. The statute explicitly states that the enclosed area itself must have a lock or other security device to prevent access by anyone other than the person licensed to

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<sup>3</sup> Though, we observe that the trial court cited a definition that specifies enclosure on all sides, but nonetheless concluded that the open-top kennel satisfies the definition.

grow marijuana under the MMA. An unlocked closet would permit access by anyone else within the home and it appears that the home itself was not secured by locks on all of the doors. The trial court's conclusion that defendant acted as a "security device" for the marijuana growing inside his home is pure sophistry and belied by defense counsel's unsurprising admission at oral argument that, at times, defendant left the property, thus leaving the marijuana without a "security device" and accessible to someone other than defendant as the registered patient.

Because defendant failed to comply with the strict requirements in the MMA that he keep the marijuana in an "enclosed, locked facility," he is subject to prosecution under MCL 333.7401(2)(d)(iii), and the trial court abused its discretion by dismissing the charges against defendant.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ David H. Sawyer

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LARRY STEVEN KING,

Defendant-Appellee.

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FOR PUBLICATION  
February 3, 2011

No. 294682  
Shiawassee Circuit Court  
LC No. 09-008600-FH

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

FITZGERALD, J. (*dissenting*).

I respectfully dissent.

The police had received an anonymous tip that defendant was growing marijuana in his back yard. The police then drove to the defendant's neighbor's driveway. The police, using binoculars, were able to observe marijuana plants growing in a dog kennel in defendant's back yard. The dog kennel was made of six-foot high chain link fence covered with black shrink wrap. The police were able to see into the kennel where a section of shrink wrap had been detached. The police then approached defendant's home, knocked on the door, and asked if defendant had a medical marijuana card. Defendant produced his card. The police then asked if defendant would allow them to see the plants. Defendant went back inside the house to obtain the key to the lock on the kennel. He then went with officers around the house, and opened the lock on the kennel. The officers then asked if he had more marijuana in the home. Defendant stated that he did, but that the officers would need a search warrant. The police then obtained a search warrant. Six Marijuana plants, processed marijuana, and plants in various states of processing were found inside the home.

Defendant moved to dismiss the charges of manufacturing marijuana pursuant to the Michigan Medical Marijuana Act (MMMA).<sup>1</sup> MCL 333.26421 *et seq.* The MMMA was passed by referendum on November 4, 2008, and went into effect soon thereafter. The MMMA declares

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<sup>1</sup> Although the statute spells it "marihuana," unless used in a direct quote, I have spelled it throughout as "marijuana" as that is the more commonly used spelling.

that, in “chang[ing] state law,” the act was designed to “have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana.” MCL 333.26422(b). The MMMA further declares that the laws of certain other states “do not penalize the medical use and cultivation of marihuana. Michigan joins in this effort for the health and welfare of its citizens.” MCL 333.26423(c). Such declarations reveal the intent that the MMMA be used not as a sword against those who have a medical need to use marihuana, but rather as a shield.

MCL 333.26424(a) of the MMMA allows a qualifying patient who has been issued and possesses a registry identification card to possess 2.5 ounces of marijuana and to cultivate 12 marijuana plants (if the patient has not designated a primary care giver) and not be subject to arrest or prosecution for possession of the marijuana or for growing the plants. Specifically, subsection 4(a) states:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business of occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an *enclosed, locked facility*.

There is no dispute that defendant is a qualifying patient in possession of a valid registry card.<sup>2</sup> The prosecution argues that defendant was not entitled to the protection of this statutory section because he was not growing his marijuana plants in “an enclosed, locked facility.” In particular, the prosecution asserts that the dog kennel in defendant’s backyard was not an “enclosed, locked facility” because it lacked a roof or a top and was movable. Additionally, the prosecution asserts that defendant’s house was not an “enclosed, locked facility” because the back door lacked a lock.

The narrow issue before this Court is the interpretation of the term “enclosed, locked facility” as used in MCL 333.26423(c) of the MMMA. Questions of statutory interpretation are reviewed de novo. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010).

The purpose of statutory construction is to discern and give effect to the intent of the Legislature. *Feezel*, 486 Mich at 205. The MMMA was enacted as a result of an initiative adopted by the voters. The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters. In the absence of a statutorily provided definition, a statutory term will be given its ordinary meaning. *People v Peals*, 476 Mich 636,

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<sup>2</sup> The prosecution does not dispute that defendant was entitled to possess 2.5 ounces of marijuana.

641; 720 NW2d 196 (2006). The ordinary meaning of a term may be discerned by consideration of dictionary definitions. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). This Court presumes that the meaning as plainly expressed in the statute is what was intended. *People v Redden*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2010), slip op at 6-7.

The MMMA defines “enclosed, locked facility” as follows:

“Enclosed, locked facility” means a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient. [MCL 333.26423(c).]

Clearly, the outdoor dog kennel could only qualify as an enclosed, locked facility under the term “other enclosed area.” MCL 333.26423(c) does not define the word “enclosed.” Random House Webster’s College Dictionary contains the following definition of “enclose”: “1. to close in on all sides; shut in. 2. to surround, as with a fence; *to enclose land*. 3. to insert in the same envelope, package, etc.: to enclose a check. 4. to contain or hold.” *The Random House Webster’s College Dictionary* (1997). Under this definition, the dog kennel in this case would fall under the definition of “other enclosed area.” The chain link walls of the kennel were six feet high and the area surrounded by the chain link walls was closed in on all sides. Like a fence that surrounds land (as in the dictionary example above), the kennel did not have a top, but, by dictionary definition, a top is not required to “enclose” something.”<sup>3</sup> Defendant covered the walls of the kennel with black shrink-wrap in an attempt to conceal the contents of the enclosure. Additionally, the kennel was equipped with a lock, and defendant maintained the key to the lock, thereby satisfying the additional requirement that the “other enclosed area” be equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient. MCL 333.26423(c). Thus, in my view, the dog kennel qualifies as an “enclosed, locked facility.”

The prosecution further argues that defendant’s house was not an “enclosed, locked facility” because the back door did not have a lock. MCL 333.26423(c) provides that such a facility be equipped with “locks” or “other security devices.” The term “other security devices” is not defined in the MMMA. The dictionary defines a device” as “1. A thing made for a particular purpose, esp. a mechanical electronic invention or contrivance.” *The Random House Webster’s College Dictionary* (1997). Given that the statutory definition of an “enclosed, locked facility” allows for not only locks, but also “other security devices” to be used, the term “locked” should be broadly interpreted. Indeed, it appears from the use of the term “other security devices” that the intent is that the facility be “secure.”

Here, Michigan State Police Detective Sergeant Brian Fox presented testimony at the preliminary examination that the back door of defendant’s home did not have a knob and that he did not “think” that defendant was able “to lock or to keep the house secure.” However, the lack

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<sup>3</sup> Contrary to the prosecution’s suggestion, nothing in the statutory definition of “enclosed, locked facility” prevents the facility from being movable.

of a knob on the back door does not necessarily mean that defendant's house was not secure. As the statutory definition makes clear, the door could have been secured by other devices. Some other "contrivance for securing or fastening" would satisfy the statute. Although Fox testified that he did not see a board that kept the door closed from the inside, that does not mean that there lacked a mechanism to keep the door secure. In my view, in the absence of evidence that persons other than defendant had access to or actually entered the home, defendant's home satisfies the definition of "enclosed, locked facility."

Furthermore, the definition of "enclosed, locked facility" reveals the people's intent that the marijuana being cultivated be accessible only by a registered primary caregiver or registered qualifying patient. In other words, the concern is that the marijuana being cultivated not be accessible by anyone other than a registered primary caregiver or registered qualifying patient. As previously noted, the declared intent of the MMMA "to protect from arrest the vast majority of seriously ill people who have a medical need to use marihuana." Rather than having a rigid definition of "other enclosed area" and "locked" or "other security device," the true key to determining whether defendant's dog kennel and home were "enclosed, locked facilities" for purposes of the MMMA is to determine whether access to the marijuana in the dog kennel and the house was permitted "only by a primary care giver or registered qualifying patient." MCL 333.26423(c).

The evidence in the record indicates that the dog kennel where defendant was growing marijuana was located in his backyard. The walls of the kennel were made of six feet high chain link fence wrapped in black plastic. Parts of the black plastic had blown open allowing Fox and another deputy to see defendant's marijuana from the street with the use of binoculars. The kennel was locked and Fox and the deputy were only able to access it after defendant obtained a key for the lock from his house. The prosecution made no allegations that anyone attempted to steal defendant's marijuana plants. Rather, the prosecution argued that access to the marijuana plants was not limited to defendant because someone could move the kennel or climb over the six-foot walls to access the marijuana plants. However, the evidence presented at the preliminary examination revealed that defendant had to obtain a key to gain access to the marijuana. No evidence was presented that anyone had tried to move the kennel or climb over the kennel to obtain the marijuana. In fact, no evidence was presented that anyone other than defendant had access to the marijuana. The prosecution's argument is premised solely on a set of hypothetical facts.

Similarly with defendant's house, we need not find a rigid definition for "locked" which requires the use of a key. Instead, the determination to be made is whether access to the marijuana in defendant's house was limited to defendant. Defendant refused to allow Fox and the other officer access to his house. The police obtained access to the house only by securing a search warrant. No evidence was presented that anyone other than defendant had access to the house. I would conclude that defendant was growing marijuana in accordance with the provisions of the MMMA. The evidence from the preliminary examination reveals that access to both the kennel and the house was limited to defendant, which is sufficient for purposes of MCL 333.26424.

I find it worthy to note that this is not a case involving an individual who was trying to flout the clear prohibitions of the Public Health Code and engage in recreational use of

marijuana. This is a case involving an individual who went through the necessary procedure to become a qualifying patient who has been issued a valid registry identification card. The MMMA's susceptibility to multiple interpretations should not result in the use of the act as a sword, rather than a shield, under the circumstances of this case.

I would affirm the learned circuit judge's dismissal of the charges against defendant.

/s/ E. Thomas Fitzgerald

## AGENDA ITEM #4

### **NEW CHAPTER CREATION:** **“TELECOMMUNICATIONS AND COMPUTERS”**

As the list of telephone and internet crimes has increased, the ability to “shoehorn” them into existing chapters has become more difficult.

After discussion with ICLE, a chapter heading change has been made. A new chapter heading (Chapter 35) “Telecommunications and Computers” will be created and previous chapters 30.14 – 30.21 moved into the new chapter heading.

The subchapter headings for the existing CJI 2d Chapter 30 are attached.

## Chapter 30 Financial Transaction Devices

C30-01.*	CJI2d 30.1	Definition of Deviceholder (p. 30-3)
C30-02.*	CJI2d 30.2	Definition of Financial Transaction Device (p. 30-5)
C30-03.*	CJI2d 30.3	Stealing, Removing, or Hiding Another's Financial Transaction Device Without Consent (p. 30-7)
C30-04.*	CJI2d 30.4	Possession of Fraudulent or Altered Financial Transaction Device (p. 30-9)
C30-05.*	CJI2d 30.5	Possession of Another's Financial Transaction Device with Intent to Use, Deliver, Circulate, or Sell (p. 30-11)
C30-06.*	CJI2d 30.6	Financial Transaction Device Fraud, Forgery, Material Alteration, Counterfeiting (p. 30-13)
C30-07.*	CJI2d 30.7	Use of Revoked or Canceled Financial Transaction Device with Intent to Defraud (p. 30-15)
C30-08.*	CJI2d 30.8	Sales to or Services Performed for Violators (p. 30-17)
C30-09.*	CJI2d 30.9	Causing Deviceholder to Be Overcharged (p. 30-19)
C30-10.*	CJI2d 30.10	False Statement for Purpose of Obtaining Financial Transaction Device (p. 30-21)
C30-11.*	CJI2d 30.11	Use of Financial Transaction Device to Defraud (p. 30-23)
C30-12.*	CJI2d 30.12	Uttering and Publishing a Financial Transaction Device (p. 30-25)
C30-13.*	CJI2d 30.13	Possession, Use, etc. of Instrument for Making False Financial Transaction Device (p. 30-27)

*Note: CJI2d 30.14 through 30.21 were moved to new chapter 35 and renumbered.*

AGENDA ITEM #5

**CJI 2d 17.21 – Child Abuse Third Degree**

Committee member Anica Letica has brought to my attention that we have not amended CJI 2d 17.21 to reflect the 2008 statutory revision. In 2010 the committee made an amendment to CJI 2d 17.23 (Child Abuse – Fourth Degree) to conform to the statutory revision.

I recommend the committee amend CJI 2d 17.21 (Child Abuse – Third Degree) to conform to the statutory change.

A copy of the present CJI 2d 17.21, the revised CJI 2d 17.23, and MCL 750.136b are attached.

Judge,

I received the following e-mail and it appears that the mailer is correct. Is it possible to add this to our February agenda.

Thank you.

Hi Anica, following is the version of CJI2d 17.21, child abuse, third degree that I have in the courtroom manual. The statute was amended in 2008 to include physical harm caused by doing an act that posed an unreasonable risk of harm. Here is the language:

(5) A person is guilty of child abuse in the third degree if any of the following apply:

(a) The person knowingly or intentionally causes physical harm to a child.

(b) The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child.

My question is, was this instruction updated to reflect the highlighted language? If not, is it on the agenda for an update?

FYI. CJI2d 17.23, 4<sup>th</sup> degree child abuse does have the updated language.

#### **CJI2d 17.21 Child Abuse, Third Degree**

(1) The defendant is charged with the crime of third-degree child abuse. To establish this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:

[Choose (2) or (3):]

(2) First, that [name defendant] is the [parent / guardian] of [name child].

(3) First, that [name defendant] had care or custody of or authority over [name child] when the abuse allegedly happened.

(4) Second, that the defendant either knowingly or intentionally caused physical harm to [name child].

(5) Third, that [name child] was at the time under the age of 18.

*Use Note*

The jury should be instructed on parental discipline, CJI2d 17.24, when this is raised as a defense.

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Current with changes issued by the committee through 09/30/10

## Michigan Criminal Jury Instructions

Prepared by the Michigan State Bar Standing Committee on Standard Criminal Jury Instructions

### CJI2d 17.23 Child Abuse, Fourth Degree (Unreasonable Risk of Harm or Injury)

(1) The defendant is charged with the crime of fourth-degree child abuse. To establish this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:

*[Choose (2) or (3):]*

(2) First, that *[name defendant]* is the **[parent / guardian]** of *[name child]*.

(3) First, that *[name defendant]* had care or custody of or authority over *[name child]* when the abuse allegedly happened.

*[Choose (4) or (5):]*

(4) Second, that the defendant knowingly or intentionally committed an act that under the circumstances posed an unreasonable risk of harm or injury to *[name child]*. Actual injury is not necessary.

(5) Second, that the defendant's omission or reckless act caused physical harm to *[name child]*.

(6) Third, that *[name child]* was at the time under the age of 18.

#### Use Note

For conviction, jurors need not all agree on paragraphs (4) or (5) as long as they unanimously agree that either paragraph (4) or (5) was proved beyond a reasonable doubt. The statutory language indicates this is a general intent crime.

The jury should be instructed on parental discipline, CJI2d 17.24, when this is raised as a defense.

#### History

CJI2d 17.23 was CJI 17:8:04B; amended September, 2010.

#### Commentary

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FOCUS - 14 of 22 DOCUMENTS

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CHAPTER 750 MICHIGAN PENAL CODE  
THE MICHIGAN PENAL CODE  
CHAPTER XX. CHILDREN

**Go to the Michigan Code Archive Directory**

*MCLS § 750.136b (2011)*

MCL § 750.136b

§ 750.136b. Definitions; child abuse.

Sec. 136b. (1) As used in this section:

(a) "Child" means a person who is less than 18 years of age and is not emancipated by operation of law as provided in section 4 of 1968 PA 293, MCL 722.4.

(b) "Cruel" means brutal, inhuman, sadistic, or that which torments.

(c) "Omission" means a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child.

(d) "Person" means a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person.

(e) "Physical harm" means any injury to a child's physical condition.

(f) "Serious physical harm" means any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.

(g) "Serious mental harm" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.

(2) A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child. Child abuse in the first degree is a felony punishable by imprisonment for not more than 15 years.

(3) A person is guilty of child abuse in the second degree if any of the following apply:

(a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.

(b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.

(c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

## MCLS § 750.136b

- (4) Child abuse in the second degree is a felony punishable by imprisonment for not more than 4 years.
- (5) A person is guilty of child abuse in the third degree if any of the following apply:
- (a) The person knowingly or intentionally causes physical harm to a child.
  - (b) The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child.
- (6) Child abuse in the third degree is a felony punishable by imprisonment for not more than 2 years.
- (7) A person is guilty of child abuse in the fourth degree if any of the following apply:
- (a) The person's omission or reckless act causes physical harm to a child.
  - (b) The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results.
- (8) Child abuse in the fourth degree is a misdemeanor punishable by imprisonment for not more than 1 year.
- (9) This section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force.
- (10) It is an affirmative defense to a prosecution under this section that the defendant's conduct involving the child was a reasonable response to an act of domestic violence in light of all the facts and circumstances known to the defendant at that time. The defendant has the burden of establishing the affirmative defense by a preponderance of the evidence. As used in this subsection, "domestic violence" means that term as defined in section 1 of 1978 PA 389, MCL 400.1501.

**HISTORY:** Act 328, 1931, p 624; eff September 18, 1931.

Pub Acts 1931, No. 328, Ch. XX, § 136b, as added by Pub Acts 1988, No. 251, imd eff July 12, 1988, by § 2 eff September 1, 1988; amended by Pub Acts 1999, No. 273, imd eff January 3, 2000, by enacting § 1 eff April 3, 2000.

Amended by Pub Acts 2008, No. 577, imd eff January 16, 2009, by enacting § 1 eff April 1, 2009.

**NOTES:**

## Editor's notes:

Pub Acts 1988, No. 251, § 4, imd eff July 12, 1988, by § 2 eff September 1, 1988, provides:

"Section 4. All proceedings pending and liabilities existing at the time this amendatory act takes effect are saved and may be prosecuted according to the law in force when they are commenced pursuant to section 4a of chapter 1 of the Revised Statutes of 1846, being *section 8.4a of the Michigan Compiled Laws*."

## Effect of amendment notes:

The 1999 amendment in subsection (1), paragraph (a) changed the style of statutory references; added subsection (1), paragraph (b); redesignated former subsection (1), paragraphs (b)-(f) as (c)-(g); substantially revised subsection (1), paragraph (f); redesignated former subsection (3) as subsection (3), introductory paragraph, paragraph (a), and subsection (4); in subsection (3), introductory paragraph substituted "any of the following apply:" for "the"; in subsection (3), paragraph (a), inserted "The"; added subsection (3), paragraphs (b) and (c); redesignated former subsections (4)-(6) as (5)-(7); and in subsection (7) substituted "does" for "shall" and deleted "be construed to" preceding "prohibit".

The 2008 amendment in subsection (1), paragraph (c) deleted "the" in two instances; in subsection (3), paragraph (a) inserted "or serious mental harm"; redesignated and revised former subsection (5) as subsection (5), opening paragraph and paragraph (a), and subsection (6) from text which read: "A person is guilty of child abuse in the third degree if the person knowingly or intentionally causes physical harm to a child. Child abuse in the third degree is a misdemeanor punishable by imprisonment for not more than 2 years."; added subsection (5), paragraph (b); redesignated and revised former subsection (6) as subsection (7), opening paragraph and paragraph (a) and subsection (8) from text which read: "A person is guilty of child abuse in the fourth degree if the person's omission or reckless act causes physical harm to a child. Child abuse in the fourth degree is a misdemeanor punishable by imprisonment for not more than 1 year."; added subsection (7), paragraph (b); redesignated former subsection (7) as (9); and added subsection (10).

## Michigan Digest references:

Constitutional Law § 276

Criminal Law and Procedure §§ 2, 61, 315.04, 401, 445, 659.95, 961

Homicide §§ 7, 11

AGENDA ITEM #6

**CJI 2d 25.5 - POSSESSION OF BURGLAR'S TOOLS**

The burglar tools statute, MCL 750.116, limits the list of tools to those used to open “a building, room, vault, safe or other depository.”

In People v Osby, Court of Appeals case no. 295548, decided January 27, 2011, the court held that the term “depository” applies to motor vehicles.

I recommend we add this case reference to the commentary.

The pertinent portion of the Osby opinion is attached.

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IRBY OSBY, JR.,

Defendant-Appellant.

FOR PUBLICATION

January 27, 2011

9:00 a.m.

No. 295548

Berrien Circuit Court

LC Nos. 2009-002479-FH;

2009-001118-FH

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Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

A jury convicted defendant of possession of burglar's tools, MCL 750.116, receiving and concealing stolen property worth \$200 to \$1,000, MCL 750.535(b), possession of marihuana, MCL 333.7403(2)(d), and breaking and entering into a motor vehicle to steal property worth \$200 to \$1,000, MCL 750.356a(b)(i). The trial court sentenced defendant to 58 to 240 months as a habitual offender fourth offense coming from the possession of burglar's tools conviction. The trial court also sentenced defendant to 161 days for the other convictions. Defendant received a jail credit of 161 days. Defendant now appeals and we affirm.

On March 12, 2009, there was a series of thefts involving the breaking and entering of motor vehicles. All of the vehicles had a smashed window and property stolen from inside. All of the thefts occurred in the area of St. Joseph, Michigan. A surveillance camera recorded footage of one of the thefts. The footage showed a black man walking toward one of the victims' car from a white van. There was something in the man's hands. The police issued a BOLO (be on the look-out) for the white van seen in the surveillance footage. A similar van was spotted parked in front of a motel. The police surrounded the area and saw defendant leave the motel in the white van. The police got a warrant to search defendant's room. Inside the room, the police found items that belonged to the victims of the thefts and a small bag of marijuana. When the police apprehended defendant, they found a "window punch" on his person, which the police believed was used to break car windows.

Defendant first argues that the trial court impermissibly allowed in hearsay testimony when it allowed a victim's wife to testify about the damage to the victim's car and his stolen items. The defendant did not object to the witness's testimony at trial and so did not preserve this issue. Generally, this Court does not review unpreserved issues, but this Court may review unpreserved issues for plain error. MRE 103(d); *People v Jones*, 468 Mich 345, 355; 662 NW2d

376 (2003); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to avoid forfeiting an unpreserved error, defendant has the burden of establishing that the “(1) error occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights.” *Jones*, 468 Mich at 355. Here, defendant fails to prove the first prong—that the error even occurred. The witness testified from her own observation of the car after it had been damaged, and she testified from her own knowledge of the value of the victim’s stolen items. MRE 801(c) defines hearsay as “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Here, the witness was testifying from her own knowledge, not from what her husband had told her. Therefore, there was no hearsay and defendant has failed to show that there was any plain error.

Next, defendant argues that there was insufficient evidence to convict him of possession of burglar’s tools because the burglar’s tools statute does not include a reference to motor vehicles. The statute limits the list of tools to those used to open “a building, room, vault, safe, or other depository.” MCL 750.116. The statute goes on to state that the reason for the breaking into is “to steal therefrom any money or other property.” *Id.* Even though unpreserved, a question of sufficiency of evidence may be reviewed de novo by this Court in a criminal case. *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Review is limited to whether failure to review would deprive the defendant of a fair trial or result in manifest injustice. *Napier v Jacobs*, 429 Mich 502, 233; 414 NW2d 862 (1987) (dicta). The term “depository” is a catch-all phrase that includes motor vehicles. When interpreting statutes, this Court looks to the plain meaning of terms unless those terms are defined within the statute. MCL 8.3a; *Brackett v Focus Hope, Inc.*, 482 Mich 269, 276; 753 NW2d 207 (2008); *People v Lee*, 447 Mich 552, 558; 526 NW2d 882 (1994). The term “depository” is defined as “a place where one leaves money or valuables for safekeeping.” *Black’s Law Dictionary*, 9<sup>th</sup> ed. Another definition states that a “depository” is “a place where something is deposited or stored, as for safekeeping.” *Random House Webster’s Collegiate Dictionary*, 2<sup>nd</sup> ed. In order to store things safely within a motor vehicle, the average person locks the vehicle and assumes that the contents will be relatively safe. So, in the plain language of the statute, “depository” includes motor vehicles. Because defendant was burglarizing motor vehicles, there is sufficient evidence to convict defendant of the possession of burglar’s tools.

Defendant argues that the sentence was excessive in light of the United States Supreme Court’s decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, other than facts about prior convictions, any fact that increases a sentence beyond the statutory maximum must be submitted to a jury. *Id.* at 301-302. Defendant argues that because the sentencing court sentenced defendant beyond the maximum sentence for the possession of burglar’s tools based on facts that were not submitted to the jury, the trial court violated *Blakely*. First, “*Blakely* does not apply to sentences imposed in Michigan.” *People v Endres*, 269 Mich App 414, 422; 711 NW2d 398 (2006), citing *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004); *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006); *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005). Second, even if *Blakely* did apply in Michigan, here the extended sentence was based on defendant’s other convictions—which is exactly the exception listed in *Blakely*. *Blakely*, 542 US at 301. *Blakely* does not apply here, and defendant’s sentence was not excessive.

## AGENDA ITEM #7

### **CJI2d 18.2 Robbery**

In People v Haverson, Court of Appeals case no. 293014, decided December 28, 2010, the court held the element of “permanently depriving...” does not require a literal permanent deprivation of the property.

I recommend we amend the instruction to reflect the language of the Haverson decision.

A proposed new instruction, the existing CJI 2d 18.2, and the pertinent portion of the Haverson opinion are attached.

An amendment to the “permanently deprived” instruction would also require amendments to:

CJI 2d 18.1 – Armed Robbery

18.3 – Assault with Intent to Commit Armed Robbery

18.4 – Assault with Intent to Commit Unarmed Robbery

18.4a – Carjacking

Larceny – Amendments should be made to Chapter 23,

Larceny Offenses

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERELL DEMETRIOS HARVERSON,

Defendant-Appellant.

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FOR PUBLICATION  
December 28, 2010  
9:00 a.m.

No. 293014  
Kent Circuit Court  
LC No. 08-012260-FC

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

MURRAY, P.J.

Defendant appeals as of right his jury trial conviction of unarmed robbery, MCL 750.530. For this conviction, defendant was sentenced to 3 to 15 years' imprisonment. We affirm.

**I. BACKGROUND**

The events in this case were set in motion on March 14, 2008, when Kenneth Conliffe accepted a UPS shipment of a cell phone for Kiara Anderson, his sister's roommate and defendant's girlfriend, at the girls' apartment. Under the impression that Anderson was involved in stealing the phone of his sister's boyfriend, Conliffe explained that after accepting the phone, he threw it in a stream as a means of retaliation. Shortly thereafter, Conliffe received a ride home from his mother and stepfather.

Upon Conliffe's arrival home, he was accosted in his driveway by defendant, Anderson, and Jovanta Jackson. According to Conliffe's parents, defendant accused Conliffe of stealing a cell phone and then removed Conliffe's sunglasses at gunpoint before fleeing the scene with his compatriots. Both Conliffe and his mother added that before the assailants left, Jackson told Conliffe to "run his pockets."

Offering a variation on this version of events, Anderson claimed that after learning from UPS that Conliffe had accepted the cell-phone shipment, she, defendant, and Jackson went to Conliffe's house to scare Conliffe into returning her cell phone. Anderson elaborated that although Jackson pulled a gun during the altercation and later "passed it" to defendant, she did not recall either man pointing a gun at Conliffe. Similar to Anderson's assertions, defendant testified that he accompanied Anderson and Jackson in order to retrieve Anderson's phone and that it was Jackson who pulled the gun during the altercation. Notably, defendant admitted "snatching [Conliffe's] glasses," but claimed that he told Conliffe, "you get these back when we

get the phone back.” Defendant denied, however, that he had possession of the gun and instead explained that he refused Jackson’s demand to “run [Conliffe’s] pockets” when Jackson threatened Conliffe with the gun after defendant had taken the glasses.

Following their altercation with Conliffe, the assailants drove off, but were pulled over and arrested when police identified their car and license plate number from a dispatch call regarding an armed robbery. During the course of the arrest, police found Conliffe’s glasses and ammunition inside the car. The gun was found the next day in the neighborhood where the assailants were pulled over. Defendant was subsequently tried on a charge of armed robbery, but convicted of the lesser offense previously stated. This appeal ensued.

## II. ANALYSIS

### A. SUFFICIENCY OF THE EVIDENCE

#### I. STANDARD OF REVIEW

Defendant first’s assignment of error is that the evidence was insufficient to support his unarmed robbery conviction. Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005) (opinion by KELLY, J.). We do not consider whether any evidence existed that could support a conviction, but rather, we must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979). “[C]ircumstantial evidence and reasonable inferences arising from th[e] evidence can constitute satisfactory proof of the elements of a crime.” *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000) (citation omitted).

The prosecution does not challenge the foregoing, but nonetheless points out that this Court has cited our Supreme Court for the proposition that sufficiency of the evidence issues are subject to de novo review despite the fact that no Michigan Supreme Court case expressly cites that standard. See *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). In making this argument, the prosecution seems to imply that traditional de novo review would require this Court to overturn a verdict simply because its review of the facts conflicts with the jury’s determination. This, however, misapprehends our duty in these cases.

When our Court reviews an issue “de novo”, it means that we are addressing a legal issue anew, without any deference to the trial court’s conclusion. See, e.g., *Michigan Ed Ass’n v Secretary of State*, 280 Mich App 477, 511; 761 NW2d 234 (2008) (WHITBECK, J., dissenting); *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 218-219; 707 NW2d 353 (2005). Hence, when reviewing an argument that there was legally insufficient evidence to support a conviction, we do not defer to any decision made by the trial court, but instead employ our independent judicial views while employing the well-settled standards for deciding sufficiency issues. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d

776 (2000), aff'd 466 Mich 39 (2002) (employing de novo review of sufficiency argument from a bench trial conviction). More than two decades ago the United States Court of Appeals for the District of Columbia Circuit accurately and succinctly stated this proposition:

We have concluded that we do not defer to the district court, because we must make our own independent judgment regarding the sufficiency of evidence. In so doing, of course, we may consider and be influenced by the opinion of the expert trial judge who has lived with the case—just as we give weight to one another's views. This will be particularly so where the trial judge has set forth his reasons with specificity. Moreover, it is the burden of the Government, as it is always the appellant's burden, to show that the judgment appealed from was wrong. But ultimately, the decision whether or not the evidence was sufficient is a question of law and therefore entirely our own. [*United States v Singleton*, 702 F2d 1182, 1183 (CA DC, 1983) (en banc).]

See, also, *United State v Kelley*, 461 F3d 817, 825 (CA 6, 2006).<sup>1</sup>

In light of this explanation, it is easy to see that in articulating the de novo standard of review our prior cases cited to Supreme Court decisions that were reviewing the evidence in a de novo fashion, even though not specifically saying so. See, e.g., *Tombs*, 472 Mich at 459-461; *Johnson*, 460 Mich at 732-733; *Wolfe*, 440 Mich at 516-528. Consequently, we hold that although not expressly articulated by our Supreme Court, the de novo standard of review is proper in reviewing defendants' challenges that the evidence was insufficient to support their convictions.

## 2. UNARMED ROBBERY

To be guilty of unarmed robbery, a defendant must (1) feloniously take the property of another, (2) by force or violence or assault or putting in fear, and (3) be unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994); MCL 750.530. Unarmed robbery is a specific intent crime for which the prosecutor must establish that the defendant intended to permanently deprive the owner of property. *People v Dupie*, 395 Mich 483, 487; 236 NW2d 494 (1975); *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995).<sup>2</sup> Because intent may be

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<sup>1</sup> Importantly, whether in federal or state court, it is a defendant's constitutional right to due process that is at stake in sufficiency cases. *Johnson*, 460 Mich at 723; *Clark v Kansas City Missouri Sch Dist*, 375 F3d 698, 701 (CA 7, 2004). And "state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights . . ." *Wright v West*, 505 US 277, 287; 120 L Ed 2d 225; 112 S Ct 2482 (1992) (quotation marks and citation omitted).

<sup>2</sup> Although *King* refers to armed robbery, the intent element of that offense is identical to that required for unarmed robbery. *King*, 120 Mich App at 428; *Johnson*, 206 Mich App at 125-126.

difficult to prove, only minimal circumstantial evidence is necessary to show a defendant entertained the requisite intent. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

In raising this issue, defendant challenges only the intent element of this offense, in essence arguing that because he walked away after taking the glasses and refused to steal any other items from Conliffe, the prosecution failed to establish that defendant intended to permanently deprive Conliffe of his property.<sup>3</sup> However, to permanently deprive in the context of unarmed robbery “does not require, in a literal sense that a thief have an intent to *permanently* deprive the owner of the property.” *People v Jones*, 98 Mich App 421, 425-426; 296 NW2d 268 (1980) (emphasis in original). Rather, the intent to permanently deprive includes the retention of property without the purpose to return it within a reasonable time or the retention of property with the intent to return the property on the condition that the owner pay some compensation for its return. *Id.*

It is clear from defendant’s own rendition of events that he possessed the requisite intent. On this score, defendant explained that he accompanied Anderson and Jackson for the express purpose of retrieving Anderson’s cell phone. When Conliffe subsequently denied having knowledge of Anderson’s phone, defendant “snatched” Conliffe’s glasses and told him, “you get these back when we get the phone back.” In other words, defendant intended to retain Conliffe’s glasses and *only* return them on the condition that Conliffe pay compensation in the form of returning Anderson’s phone. Such testimony easily satisfies the intent element of unarmed robbery.

Defendant argues that the testimony of Anderson and Conliffe’s mother contained inconsistencies. However, it is for the jury to determine witness credibility and resolve inconsistencies of testimony. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). And in any event, defendant’s explanation of his words to Conliffe is tantamount to an admission that he possessed the requisite intent.

Before moving on, we note that although not directly challenged by defendant, sufficient evidence existed to satisfy the other elements of the offense. Indeed, Conliffe’s parents positively identified defendant as the perpetrator who pointed the gun at Conliffe before taking the glasses. An inference of the use of fear or violence (and even that defendant was armed) is easily deducible from such testimony. Thus, the prosecution met its burden of proving the elements of unarmed robbery beyond a reasonable doubt.

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<sup>3</sup> Ironically, despite challenging the intent element of unarmed robbery on these grounds, defendant concedes that he is guilty of larceny from a person, MCL 750.357—an offense requiring the intent to permanently deprive. *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004), *aff’d* 473 Mich 626 (2005). Despite this inconsistency, we will address defendant’s argument as presented.

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## Michigan Criminal Jury Instructions

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### CJI2d 18.1 Armed Robbery

(1) The defendant is charged with the crime of armed robbery. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, the defendant **[used force or violence against / assaulted<sup>1</sup> / put in fear]** *[state complainant's name]*.<sup>2</sup>

(3) Second, the defendant did so while **[he / she]** was in the course of committing a larceny. A "larceny" is the taking and movement of someone else's property or money with the intent to take it away from that person permanently.<sup>3</sup>

"In the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property or money.

(4) Third, *[state complainant's name]* was present while defendant was in the course of committing the larceny.

(5) Fourth, that while in the course of committing the larceny, the defendant:

*[Choose one or more of the following as warranted by the charge and proofs:]*

(a) possessed a weapon designed to be dangerous and capable of causing death or serious injury; **[or]**

(b) possessed any other object capable of causing death or serious injury that the defendant used as a weapon; **[or]**

(c) possessed any **[other]** object used or fashioned in a manner to lead the person who was present to reasonably believe that it was a dangerous weapon<sup>4</sup>; **[or]**

(d) represented orally or otherwise that **[he / she]** was in possession of a weapon.

*[Add the following paragraph if appropriate:]*

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(6) Fifth, the defendant inflicted an aggravated assault or serious injury to another while in the course of committing the larceny.

**Use Note**

1. If needed, a definition of “assault” can be found at CJI2d 17.1.
2. The “complainant” need not be the owner or rightful possessor of the property taken. He or she can be “any person who is present” while the defendant was in the course of committing the underlying larceny. MCL 750.530.
3. If the issue is contested, the court may find it useful to expand upon the definition of “take it away from that person permanently” by explaining that it means the defendant must have intended to
  - (a) withhold property or cause it to be withheld from a person permanently, or for such a long time that the person loses a significant part of its value, use, or benefit; or
  - (b) dispose of the property in such a way that it is unlikely that the owner will get it back; or
  - (c) keep the property with the intent to give it back only if the owner buys or leases it back, or pays a reward for it; or
  - (d) sell, give, promise, or transfer any interest in the property; or
  - (e) make the property subject to the claim of a person other than the owner.

The court may select the factually appropriate paragraph(s) from these options.

4. For a definition of “dangerous weapon,” see CJI2d 17.10.

**History**

This instruction was substantially revised by the committee in October, 2004, to reflect the elements of the offense as set forth in 2004 PA 128, effective July 1, 2004, MCL 750.529.

**Commentary**

This revised instruction is intended to set forth the elements of the armed robbery offense created by 2004 PA 128, effective July 1, 2004, MCL 750.529.

The amended statute incorporates the broader “transactional approach” to armed robbery rejected by the court of appeals in *People v Scruggs*, 256 Mich App 303, 662 NW2d 849 (2003), on the strength of the supreme court’s rejection of that approach in unarmed robbery cases in *People v Randolph*, 466 Mich 532, 648 NW2d 164 (2002).

The amended statute also expressly provides that a representation alone, orally or otherwise, that the

defendant possesses a dangerous weapon is sufficient to constitute armed robbery. Thus, the former requirement that “there must be some objective evidence of the existence of a weapon or article before a jury will be permitted to assess the merits of an armed robbery charge” is eliminated. *See People v Jolly*, 442 Mich 458, 468, 502 NW2d 177 (1993).

Similarly, the former statutory requirement that the defendant be “armed with” a dangerous weapon has been supplanted by the possession or representation requirement.



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## Michigan Criminal Jury Instructions

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### CJI2d 18.3 Assault with Intent to Commit Robbery Being Armed

(1) The defendant is charged with the crime of assault with intent to commit armed robbery. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant assaulted *[name complainant]*. There are two ways to commit an assault. Either the defendant must have attempted or threatened to do immediate injury to *[name complainant]*, and was able to do so, or the defendant must have committed an act that would cause a reasonable person to fear or apprehend an immediate injury.

(3) Second, that at the time of the assault, the defendant was armed with:

*[Choose one or more of the following:]*

(a) A weapon designed to be dangerous and capable of causing death or serious injury; **[or with]**

(b) Any **[other]** object capable of causing death or serious injury that the defendant used as a weapon; **[or with]**

(c) Any **[other]** object used or fashioned in a manner to lead the person who was assaulted to reasonably believe that it was a dangerous weapon.<sup>1</sup>

(4) Third, that at the time of the assault the defendant intended to commit robbery. Robbery occurs when a person assaults someone else and takes money or property from **[him / her]** or in **[his / her]** presence, intending to take it from the person permanently. It is not necessary that the crime be completed or that the defendant have actually taken any money or property. However, there must be proof beyond a reasonable doubt that at the time of the assault the defendant intended to commit robbery.<sup>2</sup>

#### Use Note

1. These alternatives may be used singly or in combination depending on the evidence presented in the case. Alternative (a) should be used when there is evidence from which the jury could conclude that the defendant committed the assault while armed with such a per se dangerous weapon as a loaded gun. Alternative (b) should be used when there is evidence from which the jury could conclude that the defendant was armed with an object which, although not designed to be a dangerous weapon, is used as a weapon and, when so employed, is dangerous. A screwdriver used as a knife would fall into this category. Alternative (c) should be used when there is evidence from which the jury could conclude that the defendant was armed with an object used or fashioned in a manner to lead the victim to reasonably

believe that the object is a dangerous weapon. Examples of objects that would fall into this category are unloaded or inoperable firearms, toy guns that look real, or a hand held in a pocket in such a way as to generate a reasonable belief that it is a dangerous weapon. See *People v Barkley*, 151 Mich App 234, 238, 390 NW2d 705 (1986), and commentary following CJI2d 18.4.

2. When the issue is contested, the court may find it useful to expand upon the definition of “permanently take away” by explaining that it means that the defendant must have intended to

(a) withhold property or cause it to be withheld from a person permanently, or for such a long time that the person loses a significant part of its value, use, or benefit; or

(b) dispose of the property in such a way that it is unlikely that the owner will get it back; or

(c) keep the property with the intent to give it back only if the owner buys or leases it back, or pays a reward for it; or

(d) sell, give, promise, or transfer any interest in the property; or

(e) make the property subject to the claim of a person other than the owner.

The court may select the factually appropriate paragraph(s) from the above options.

### History

CJI2d 18.3 was CJI 18:3:01. Amended September, 2008.

### Commentary

See MCL 750.89 in “Statutes” at the end of this chapter.

The essential elements of assault with intent to rob being armed are (1) an assault, (2) while armed, (3) with an intent to rob. *People v Smith*, 152 Mich App 756, 761, 394 NW2d 94 (1986).

In *People v Krist*, 97 Mich App 669, 675, 296 NW2d 139 (1980), the court cited CJI 18:3:01(3) (now CJI2d 18.3(2)) for the proposition that the assault can be accomplished in one of the following two ways: (1) by force or violence to the person, or (2) by putting the person in fear of immediate injury.

The definition of *assault* in the instruction comes from *People v Joeseype Johnson*, 407 Mich 196, 284 NW2d 718 (1979).

For a discussion of the “armed” element, see CJI2d 18.1.

This offense requires proof of specific intent to rob. *People v Harris*, 110 Mich App 636, 313 NW2d 354 (1981).



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## Michigan Criminal Jury Instructions

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### CJI2d 18.4 Assault with Intent to Commit Robbery Being Unarmed

(1) The defendant is charged with the crime of assault with intent to commit robbery while unarmed. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant assaulted [*name complainant*] with force and violence. There are two ways to commit an assault. The defendant must either have attempted or threatened to do immediate injury to [*name complainant*], and was able to do so, or the defendant must have committed an act that would cause a reasonable person to fear or apprehend an immediate battery.

(3) Second, that at the time of the assault the defendant intended to commit robbery. Robbery occurs when a person assaults someone else and takes money or property from **[him / her]** or in **[his / her]** presence, intending to take it from the person permanently. It is not necessary that the crime be completed or that the defendant have actually taken any money or property. However, there must be proof beyond a reasonable doubt that at the time of the assault the defendant intended to commit robbery.

#### Use Note

When the issue is contested, the court may find it useful to expand upon the definition of “permanently take away” by explaining that it means that the defendant must have intended to

- (a) withhold property or cause it to be withheld from a person permanently, or for such a long time that the person loses a significant part of its value, use, or benefit; or
- (b) dispose of the property in such a way that it is unlikely that the owner will get it back; or
- (c) keep the property with the intent to give it back only if the owner buys or leases it back, or pays a reward for it; or
- (d) sell, give, promise, or transfer any interest in the property; or
- (e) make the property subject to the claim of a person other than the owner.

The court may select the factually appropriate paragraph(s) from the above options.

#### History

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CJI2d 18.4 was CJI 18:4:01. Amended September, 2008.

### Commentary

See MCL 750.88 in “Statutes” at the end of this chapter.

The essential elements of assault with intent to rob being unarmed are (1) an assault with force or violence, (2) with an intent to rob, (3) by an unarmed defendant. *People v Gardner*, 402 Mich 460, 265 NW2d 1 (1978).

Like assault with intent to rob armed, this offense requires a specific intent to rob. *People v Spry*, 74 Mich App 584, 254 NW2d 782 (1977).


In *People v Reeves*, 222 Mich App 32, 564 NW2d 476 (1997), the court of appeals held that the assault element of assault with intent to rob while unarmed requires a present intention and a present ability to carry out a threat of violence. The *Reeves* panel urged the supreme court to revisit the issue. The supreme court did, reversed the court of appeals, and held “that an assailant’s undisclosed inability to do harm to an intended victim does not preclude a conviction of an AWIR-U offense, as long as the victim’s apprehension of imminent injury was reasonable.” *People v Reeves*, 458 Mich 236, 237, 580 NW2d 433 (1998). Reaffirming that present ability is a “necessary component of all criminal assaults,” *id.* at 244, the supreme court found that such present ability could be either actual or apparent. The apparent present ability theory “is satisfied where the circumstances indicate that an assailant, by overt conduct, causes the victim to reasonably believe that he will do what is threatened.” *Id.* at 244.



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## Michigan Criminal Jury Instructions

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### CJI2d 18.4a Carjacking

(1) The defendant is charged with the offense of carjacking. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, the defendant **[used force or violence / threatened the use of force or violence / assaulted<sup>1</sup> / put in fear]** *[state complainant's name]* .

(3) Second, the defendant did so while **[he / she]** was in the course of committing a larceny of a motor vehicle. A “larceny” is the taking and movement of someone else’s motor vehicle with the intent to take it away from that person permanently.<sup>2</sup>

“In the course of committing a larceny of a motor vehicle” includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

(4) Third, *[state complainant's name]* was the **[operator / passenger / person in lawful possession / person attempting to recover possession]** of the motor vehicle.

#### Use Note

1. If needed, a definition of “assault” can be found at CJI2d 17.1.
2. If the issue is contested, the court may find it helpful to expand upon the definition of “take it away from that person permanently” in accordance with Use Note 3 to CJI2d 18.1.

#### History

This instruction was substantially revised by the committee in October, 2004, to reflect the elements of the offense as set forth in 2004 PA 128, effective July 1, 2004, MCL 750.529a.



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## Michigan Criminal Jury Instructions

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### CJI2d 23.1 Larceny

(1) The defendant is charged with the crime of larceny. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant took someone else's property.

(3) Second, that the property was taken without consent.

(4) Third, that there was some movement of the property. **[It does not matter whether the defendant actually kept the property or whether the property was taken off the premises]**.<sup>1</sup>

(5) Fourth, that at the time the property was taken, the defendant intended to permanently deprive the owner of the property.<sup>2</sup>

(6) Fifth, that the property had a fair market value at the time it was taken of:<sup>3</sup>

*[Choose only one of the following unless instructing on lesser offenses:]*

(a) \$20,000 or more.

(b) \$1,000 or more, but less than \$20,000.

(c) \$200 or more, but less than \$1,000.

(d) some amount less than \$200.

*[Use the following paragraph only if applicable.]*

(7) **[You may add together the values of property stolen in separate incidents if part of a scheme or course of conduct within a 12-month period when deciding whether the prosecutor has proved the amount required beyond a reasonable doubt.]**

#### Use Note

1. Use bracketed material when appropriate.

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2. This is a specific intent crime.

When the issue is contested, the court may find it useful to expand on the definition of “permanently deprive” by giving examples such as the following:

- (a) withhold property or cause it to be withheld from a person permanently, or for such a period of time that the person loses a significant part of its value, use, or benefit, or
  - (b) dispose of the property in such a way that it is unlikely that the owner will get it back, or
  - (c) keep the property with the intent to give it back only if the owner buys or leases it back, or pays a reward for it, or
  - (d) sell, give, promise, or transfer any interest in the property, or
  - (e) make the property subject to the claim of a person other than the owner.
3. The Fair Market Value Test, CJI2d 22.1, should be given when applicable.

### History

CJI2d 23.1 was CJI 23:1:01; amended September, 1999, to reflect changes made by 1998 PA 311, eff. January 1, 1999.

### Commentary

See MCL 750.356 in “Statutes” at the end of this chapter.

The crime of larceny consists of the following elements: (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. *People v Long*, 93 Mich App 579, 286 NW2d 909 (1979).

Any movement of goods is sufficient for a larceny. *People v Alexander*, 17 Mich App 30, 169 NW2d 190 (1969). See, for example, *People v Wilbourne*, 44 Mich App 376, 205 NW2d 250 (1973), where the defendant dropped a tape deck before leaving a store.

The defendant is not required to move the property himself or herself. A co-actor or an innocent agent may move the property. *People v Fisher*, 32 Mich App 28, 188 NW2d 75 (1971); *People v Anderson*, 7 Mich App 513, 152 NW2d 40 (1967).

Larceny is a specific intent crime, and requires an intent to deprive the owner of his or her property permanently. *People v Kyllonen*, 402 Mich 135, 262 NW2d 2 (1978); *People v Lerma*, 66 Mich App 566, 239 NW2d 424 (1976).

For purposes of the larceny statute, the “owner” of property is the person having custody and possession of it at the time of the taking. *People v Hatch*, 156 Mich App 265, 401 NW2d 344 (1986).



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AGENDA ITEM #8

**CJI 2d 18.3 ASSAULT WITH INTENT  
TO COMMIT ROBBERY BEING ARMED**

Given the fact that the armed robbery statute was amended in 2004 and now includes “acts that occur in an attempt to commit a larceny”, should the committee add a use note indicating that assault with intent to commit armed robbery will rarely (if ever) be a lesser included offense of armed robbery.

The armed robbery statute MCL 750.529 and the assault with intent to commit robbery being armed statute MCL 750.89 are attached. CJI 2d 18.1 and 18.3 are also attached.



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CHAPTER 750 MICHIGAN PENAL CODE  
THE MICHIGAN PENAL CODE  
CHAPTER LXXVIII. ROBBERY

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*MCLS § 750.529 (2011)*

MCL § 750.529

§ 750.529. Use or possession of dangerous weapon; aggravated assault; penalty.

Sec. 529. A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years .

**HISTORY:** Act 328, 1931, p 624; eff September 18, 1931.

Pub Acts 1931, No. 328, Ch. LXXVIII, § 529, eff September 18, 1931; amended by Pub Acts 1959, No. 71, eff March 19, 1960.

Amended by Pub Acts 2004, No. 128, imd eff June 3, 2004, by enacting § 1 eff July 1, 2004.

Prior codification:

RS 1846, Ch. 153; CL 1857, § 5725; CL 1871, § 7524; How § 9089; CL 1897, § 11484; CL 1915, § 15206; Pub Acts 1927, No. 374, eff September 5, 1927; CL 1929, § 16722.

**NOTES:**

Effect of amendment notes:

The 2004 amendment revised this section from one which read: "Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by

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CHAPTER 750 MICHIGAN PENAL CODE  
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CHAPTER XI. ASSAULTS

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*MCLS § 750.89 (2011)*

MCL § 750.89

§ 750.89. Assault with intent to rob and steal; armed.

Sec. 89. Assault with intent to rob and steal being armed-Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.

**HISTORY:** Act 328, 1931, p 624; eff September 18, 1931.

Pub Acts 1931, No. 328, Ch. XI, § 89, eff September 18, 1931; amended by Pub Acts 1939, No. 94, eff September 29, 1939.

Prior codification:

RS 1846, Ch. 153; CL 1857, § 5726; Pub Acts 1869, No. 143, eff July 5, 1869; CL 1871, § 7525; How § 9090; CL 1897, § 11485; CL 1915, § 15207; Pub Acts 1927, No. 374, eff September 5, 1927; CL 1929, § 16723.

**NOTES:**

Michigan Digest references:

- Assault and Battery §§ 15, 17.60
- Constitutional Law §§ 223, 286.60
- Criminal Law and Procedure §§ 26, 26.20, 123, 264.120, 264.55, 264.70, 265, 327, 688, 736.10, 744.10, 798.70, 808.80, 882, 965.60, 968.50, 968.80
- Former Jeopardy §§ 20, 21, 25, 28, 33
- Homicide § 11

(6) Fifth, the defendant inflicted an aggravated assault or serious injury to another while in the course of committing the larceny.

**Use Note**

1. If needed, a definition of “assault” can be found at CJI2d 17.1.

2. The “complainant” need not be the owner or rightful possessor of the property taken. He or she can be “any person who is present” while the defendant was in the course of committing the underlying larceny. MCL 750.530.

3. If the issue is contested, the court may find it useful to expand upon the definition of “take it away from that person permanently” by explaining that it means the defendant must have intended to

(a) withhold property or cause it to be withheld from a person permanently, or for such a long time that the person loses a significant part of its value, use, or benefit; or

(b) dispose of the property in such a way that it is unlikely that the owner will get it back; or

(c) keep the property with the intent to give it back only if the owner buys or leases it back, or pays a reward for it; or

(d) sell, give, promise, or transfer any interest in the property; or

(e) make the property subject to the claim of a person other than the owner.

The court may select the factually appropriate paragraph(s) from these options.

4. For a definition of “dangerous weapon,” see CJI2d 17.10.

**History**

This instruction was substantially revised by the committee in October, 2004, to reflect the elements of the offense as set forth in 2004 PA 128, effective July 1, 2004, MCL 750.529.

**Commentary**

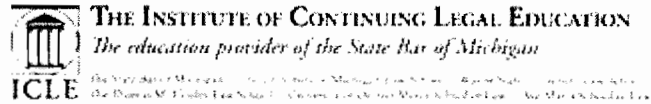
This revised instruction is intended to set forth the elements of the armed robbery offense created by 2004 PA 128, effective July 1, 2004, MCL 750.529.

The amended statute incorporates the broader “transactional approach” to armed robbery rejected by the court of appeals in *People v Scruggs*, 256 Mich App 303, 662 NW2d 849 (2003), on the strength of the supreme court’s rejection of that approach in unarmed robbery cases in *People v Randolph*, 466 Mich 532, 648 NW2d 164 (2002).

The amended statute also expressly provides that a representation alone, orally or otherwise, that the

defendant possesses a dangerous weapon is sufficient to constitute armed robbery. Thus, the former requirement that “there must be some objective evidence of the existence of a weapon or article before a jury will be permitted to assess the merits of an armed robbery charge” is eliminated. *See People v Jolly*, 442 Mich 458, 468, 502 NW2d 177 (1993).

Similarly, the former statutory requirement that the defendant be “armed with” a dangerous weapon has been supplanted by the possession or representation requirement.



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Current with changes issued by the committee through 09/30/10

## Michigan Criminal Jury Instructions

Prepared by the Michigan State Bar Standing Committee on Standard Criminal Jury Instructions

### CJI2d 18.3 Assault with Intent to Commit Robbery Being Armed

(1) The defendant is charged with the crime of assault with intent to commit armed robbery. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant assaulted *[name complainant]*. There are two ways to commit an assault. Either the defendant must have attempted or threatened to do immediate injury to *[name complainant]*, and was able to do so, or the defendant must have committed an act that would cause a reasonable person to fear or apprehend an immediate injury.

(3) Second, that at the time of the assault, the defendant was armed with:

*[Choose one or more of the following:]*

(a) A weapon designed to be dangerous and capable of causing death or serious injury; **[or with]**

(b) Any **[other]** object capable of causing death or serious injury that the defendant used as a weapon; **[or with]**

(c) Any **[other]** object used or fashioned in a manner to lead the person who was assaulted to reasonably believe that it was a dangerous weapon.<sup>1</sup>

(4) Third, that at the time of the assault the defendant intended to commit robbery. Robbery occurs when a person assaults someone else and takes money or property from **[him / her]** or in **[his / her]** presence, intending to take it from the person permanently. It is not necessary that the crime be completed or that the defendant have actually taken any money or property. However, there must be proof beyond a reasonable doubt that at the time of the assault the defendant intended to commit robbery.<sup>2</sup>

#### Use Note

1. These alternatives may be used singly or in combination depending on the evidence presented in the case. Alternative (a) should be used when there is evidence from which the jury could conclude that the defendant committed the assault while armed with such a per se dangerous weapon as a loaded gun. Alternative (b) should be used when there is evidence from which the jury could conclude that the defendant was armed with an object which, although not designed to be a dangerous weapon, is used as a weapon and, when so employed, is dangerous. A screwdriver used as a knife would fall into this category. Alternative (c) should be used when there is evidence from which the jury could conclude that the defendant was armed with an object used or fashioned in a manner to lead the victim to reasonably

believe that the object is a dangerous weapon. Examples of objects that would fall into this category are unloaded or inoperable firearms, toy guns that look real, or a hand held in a pocket in such a way as to generate a reasonable belief that it is a dangerous weapon. See *People v Barkley*, 151 Mich App 234, 238, 390 NW2d 705 (1986), and commentary following CJI2d 18.4.

2. When the issue is contested, the court may find it useful to expand upon the definition of “permanently take away” by explaining that it means that the defendant must have intended to

- (a) withhold property or cause it to be withheld from a person permanently, or for such a long time that the person loses a significant part of its value, use, or benefit; or
- (b) dispose of the property in such a way that it is unlikely that the owner will get it back; or
- (c) keep the property with the intent to give it back only if the owner buys or leases it back, or pays a reward for it; or
- (d) sell, give, promise, or transfer any interest in the property; or
- (e) make the property subject to the claim of a person other than the owner.

The court may select the factually appropriate paragraph(s) from the above options.

### History

CJI2d 18.3 was CJI 18:3:01. Amended September, 2008.

### Commentary

See MCL 750.89 in “Statutes” at the end of this chapter.

The essential elements of assault with intent to rob being armed are (1) an assault, (2) while armed, (3) with an intent to rob. *People v Smith*, 152 Mich App 756, 761, 394 NW2d 94 (1986).

In *People v Krist*, 97 Mich App 669, 675, 296 NW2d 139 (1980), the court cited CJI 18:3:01(3) (now CJI2d 18.3(2)) for the proposition that the assault can be accomplished in one of the following two ways: (1) by force or violence to the person, or (2) by putting the person in fear of immediate injury.

The definition of *assault* in the instruction comes from *People v Joeseype Johnson*, 407 Mich 196, 284 NW2d 718 (1979).

For a discussion of the “armed” element, see CJI2d 18.1.

This offense requires proof of specific intent to rob. *People v Harris*, 110 Mich App 636, 313 NW2d 354 (1981).



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AGENDA ITEM #9

**CJI 2d 15.11 – Operating While Intoxicated (OWI) Causing Death**

In People v Lechleitner, Court of appeals case no. 293577, decided December 7, 2010, the court held “operating” a vehicle means that once an intoxicated person puts a vehicle in motion, that person continue to “operate” the vehicle until it is placed in a position that does not pose a significant collision risk.

I recommend a commentary addition that reflects the Lechleitner holding.

The commentary addition would also apply to other sections of Chapter 15 – Traffic Offenses.

The pertinent portion of the Lechleitner opinion is attached.

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW RAYMOND LECHLEITNER,

Defendant-Appellant.

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FOR PUBLICATION

December 7, 2010

9:00 a.m.

No. 293577

Ingham Circuit Court

LC No. 08-000226-FH

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of and sentence for operating a motor vehicle while under the influence of a controlled substance and causing death, MCL 257.625(4). The circuit court sentenced defendant as a second habitual offender, MCL 769.10, to serve a term of imprisonment of 43 to 270 months. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from a traffic accident that occurred during the early morning hours of November 22, 2007. The parties stipulated that defendant's blood alcohol was .12 grams of alcohol per 100 milliliters of blood.<sup>1</sup> According to the testimony, during the time his blood alcohol exceeded the statutory limit, defendant drove his truck on a slippery freeway surface and lost control. The truck struck the right guardrail, then the left guardrail, and then stopped in the middle of the freeway, taking up two lanes. Defendant turned off his headlights and activated his hazard lights, then opened the door and attempted to propel the truck out of harm's way with his leg. Another motorist swerved to miss the truck, then stopped on the shoulder out of concern for the accident. Then a third car, which also had two occupants, swerved to avoid defendant's truck and, in so doing, struck the vehicle that had stopped on the shoulder, killing that motorist.

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<sup>1</sup> This is well over the proscribed limit of "0.08 grams or more per 100 milliliters of blood . . . ." MCL 257.625(1)(b).

On appeal, defendant argues that the trial court applied an incorrect definition of “operate” in concluding that defendant was operating his vehicle at the time in question and that the court erroneously scored one of the offense variables under the sentencing guidelines.

Statutory interpretation is a question of law calling for review de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). However, defendant admits that this issue is unpreserved. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

MCL 257.625(4) sets forth penalties for a person who “operates a motor vehicle” while intoxicated “and by the operation of that motor vehicle causes the death of another person . . . .” MCL 257.35a defines “operate” and “operating” as “being in actual physical control of a vehicle . . . .” MCL 257.36 defines “operator” as “every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway.”

In explaining its view operation and causation the trial court stated as follows:

[A] person who places a motor vehicle in motion or in a position posing a significant risk of causing a collision, remains responsible for that motor vehicle until such time as that vehicle is put into some position where it poses no risk to other drivers. In other words, we cannot simply stop our car in the middle of the road for whatever reason, in this case striking the curbs or striking the sides, but we can’t just stop our car in the middle of the road, stagger off somewhere, standing somewhere else, and expect our liability for that vehicle to end. People are responsible for placing that vehicle in a proper environment.

Now, the only exceptions to that would be in situations where there was a grossly negligent act by another citizen or some type of emergency occurs . . . . But basically, ordinary negligence by other citizens does not cause a person otherwise responsible for a serious breach of the law to be not liable. . . .<sup>2</sup>

On appeal, defendant concedes that the trial court addressed the issue of what constituted operation of a vehicle so as to comport with our Supreme Court’s opinion in *People v Wood*, 450 Mich 399; 538 NW2d 351 (1995). In that case, the Court stated that “operating” must be defined “in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property.” *Id.* at 404. Accordingly, “[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person

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<sup>2</sup> This case contains no allegation of intervening gross negligence.

continues to operate it until the vehicle is returned to a position posing no such risk.” *Id.* at 404-405.

This is consistent with both the language and the purpose of the statute. The statute provides that a defendant may be convicted where he “operates a motor vehicle” while intoxicated and “by the operation of that motor vehicle causes the death of another person.” The statute does not require that the defendant’s vehicle be in motion at the time of the accident, but rather that the victim’s death be caused by the defendant’s operation of the vehicle while intoxicated. In this case, defendant was intoxicated, operated his vehicle, and crashed it, with the result that it sat in the middle of the freeway at night creating a risk of injury or death to others.

Defendant disparages the reasoning of *Wood* as “outmoded” and suggests instead that we adopt the definition of “operation” employed in a lay dictionary, i.e. “to cause to function.” Defendant argues that, since after the crash his vehicle was no longer capable of functioning, defendant could not “cause” it to “function” and so, by definition, defendant could not have operated it. As just noted, we reject this argument as injecting a temporal component into the statute that is not present. Moreover, defendant’s suggestion that we rely preeminently upon a lay dictionary to determine how to apply a statute ignores the axiom that the first requirement of statutory interpretation is to determine the intent of the Legislature. Certainly, a dictionary is one of the arrows in a court’s quiver regarding statutory interpretation, but it is not the only one, nor is it necessarily the one that will bring the interpreting court closest to the Legislature’s target. Moreover, reliance on a single dictionary definition fails to take into account the reality that there are many dictionaries of the English language while there is only one Michigan Legislature. We should not confuse reference to a particular dictionary definition by the proponent of a certain result, with the demanding task of statutory interpretation that judges are expected to perform using the available data and time-tested rules of construction.

Thus, we conclude that *Wood* remains good law and that the trial court properly followed it, and affirm defendant’s conviction.<sup>3</sup>

Defendant also challenges the scoring of Offense Variable (OV) 9 which concerns the number of victims. “This Court reviews a sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, to the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

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<sup>3</sup> We also note that, as recently as 2007, our Supreme Court adopted a broader interpretation of “operate” than defendant suggests when it concluded that “[t]he loading and unloading of passengers is an action within the ‘operation’ of a shuttle bus.” *Martin v Inter-Urban Transit*, 480 Mich 936; 740 NW2d 657 (2007).

A score of ten points is prescribed where “[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . .” MCL 777.39(1)(c). In rejecting defense counsel’s challenge to the assessment of ten points for this variable at sentencing, the trial court explained, “the other gentleman who was trying to assist [defendant] was in a place of danger. And . . . the people driving the other vehicle that had to swerve around everything were in a potentially dangerous situations because of it . . . .”

Defendant relies on *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), to argue that OV 9 should have been scored at 0, because only the victim was placed in danger. However, *McGraw* is plainly distinguishable. In that case, the sentencing offense was breaking and entering and the trial court assessed ten points for OV 9 on the ground that the additional victims only came into play when the defendant fled from the police by car with two passengers then crashed. *Id.* at 132-133. Our Supreme Court held that the transactional approach to scoring OV 9 was not appropriate. *Id.* at 133. “OV 9 does not provide for consideration of conduct after completion of the sentencing offense,” and thus had in that case to be scored “solely on the basis of defendant’s conduct during the breaking and entering.” *Id.* at 133-134.

Using the *McGraw* approach, we conclude that defendant’s intoxication and the fatal car collision endangered not only the person who died, but also both occupants of the car that struck that person; obviously, those three persons faced a serious risk of physical harm simultaneously. Further, there was also a passenger traveling with the decedent. While he was uninjured, he was also placed in danger.

Thus, the trial court correctly identified a total of four victims, resulting in a score of ten points under OV 9, because, in addition to the decedent, defendant created a risk of physical injury to the decedent’s passenger, the driver of the car that struck the decedent, and the passenger in that car, all in the course of the sentencing offense.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Douglas B. Shapiro

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW RAYMOND LECHLEITNER,

Defendant-Appellant.

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FOR PUBLICATION  
December 7, 2010

No. 293577  
Ingham Circuit Court  
LC No. 08-000226-FH

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

WILDER, P.J., (*concurring*)

I concur in the result reached by the majority, but decline to join the majority's comments concerning the use of dictionaries to interpret a statute, which fail to fully acknowledge the well-established rules concerning this subject. See *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 56 n11; 746 NW2d 282 (2008).

/s/ Kurtis T. Wilder

## AGENDA ITEM #10

### **TOP 50 CRIME CATEGORIES**

Committee member, Judge John Hammond has again graciously compiled the list of the 50 most frequently charged offenses. We have used this list as a guideline for future additional criminal instructions.

Judge Hammond has also supplied me with sample trial jury instruction packet for use by the attorneys and jurors. He has also included an article about the impact of juror access to information on jurors. Since they are lengthy, I will present them at our February 26<sup>th</sup> meeting.

prior	last	THE 50 MOST FREQUENT FELONIES			STATUTE	JURY	Stat.	Cl.	Grp.	Sentence G/L				
		OFFENSE								INST.	Max	1-A	6*A	
1	1	1	Contr. Sub - Poss (Narcotic/Cocaine)<25gm.	333.7403 (2)a5	12.5	4	G (f)	C.S.	3	9	17*	23*	1	
3	2	2	OWI - Impaired w/C/S 3rd off. (many variables)	257.625 @	15.1	5	E	P.S.	3	17*	23	38	2	
4	4	3	Contr. Sub - Del Mfg Marijuana	333.7401 (2)d3	12.2	4	F	C.S.	3	17*	23	30	3	
2	3	4	Contr. Sub - Del Mfg (Narc. Or Cocaine)<50gm	333.7401 (2)a4	12.2	20	D(b)	C.S.	6	23	23	76	4	
6	5	5	Police Officer - Assault / Resist / or Obstruct	750.81d1	13.1	2	G (f)	Pers.	3	9	17*	23*	5	
5	6	6	Uttering & Publishing of Forgery	750.249	28.2	14	E (c)	Prop.	3	17*	23	38	6	
9	10	7	Larceny in a Building	750.360	23.4	4	G (f)	Prop.	3	9	17*	23*	7	
7	7	8	Break & Enter - Unoccupied Bldg. w/ intent	750.110	25.1	10	D (b)	Prop.	6	23	23	76	8	
8	9	9	Assault W/ Weapon (aka Felonious Assault)	750.82	17.8	4	F	Pers.	3	17*	23	30	9	
11	11	10	Home Invasion - 2nd Degree (Many Variables)	750.110a (3)	25.2O	15	C	Pers.	11	57	57	114	10	
10	8	11	Weapons - Carrying Concealed	750.227	11.1	5	E	P.S.	3	17*	23	38	11	
12	12	12	Child Support - Fail to Pay	750.165	34.4	4	F	P.O.	3	17*	23	30	12	
19	15	13	Contr. Sub - Poss Analogues or Sched. 1-4	333.7403 (2)bii	12.5	2	G	C.S.	3	9	17*	23*	13	
13	13	14	Stolen Vehicle - Receive & Conceal	750.535 (7)	26.1	5	E	Prop.	3	17*	23	38	14	
14	14	15	Police Officer - Fleeing 3rd Degree (2 statutes)	257.602a #	13.6c	5	E	P.S.	3	17*	23	38	15	
16	16	16	Financial Transaction Device - Steal/Retain	750.157n1	30.3	2	H (g)	Prop.	1	6	17*	17*	16	
18	19	17	Retail Fraud - 1st Degree (>\$1,000)	750.356c	23.13	5	E	Prop.	3	17*	23	38	17	
15	18	18	Motor Vehicle - Unlawfully Driving Away	750.413	24.1	5	E	Prop.	3	17*	23	38	18	
17	20	19	Robbery - Armed	750.529	18.1	Life	A	Pers.	35	180	180	L	19	
21	23	20	Larceny - From a Motor Vehicle	750.356A (3)	23.5	5	G (e)	Prop.	3	9	17*	23*	20	
20	21	21	Felon Possessing a Firearm	750.224f	11.38a	5	E	P.S.	3	17*	23	38	21	
24	26	22	Home Invasion - 1 st Degree (Many Variables)	750.110a (2)	25.2a	20	B	Pers.	18*	60	120	160	22	
25	22	23	Contr. Sub - Maintaining a Drug House	333.7405 d	12.8	2	G	C.S.	3	9	17*	23*	23	
32	30	24	Contr. Sub - Poss Methamphetamine/Ecstasy	333.7403 (2)b1	12.5	10	D	C.S.	6	23	23	76	24	
22	24	25	Robbery - Unarmed	750.530	18.2	15	C	Pers.	11	57	57	114	25	
28	29	26	Assault w/ Intent to do Great Bodily Harm	750.84	17.7	10	D	Pers.	6	23	23	76	26	
29	27	27	Sex Offender - Fail to register (S.O.R.A.)	28.729 (1)a		4	F	P.O.	3	17*	23	30	27	
23	25	28	CSC - 2nd Degree (N.B. - Multiple Variables)	750.520c	20.2	15	C	Pers.	11	57	57	114	28	
34	32	29	Home Invasion - 3rd Degree (Many Variables)	750.110a (4)	25.2e	5	E	Pers.	3	17*	23	38	29	
36	34	30	Domestic Violence, 3rd Offense	750.81(4)	17.2a	2	G	Pers.	3	9	17*	23*	30	
27	17	31	CSC - 3rd Degree (N.B. - Multiple Variables)	750.520d	20.12	15	B c	Pers.	18	60	120	160*	31	
26	28	32	Weapons - Poss. Firearm in Felony	750.227b	11.34	2	n/a	n/a	24	24	24	24	32	
31	31	33	Stolen Property - Receive & Conceal >\$1,000	750.535 (3)	26.1	5	E	Prop.	3	17*	23	38	33	
30	33	34	Police Officer - Fleeing 4th Degree (2 statutes)	750.479a ##	13.6d	2	G	P.S.	3	9	17*	23*	34	
46	44	35	Financial Transaction Device - illegal sale/use	750.157Q	30.5	4	H (f)	Prop.	1	6	17*	17*	35	
39	38	36	Larceny from a Person	750.357	23.3	10	D	Pers.	6	23	23	76	36	
40	35	37	Identity theft	445.65		5	E	P.O.	3	17*	23	38	37	
49	47	38	Contr. Sub Del Mfg (Schedules 1-3) (ex.MJ)	333.7401 (2)Bii	12.2	7	E (d)	.S.	3	17*	23	38	38	
38	39	39	Embezzlement - Agent/Trustee >\$1,000	750.174 (4)	27.1	5	E	Prop.	3	17*	23	38	39	
37	37	40	CSC - 4th Degree (N.B. - Multiple Variables)	750.520d	20.13	2	G	Pers.	3	9	17*	23*	40	
45	45	41	Contr. Sub - Obtain by Fraud	333.7407 (1)C		4	G (f)	C.S.	3	9	17*	23*	41	
42	43	42	Check - No Account	750.131A (1)	29.7	2	H (g)	Prop.	1	6	17*	17*	42	
35	36	43	Motor Vehicle - Unlawful Use	750.414	24.2	2	H (g)	Prop.	1	6	17*	17*	43	
33	40	44	CSC - 1st Degree (N.B. - Multiple Variables)	750.520b	20.1	Life	A	Pers.	35	180	180	L	44	
41	41	45	Larceny - >\$1,000 - < \$20,000	750.356 (3)	23.1	5	E	Prop.	3	17*	23	38	45	
43	42	46	Break and Enter Vehicle - With Damage	750.356A (3)	23.7	5	G (e)	Prop.	3	9	17*	23*	46	
47	48	47	Malicious Destruct. Prop. >\$1,000 < \$20,000	750.377 a(1)b	32.2	5	E	Prop.	3	17*	23	38	47	
44	46	48	Forgery	750.248	28.1	15	E (c)	Prop.	3	17*	23	38	48	
	50	49	Fraud - Welfare (Failure to Inform)	400.60 (2)-b	34.3	4	H (f)	Prop.	1	6	17*	17*	49	
48		50	Obtain prop. By false pretense / >\$1,000	750.218	23.11	5	E	Prop.	3	17*	23	38	50	
			#or 750.479A // ##or 257.602A // @ totally revised statute !			Bold = aberrant								
			17* means 12 //23* means 12 //			160* means120			6* may mean 3				JTH	

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prior	last	THE 50 MOST FREQUENT FELONIES OFFENSE	STATUTE	JURY INST.	Stat. Cl.		Grp.	Sentence G/L					
					Max			1-A	6*A	1-F	6*F		
1	1	1	Contr. Sub - Poss (Narcotic/Cocaine)<25gm.	333.7403 (2)a5	12.5	4	G (f)	C.S.	3	9	17*	23*	1
3	2	2	OWI - Impaired w/C/S 3rd off. (many variables)	257.625 @	15.1	5	E	P.S.	3	17*	23	38	2
4	4	3	Contr. Sub - Del Mfg Marijuana	333.7401 (2)d3	12.2	4	F	C.S.	3	17*	23	30	3
2	3	4	Contr. Sub - Del Mfg (Narc. Or Cocaine)<50gm	333.7401 (2)a4	12.2	20	D(b)	C.S.	6	23	23	76	4
6	5	5	Police Officer - Assault / Resist / or Obstruct	750.81d1	13.1	2	G (f)	Pers.	3	9	17*	23*	5
5	6	6	Uttering & Publishing of Forgery	750.249	28.2	14	E (c)	Prop.	3	17*	23	38	6
9	10	7	Larceny in a Building	750.360	23.4	4	G (f)	Prop.	3	9	17*	23*	7
7	7	8	Break & Enter - Unoccupied Bldg. w/ intent	750.110	25.1	10	D (b)	Prop.	6	23	23	76	8
8	9	9	Assault W/ Weapon (aka Felonious Assault)	750.82	17.8	4	F	Pers.	3	17*	23	30	9
11	11	10	Home Invasion - 2nd Degree (Many Variables)	750.110a (3)	25.2O	15	C	Pers.	11	57	57	114	10
10	8	11	Weapons - Carrying Concealed	750.227	11.1	5	E	P.S.	3	17*	23	38	11
12	12	12	Child Support - Fail to Pay	750.165	34.4	4	F	P.O.	3	17*	23	30	12
19	15	13	Contr. Sub - Poss Analogues or Sched. 1-4	333.7403 (2)bii	12.5	2	G	C.S.	3	9	17*	23*	13
13	13	14	Stolen Vehicle - Receive & Conceal	750.535 (7)	26.1	5	E	Prop.	3	17*	23	38	14
14	14	15	Police Officer - Fleeing 3rd Degree (2 statutes)	257.602a #	13.6c	5	E	P.S.	3	17*	23	38	15
16	16	16	Financial Transaction Device - Steal/Retain	750.157n1	30.3	2	H (g)	Prop.	1	6	17*	17*	16
18	19	17	Retail Fraud - 1st Degree (>\$1,000)	750.356c	23.13	5	E	Prop.	3	17*	23	38	17
15	18	18	Motor Vehicle - Unlawfully Driving Away	750.413	24.1	5	E	Prop.	3	17*	23	38	18
17	20	19	Robbery - Armed	750.529	18.1	Life	A	Pers.	35	180	180	L	19
21	23	20	Larceny - From a Motor Vehicle	750.356A (3)	23.5	5	G (e)	Prop.	3	9	17*	23*	20
20	21	21	Felon Possessing a Firearm	750.224f	11.38a	5	E	P.S.	3	17*	23	38	21
24	26	22	Home Invasion - 1st Degree (Many Variables)	750.110a (2)	25.2a	20	B	Pers.	18*	60	120	160	22
25	22	23	Contr. Sub - Maintaining a Drug House	333.7405 d	12.8	2	G	C.S.	3	9	17*	23*	23
32	30	24	Contr. Sub - Poss Methamphetamine/Ecstasy	333.7403 (2)b1	12.5	10	D	C.S.	6	23	23	76	24
22	24	25	Robbery - Unarmed	750.530	18.2	15	C	Pers.	11	57	57	114	25
28	29	26	Assault w/ Intent to do Great Bodily Harm	750.84	17.7	10	D	Pers.	6	23	23	76	26
29	27	27	Sex Offender - Fail to register (S.O.R.A.)	28.729 (1)a		4	F	P.O.	3	17*	23	30	27
23	25	28	CSC - 2nd Degree (N.B. - Multiple Variables)	750.520c	20.2	15	C	Pers.	11	57	57	114	28
34	32	29	Home Invasion - 3rd Degree (Many Variables)	750.110a (4)	25.2e	5	E	Pers.	3	17*	23	38	29
36	34	30	Domestic Violence, 3rd Offense	750.81(4)	17.2a	2	G	Pers.	3	9	17*	23*	30
27	17	31	CSC - 3rd Degree (N.B. - Multiple Variables)	750.520d	20.12	15	B c	Pers.	18	60	120	160*	31
26	28	32	Weapons - Poss. Firearm in Felony	750.227b	11.34	2	n/a	n/a	24	24	24	24	32
31	31	33	Stolen Property - Receive & Conceal >\$1,000	750.535 (3)	26.1	5	E	Prop.	3	17*	23	38	33
30	33	34	Police Officer - Fleeing 4th Degree (2 statutes)	750.479a ##	13.6d	2	G	P.S.	3	9	17*	23*	34
46	44	35	Financial Transaction Device - illegal sale/use	750.157Q	30.5	4	H (f)	Prop.	1	6	17*	17*	35
39	38	36	Larceny from a Person	750.357	23.3	10	D	Pers.	6	23	23	76	36
40	35	37	Identity theft	445.65		5	E	P.O.	3	17*	23	38	37
49	47	38	Contr. Sub Del Mfg (Schedules 1-3) (ex.MJ)	333.7401 (2)Bii	12.2	7	E (d)	.S.	3	17*	23	38	38
38	39	39	Embezzlement - Agent/Trustee >\$1,000	750.174 (4)	27.1	5	E	Prop.	3	17*	23	38	39
37	37	40	CSC - 4th Degree (N.B. - Multiple Variables)	750.520d	20.13	2	G	Pers.	3	9	17*	23*	40
45	45	41	Contr. Sub - Obtain by Fraud	333.7407 (1)C		4	G (f)	C.S.	3	9	17*	23*	41
42	43	42	Check - No Account	750.131A (1)	29.7	2	H (g)	Prop.	1	6	17*	17*	42
35	36	43	Motor Vehicle - Unlawful Use	750.414	24.2	2	H (g)	Prop.	1	6	17*	17*	43
33	40	44	CSC - 1st Degree (N.B. - Multiple Variables)	750.520b	20.1	Life	A	Pers.	35	180	180	L	44
41	41	45	Larceny - >\$1,000 - < \$20,000	750.356 (3)	23.1	5	E	Prop.	3	17*	23	38	45
43	42	46	Break and Enter Vehicle - With Damage	750.356A (3)	23.7	5	G (e)	Prop.	3	9	17*	23*	46
47	48	47	Malicious Destruct. Prop. >\$1,000 < \$20,000	750.377 a(1)b	32.2	5	E	Prop.	3	17*	23	38	47
44	46	48	Forgery	750.248	28.1	15	E (c)	Prop.	3	17*	23	38	48
	50	49	Fraud - Welfare (Failure to Inform)	400.60 (2)-b	34.3	4	H (f)	Prop.	1	6	17*	17*	49
48		50	Obtain prop. By false pretense / >\$1,000	750.218	23.11	5	E	Prop.	3	17*	23	38	50
			#or 750.479A // ##or 257.602A // @ totally revised statute !				Bold = aberrant						
			17* means 12 //23* means 12 //	160* means 120	6* may mean 3							JTH	

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**SBM**

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STATE BAR OF MICHIGAN

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