

Do's and Don'ts of Motion Practice

Friday, October 25, 2013

12:45 PM

C.A.Y.M.C. Auditorium

Moderator: Matt Evans

Speaker: Neil Leithauser

Neil Leithauser is a Michigan attorney admitted to practice in 1982, currently specializing in criminal appeals as a solo practitioner. He is qualified at the highest level to accept assigned criminal appeals from the Michigan State Appellate Assigned Counsel System and admitted to practice in the US Eastern District Court. Mr. Leithauser has been principal author of the 2010 and subsequent editions of the Defender Motions Book and provided research attorney services to the State Appellate Defender Office since 2001. He has served as an Associate Editor for SADO's Criminal Defense Newsletter since 2007 and has trained criminal defense attorneys throughout Michigan on legal research techniques. Currently, Mr. Leithauser serves as a research attorney for criminal defense attorneys in Michigan's busiest court, the Wayne County Circuit Court.

Table of Contents

Overview

Discovery

Search and Seizure

Interlocutory Appeals

Significant Cases, Statutes, and Rules

Burdens

Criminal Defense Notice Requirements

Also Important

Additional Helpful Sources

Reference Sources

Overview

Know the facts.

Know the law.

Know the applicable local rules, and ascertain if a particular judge has specific requirements. Remember that there is a 20-page limit for the combined length of a motion and brief. M.C.R. 2.119(A)(2).

How many different motions are there?

Be prepared.

Be on time.

Some cases, statutes and rules follow in support of the various issues you might encounter; those common areas, e.g. discovery, search and seizure, are treated a little more substantively.

Discovery

Discovery in criminal cases is governed by the Court Rules.

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

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

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

Keep in mind the following:

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

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

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

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

MCL 600.2157a, social workers, MCL 333.18513, and juvenile diversion officers, MCL 722.828-722.829, are also privileged.

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

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

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

Make sure you get what is needed.

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

1. any exculpatory evidence or information known to him or her;
2. police reports and interrogation records concerning the case, except parts of the report that concern continuing investigations;
3. written/recorded statements by the defendant, a co-defendant or accomplice pertaining to the case, even if they are not prospective witnesses at trial;

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

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

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

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

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

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

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

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

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

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

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

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

Your client has a Fifth and Fourteenth Amendment due process right to obtain evidence in the possession of the prosecution if it is favorable to him and material to guilt or punishment. *Brady v. Maryland*, 373 US 83, 87 (1963); *People v. Banks*, 249 Mich App 247 (2002). "Material" is defined as evidence that would raise a doubt about your client's guilt. *US v. Agurs*, 427 US 97 (1976). The prosecutor must disclose such evidence to your client whether or not it is requested. Evidence is also material under *Brady* if it tends to impeach the credibility of a key government witness. *US v. Bagley*, 473 US 667 (1985); *see also Smith*

v. Cain, __ US __; 132 S Ct 627 ; __ L Ed 2d __ , decided 01-10-2012 (U.S.S.C. No. 10-8145)(a multi-count murder case was reversed because the prosecutor hid exculpatory evidence).

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

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

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

Search and Seizure

This is an area of the law that is vast, complex and ever-changing. Inevitably, you will have a case involving a search and seizure issue, and your particular case must be examined and the law researched with an eye on your specific facts. Only the briefest overview is possible here.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, provides the following:

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

The Fourteenth Amendment provides that:

"No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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

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

The Michigan Constitution is to be construed as providing the same protection as that of the federal Constitution, absent a "compelling reason" for a different interpretation. *People v Custer*, 465 Mich 319, at 326 n 2; 630 NW2d 870 (2001) ["Michigan's constitutional prohibition against unreasonable searches and seizures "is to be construed to provide the same protection as that secured by the Fourth Amendment [of the federal constitution], absent, 'compelling reason' to impose a different interpretation," citing *People v. Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991)].

The federal and state constitutions were designed to set limits on governmental actions and intrusions into the lives of the people. However, those limits are limited. For example, while a search without a warrant which does not fit within a recognized exception is deemed *per se* unreasonable, *Katz v. United States*, 389 U.S. 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967), "[T]he Fourth Amendment is not a guarantee against all searches and seizures, only those that are unreasonable."

If a search is “unreasonable” it is illegal, and the fruits of the illegal search must be suppressed. *Weeks v. United States*, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1914), overruled on other grounds, 364 US 206 (1960); *Wong Sun v. United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963) (setting-forth the “fruit of the poisonous tree” doctrine [evidence obtained - - directly or indirectly -- from an illegal search must be excluded]; *Lucas v. Michigan*, 420 F 2d 259 (CA Mich, 1970); see, also, *Coolidge v. New Hampshire*, 403 US 443, 474-475; 91 S Ct 2022; 29 L Ed 2d 564 (1971) (“It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'”).

A warrant may properly issue where there is probable cause (or a “fair probability”) to believe evidence of a crime may be found in that particular place. See, for example, *Illinois v. Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983); *United States v. Allen*, 211 F 3d 970 (CA 6, 2000).

There are several recognized, and established, exceptions to the warrant requirement, including exigent circumstances; searches incident to an arrest [although limited in recent years in *Arizona v. Gant*, 566 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009)]; automobile searches and seizures [the “automobile exception”]; plain view seizures; consensual searches; stop and frisk searches [investigative detentions, i.e., “*Terry* stops]; community caretaking functions; and emergency aid assistance [**Note:** *these last two exceptions seem ripe for continued expansion by the courts; see, for example, People v Slaughter*, 489 Mich 302; 803 NW2d 171 (2011), *People v Lemons*, 299 Mich App 541 (2013), and *People v Hill*, 299 Mich App 402 (2013)].

Investigative stops must last no longer than necessary to effectuate the purpose of the stop and dispel the officer’s suspicions. *Florida v. Royer*, 460 US 491, 500; 103 S Ct 1319; 75 L Ed 2d 229 (1983); *United States v. Townsend*, 305 F 3d 537, 541 (CA6, 2002)(“To detain the motorist any longer than is reasonably necessary to issue the traffic citation ... the officer must have reasonable suspicion that the individual has engaged in more extensive criminal conduct.”).

Common terms

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

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

The probable cause standard applies when searches and/or arrests are challenged. *United States v. Pasquarille*, 20 F3d 682 (CA6, 1994), cert den 513 US 986; 115 S Ct 481; 130 L Ed 2d 394 (1994).

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

Terry "accepts the risk that officers may stop innocent people..." *People v. Oliver*, 464 M 184, 202; 627 NW2d 297 (2001), quoting *Illinois v. Wardlow*, 528 US 119, at 126; 120 S Ct 673; 145 L Ed 2d 570 (2000).

'Stop and frisk' has been extended from the *Terry* scenario to general investigative stops. *Custer*, at 329, citing *Terry* at 20. The relevant inquiry to determine the validity of a patdown is "whether the officer's action was justified at its inception . . ." For patdowns, generally, see *Terry*; *Custer*; *People v. Gevarges*, 176 MA 65; 439 NW2d 272 (1989); *People v. Chambers*, 195 MA 118; 489 NW2d 168 (1992); *People v. Champion*, 205 MA 623; 518 NW2d (1994), rev'd 452 M 92 (1996), cert den 519 US 1081; 117 S Ct 747; 136 L Ed 2d 685 (1997).

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

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

Pretext stop: There are older cases holding that, "When police lack the reasonable suspicion necessary to support a stop and use a minor violation to stop and search a person or place for evidence of an unrelated serious crime, the stop is a mere pretext," *People v. Haney*, 192 MA 207; 480 NW2d 322 (1991), citing *United States v. Rivera*, 867 F2d 1261 (CA10, 1989), and, "An arrest may not be used as a pretext to search for evidence," *United States v. Lefkowitz*, 285 US 452, 467; 52 S Ct 420; 76 L Ed 877 (1932).

However, be very cautious about using the term "pretext stop." The subjective intent of an officer *is not relevant* to the legal inquiry, provided that the officer has an objective basis or legitimate ground(s) for the action. See *Whren, et al v. United States*, 517 US 806; 116 S Ct 1769; 135 L Ed 2d 89 (1996); *People v. Oliver*, 464 M 184; 627 NW2d 297 (2001). In short, a pretext stop *is not, in-and-of-itself*, a basis for suppression of evidence.

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

The 'standard' is [by design] not exactly defined, and remains "not finely tuned." *United States v. Cortez*, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). It is a "somewhat elusive concept." *Ornelas v. United States*, 517 US 690, 695; 116 S Ct 1657; 134 L Ed 2d 911 (1996). "[T]he

reasonable suspicion standard is less demanding than the probable cause standard in terms of both the quantity and quality of information." *People v. Faucett*. 442 Mich 153; 499 NW2d 764 (1993).

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

An officer's "particularized suspicion" is reasonable if based upon an objective observation by the officer, that, based upon the "totality of the circumstances" (including the officer's inferences and deductions) criminal activity is afoot; that is, that the person has been, is, or is about to be engaged in criminal activity. *Wardlow* at 123; *People v. Shabaz*, 414 Mich 42, 57, 59; 378 NW2d 451 (1985); *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW2d 498 (1996).

Seizure: Two categories are usually mentioned: 1) investigative; and 2) arrest-related. See, e.g., *United States v. Dixon*; 51 F 3d 385 (CA 8, 1995); *Shabaz*. The Fourth Amendment applies to both, whether a brief detention or an arrest. *Shabaz*. There is a seizure only when an officer has restrained one's liberty, such that a reasonable person would think she or he was not free to leave. E.g., *People v. Frohriep*, 247 MA 692; 637 NW2d 562 (2001), lv den 646 NW2d 178 (2002).

Broader context: A term often used in tip-cases, that includes factors such as: 1) location (e.g., known high-crime area) and 2) extent of information. *Wardlow* at 1231; *Shabaz* at 57 and 59; *LoCicero* at 501-502; *United States v. Valentine*, 232 F3d 350 (CA3, 2000).

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

"Knock and talk": Investigative tactic where police have some information and suspicion -- but not enough for probable cause to support warrant -- that a defendant is engaged in criminal activity. Police knock on door and ask for consent to search. Upheld as constitutional in *Frohriep*, see also *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041; 36 L Ed 2d 854 (1973).

Interlocutory Appeals

You have diligently and ably prepared and argued your motion. Now what? Appeal!

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

The trial court is not divested of jurisdiction over the case itself, but it loses jurisdiction over the specific order from which the appeal taken. *Bass v. Combs*, 238 Mich App 16, 23-24; 604 NW2d 727 (1999). When an issue is decided by interlocutory appeal, it generally cannot be raised again in a post-verdict appeal. *People v. Brown*, 173 Mich App 202 (1988), *rev'd on other grds* 439 Mich 34 (1991). On the other hand, some issues, for example, one relating to a circuit court denial of a motion to quash an improper bindover, *are waived if not appealed* prior to trial. *People v. Hall*, 435 Mich 599 (1990).

The 'law of the case' doctrine, which "holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue," *Sinicropi v. Mazurek*, 279 Mich App 455, 465; 760 NW2d 520 (2008), seeks to promote finality and to prevent forum shopping. *People v. Radowick*, 63 Mich App 734, 739; 235 NW2d 28 (1975)(circuit court suppression of defendant's statement binding on district court); *International Union, UAW Local 600 v. State*, 211 Mich App 20, 24; 535 NW2d 210 (1995). However, "[p]articularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice," *People v. Phillips (After Second Remand)*, 227 Mich App 28, 33-34; 575 NW2d 784 (1997)(citing *People v. Herrera (On Remand)*, 204 Mich App 333, 340-341; 514 NW2d 543 (1994), and *People v. Wells*, 103 Mich App 455, 463; 303 NW2d 226 (1981)).

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

The prosecution has statutory authority to appeal, or to seek leave to appeal, provided that jeopardy has not attached, MCL 770.12, and successful interlocutory appeals by the prosecution are common. For example, one study showed that in 1989, there were 53 interlocutory appeals to the Court of Appeals. Fourteen of those were filed by the defense, and

the lower court was reversed in seven of the appeals. Thirty-nine of the appeals were brought by the prosecution, and thirty-six of those resulted in reversal of the trial court.

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

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

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

The primary burden on counsel in an interlocutory appeal is to demonstrate for the appeals court that the trial court committed error, and the appeals court should hear the issue at that point in time.

Former Chief Justice of the Michigan Supreme Court, and then Chief Judge of the Court of Appeals, Maura D. Corrigan, in a 1997, interview for Michigan Lawyers Weekly, stated that "It's a two-step process ... [t]o get leave granted in an interlocutory appeal, you better show me that the trial judge was stone-cold dead wrong. And then you have to tell me why I need to fix it *now*." Justice Corrigan also cautioned attorneys to be "short and to the point." Marcia M. McBrien, "Interlocutory Appeals: Convince Court of Need For Prompt Action," Michigan Lawyers Weekly, Vol. 11, No. 47, September 29, 1997. Court of Appeals Judge Peter D. O'Connell was also quoted in the article as saying, "I have two criteria: First, did the trial judge get it right? And second, is the error outcome-determinative?" *Id.*

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

The Court of Appeals may: 1) grant or deny the application; 2) enter a final decision; 3) grant other relief; 4) request additional information from the lower court record; and 5) order production of a certified concise statement of facts and proceedings. MCR 7.205(D)(2). The certified statement procedure is described in MCR 7.205(G).

Checklist:

Counsel *must* file:

- an original (signed) copy, plus four additional copies of the application. The application must describe the nature of the judgment or order being appealed, must comply with the format requirements of MCR 7.212(C), and must, in an interlocutory appeal, set forth the "facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal." MCR 7.205(B).
- five copies of the judgment, order, or opinion of the lower court.
- five copies of the lower court docket entries/register of actions.
- the transcript necessary for review; if the transcript is not immediately available it must be ordered, and proof [e.g., a court reporter's certificate] it has been ordered filed with the court.
- proof of service.
- the entry/filing fee [by statute, MCL 600.321, currently \$375.00 (per case number); a motion for immediate consideration, if filed, is an additional \$200.00; a motion for a stay, if needed, is an additional \$100.00]. If the defendant is indigent, then a copy of the assignment order should suffice in lieu of the fees.

Counsel *may need* to file:

- a motion for immediate consideration (with the fee -- unless waived -- and proof of personal service) of the application for leave to appeal. MCR 7.205(B).
- a motion for stay of proceedings in the trial court.
- a motion for stay of proceedings in the Court of Appeals (with the filing fee -- unless the defendant is indigent -- and a copy of the lower court relevant transcript). MCR 7.209(A)(3). An ex parte motion may be filed. MCR 7.209(I).
- a motion for immediate consideration (with the fee -- unless waived -- and proof of personal service) of the motion to stay proceedings. MCR 7.211(C)(6)

Significant Cases, Statutes and Rules

Arrest:

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

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

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

Bad/other acts/MRE 404(b):

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

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

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

People v. Smelley, 285 Mich App 314; 775 NW2d 350 (2009), vacated in part, 776 NW2d 310 (2010)(Docket No. 139591).

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

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

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

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

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

Ohio v. Roberts, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980)(standard of reliability, for admission of non-testimonial hearsay).

Pennsylvania v. Ritchie, 480 US 39, 51-52 (1987) (“the right to cross examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable, ” and the Confrontation Clause is “designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination”).

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

Discovery:

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

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

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

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

Due Process right to present defense:

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

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

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

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

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

Experts:

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

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

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

Experts (right to at public expense):

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

Habitual offender notice:

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

Identification:

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

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

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

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

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

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

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

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

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

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

Motion for Directed Verdict of Acquittal:

The evidence is reviewed in the light most favorable to prosecution to determine whether a rational trier of fact could determine that all of the elements had been proven. *People v. Hampton*, 407 Mich 354; 285 NW2d 284 (1979). MCR 6.419. **Note:**

The motion may be filed after the prosecution has rested the case-in-chief, or after the verdict. MCR 6.419(B).

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

Nontestifying codefendants:

Bruton v. United States, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968)(confrontation right violated by unredacted nontestifying codefendant’s incriminating statement).

People v. Banks, 438 Mich 408; 475 NW2d 769 (1991).

Preliminary examination:

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

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

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

Searches:

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

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

Florida v. Jardines, 569 US __ ; __ S Ct __ ; __ L Ed. 2d __ (2013), decided March, 26, 2013 (Docket 11-564) (a dog sniff at the door of a residence held to be a search under the Fourth Amendment).

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

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

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

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

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

Sentencing: Substantial and compelling reasons for specific statutory sentencing guidelines departures.

People v. Babcock, 469 Mich 247; 666 NW2d 231 (2003)(court must articulate substantial and compelling, objectively verifiable reasons for the particular departure).

People v. Fields, 448 Mich 58; 528 NW2d 176 (1995).

People v. Smith, 482 Mich 292; 754 NW2d 284 (2008). A sentencing departure must be proportionate to defendant's conduct and record; the extent of the departure must be more proportionate than a guidelines' sentence; comparison of defendant's case to other offenders can help appellate court on review.

People v. McGraw, 484 Mich 120; 771 NW2d 655 (2009). Generally, only conduct relating to the offense may be considered in scoring points under a guideline variable (unless otherwise indicated).

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

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

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

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

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

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

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

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

Burdens

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

The burdens in some common issues are:

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

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

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

Identification: If the defendant had counsel, then the defendant must show the identification procedure was unduly suggestive. If the procedure was tainted/unduly suggestive, the prosecution must show, by a preponderance, that there is an independent basis for the identification; otherwise, the court may suppress an in-court identification of the defendant. See *People v. Gray*, 457 Mich 107; 577 NW2d 92 (1998).

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

Miranda rights/voluntariness of confession: The burden is on the prosecution, by a preponderance, to demonstrate the challenged confession was voluntarily made, that rights were given before a custodial interrogation, and that the rights were properly waived. *Miranda, supra*, 384 US at 475 (“a heavy burden rests upon the government to demonstrate that the defendant knowingly and intelligently waived his [rights]”).

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

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

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

Criminal Defense Notice Requirements

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

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

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

Rape Shield: MCL 750.520j(2) [within 10 days after AOI; written motion and offer of proof required]. **Note:** prior false allegations of the complaining witness are not included within the Rape Shield. *People v. Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984) (“the defendant should be permitted to show that the complainant has made false accusations of rape in the past”); *People v. Jackson*, 477 Mich 1019; 726 NW2d 727 (2007).

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

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

Also Important

- **preserve issues** by multiple-ground objections, where possible: e.g., hearsay *and* Sixth Amendment.

- **know the Sentencing Guidelines**

Michigan Judicial Institute *Sentencing Guidelines Manual*, June, 2013, available online: <http://courts.michigan.gov/education/mji/Publications/Documents/sg-manual.pdf>

Defender Sentencing Guidelines Manual Annotated (2013), Criminal Defense Resource Center, State Appellate Defender Office; available for \$10.00 from:

Criminal Defense Resource Center
3300 Penobscot Building
645 Griswold Street
Detroit, MI 48226
(313) 256-9833

Additional Helpful Sources

The Criminal Defense Resource Center of the State Appellate Defender Office offers many publications and services, including access to the Brief Bank and, for criminal defense subscribers, access to an online forum. Also, there are four primary Defender books published annually (the *Defender Trial Book*, *Defender Plea*, *Sentencing & Post-conviction Book*, *Defender Motions Book*, and *Defender Habeas Book*, as well as the newly-available *Defender Sentencing Guidelines Manual Annotated*), and the monthly Criminal Defense Newsletter.

The State Bar of Michigan provides, through your membership, access to Casemaker.

The Court of Appeals provides access and links to docket histories, published opinions (since January, 2001) and unpublished opinions (since July, 1996); Michigan Supreme Court opinions (since January, 2001) and orders (since September, 2005); and, currently, an Appellate Digest (that service will end by the end of the year), as well as the Michigan Court Rules. The Court also provides a free e-mail subscription of Michigan Supreme Court and Court of Appeals opinions; links to the opinions are sent out on the business day following issuance of the opinion.

Google Scholar provides free search capability for cases.

The Michigan Judicial Institute provides -- free -- the Benchbooks, including a new, two-volume *Criminal Proceedings Benchbook*, and other titles, including *Juvenile Justice*, *Traffic*, and *Domestic Violence*, at:

<http://courts.mi.gov/education/mji/Publications/Pages/default.aspx>

Attorney F. Martin Tieber provides, through his website, helpful annual updates relating to developments in the law: www.tieberlaw.com

Reference Sources

Dawn Van Hoek and Gail Rodwan, "Noting a Trend: Increased Use of Interlocutory Appeals in Criminal Cases," *Michigan Bar Journal*, January, 1991

Kim Robert Fawcett, "Interlocutory Appeals," *Criminal Defense Newsletter*, Volume 10, Number 3, December, 1986

Kim Robert Fawcett, *Michigan Criminal Appeals: Practice and Procedure*, Revised Second Edition, 1991

R. Steven Whalen, "Interlocutory Appeals: When and How to Take Them," *Criminal Defense Newsletter*, Vol. 20, Number 11, August, 1997

Marcia M. McBrien, "Interlocutory Appeals: Convince Court of Need For Prompt Action," *Michigan Lawyers Weekly*, Vol. 11, No. 47, September 29, 1997

Defender Motions Book, Michigan State Appellate Defender Office, Criminal Defense Resource Center, 2012

Defender Plea, Sentencing & Post-Conviction Book, Michigan State Appellate Defender Office, Criminal Defense Resource Center, 2012

SADO website, www.sado.org