

**IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS**

Stephen L. Borello, P.J., and Mark J. Cavanagh and Donald S. Owens, JJ.

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellee,

-v-

**MAURICE ANTHONY RICHARDS,**

Defendant-Appellant.

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**Supreme Court No. 142234**

**Court of Appeals No. 293285**

**Circuit Court No. 09-434-FC**

**DEFENDANT-APPELLANT'S BRIEF ON APPEAL**

**(ORAL ARGUMENT REQUESTED)**

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## STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Macomb County Circuit Court by jury trial, and a Judgment of Sentence was entered on June 30, 2009. A Claim of Appeal was filed on August 17, 2009, by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated July 6, 2009, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in this appeal as of right provided for by Const 1963, art 1, §20, pursuant to MCL 600.308(1), MCL 770.3, MCR 7.203(A), and MCR 7.204(A)(2).

The Court of Appeals affirmed in an unpublished opinion issued October 19, 2010. Defendant-Appellant subsequently filed a timely application for leave to appeal to this Court on December 7, 2010. MCR 7.302(C)(2). This Court granted leave to appeal on May 18, 2011 and therefore has jurisdiction. MCR 7.301(A).

**STATEMENT OF QUESTION PRESENTED**

- I. DID THE TRIAL COURT VIOLATE MAURICE RICHARDS' SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN IT ALLOWED JURORS AND ALTERNATES TO DISCUSS THE CASE WITH ONE ANOTHER BEFORE THE COMPLETION OF TRIAL?**

Trial Court answers, "No".

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

## STATEMENT OF FACTS

A jury found Defendant-Appellant Maurice Richards guilty of carjacking<sup>1</sup> and felony-firearm<sup>2</sup> following a trial held in the Macomb County Circuit Court, the Honorable David F. Viviano presiding. (103a). The trial was conducted in accord with the pilot jury reform project created by Administrative Order 2008-2. (10a, 132a-133a, fn. 1). Over the defendant's objection, the judge permitted the fourteen jurors to discuss the case with one another before deliberations. (11a, 22a-23a). The Court of Appeals affirmed this ruling in an unpublished opinion. (131a-135a). This Court granted leave to consider whether the authorization of pre-deliberation discussions violated Mr. Richards' right to a fair trial by an impartial jury. (136a).

### A. FACTUAL BACKGROUND

The events underlying Mr. Richards' convictions took place at a gas station in Warren in the early morning hours of January 4, 2009. (30a-31a). Two officers described how Mr. Richards came to be at that gas station. (55a-85a). Earlier that night, the police pulled him over for driving too fast in someone else's car. (62a). When Mr. Richards could not produce his driver license or proof of his relationship with the car's owner, the officers impounded the car. (61a-62a).

This left Mr. Richards and his passenger, Dorian Pittman, without transportation. (79a, 103a). The officers agreed to drive the two young men to the gas station in Warren, where a friend would pick them up and take them the rest of the way home. (63a, 81a). But before the officers could allow either of the young men to enter their police cruiser, they had to make certain that neither of them were carrying weapons. (69a). Lt. Thomas Costello thoroughly

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<sup>1</sup> MCL 750.529a.

<sup>2</sup> MCL 750.227b.

patted down Mr. Richards; Officer Michael Gerald did the same with Mr. Pittman. (70a, 72a-75a, 82a-83a). Once satisfied that neither of the young men had a gun, the officers dropped them off at the gas station. (71a-75a, 80a, 82a-83a).

A mere three minutes later, the officers received a report involving a car stolen from the same gas station where they had left Mr. Richards and his companion. (66a, 75a, 85a). Haytham Allos, the complainant, reported that he first saw Mr. Richards inside the gas station, bemoaning the impounding of his car. (35a). Mr. Richards appeared to be intoxicated; he knocked products off of the shelves while demanding to use the attendant's telephone. (35a, 48a). Salf Sulieman, the complainant's companion, made similar observations. (88a-89a). They soon decided to leave. (36a).

Outside, Mr. Richards approached the complainant and demanded the keys to his Dodge Charger. (37a). The complainant initially refused, offering instead to give Mr. Richards a ride home. (38a). But he relented when he saw what appeared to be "the trigger of the gun, the silver part" in Mr. Richards' waistband. (40a-41a). Mr. Richards drove away in the car, taking Dorian Pittman with him. (53a).

More than a week later, on January 13, 2009, police in Southfield arrested Mr. Richards and Mr. Pittman after finding them in possession of the stolen Charger. (103a-105a). Analysts linked Mr. Richards to fingerprints found inside the car. (119a). In addition, police obtained from Mr. Richards a written statement of apology to the complainant. (102a-103a). They also obtained surveillance footage that captured the incident. (98a-99a).

At no point, however, did Mr. Richards indicate that he possessed a gun. (105a). Nor did the police recover any firearms from the stolen Charger. (105a). In fact, the officer-in-charge

concluded that there was no need to even look for a gun after speaking with the complainant, Mr. Richards, and their respective passengers. (88a, 105a).

**B. PROCEDURAL HISTORY**

The prosecution charged Mr. Richards with carjacking and felony-firearm. (1a). The defense ultimately conceded that Mr. Richards had driven away in the complainant's car. (27a, 131a). But the defense maintained that Mr. Richards never possessed the gun that the complainant thought he saw, citing the thorough pat-down conducted by the police a few minutes earlier. (131a). Accordingly, the defense argued, Mr. Richards could not be guilty of felony-firearm. (131a). Further, the defense continued, he could not be guilty of carjacking due to the lack of any overt threat. (131a). Rather, Mr. Richards could only be guilty of the lesser offense of unlawful driving away of an automobile. (27a).

The trial lasted three days; jury selection consumed nearly all of the first day. The trial court conducted the proceedings in conformity with the pilot program created by Administrative Order 2008-2. (10a-11a). After selecting twelve jurors and two alternates, the trial court supplied with paper for note-taking and a three-ring binder containing "some of the pertinent jury instructions." (10a). The court invited jurors to pose questions not only of each witness, but also of the trial court if any instructions were unclear. (11a-12a). Lastly, over the defendant's objection, the trial court permitted jurors to discuss the case with one another during breaks before deliberations. (11a, 22a-23a).

The trial court cautioned jurors not to engage in pre-deliberation discussions unless "all of the jurors are present." (11a). The court also warned that "it's extremely important that you remember and clearly understand that any discussions you have are tentative until you've heard

all the evidence, the instructions the court will give, and the argument by the attorneys.” (11a).

After giving additional preliminary instructions, the court further instructed the jury as follows:

You must keep an open mind and not decide any issue in the case until you’ve heard all the evidence, all the instructions on the law, all the arguments of counsel, and until the court directs you to begin your deliberations. However, you may discuss the case among yourselves in the jury room during trial recesses when all of the jurors are present. Although you can discuss the evidence with your fellow jurors you must clearly understand that any such discussions are tentative pending final presentation of all evidence, instructions, and argument. I cannot stress enough how important it is for you to keep an open mind and to avoid forming opinions about the outcome of the case until I direct you to begin your deliberations. [(17a)].

Before breaking for the day, the court again instructed jurors “to keep an open mind and not make a decision about anything in the case until you go to the jury room to decide the case at the conclusion of the trial.” (20a).

The second day of trial began with each party delivering an opening statement. (25a).

Afterwards, the court took its first of three mid-day recesses. (27a). Once again, the court allowed the jury to “talk about the case when all of you are present in the jury room together[,]” and reiterated that “it is extremely important that you remember that you have to listen to all of the evidence before you reach any type of final determination about the case. (28a).

Following this initial break, the prosecution called its first witness. (25a, 29a). Rather than proceed in chronological order, the prosecution called the complainant, Haytham Allos, who described what happened to his car on the night in question. (29a-53a). When he finished testifying, the court took its second break of the day. (54a). This time, the trial court provided no additional instructions to the jury. (54a).

When the jury returned from their second break, they heard Lt. Costello and Ofr. Gerald describe how the defendant had come to be at the gas station that night. (55a-85a). Both officers

testified that the defendant and his companion were thoroughly searched for weapons minutes before the complainant's car was taken. (66a, 71a-75a, 80a, 82a-83a, 85a). Two other officers described other aspects of the investigation before the final mid-day break. (25a, 86a). Once again, no instructions preceded this break. (86a). Finally, after hearing from two evidence technicians and the officer-in-charge, the jury was sent home with no additional advice about its pre-deliberation discussions. (111a-112a).

On the third day of trial, the jury listened to closing arguments and received its final instructions. (114a). None of these instructions referenced the experimental procedures authorized by Administrative Order 2008-2. (114a-127a). Two alternates were drawn off the jury, and the remaining twelve deliberated for four hours before returning with a verdict. (127a-128a). They ultimately found Mr. Richards guilty of both carjacking and felony-firearm. (130a). At sentencing, Mr. Richards received consecutive prison terms of two years and 96 months to 25 years. (130a).

On appeal, Mr. Richards challenged the trial court's authorization of pre-deliberation discussions. The Court of Appeals, however, rejected this argument. (131a-135a). The appellate court acknowledged that "allowing the jurors to discuss the evidence during recesses is contrary to longstanding precedent." (132a). It reasoned, however, that this Court had authorized the trial court to ignore this precedent with the issuance of Administrative Order 2008-2. (132a). The appellate court further found that the pilot program had adequately addressed the concerns raised by the prior cases which had been displaced by the order. (132a-133a). This Court granted leave to consider whether the authorization of pre-deliberation discussions violated Mr. Richards' rights to an impartial jury and to a fair trial. (136a).

**I. THE TRIAL COURT VIOLATED MAURICE RICHARDS' SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN IT ALLOWED JURORS AND ALTERNATES TO DISCUSS THE CASE WITH ONE ANOTHER BEFORE THE COMPLETION OF TRIAL.**

*Summary of the Argument*

At trial, Mr. Richards was forced to serve as a so-called “guinea pig[] for a pilot project on jury reform.” Christina Stolarz, *Local Courts Try Out Jury Reforms*, Det News, Nov 5, 2008. This Court created the pilot project as a way to field-test a number of departures from the traditional procedures governing jury trials. Administrative Order No. 2008-2. Among these departures was a rule authorizing jurors to discuss the case with one another before deliberations and before the completion of proofs. *Id.* Mr. Richards’ trial took place in one of only a handful of Michigan courtrooms to participate in the pilot project. *Id.*; (10a). Over his objection, the trial court permitted jurors to engage in pre-deliberation discussions. (11a, 22a-23a).

This Court granted leave to consider whether this deviation from the norm deprived Mr. Richards of his constitutional right to a fair trial by an impartial jury. (136a); US Const, Am VI, XIV; Const 1963, art 1, §17. Virtually every jurisdiction to address this question has answered it affirmatively. *See* Part B, *infra*. The traditional rule against pre-deliberation discussions is deeply rooted in Anglo-American jurisprudence. *See* Part A, *infra*. Its principal purpose is to prevent jurors from drawing premature conclusions before the close of evidence or shifting the burden of proof to the defendant. *See* Part A, *infra*. While the modern trend is to allow mid-trial discussions by carefully instructed jurors, that trend has been confined to civil cases to avoid any conflict with the Sixth Amendment. *See* Part A, *infra*.

Of course, this Court is not writing on a blank slate. *See* Part C, *infra*. Nearly a half-century ago, this Court declared it “clear beyond any doubt that jurors should not be encouraged

to discuss evidence they have heard and seen during the course of trial until all of the evidence has been introduced, the arguments to the jury made and the jury charged by the court . . . ” *People v Hunter*, 370 Mich 262, 269; 121 NW2d 442 (1963). “[R]ather, juries should be directed by the court not to do so until ready to deliberate upon their verdict at the conclusion of the trial.” *Id.* Courts in this state and in other jurisdictions have repeatedly relied upon *Hunter* in reversing trial courts that allowed pre-deliberation discussions in criminal cases. *See* Part C, *infra*. Stare decisis requires adherence to this well-settled precedent. Reversal is required because the error—if not structural—cannot be proven harmless beyond a reasonable doubt. *See* Part D, *infra*.

#### *Issue Preservation*

Mr. Richards preserved this issue by objecting when the trial court permitted the jury to engage in pre-deliberation discussions about the evidence. (22a-23a). As discussed below, a preserved constitutional error of this type requires reversal and is not amenable to harmless error analysis. *See* Part D, *infra*. Mr. Richards is thus entitled to a new trial before an impartial jury.

#### *Standard of Review*

This Court applies *de novo* review to issues implicating fundamental constitutional rights. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Similarly, the legal accuracy of a non-standard jury instruction is subject to *de novo* review. *See Knight v Gulf & Western Properties, Inc.*, 196 Mich App 119, 123; 492 NW2d 761 (1992).

#### **A. The Traditional Rule Against Authorizing Pre-Deliberation Discussions in Criminal Cases Is Deeply Rooted in Anglo-American Jurisprudence and Embedded in the Sixth Amendment.**

Both the United States and Michigan Constitutions guarantee the right to a fair trial by an impartial jury. US Const, Am VI, XIV; Const 1963, art 1, § 20; *Duncan v Louisiana*, 391 US

145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1968); *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (“A defendant who chooses a jury trial has an absolute right to a fair and impartial jury”). Implicit in this right is the right to be presumed innocent throughout the proceedings. *Estelle v Williams*, 425 US 501, 503; 96 S Ct 1691; 48 L Ed 2d 126 (1976). Although not articulated in the Constitution, “[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Id.* (quoting *Coffin v United States*, 156 US 432, 453; 15 S Ct 394; 39 L Ed 481 (1895)). Accordingly, “courts must carefully guard against dilution of [this] principle” and “be alert to factors that may undermine the fairness of the fact-finding process.” *Id.* (citing *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970)).

One safeguard against the dilution of this right is the rule that jurors may not discuss the case amongst one another before formal deliberations. The precise origin of this rule is unclear. Scholars agree, however, that it is deeply embedded in our jurisprudence. *See, e.g.* Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 Ind L J 1229, 1231-1232 (1993); Anderson, *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial*, 174 Mil L Rev 92 (2002).

Initially, in the centuries which followed the Norman Conquest, England employed the same inquisitorial model of the criminal process found on the continent. Dann, *supra*, at 1231-1232; Anderson, *supra*, at 94. The earliest English juries were “drawn from the exact neighborhood in which the case arose.” Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St L J 713, 730 (1983). These jurors actively spoke to the parties,

investigated the facts, and questioned the witnesses without judicial supervision. Anderson, *supra*, at 94; Dann, *supra*, at 1232.

By the mid-sixteenth century, however, things began to change. Anderson, *supra*, at 94; Dann, *supra*, at 1234; Landsman, *supra*, at 730. Juries became more impartial with the abolition of the requirement that the parties' neighbors serve as jurors. Landsman, *supra*, at 732. They also assumed a much more passive role. *Id.*; Anderson, *supra*, at 94; Dann, *supra*, at 1234. As trials became more adversarial in nature, attorneys asserted and expanded their role. Landsman, *supra*, at 732. This led to "[n]umerous controls over the jury's relative autonomy and activism." Dann, *supra*, at 1234. The rules of evidence, for example, limited and controlled the information made available to jurors. Dann, *supra*, at 1234; Anderson, *supra*, at 94. Another example "was a rule prohibiting jurors from discussing the case with other jurors until the case was submitted to them for formal deliberations." Anderson, *supra*, at 94-95.

These traditions were ultimately imported to the American colonies and "enshrined as interpretive materials to the Sixth and Seventh Amendments' guarantees of trial by jury." Dann, *supra*, at 1235; Anderson, *supra*, at 94-95. *See also Crawford v Washington*, 541 US 36, 43, 47-48; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (discussing the Framers' preference for English common-law rather than continental civil-law procedures). States embraced the principle that "it is improper for jurors to discuss a case prior to its submission to them," a practice that safeguards a defendant's 'entitle[ment] under the [Sixth Amendment] to a fair trial to an impartial jury.'" *United States v Jadowe*, 628 F3d 1, 15 (2010) (quoting *Winebrenner v United States*, 147 F2d 322, 329, 327 (CA 8, 1945)). By the mid-twentieth century, one federal court declared, "So general is the rule that jurors should not discuss a case prior to its submission to

them, that it has been enacted into statute in practically all the states of the Union.”

*Winebrenner, supra*, at 329.

*Winebrenner* was the first reported federal case to consider a deviation from the traditional rule against pre-deliberation discussions. *Id.* The defendants in that case faced charges of conspiring to defraud the United States military just before the Japanese attack on Pearl Harbor. *Id.* at 323, 324-325. At trial, the judge explicitly authorized the jury to discuss the case “and to form and express opinions bearing upon the guilt or [innocence] of appellants with the restriction only that no such opinion should be so positive that no evidence could change it[.]” *Id.* at 323. After giving this instruction, the judge repeatedly warned the jurors “not to make up your mind finally and definitely about it,” and “not [to] discuss the case before you to such an extent that you form definite, fixed ideas that would prevent you from changing after you had heard all of the evidence in the case[.]” as well as “not getting one’s self worked up about the case to the extent that you may be committed to a position which you would hesitate about retracting from later[.]” *Id.* at 327.

Despite the trial judge’s repeated admonishments, the Eighth Circuit reversed. *Id.* The court grounded its ruling in the Constitution, citing both due process of law and the Sixth Amendment’s guarantee of a fair trial by an impartial jury. *Winebrenner, supra*, at 327, 328. It reasoned that “[t]he jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by them, and neither have they heard the arguments of counsel.” *Id.* at 328. In addition, it criticized the trial court’s failure to make certain that the case was “considered by all the jurors as a jury” rather than “divisions or coteries of jurors, which might include the alternate juror . . .” *Id.* at 329.

Most critically, the *Winebrenner* court expressed concern that once jurors verbalized their opinions, they would be less inclined to abandon those initial impressions, even in the face of explicit instructions to keep an open mind. The court explained:

Now, the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered by other persons. When most men commit themselves publicly to any fact, theory, or judgment they are [too] apt to stand by their own public declarations, in defiance of evidence. This pride of opinion and of consistency belongs to human nature. [*Id.* at 328 (quoting *Pool v Chicago, B & Q R Co*, 6 F 844, 850 (Cir Ct Iowa 1881))].

Since the prosecution presents its evidence first, these initial opinions would almost always be adverse to the defense. *Id.* Thus, as the *Winebrenner* court noted, the authorization of pre-deliberation discussions effectively shifted the burden of proof, since “[s]uch an opinion once formed could only be removed, if at all, by evidence.” *Id.* “Such a person . . . will listen with more favor to that testimony which confirms, than to that which would change his opinion . . .” *Winebrenner, supra*, at 328 (quoting *United States v Burr*, 25 F Cas 30 (No. 14,692d) (CC Va. 1807) (Marshall, C.J., presiding over the trial of Aaron Burr for treason)). For all of these reasons, the Eighth Circuit reversed the defendant’s convictions. *Id.* at 329.

Most jurisdictions have adopted the reasoning of *Winebrenner*, especially in criminal cases. *See* Part B, *infra*. In recent years, however, calls to permit pre-deliberation discussions in civil cases have garnered increasing attention among state courts. This trend began in 1993, when the Arizona Supreme Court established a committee charged with identifying aspects of the trial process which interfered with optimal jury performance. Anderson, *supra*, at 104; Diamond, et al, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 Ariz L R 1, 3-4 (2003). The committee ultimately offered fifty-five recommendations to overhaul the

jury system, one of which suggested: “After being admonished not to decide the case until they have heard all the evidence, instructions of law and arguments of counsel, jurors should also be told, at the trial’s outset, that they are permitted to discuss the evidence among themselves in the jury room during recesses.” Anderson, *supra*, at 104 (quoting *Arizona Supreme Court Committee on More Effective Use of Juries, Jurors: The Power of 12*, at 2, 5-6 (1994)).

Yet even supporters of this movement acknowledge that the Sixth Amendment prevents state courts from adopting such a proposal in criminal cases. *See, e.g.*, Anderson, *supra*, at 121 (advocating for “the military [to] become the first jurisdiction to adopt a rule permitting pre-deliberation discussions in criminal cases” because “the Sixth Amendment right to a trial by jury does not apply to the military”). Arizona, the jurisdiction which started it all, amended its rules of civil procedure to allow for pre-deliberation discussions, but did not alter its rules of criminal procedure. *Compare* Ariz R Civ P 39(f) *with* Ariz R Crim P 19.4. The state supreme court expressed “concerns about a division among the federal courts of appeals on the question whether permitting juror discussions deprives the defendant of the Sixth Amendment right to an impartial jury.” Anderson, *supra*, at 106 (quoting Dann & Logan, *Jury Reform: The Arizona Experience*, 79 *Judicature* 280, 283 (1996)). Those concerns were shared by the American Jury Project of the American Bar Association, which recently recommended pre-deliberation talks in civil cases, but not criminal cases.<sup>3</sup>

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<sup>3</sup> *See* ABA American Jury Project, *Principles for Juries and Jury Trials*, available at [www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf) (last accessed August 31, 2011).

**B. The Majority of Jurisdictions to Consider This Issue Have Adopted the Traditional Rule Against Authorizing Pre-Deliberation Discussions in Criminal Cases.**

The *Winebrenner* analysis has been adopted by nearly all of the jurisdictions to consider this issue. Twenty states have adopted court rules or statutory schemes which explicitly bar juries from engaging in pre-deliberation discussions in both criminal and civil cases.<sup>4</sup> Five more states have embraced the modern trend of permitting pre-deliberation discussions in civil cases, but continue to forbid them in criminal cases.<sup>5</sup> Similarly, “the prevailing view in the federal courts remains that it is improper for jurors to discuss the case other than during their formal deliberations.” *Jadlowe, supra*, at 16-17. Indeed, only one state—Indiana—explicitly authorizes such discussions in criminal cases, though that state’s highest court has yet to speak. *See State v Weatherspoon*, 912 NE2d 437 (Ind App 2009);

Michigan has long been among the jurisdictions which follow *Winebrenner*. Nearly fifty years ago, this Court found error in the authorization of pre-deliberation discussions and quoted extensively from the Eighth Circuit’s opinion. *Hunter, supra*, at 269-273. Indeed, several other

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<sup>4</sup> These twenty states include: Alaska, California, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maryland, Missouri, Montana, Nebraska, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Wisconsin, and Wyoming. *See* Alas R Civ P 48(d); Alas R Crim P 27(c)(1); Cal Civ P § 611; *State v Washington*, 438 A2d 1144 (Conn, 1980); Fla Stat Ann § 918.06; Idaho R Civ P 47(n); *State v McLeskey*, 69 P3d 111, 116 (Idaho 2003); Illinois Sup Ct R 436(b)(3); Iowa Ct. R. 1.927(1), 2.19(5)(d); Kan Stat Ann 60-248; Kan Crim Pattern Jury Ins 3d 101.02; *State v Jones-Harris*, 943 A2d 1272, 1281 (Md App 2008); Mo Ann Stat 494.495; Mont Code Ann §§ 25-7-402, 46-16-501; Neb Rev Stat §§ 25-1110, 29-2022; 12 Okla St § 581; 22 Okla St §854; Or R Civ Pro 58(C); *Commonwealth v Kerpan*, 498 A2d 829 (Penn, 1985); *State v McGuire*, 253 SE2d 103, 105 (SC, 1979); Tex. R. Civ. P. 2841 Utah R Crim P 17(k); Utah R Civ P 47(l); Wis Stat §§ 805.13(2)(b), 972.01; Wyo. Stat. §§ 1-11-208, 7-11-206(c).

courts have cited favorably to this Court's ruling in *Hunter*. For example, the Supreme Court of Connecticut cited *Winebrenner*, *Hunter*, and other cases before concluding that "[a]lmost without exception, where the issue has been properly raised, every court has held that an instruction permitting the jurors to discuss the case before its submission to them constitutes reversible error." *State v Washington*, 438 A2d 1144, 1148 (Conn, 1980) (collecting cases). Similarly, the Supreme Court of Pennsylvania relied upon both *Winebrenner* and this Court's opinion in *Hunter* before reaching the same conclusion. *Commonwealth v Kerpan*, 498 A2d 829, 831 (Pa, 1985). Those cases were also referenced in a recent opinion of the Colorado Court of Appeals. *People v Flockhart*, \_\_ P3d \_\_; 2009 WL 4981910 (Co App, 2009), leave to appeal granted \_\_ P3d \_\_; 2011 WL 597016 (Co 2011).

From these decisions, several themes emerge. First, the near-universal acceptance of the traditional rule described by *Winebrenner* is attributable to the fact that it is constitutionally grounded. *Washington, supra*, at 1147 ("It is the due process clause of the federal and state constitutions and the right to trial by an impartial jury that are the source of the prohibition of such discussions."); *Kerpan, supra*, at 423; *McLeskey, supra*, at 113-114; *Flockhart*, slip op at 8. It is one thing if a jury receives confusing advice about mid-trial discussions, or if they disobey the judge's instruction about not discussing the case. It is quite another if the jury discusses the case with the trial court's blessing. *Washington, supra* at 1147; *see also People v Blondia*, 69 Mich App 554, 557-558; 245 NW2d 130 (1976) ("We assume that having been invited to do so,

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<sup>5</sup> These states include Arizona, Arkansas, Colorado, Massachusetts, and North Dakota. *See* Ark Code Ann §§ 16-64-117, 18-89-118; *People v Flockhart*, \_\_ P3d \_\_, 2009 WL 4981910 (Co App, 2009) (citing Colo Jury Instr, Civil 1:4), leave to appeal granted \_\_ P3d \_\_; 2011 WL 597016 (Co 2011); *Kelly v Foxboro Realty Assocs*, 909 NE2d 523, 529 fn 17 (Mass, 2009) ("While the parties in a civil case may consent to juror discussions during the trial, we would not approve of that practice in a criminal case."); ND R Ct 6.11.

some jurors did discuss testimony during the course of this 11-day trial.”). The latter constitutes a breach of the trial court’s duty to “carefully guard against dilution of [the presumption of innocence]” and burden-shifting, as well as its obligation to “be alert to factors that may undermine the fairness of the fact-finding process.” *Estelle, supra*, at 503.

These cases further recognize that the traditional rule against authorizing pre-deliberation discussions serves a number of important purposes. The Supreme Court of Pennsylvania summarized the rule’s underlying policy rationale as follows:

There are generally five reasons given for prohibiting premature jury discussion. First, since the prosecution’s evidence is presented first, any initial opinions formed by the jurors are likely to be unfavorable to the defendant, and there is a tendency for a juror to pay greater attention to evidence that confirms his initial opinion. ...Second, once a juror declares himself before his fellow jurors he is likely to stand by his opinion even if contradicted by subsequent evidence. ...Third, the defendant is entitled to have his case considered by the jury as a whole, not by separate groups or cliques that might be formed within the jury prior to the conclusion of the case. ...Fourth, jurors might form premature conclusions without having had the benefit of the court’s instructions concerning what law they are to apply to the facts of the case. ...Fifth, jurors might form premature conclusions without having heard the final arguments of both sides. [*Kerpan, supra*, at 831-832 (internal citations omitted)].

The traditional rule also prevents the alternate jurors from exerting an undue influence upon the twelve people actually charged with reaching a verdict. *Washington, supra*, at 1145; *McLeskey, supra*, at 114; *Flockhart*, slip op at 12. See also *State v Jones-Harris*, 943 A2d 1272, 1282 (Md App 2008) (finding error in both the authorization of pre-deliberation talks and in allowing alternates to participate, but concluding that the defendant had failed to preserve his objection).

Most importantly, these cases establish that instructions to keep an open mind cannot alleviate the prejudice inherent in pre-deliberation discussions. In *Weinbrenner*, the trial court repeatedly warned jurors not to make up their minds before the close of evidence, but the Eighth Circuit concluded this was not enough. *Weinbrenner, supra*, at 323, 327. The trial court in

*Washington, supra*, at 1146, offered similar instructions, but the Supreme Court of Connecticut reversed anyway. The Supreme Court of Pennsylvania also found reversible error even though “[t]he court also instructed the jurors that they should avoid forming premature conclusions.” *Kerpan, supra*, at 832. Likewise, the Supreme Court of Idaho reversed despite the trial judge’s instruction that “most important, you [must] reach no final decisions on any contested questions, remembering that you’re only making temporary assessments as the case progresses.” *McLeskey, supra*, at 113. Lastly, the jurors in *Flockhart*, slip op at 17, “were instructed to keep open minds and not reach any conclusions until after the case was formally submitted for deliberation[.]” but the Colorado Court of Appeals nonetheless found error.

C. **Stare Decisis Requires this Court to Adhere to the Traditional Rule Against Authorizing Pre-Deliberation Discussions in Criminal Cases.**

In this case, the issue is “whether the circuit judge’s instruction to the jury permitting jurors to discuss the evidence among themselves in the jury room during trial recesses violated the defendant’s right to an impartial jury and a fair trial.” (136a). As discussed above, this Court answered that question in the affirmative nearly fifty years ago. *Hunter, supra*, at 269-270. This Court quoted at length from *Winebrenner*, adopting its rationale for disallowing jurors from discussing the case before its submission. *Id.* This Court ultimately reversed the defendant’s murder conviction, both for the reasons expressed in *Winebrenner* and for another instructional error. *Id.* 268-269. Since then, Michigan courts have regarded the *Hunter* Court’s analysis of pre-deliberation discussions as binding precedent. *See, e.g., People v Feldman*, 87 Mich App 157; 274 NW2d 1 (1978), *People v Monroe*, 85 Mich App 110; 270 NW2d 655 (1978); *People v Blondia*, 69 Mich App 554; 245 NW2d 130 (1976). Other jurisdictions have also favorably cited to *Hunter*. *See, e.g., Kerpan, supra*, at 831; *Washington, supra*, at 1148.

The real question, thus, is whether this Court should overrule *Hunter*. To do so would be to reject the position taken by the overwhelming majority of jurisdictions to consider this issue. *See Part B, supra*. Further, “[s]tare decisis is generally ‘the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000) (quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998)).

This Court considers four factors in determining whether to overrule a previously decided case. *Robinson, supra*, at 464. “The first question, of course, should be whether the earlier decision was wrongly decided.” *Id.* The second factor is “whether the decision at issue defies ‘practical workability[.]’” *Id.* Third, this Court addresses “whether reliance interests would work an undue hardship[.]” *Id.* Lastly, this Court examines “whether changes in the law or facts no longer justify the questioned decision.” *Id.*

Here, three of the four factors favor reaffirming *Hunter*. As for the first factor, there is no indication that *Hunter* was wrongly decided. *Hunter* embraced the majority viewpoint espoused by *Weinbrenner*, one that only Indiana has refused to follow. It recognizes the constitutional underpinnings of the rule against authorizing pre-deliberation discussions, and it acknowledges the important policies served by the rule. *Hunter, supra*, at 269-270. Further, it bears repeating that other jurisdictions have relied upon *Hunter* to adopt a similar rule. *See, e.g., Kerpan, supra*, at 831; *Washington, supra*, at 1148.

Second, *Hunter* is not unworkable. For a half-century, Michigan’s trial courts have instructed jurors not to engage in mid-trial discussions without any problems. *See* CJI2d 2.12. Even during the pilot project’s run, trials in all but a handful of courtrooms were conducted in

accord with *Hunter*. Indeed, Mr. Richards is one of a very few criminal defendants to be tried without the protection of the *Hunter* rule over his objection.

Third, while overruling *Hunter* may result in the violation of the constitutional rights it seeks to protect, it will not cause “significant dislocations” or frustrate citizens’ attempts to conform their conduct to the law. *Robinson, supra*, at 466-477. “[T]o have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event.” *Id.* at 467. As a rule of criminal procedure, *Hunter* does not affect anything that happens outside of the courthouse.

Finally, the only difference between this case and *Hunter* is the fact that A.O. 2008-2 expressly authorized the trial court to instruct the jurors in the manner that it did. After the pilot project, however, this Court declined to allow pre-deliberation discussions in criminal cases. Rather, the newly effective MCR 2.512(K) permits such discussions in civil cases only. This rule, therefore, is not a “change[] in the law . . . [which] no longer justif[ies] the questioned decision.” *Robinson, supra*, at 464. Nor have any other changes occurred. Accordingly, this Court should reaffirm *Hunter* and find a violation of Mr. Richards’ right to a fair trial by an impartial jury.

**D. The Authorization of Pre-Deliberation Discussions at Mr. Richards’ Trial Amounted to Reversible Error.**

Nearly all of the problems identified by *Winebrenner, Hunter*, and their progeny arose at the trial below. Before trial, jurors received binders containing only some—not all—of the final instructions of law. Once the trial began, jurors were permitted to voice their initial opinions without the benefit of all of the evidence. And although jurors could not engage in pre-deliberation discussions in small groups or cliques, they were required to include the alternate

jurors. (11a); *contra Washington, supra*, at 1145; *McLeskey, supra*, at 114; *Flockhart*, slip op at 12; *Jones-Harris, supra*, at 1282.

Critically, although the jurors were instructed to treat these opinions as “tentative,” human nature makes it difficult to budge from an openly declared position even in the face of opposing evidence and persuasive closing arguments by counsel. *Hunter, supra*, at 272. Since the prosecution presented its evidence first, the juror’s initial opinions were likely unfavorable to Mr. Richards, particularly since the prosecution did not present its evidence in chronological order, as the defense would have preferred. The early part of the trial focused on what the complainant believed he had seen, so the jurors likely formed and then shared an opinion that the defendant had a gun. (40a-41a). This tended to make jurors less likely to pay attention to contradictory evidence—such as the testimony of the two police officers who patted down Mr. Richards and his companion only minutes before the instant offense. (67a, 83a). As in *Winebrenner, Hunter*, and the other cases, this deprived Mr. Richards of his Sixth Amendment right to a fair trial by an impartial jury.

This error requires reversal. In determining whether constitutional error requires reversal, the first step is to classify it as either structural or nonstructural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000) (citing *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994)). A structural error requires automatic reversal. *Id.* (citing *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999)). This is because such an error “infect[s] the entire trial process[.]” *Brecht v Abrahamson*, 507 US 619, 630; 113 S Ct 1710; 123 L Ed 2d 353 (1993). Such an error defies harmless error analysis and is “inherently harmful” because it “necessarily renders unfair or unreliable the determining of guilt or innocence.” *Id.* at 51.

Structural errors prevent the criminal trial from “reliably serv[ing] its function as a vehicle for determination of guilt or innocence.” *Id.* at 51-52 (citations omitted).

In contrast, nonstructural constitutional “trial error” warrants reversal only if the prosecution establishes their harmlessness beyond a reasonable doubt. *Arizona v Fulminante*, 499 US 279, 307-308; 111 S Ct 1246; 113 L Ed 2d 302 (1991); *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). The harmless error doctrine arises from “the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.” *Delaware v Van Arsdall*, 475 US 673, 681; 106 S Ct 1431; 89 L Ed 2d 674 (1986) (citing *United States v Nobles*, 422 US 225, 230; 95 S Ct 2160; 45 L Ed 2d 141 (1975)). Harmless error analysis evaluates whether an error is “harmless” in terms of its “effect on the factfinding process at trial.” *Id.*

While “most constitutional errors can be harmless[,]” there are a limited class of fundamental constitutional errors that “defy analysis by ‘harmless error’ standards.” *Fulminante, supra*, at 306-307, 309 (collecting cases). These include: the complete denial of the right to counsel, *Gideon v Wainwright*, 372 US 335, 344; 83 S Ct 792; 9 L Ed 2d 799 (1963); the denial of counsel of choice, *United States v Gonzalez-Lopez*, 548 US 140; 126 S Ct 2557; 165 L Ed 2d 409 (2006); the denial of an impartial judge, *Tumey v Ohio*, 273 US 510, 535; 47 S Ct 437; 71 L Ed 749 (1927); a faulty jury instruction on reasonable doubt, *Sullivan v Louisiana*, 508 US 275, 282; 113 S Ct 2078; 124 L Ed 2d 182 (1993); and others. Structural errors, unlike trial errors, cannot “be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.” *Gonzalez-Lopez, supra*, at 148 (quoting *Fulminante, supra*, at 307-308) (alteration in *Gonzalez-Lopez*).

Generally, an error is structural if harmless error analysis would be purely speculative. The *Gonzalez-Lopez* majority opinion, authored by Justice Scalia, explains that “we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.” *Id.* at 149 fn 4 (collecting cases). “We have little trouble concluding that erroneous deprivation of the right to counsel of choice, ‘with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’”” *Id.* at 150 (quoting *Sullivan, supra*, at 282). “Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.” *Id.*

Hypothesizing the effect of the authorization of pre-deliberation discussions in this case requires an equal degree of speculation. It is unknown what the jurors discussed during the breaks, if anything. Nor does the record disclose the extent to which the alternate jurors exerted their influence over these discussions. In light of *Gonzalez-Lopez*, structural error would seem to be the appropriate label here.

It is true that most courts have declined to characterize *Winebrenner* error as structural. Rather, it is considered to be constitutional error that requires reversal unless proven harmless beyond a reasonable doubt. At any rate, the effect is the same; the speculative nature of the error requires near-automatic reversal. In *Washington, supra*, the Supreme Court of Connecticut reversed because “there has been no showing that the jurors did not discuss the case” and “it is incumbent upon the state to show that it is harmless beyond a reasonable doubt.” *Id.* at 1149. Accordingly, the *Washington* court did not analyze the strength or weakness of the prosecution’s case. Similarly, the Supreme Court of Idaho recognized that “it would be virtually impossible for the Defendant to show actual prejudice.” *McLeskey, supra*, at 116, fn 2. It reversed because “prejudice reasonably could have occurred.” *Id.* at 116. Likewise, the Colorado Court of

Appeals has found a rebuttal presumption of prejudice so long as: (1) pre-deliberation discussions were authorized by the trial court; and (2) the jury had an opportunity to pre-deliberate. *Flockhart*, slip op at 16.

Whatever the label applied, Mr. Richards is entitled to a new trial for the same reasons. The prosecution simply cannot sustain its burden of proving the error to be harmless beyond a reasonable doubt. The jury was permitted to discuss the case mid-trial. (11a). Moreover, they had multiple opportunities to have actual interim conversations, even before the second witness was called. (27a, 54a). While the trial judge did warn the jurors to keep in mind, several cases have found that such an instruction “[does] little to address the staying power of a juror’s expressed opinion and the fact that the prosecution’s evidence, unfavorable to the defendant, is heard by the jury first.” *Id.* at 17-18; *Weinbrenner, supra*, at 323, 327; *Washington, supra*, at 1146; *Kerpan, supra*, at 832; *McLeskey, supra*, at 113.

Lastly, while there was plenty of evidence to support the carjacking charge, evidence of felony-firearm was far from overwhelming. Two officers of the Center Line Police Department testified that they searched Mr. Richards and his companion minutes before the instant offense and found no gun. (70a, 72a-75a, 82a-83a). And there was no opportunity for Mr. Richards to obtain a gun in the short time between that search and his encounter with the complainant. So it is likely that the sleep-deprived complainant—who had just completed a 12-hour shift at 3:00 AM—was mistaken about the presence of a gun. An untainted, open-minded jury might well have reached a different conclusion about the firearm element of felony-firearm, as well as the threat element of carjacking. Accordingly, Mr. Richards is entitled to a new trial.

**SUMMARY AND REQUEST FOR RELIEF**

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant his request for a new trial.

Respectfully submitted,

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