STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

MSC No 314980
Court of Appeals No ~~314890~~

vs

Lower Court No 11-29652 FC

MANTREASE DATRELL ~~DEQUAN~~ SMART,
Defendant-Appellee

Judge: Yuille

ATTORNEY FOR PLAINTIFF-APPELLANT	ATTORNEY FOR DEFENDANT-APPELLEE
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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL
BRIEF AND APPENDIX IN SUPPORT

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Statement of Jurisdiction

The trial court suppressed a statement defendant made to police. The People filed an interlocutory application for leave to appeal, which the Court of Appeals granted. In a 2-1 opinion issued February 11, 2014, the Court of Appeals Affirmed. The People are seeking leave to appeal with this Honorable Court. This Court has jurisdiction pursuant to MCR 7.301(B)(1).

Statement of Questions Presented

Issue I

MRE 410(4) prohibits the admission of a defendant's statement made "in the course of plea discussion with an attorney for the prosecuting authority." Defendant entered into plea discussions with the prosecuting attorney and a plea agreement was reached before June 8, 2011. Defendant made a voluntary and second statement on June 8, 2011; but before he did so, both his attorney and Sgt. Mitch Brown informed him that the plea agreement reached prior to June 8, 2011, would not get better. Since defendant's June 8, 2011, statement was not made in the course of plea discussion, the trial court's order suppressing defendant's statement should be reversed.

Plaintiff-Appellant says yes.

Defendant-Appellee says no.

Trial court says no

Issue II

On two occasions Sgt. Mitch Brown took a statement from defendant concerning the homicide of victim Megan Kreuzer. Defendant's attorney was present both times defendant made a statement to Sgt. Brown. At the time of these statements, defendant was in custody for an unrelated felony, but he was not in custody for the homicide. Were "Miranda Rights" inapplicable when defendant made his statement since he was not in custody for the homicide and should the trial court's order granting defendant's motion to suppress his statement be reversed?

Plaintiff-Appellant says yes.

Defendant-Appellee says no.

Trial court says no

Application for Leave to Appeal

Now come the People of the State of Michigan by and through their attorneys David S Leyton, Prosecuting Attorney and Vikki Bayeh Haley, Assistant Prosecuting Attorney with its Application for Leave to Appeal and state the following:

1. Defendant Mantrease Smart was charged with:

   Count 1: Felony Murder, for the death of Megan Kreuzer, MCL 750.316;
   Count 2: Armed Robbery, involving victim Megan Kreuzer, MCL 750.529;
   Count 3: Armed Robbery, involving victim Blake Hickman, MCL 750.529;
   Count 4: Assault with Intent to Murder, involving victim Blake Hickman, MCL 750.83;
   Count 5: Felony Firearm, MCL 750.227b.

2. Prior to being charged in this case, defendant had a pending and unrelated charge for carjacking. See *People v Smart*, LC Number 11-29652 FC. Defendant was arraigned in circuit court for the carjacking case on June 17, 2010. See Attached Docket Entries for People v Smart, CC No 10-27149-FC/Neithercut @ Appendix 1a.

3. District Court Judge Nathaniel Perry presided over a preliminary examination in this matter and bound it over to the Seventh Circuit Court for trial.

4. On the first day of trial, defendant made an oral motion to suppress statements he made to Sgt Mitch Brown on March 15, 2011 and June 8, 2011. Defendant cited MRE 410 and argued that defendant gave his statements to Sgt. Brown for the purpose of discussion. The prosecutor opposed defendant's motion to suppress. (Transcript entitled Defendant's Motion in Limine April 10, 2012 @ Appendix 60a).

5. The trial court presided over an evidentiary hearing. The witnesses for that hearing were Attorney Patricia Lazzio, defendant's attorney on the carjacking case, as well as Assistant Attorney General Richmond Riggs, who was a Genesee County Assistant Prosecuting Attorney during the pendency of defendant's carjacking case, Sgt Mitch Brown

the investigating officer on this matter and defendant Mantrease Smart. The trial court heard the following evidence:

a. Attorney Lazzio and Brown testified about statements defendant made in their presence. Attorney Lazzio testified that she arranged a meeting with Sgt Mitch Brown to share information defendant gave her regarding the murder of victim Megan Kreuzer. Lazzio testified that defendant told her he witnessed a murder while selling drugs on a street corner. (Tr April 11, 2012 pp 41-42).

b. Prior to meeting with defendant and Sgt. Brown, Lazzio contacted assistant prosecutor Richmond Riggs and advised Riggs that her client would make a statement on the condition that any incriminating statement he were to make would not be used against him and that he would not be charged in any matter other than the pending carjacking case. (Tr April 11, 2012 pp 42-43).

c. Lazzio wanted assurances that Smart would not be charged with any crimes under the controlled substances act. At the time she arranged the March 15, 2011 meeting, she was unaware of defendant's role in the murder. Lazzio testified that Riggs agreed not to use Smart's statements and told her he was only interested in Smart as a witness to the murder. (Tr April 11, 2012 pp 44-45).

d. Sgt Mitch Brown testified that he met with defendant and Attorney Lazzio on March 15, 2011, at the request of assistant prosecutor Riggs. Sgt. Brown testified that it had been his understanding that defendant was a witness in the murder. (Tr April 12, 2012 p 8). Brown also testified that, prior to March 15, it was his understanding that the prosecutor's office and the defendant were "in the middle of discussions [on the carjacking case]." (*Id.*, p 9, 32).

e. On March 15, 2011, defendant told Sgt. Brown that he provided two individuals with the weapon that was used to murder Megan Kruezer. (*Id.*, pp 17, 21-22).

f. Attorney Lazzio arranged a second meeting between defendant and Sgt Brown which occurred on June 8, 2011. Prior to this meeting, attorney Lazzio had contacted Brown and asked him to inform defendant that the plea agreement attorney Lazzio had previously negotiated on his behalf for the carjacking case would not get better. (*Id.*, pp 34-35). Assistant Prosecutor Riggs also asked Sgt. Brown to talk to defendant to get more information from him about the murder. (*Id.*, pp 35.). It was Brown's understanding that defendant wanted a better deal but that the prosecutor's office would not give him a better one. (*Id.*, p 35).

6. It is undisputed that no attorney for the prosecuting authority was present during either statement. However, the People chose to withdraw their objection to defendant's motion to suppress his statement on March 15, 2011, as the record established that the prosecutor engaged in plea discussions with defense counsel and arranged the March 15, 2011, meeting for the purpose of determining if defendant had credible information concerning the murder and if that information was worth consideration on defendant's carjacking case. (Tr Oct 22, 2012 p 5).

7. Before the trial court, the People maintained their to objection to suppression of the statement defendant made on June 8, 2011. The People argued that the record showed that plea discussions concluded prior to June 8, 2011, and the prosecutor was not willing to reopen negotiations when defendant spoke to Brown on June 8th. The People pointed out that the evidence clearly established that the June 8th meeting was scheduled for the sole purpose of telling the defendant that the prosecutor would not make an offer more favorable to him. Nonetheless, the prosecutor encouraged Sgt. Brown to try to get more information about what defendant knew about the murder. (Tr Oct 22, 2012 pp 5-6).

8. In *People v Dunn*, 446 Mich 409, 415; 521 NW2d 255 (1994) the Court held that MRE 410 applies in cases where the defendant has "an actual subjective expectation to negotiate a plea at the time of the discussion," and (2) that expectation is reasonable given the totality of the objective circumstances. *Id.*, at 415. Although decided in 1994, *Dunn* examined MRE 410 prior to amendments to the rule made in 1991.

9. Citing *Dunn*, the People argued that defendant did not make his statement on June 8, 2011, during the course of plea discussions nor did he have a reasonable expectation that his statement was being made during the course of plea discussions because the defendant and prosecutor's office had already reached a plea agreement and defendant had been advised, prior to the June 8, 2011 statement that the plea agreement would not be altered. (Tr Oct 22, 2012 p 5).

10. The trial court found that defendant wanted the June 8th meeting because he was not satisfied with the plea agreement that had been worked out. The trial court found that on June 8th "it was pretty apparent" that the plea agreement for the carjacking case would not change. (Tr Dec 12, 2012 p 6). Despite the trial court's statement, the Court of Appeals majority found that the trial court, found that the trial court implicitly found that defendant's expectation that his statement was made during the course of plea negations was reasonable. (Slip pp 4-5).

11. The trial court stated it failed distinguish between the facts surrounding the March 15th meeting and the facts surrounding the Jun 8th meeting. The Court of Appeals majority held that the trial court's finding on this issue was not clearly erroneous.

12. Even though the trial court found "it was pretty apparent" that the plea agreement reached prior to June 8, 2011, would not get any better, the court found that since Sgt. Brown did not read defendant his rights pursuant to *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 691 (1966), MRE 410 precluded the admission of defendant's June 8th statement because from "defendant's perspective

that second meeting was requested in order to secure a better plea deal [in the carjacking case]." (Tr Dec 12, 2012 p 8).

13. The People argued that Miranda did not apply since defendant was not in custody the unrelated carjacking but not for the murder at the time he made his statement on June 8, 2011. The Court of Appeals majority did not address the issue of whether defendant was entitled to be advised of his *Miranda* rights. Judge Wilder agreed with the People that *Miranda* was inapplicable because defendant was not in custody for murder at the time he was interviewed about the murder. See *Howes v Fields*, ___ US ___; 132 S Ct 1181; L Ed 2d ___ (2012).

14. The trial court granted the People's motion to stay proceedings pending appeal and the People filed an application for leave to appeal with the Court of Appeals. The issues raised on appeal related exclusively to the statement defendant made on June 8, 2011. The People raised the following two issues:

Issue I

Before the defendant made a statement, on June 8, 2011, incriminating himself as a perpetrator in the present case, both his attorney and Sgt. Mitch Brown informed him that a previously made plea agreement would not get better. The only individuals present when defendant incriminated himself were his attorney and Sgt. Brown. Since there was no attorney for the prosecuting attorney present and since defendant had no reasonable basis to expect a second statement to result in furthered plea discussions, the trial court erroneously applied MRE 410. Therefore, the trial court's order granting defendant's motion to suppress his statement must be reversed.

Issue II

On two occasions Sgt. Mitch Brown took a statement from defendant concerning the homicide of victim Megan Kreuzer. Defendant's attorney was present both times

defendant made a statement to Brown. At the time of these statements, defendant was in custody for an unrelated felony, but he was not in custody for the homicide. Sgt. Brown had no duty to advise defendant of his "Miranda Rights because he was not in custody for the homicide and the trial court's order granting defendant's motion to suppress his statement must be reversed.

15. The Court of Appeals granted leave on March 27, 2013, and heard oral arguments on August 8, 2013. On February 11, 2014, the court affirmed in a 2-1 opinion.

16. The majority held that *Dunn* "reasonable expectation" test applied to amendments to MRE 410 that took effect in 1991.

17. The Court of Appeals held that the trial court properly granted defendant's motion to suppress his June 8 statement and further held that "it was reasonable for defendant to believe that his second meeting with Sgt. Brown would have a similar outcome as the first, and possibly benefit him in terms of a plea deal." (Slip op p 5).

18. Applying *Dunn,* the majority in this case, held that "it was reasonable for defendant to believe that his second meeting with Sgt. Brown would have a similar outcome as the first, and possibly benefit him in terms of a plea deal." Slip op p 6. The People respectfully submit that although the majority applied *Dunn*, it's finding on the question of reasonableness conflicts with *Dunn*.

19. The Court in *Dunn* held that a defendant had a reasonable expectation that he initiated making an incriminating statement in hopes that the police would speak to the prosecutor on his behalf to negotiate a plea disposition. In *Dunn*, the police expressly encouraged defendant to talk so they could speak to the prosecutor about negotiating a plea disposition.

20. In this case, contrary to *Dunn*, defense counsel and Sgt. Brown specifically told defendant that plea discussions were over and would

not be renewed. There were no promises that would have enticed defendant to talk to Sgt. Brown about the murder.

21. In his dissent, Judge Wilder opined that *Dunn* did not apply to the MRE 410 as amended in 1991, and that the rule should be interpreted on the basis the plain language of the rule. Judge Wilder found that plea discussions concluded before June 8, 2011, and therefore, defendant did not make his June 8th statement in the course of plea discussions with an attorney for the prosecuting authority.

22. Judge Wilder reaseoned that the trial court erred in finding that defendant's June 8th statement occurred "in the course of plea discussion with an attorney for the prosecuting authority." Judge Wilder agreed with the People that, at the time he made his statement on June 8th, defendant was not entitled to be advised of his rights under Miranda, *supra* because he was not in custody for the murder at the time he made his statement.

23. Although the People did not argue that MRE 410 was inapplicable because there was no attorney for prosecuting authority present at the June 8th interview, the majority examined the specific language of MRE 410(4) and stated, "It is conceivable that a defendant may speak to persons other than an attorney for the prosecuting authority in the course of plea discussions." However, the majority offered no standard or test as to when MRE 410 applied for incriminating statements made during the course of discussions and outside the physical presence of an attorney for the prosecuting authority. Also, the majority's statement conflicts with the Court of Appeals previous statement in *People v Hannold*, 217 Mich App 382; 551 NW2d 710 (1996).

24. In *Hannold* the court held that MRE 410(4) was inapplicable when a defendant made incriminating statement outside the presence of the prosecuting attorney. *Id.*, at 391. The Court of Appeals statement in *Hannold* did not specifically analyze the language of MRE 410, but merely stated that the rule was inapplicable because there

was no attorney for the prosecutor present when defendant Hannold made his statement.

25. This case presents issues of legal significant to the jurisprudence of the entire State of Michigan, i.e., the proper application of MRE 410. There are a limited number of cases interpreting MRE 410 with none examining when a statement is made "in the course of plea discussions." Although the People did not raise the issue of whether the physical presence of an attorney for the prosecuting authority is required, the majority's extensive examination of the issue in a published opinion warrants review by this Honorable Court in order to clarify the rule and advance the jurisprudence of the state on this issue.

26. The People respectfully submit that both the trial court and the Court of Appeals majority opinion is clearly erroneous and contradictive to the facts established at the evidentiary hearing and will result in a substantial injustice to the People of this community.

27. The issues in this case also raise significant public policy concerns and limit the ability of prosecutors to use a suspect's voluntary statement. This case opens the door for suppression whenever a defendant claim to have made an otherwise voluntary confession in hopes of attaining favorable treatment even when the facts clearly indicate that the prosecuting authority is unwilling to enter into plea negotiations when defendant makes his statement.

28. Such a consequence expressed above will have a chilling effect on the ability of the People to secure justice. Therefore, criminal jurisprudence requires guidance from this Court as to when a statement is made "in the course of plea discussions" and whether or not MRE 410 requires the physical presence of the attorney for the prosecuting authority.

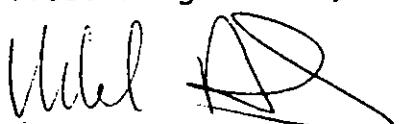
Relief

Wherefore, the People ask this Honorable Court to grant its application for leave to appeal and reverse the Court of Appeals opinion affirming the trial court's order granting defendant's motion to suppress his June 8, 2011 statement.

April 2, 2014

Respectfully submitted,

David S. Leyton P35086
Prosecuting Attorney

By 
Vikki Bayeh Haley P48311
Assistant Prosecuting Attorney

Statement of Facts

The Genesee County Prosecutor charged defendant Mantrease Smart with:

Count 1: Felony Murder, for the death of Megan Kreuzer, MCL 750.316;
Count 2: Armed Robbery, involving victim Megan Kreuzer, MCL 750.529;
Count 3: Armed Robbery, involving victim Blake Hickman, MCL 750.529;
Count 4: Assault with Intent to Murder, involving victim Blake Hickman, MCL 750.83;
Count 5: Felony Firearm, MCL 750.227b.

PRELIMINARY EXAMINATION

Jamario Mays testified at the preliminary exam. He had also been charged with murder for the death of Megan Kreuzer. At the time of the preliminary examination, Mays had entered into an agreement with the prosecutor to plea to the amended charge of second-degree murder and armed robbery and felony firearm. There was also an agreement for Mays to receive a minimum sentence of 12 years for murder and an additional 2 years for felony firearm. (PE Vol I of III p 6).

Mays testified that on May 31, 2010 at approximately 10:55 p.m., he was at Jackson St and Alexander St in the City of Flint, Genesee County. (*Id.*, pp 6-7). He lived two blocks away on Genesee St with his sister Keisha Mays and Anthony Michael. He walked to Jackson and Alexander streets with Anthony Michael. (*Id.*, pp 7-8).

Mays had a sawed off shot gun and Anthony Michael had an AK-47 assault rifle. (*Id.*, p 9). Defendant Mantrease Smart, a.k.a. "Trell", was with Mays and Michael. (*Id.*, pp 11-10). Mays told Smart that they were going over to Jackson and Alexander Streets to rob Megan Kreuzer. (*Id.*, p 11). Mays expected to steal marijuana that he believed Kreuzer would have with her. (*Id.*, p 12). Mays had previously talked to Kreuzer and arranged for her to sell him a half ounce of marijuana. (*Id.* pp 12, 28).

Mays testified that a condition of his plea agreement was to testify against Anthony Michael, but the agreement did not include testimony against Smart. (*Id.*, p 29).

Mays testified that is was his idea to to rob Kreuzer, and he talked to Anthony Michael about it. (*Id.*, p 13). Mays had called Smart to bring a gun to him and Michael. Mays told Smart he planned to rob somebody. (*Id.*, pp 14-15). Smart brought an AK-47 to Mays's home. (*Id.*, p 15, 22).

Kreuzer was in a vehicle at Jackson and Alexander Streets when Mays approached the passenger side of the car where Kreuzer was sitting. (*Id.*, p 15). She gave Mays the marijuana. Anthony Michael approached the driver's side door and pointed a gun at the victims. Mays kept his gun in his jacket sleeve and did not pull it out. (*Id.,* p 16). Michael ordered the victims to "give me everything." Mays did not see if Michael got anything because he walked away. (*Id.*, p 17). Mays claimed that Megan didn't know he was robbing her and he "just thought of just to walk away from her and play it off." (*Id.*, p

18). Mays looked back toward the vehicle and saw Anthony Michael shoot into the driver's side of the car two to three times. (*Id.*, p 18-19). Anthony Michael threw the AK-47 in the bushes. (*Id.*, p 27)

Defendant Smart was at the corner when Michael and Mays approached the car. (*Id.*, p 19). Mays ran back towards Genesee St. (*Id.*, p 20). Mays saw defendant early the next day at his (Mays's) house. Mays told defendant about the robbery but defendant did not respond or participate in planning the robbery. There was no plan to give defendant a portion of the marijuana Mays obtained during the robbery. (*Id.*, p 33). There was no plan for Smart to act as a lookout. (*Id.*, p 35).

On redirect, Mays testified that the defendant's AK-47 was loaded when defendant brought it to Mays and Michael. Defendant showed Michael how to rack the head back. (*Id.*, p 37).

The examining magistrate found probable cause and the matter was bound over to circuit court for trial. The trial court scheduled trial for April 10, 2012. On that day, defendant made an oral motion to suppress statements he made to police on March 15, 2011, and on June 8, 2011. The trial court scheduled an evidentiary hearing. (Tr April 10, 2012).

<u>Defendant's Carjacking Case</u>

Before the People charged defendant with murder in this case, they had charged him with carjacking in lower court number 10-27149-FC. The parties ultimately entered in to a plea agreement in that case. The agreement was

reduced to writing and signed by the prosecutor on May 11, 2011. Defendant signed the written agreement on May 23, 2011. (Tr April 10, 2010 p 17). The written agreement further required defendant to "testify truthfully consistent with a proffer statement given to [Flint Police Department] Det. Mitch Brown regarding a homicide and a conspiracy count would not be scored for guideline purposes. (*Id.*, p 18).

EVIDENTIARY HEARING ON DEFENDANT'S MOTION TO SUPPRESS STATEMENTS HE MADE TO POLICE ON MARCH 15, 2011 AND JUNE 8, 2011

Defendant Mantrease Smart

Defendant Mantrease Smart testified that on March 15, 2011, he made a statement to Sgt. Mitch Brown in the presence of his attorney at the time, Patricia Lazzio. (Hrg April 11, 2012 p 8, 12). At that time he had pending charges of Armed Robbery, Carjacking, and Felony Firearm. It was the only case he had pending at that time. (*Id.*, p 9). Smart testified that he was supposed to get "a deal on my case [carjacking] for some information I knew about this [the case at bar] case." (*Id.*, pp 11-12).

Smart believed that the charges on his carjacking case would be amended to unarmed robbery and felony firearm in exchange for the information that Smart would provide to Sgt. Brown. (*Id.*, pp 12-13). Smart admitted that when he spoke to attorney Lazzio about the information he did not tell her the entire truth. (*Id.*, pp 14).

On March 15, 2011, defendant told Sgt. Brown more than he told his attorney and there came a point during the interview that the attorney stopped the interview and Sgt. Brown left the room. (*Id.*, p 16). Defendant spoke with his attorney; after which Sgt. Brown returned to the room and the interview continued. (*Id.*, p 17).

Sometime after this interview, defendant entered into a written plea agreement for his carjacking case. One term of the agreement required defendant to testify truthfully "consistent with a proffer statement given FPD Detective Mitch Brown, regarding the homicide." (*Id.*, 22). Defendant testified that, when he made his statement on March 15th he understood that he would not be charged for murder if he testified against Anthony Michael. (*Id.*, p 24-26). However, Smart refused to testify against Michael. (*Id.*, pp 31-32).

Attorney Patricia Lazzio

Attorney Patricia Lazzio represented Mantrease Smart on an unrelated carjacking case. She talked to him about this homicide case but she never represented him on it. (*Id.*, p 40).

At some point Smart told Lazzio that he had information about a homicide and would testify in exchange for "some type of consideration initially on the armed robbery/carjacking case." (*Id.*, p 41). Lazzio set up a meeting with Sgt. Brown through the prosecutor's office.

Defendant initially told Lazzio that he was a witness to the homicide. He claimed he had been selling drugs on the street corner at the time. He said nothing to her to suggest he was involved with the homicide. (*Id.*, p 42).

Lazzio made attempts to call Assistant Prosecuting Attorney Richmond Riggs. He did not return her calls. After a couple of attempts to contact Riggs, defendant advised Lazzio that he had changed his mind. Later, defendant changed his mind again and told Lazzio he would be willing to testify. Lazzio renewed her attempts to contact Riggs. (*Id.*, pp 42-43).

Lazzio finally spoke to Riggs and relayed the information that Smart had given her. (*Id.*, p 44). Lazzio told Riggs that she did not want anything defendant said during an interview to be used against him. Riggs told Lazzio that it would not be a problem and that he was interested in defendant as a witness. As per common practice in the Genesee County Prosecutor's Office, Riggs made no commitment about whether or not defendant would receive a reduction in charges on his carjacking case. Typically the prosecutor's office obtains an individual's statement before deciding if there will be an offer to resolve that individual's case with a plea to reduced charges. Lazzio reiterated to Riggs, that "the understanding" was that defendant's statement in an interview would not be used against him. (*Id.*, p 45).

Eventually a meeting was set up between Lazzio, Smart and Sgt. Brown. There was no prosecutor at the meeting. (*Id.*, p 64). At the meeting, Lazzio stated that Smart's statements to Brown would not be used against Smart.

(*Id.*, p 47). During the interview Smart made statements that Lazzio had not been aware of beforehand. (*Id.*, p 47). Specifically, Smart told Brown he sold the gun that was used by the two people who actually committed the murder. Lazzio did not expect defendant to incriminate himself in the murder and stopped the interview to speak with Smart privately. (*Id.*, p 49). Lazzio spoke with Brown before the interview resumed. (*Id.*, pp 50-51). Brown took notes of the interview. Smart reviewed the notes and signed the notes. (*Id.*, pp 52-53).

Lazzio discussed with defendant the possibility of resolving his carjacking case with a plea to unarmed robbery. She told defendant that the prosecutor had not yet made an offer. She also told him that any plea agreement with the prosecutor would require Smart to testify on the murder case. (*Id.*, p 55). On May 23, 2011, the parties entered into a written plea agreement. (*Id.*, p 56 admitted as Exhibit 1 and attached).

After the parties signed the written plea agreement Lazzio arranged a second interview between defendant and Sgt. Brown because defendant questioned whether or not Lazzio secured the best possible plea agreement for him. Lazzio spoke to Sgt. Brown and asked him to tell defendant that his offer would not get better. (*Id.*, p 57). The second meeting occurred June 8, 2011. During the second statement, defendant implicated a female and stated that she had more knowledge about the crime than he had stated in his first interview. (*Id.*, p 58).

There was no prosecutor at either the March 15th nor the June 8th meeting. (*Id.*, p 64).

Lazzio testified that when the time came for defendant to testify on the murder case, he refused to do so. Lazzio advised him that a refusal to testify would nullify the plea agreement. Defendant was upset because his codefendant in the carjacking case got the same offer to plea that had been given to him. (*Id.*, p 61).

On cross-examination, Lazzio testified that the plea agreement she worked out was for the carjacking case. There was no discussion concerning whether or not defendant would be charged with murder if he did not testify. (*Id.*, pp 68-70). Defendant was not advised of his "Miranda" rights during either of his interviews with Brown because of the agreement that his statement would not be used against him. (*Id.*, p 70). At the times defendant met with Brown, he had not been charged with the murder of Kreuzer. Therefore he was not in custody on the homicide case. (*Id.*, p 71)

Former Assistant Prosecutor Richmond Riggs

Richmond Riggs was an assistant prosecutor who supervised the circuit court trial division and the circuit court family division. (*Id.*, p 74). He denied any direct involvement in Smart's carjacking case. The carjacking case was assigned to another prosecutor.

He recalled receiving information from Attorney Lazzio advising that her client had information about a murder case. Riggs did not think that the

information Lazzio provided implicated Smart as a perpetrator. Per office policy, Riggs did not make a plea agreement until he knew what testimony Smart could offer. Riggs testified that he may have contacted Sgt. Brown to ask him to interview someone. Riggs was aware that there was at least one interview between Brown and Defendant Smart. (*Id.*, p 75).

Riggs thought the information Smart gave was "second-handed" and inconsistent with other information Sgt. Brown had. However, Riggs acknowledged that the details of this case were not fresh in his mind. (*Id.*, p 77). Riggs had no recollection of working out a plea agreement on Smart's case. (*Id.*, p 78). Riggs denied making any promise that Smart would not be charged with homicide. (*Id.*, p 79).

Sgt. Mitch Brown

Retired Flint police detective Mitch Brown was the officer in charge of the investigation of the death of Megan Kreuzer. (Hearing April 12, 2012, p 84). Approximately in the beginning of 2011, Richmond Riggs contacted Brown who advised that Mantrease Smart may have some information about the case. Brown also spoke to attorney Patricia Lazzio. (*Id.*, p 5, 8).

On March 15, 2011, Brown met with Lazzio privately before beginning the interview with Smart. Lazzio stated her belief that Smart witnessed the homicide but was not involved. She also told Brown that defendant had a carjacking case that was in the process of plea discussions. Brown was unaware of any agreement involving the homicide. (*Id.*, pp 10-11).

Brown testified that there was no discussion between himself and Lazzio about whether or not defendant would be charged with the homicide in the event he admitted involvement during the interview. Before the interview began, Lazzio stated her belief that defendant was an eyewitness and if he were to make a statement to implicate himself, she wanted the interview to stop so she could speak to defendant. (*Id.*, pp 10-11 and 15).

The interview with defendant occurred in an interview room at the Genesee County jail. Lazzio was present. Brown did not advise defendant of his Miranda rights. Brown testified there was some discussion that defendant's statements would not be used against him. Brown told defendant that if he was involved in the homicide he could be charged, and that the decision to charge would be made by the prosecutor. (*Id.*, pp 12-13).

Brown testified that defendant was free to leave the interview room, but Brown did not specifically explain that fact to defendant. (*Id.*, p 14). Brown did not advise defendant of his Miranda rights because Smart was not a suspect, he was not in custody for the homicide, and his attorney was present throughout the interview. (*Id.*, p 15).

Smart initially told Brown that he was "in the vicinity of the crime scene kind of meandering about." Brown responded by telling Smart that his statement did not make sense. Brown testified that Smart began to chuckle and shift then he admitted that he supplied the gun that was used in the homicide. (*Id.*, p 17). After Smart admitted his involvement, Brown left the

interview room to give Lazzio and Smart a chance to talk privately. (*Id.*, p 18).

After Lazzio and Smart spoke privately, Lazzio stepped out of the room to speak to Brown. Brown told her that while he was waiting he received an email from Riggs advising that Jamario Mays wanted to cooperate with the investigation and talk to the police. (*Id.*, p 19). Lazzio and Brown went back into the interview room with defendant. Brown did not tell him that Mays was going to cooperate with the investigation. (*Id.*, p 19).

Once they were back in the interview room that if Brown intended to continue the interview she would advise defendant to stop the interview if he were to make any more incriminating statements. (*Id.*, p 20). The interview continued and defendant stated that Mays had called him looking for a gun. Defendant denied knowledge of why Mays would want a gun. Defendant agreed to sell Mays an AK-47 and brought it over to Mays's house. Defendant gave the gun to Mays and Anthony Michael. (*Id.*, p 21). He then went to a nearby house on Dartmouth St. He left the house to sell some crack. Mays also called him and stated he was going to give defendant a quarter pound of marijuana for the rifle. (*Id.*, pp 21-22).

Smart told Sgt. Brown that he ran into Mays and Anthony Michael. Mays walked up to the passenger side of a station wagon, while Michael approached the driver's side of the vehicle and said "give it up." Michael was pointing the rifle at the occupants of the vehicle. Smart heard a series of gun shots and

the vehicle sped off. Michael tried to return the rifle to Smart, but Smart refused to take it because he had seen a state police cruiser was approaching. Smart left the area. (*Id.*, pp 23-24).

Brown did not participate in plea discussions with Lazzio and Riggs but knew that defendant was going to plead guilty on another case. (*Id.*, p 31). Prior to the March 15th meeting, Lazzio told Brown she was hoping to work out a favorable plea agreement on the carjacking case. (*Id.*, p 32).

Sometime after the first interview, Lazzio asked Brown to tell Smart that the plea agreement on the carjacking case was not going to get any better. (*Id.*, p 35). Brown received a request from assistant prosecutor Riggs to speak to defendant a second time and find out if he had more information about the homicide. Brown testified that Riggs made this request because Brown was not involved with the plea discussions. (*Id.*, pp 36-37).

Brown scheduled a second meeting with Smart and Lazzio for June, 2011. Brown did not advise Smart of his Miranda rights. Brown advised Smart that he did not think the agreement that Smart had worked out with the prosecutor's office was going to get any better. (*Id.*, pp 37-38). During this interview Smart admitted knowing Mays and Michael were about to commit an armed robbery. His previous statement that he went to a house on Dartmouth was a lie. Instead, Smart admitted that he stayed at Mays house, and walked with them [Mays and Michael] because he didn't think that they

would go through with the robbery and Smart wanted to see for himself. (*Id.*, p 40).

On cross-examination, Brown testified that he did not meet with Smart on June 8th for the purpose of taking a statement about the homicide. He met with Smart on June 8th to advise him that his plea agreement was not going to get better. Smart gave Brown an additional statement.

On redirect, Brown testified that Smart was not in custody for the homicide and his attorney was present. Lazzio had told Brown that Smart wanted to talk to him. (*Id.*, pp 64-65).

The People withdrew its opposition to defendant's challenge to the admission of the statement he made to Sgt. Brown on March 15, 2011. The People argued that the June 8, 2011 statement was admissible in the People's case-in-chief.

The Trial Court's Findings and Order

In making its ruling, the trial court summarized the evidence presented during the hearing. The court found that there was a meeting between the defendant, his attorney and Sgt. Brown on March 15, 2011, "to discuss the possibility of a plea agreement" for an unrelated carjacking case defendant had pending at the time. (Tr 12/12/12 p 4). A second meeting occurred on June 8, 2011. The trial court found that defendant "was of the belief that if he were to meet with Mitch Brown again [on June 8th], he might be able to secure a better plea agreement. (Tr 12/12/12 p 6). The trial court found that

neither defendant's attorney nor Det. Brown believed that a plea offer that had been made after March 15, 2011 but before June 8, 2011 would be changed. (Tr 12/12/12/ p 6) On the issue of whether or not defendant would be able to secure a more favorable plea offer, the trial court found:

> There was very little discussion about whether a plea agreement was going to be altered and it was pretty apparent that it wasn't. But there was a lot of discussion concerning the homicide case in in my Court [homicide of Megan Kreuzer].
>
> (Tr 12/12/12 p 6)

The trial court found it "clear that from the defendant's perspective that second meeting was requested in order to secure a better plea deal in Neithercut's court." The court also stated,

> "I'm not sure of the perspective of the police and prosecutor. I can't speculate. But if one were to speculate, one could look at what occurred at that second meeting and conclude that Det. Brown believed that Mr. Smart was gaming the system, which he very well may have been. It would not be hard to reach that conclusion..."
>
> (Tr 12/12/12 p 8)

The trial court granted defendant's motion to suppress his June 8th statement to Sgt. Mitch Brown. (See order attached). The trial court held that MRE 410 prohibited the admission of defendant's statement during the People's case-in-chief. (Tr 12/12/12 p 10). The trial court also held that suppression would not be required had Detective Brown advised defendant of his "Miranda" rights. (Tr (12/12/12 p 9).

The People will further supplement the facts as needed in their argument.

Issue I

MRE 410(4) prohibits the admission of a defendant's statement made "in the course of plea discussion with an attorney for the prosecuting authority." Defendant entered into plea discussions with the prosecuting attorney and a plea agreement was reached before June 8, 2011. Defendant made a voluntary and second statement on June 8, 2011; but before he did so, both his attorney and Sgt. Mitch Brown informed him that the plea agreement reached prior to June 8, 2011, would not get better. Since defendant's June 8, 2011, statement was not made in the course of plea discussion, the trial court's order suppressing defendant's statement should be reversed.

Standard of Review

Questions relating to the rules of evidence are questions of law calling for *de novo* review. *People v Carpentier,* 446 Mich 19; 521 NW2d 195 (1994).

Argument

MRE 410 precludes admission of a statements made in various situations including:

> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.

The rules of statutory construction are used when interpreting the court rules. Court rules are "construed in accordance with the ordinary and approved usage of the language; it should also be construed in light of its purpose and the object to be accomplished by its operation." *Taylor v Anesthesia Associates of Muskegon, PC,* 179 Mich App 384, 386; 445 NW2d 525 (1989).

The trial court, relying on MRE 410(4) suppressed the statement defendant made to Sgt. Brown. The trial court also found that had Sgt. Brown advised defendant of his rights under *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 691 (1966), any waiver of those rights would have also waived any rights defendant had under MRE 410.

MRE 410

No Reasonable Expectation Test

In *People v Dunn*, 446 Mich 409, 415-416; 521 NW2d 255 (1994) the Court examined the language in MRE 410 as it existed before the 1991 amendments. Prior to the 1991 amendments, MRE 410 read:

> Inadmissibility of Pleas, Offers of Pleas, and Related Statements.
>
> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime is admissible in a criminal proceeding for perjury or false statement.
>
> *Dunn* at 414.

The Court in *Dunn* held that the rule applied only where (1) defendant has a subjective expectation to negotiate a plea when he made his statements and (2) defendant's subjective expectation was reasonable under the circumstances. In this case the majority held that *Dunn* still applied to MRE 410 after the 1991 amendments. In contrast, Judge Wilder, in his dissent,

found *Dunn* to be inapplicable and believed MRE 410 should be examined on its plain language.

Regardless of whether or not the test set forth in *Dunn* applies to the 1991 amendments, the circumstances of this case do clearly establish that plea negotiations concluded before defendant made his June 8th statement.

Federal cases interpreting the federal rules of evidence are often considered when interpreting the Michigan Rules of evidence. See *People v Fomby*, 300 Mich App 46; 831 NW2d 887 (2013). Federal Rule of Evidence 410 is similar to MRE 410.

FRE 410	MRE 410
A statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.	Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.

While the federal and state rules are similar, the notable distinction is that the Federal Rule of evidence applies to a statement "made during plea discussions with an attorney...." while the state rule applies to any statement "made in the course of plea discussions with an attorney..."

Some Federal courts have applied the two-step approach similar to the one set forth in *Dunn* to determine whether a statement was made during

plea discussions, that is, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and whether the accused's expectation was reasonable given the totality of the objective circumstances." *United States v Robertson,* 582 F2d 1356, 1366 (CA5, 1978); *United States v Sayakhom,* 186 F3d 928, 936 (CA9, 1999).

Statements Not Made During the Course of Plea Discussions

Defendant made his first statement to Sgt Brown and Attorney Lazzio on March 15, 2011. The purpose of the first meeting was to give Smart the opportunity to provide Brown with information in the hopes of receiving a favorable plea disposition on an unrelated case. Attorney Lazzio contacted Assistant Prosecutor Riggs and proposed to allow defendant to provide information on knowledge he had about a murder in exchange for possible consideration on defendant's pending carjacking case. The record indicates that the sole purpose of the first meeting was to provide information in order to secure a plea disposition on the defendant's carjacking case. Lazzio testified that she set up ground rules regarding defendant's first statement and secured a commitment that statements he made on March 15, 2011, would not be used against him and would be considered to determine if defendant would be given the opportunity to plea to a lesser charge on the carjacking. Riggs directed Sgt. Mitch Brown, to set up an interview with Attorney Lazzio and Defendant Smart. Riggs did not attend this meeting.

The People do not seek to admit the first statement into evidence at defendant's trial. However, an understanding of the circumstances of the first statement is critical because, by comparison, the circumstances of the second statement are the polar opposite with respect to whether or not defendant made a statement in the course of plea discussions. The polarity of the circumstances of the respective statements illustrates why defendant's June 8th statement was not made in course of plea discussions. This is independent of the issue of whether MRE 410 requires the physical presence of an attorney for the prosecuting authority, which is dealt with *infra*.

The prosecutor offered defendant an opportunity to plea in his carjacking case to a reduced charge with other terms and conditions. The parties reached an agreement before June 8th as evidenced by the signed plea agreement sheet. (See Appendix 27a). Defendant's attorney did not schedule the second meeting for the purpose of re-opening plea discussions, and she had advised defendant there would be no further discussions. The specific reason she arranged a second meeting between the defendant and Sgt. Brown was because she told defendant that plea negotiations were over and she wanted Sgt. Brown to also make this fact clear to defendant.

In examining whether defendant had a reasonable expectation that his statement was made in the course of plea discussions, the trial court even pointed out that, "there was very little discussion about whether a plea agreement was going to be altered and *it was pretty apparent that it wasn't.*"

(Tr 12/12/12 p 6) (Emphasis added). The trial court's statement shows that the trial court made a finding of fact that defendant did not have a **reasonable** expectation that his conversation to Sgt. Brown on June 8, 2011, was during the course of plea discussions. The trial court's holding that MRE 410 precluded admission of the June 8th statement conflicts with the courts statement that at the time of the June 8th statement there would be no change in the previous agreed upon plea disposition.

When the trial court made its ruling from the bench, it focused on defendant's "perspective" that the second interview would re-open plea discussions but failed to address the issue of whether defendant's perspective was reasonable. (Tr 12/12/12 p 8). The trial court erred by failing to incorporate in its ruling its prior statement that "it was apparent" that there would be no further plea discussions.

The phrase "in the course of plea discussions" means that the discussion is more than one-sided and is ongoing at the time of a statement and requires at least two participants. A one-sided attempt to initiate plea discussions is not synonymous with "in the course of plea discussions.

Before March 15th the prosecutor and defense attorney began talking about a potential plea agreement on the carjacking case. They agreed that defendant would give a statement and at least both parties had the mutual understanding that the statement would be considered to determine if there would be an offer to plea on the carjacking. Thus, by the time of March 15

each party had negotiated and reached an agreement about the conditions under which defendant gave his statement. Defendant's March 15th statement was conditioned with the understanding that it would be considered in deciding whether defendant's carjacking charge would be reduced.

There was no such agreement when defendant gave his statement on June 8th. By the time June 8th arrived, plea discussions had been concluded. Discussions had not been reopened. Defendant was told that the previous plea offer would not change. The subsequent discussion about the murder was not subject to a promise or understanding that the June 8th statements would be considered to add or delete terms to the existing plea agreement. While the prosecutor was interested in learning what defendant had to say about the murder, there is nothing in the record to suggest any agreement, understanding, or suggestion that defendant's June 8th statement would be considered towards the carjacking case.

Defendant's statement, made in hopes of a more lenient agreement, is a far cry from a statement made "in the course of plea discussions."

The majority refers to "tweaks" in the signed agreement made on June 9, 2011 when defendant entered his plea, and specifically referred to the agreement that defendant would not be charged in the murder. However, at the evidentiary hearing, defendant testified that on March 15th, he understood that if he cooperated and testified about his knowledge of the murder he would not be charged with the murder. (Transcript April 11, 2014 pp 22-23). Thus,

the People respectfully submit that the majority clearly erred in finding that the agreement not to charge defendant with murder provided he provide truthful testimony is not a product of his June 8th statement.

Ultimately, the issue goes to whether defendant's June 8th statement was a product of plea discussions. Even if the terms of the plea agreement changed on June 9th, if the prosecuting authority is not engaged with defendant in plea discussions on June 8th, defendant's statement is nothing more than a voluntary statement not subject to MRE 410.

Whether the majority is correct that *Dunn* is applicable to the current version of MRE 410 or Judge Wilder is correct that the outcome should be based on the plain language of the rule. The result is the same. The June 8th statement was not made during the course of plea discussions nor did the defendant have any reasonable expectation that the conversation on June 8th was being made during the course of plea discussions.

PHYSICAL PRESENCE OF ATTORNEY FOR THE PROSECUTING AUTHORITY

Although the People did not present an argument concerning whether MRE 410 required the physical presence of an attorney for the prosecuting authority, both the majority and dissent examined this issue. The People submit that, while they are not attempting to now incorporate this issue in their argument for the admissibility of the statement June 8, 2011, the issue is ripe for Supreme Court consideration.

Other than *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996), the People are unaware of any published Michigan case that has addressed whether or not MRE 410 requires the physical presence of an attorney for the prosecuting authority. However, *Hannold*, did not explain their holding that MRE 410 required the physical presence of an attorney for the prosecuting attorney. Nor did the court examine the phrase "during the course of plea negotiations with..."

Federal circuits have examined this issue as it relates to FRE 410 and some have held that the physical presence of the attorney for the prosecuting authority is actually required. See *United States v Posey,* 611 F2d 1389, 1390–91 (CA5, 1980) ("[law enforcement's] statement that he would bring [defendant's] cooperation to the attention of the prosecutor and the court did not give [defendant] a reasonable expectation that he was negotiating a bargain[;][r]ather it is the antithesis of a bargained plea"); *United States v Pantohan,* 602 F2d 855, 857 (CA9, 1979) ("[defendant] apparently felt that cooperating with the ... agents was 'the only way out'[;][h]owever, he knew that he was not under arrest at the time of the statements, there was no 'promise' other than to tell the United States Attorney of the cooperation, and there was no plea offer [and thus] no plea bargaining"); *United States v O'Neal,* 1993 WL 133807, 8 (CA6, 1993) ("it would not be objectively reasonable to believe that the police had been authorized to negotiate a plea on behalf of the prosecutor if they could not guarantee results"); *United States*

v Brumley, 217 F3d 905, 910 (CA7, Cir.2000) ("the phrase 'with an attorney for the government' was added to Rule [410] in 1979 precisely to prevent the argument that a voluntary statement made to law enforcement is rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea").

Other federal courts have declined to adopt a bright-line rule and instead examine the circumstances under which the statement was made. See *United States v Serna,* 799 F2d 842, 849 (CA2, 1986) ("[w]e think the rule can fairly be read to require the *participation* of a Government attorney in the plea discussions, but not necessarily his physical *presence* when a particular statement is made to agents whom the attorney has authorized to engage in plea discussions[;] ... [b]ecause the agents were acting under the AUSA's authority in determining whether [defendant] would in fact cooperate, [defendant's] statement was properly excluded"), *cert. denied,* 481 US 1013, 107 S Ct 1887, 95 L Ed 2d 494 (1987), *overruled on other grounds by United States v DiNapoli,* 8 F3d 909 (CA2 1993) (en banc); *Rachlin v. United States,* 723 F.2d 1373, 1376 (CA8, 1983) ("1979 amendments to Rule [410] ... limit[ ] the rule's application to plea negotiations between the defendant ... and an attorney for the government[;] ... [however,] [w]e carved out an exception to this rule ... where the law enforcement official is acting with express authority from a government attorney") (internal quotation omitted); *United States v Gallo,* 2000 WL 852453, 8 (D Conn 2000) ("the Second Circuit has

construed the rules 'to require the participation of a Government attorney in the plea discussions, but not necessarily his physical presence when a particular statement is made to agents whom the attorney has authorized to engage in plea discussions' ") (quoting *United States v Serna,* 799 F2d at 849); *United States v. Bridges,* 46 FSupp2d 462, 467 (ED Va 1999) (statements made to government agents fell within the scope of Rules 410 and 11(e)(6) where they were "made in response to a direct question by a government agent whose conduct, however unintentionally, created the appearance of authority to initiate negotiations, authority that the government agent did not clearly and explicitly disclaim"), *aff'd,* 217 F3d 841 (CA4, 2000); *United States v Fronk,* 173 FRD 59, 68–69 (WDNY1997) (statements made during interview with government agents fell within scope of Rules 410 and 11(e)(6)where defendant's attorney and the government agents spoke with the prosecutor prior to the interview).

Both the majority and Judge Wilder found that in certain circumstances, MRE 410 would apply even in when a statement is made without the physical presence of the prosecuting attorney. As a matter of equity, the People cannot disagree based on the current language of MRE 410. The People do suggest if a statement is made outside the presence of the attorney for the prosecuting attorney, that this court adopt a "totality of the circumstances test to determine if the statement was made in the course of plea discussions. Factors to consider would include the prosecutor's participation in arranging

for defendant's statement, whether there was an agreement between the prosecuting attorney and the defense as to how the statement would be used and whether the statement would be considered to determine whether a defendant's current charges would be reduced or dismissed and whether the police acted under the direction or authorization of the prosecuting attorney. See *United States v McCauley,* 715 F3d 1119, 1125-1126 (CA 8, 2013).

The People submit that the proposed test would be a fair and equitable way to evaluate such statements and without allowing every defendant to use MRE 410 as a parachute to suppress any and every voluntary statement.

Issue II

On two occasions Sgt. Mitch Brown took a statement from defendant concerning the homicide of victim Megan Kreuzer. Defendant's attorney was present both times defendant made a statement to Sgt. Brown. At the time defendant made his statements he was in custody for an unrelated felony, but not in custody for the homicide. Therefore, Brown had no duty to advise defendant of his "Miranda Rights" because he was not in custody for the homicide.

Standard of Review

Whether defendant was in custody for purposes of Miranda is a question of law requiring de novo review. In a motion to suppress a defendant's statement, the trial court's findings of fact are reviewed for clear error and its ultimate ruling reviewed de novo. *People v Elliott,* 295 Mich App 623, 631; 815 NW2d 575 (2012), lv gtd 491 Mich 938 (2012).

Argument

The Court of Appeals declined to decide whether defendant was entitled to be advised of his *Miranda* rights. The trial court held that defendant's statement to Sgt. Brown on June 8, 2011 was inadmissible because Brown did not advise defendant of his *Miranda* rights. The trial court erroneously concluded that since defendant was incarcerated on a matter unrelated to the present case when he spoke to Sgt. Brown, he was in custody.

When an individual is in custody *on the offense for which he is being questioned*, an interrogating officer must advise the defendant of his right *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 691 (1966). In

Miranda, the Supreme Court established procedural safeguards to protect this right, which require that "the police must advise a suspect before custodial interrogation that the suspect has the right to remain silent, that anything the suspect says may be used against him, and that the suspect has a right to the presence of retained or, if indigent, appointed counsel during questioning." *People v Dennis,* 464 Mich 567, 572–573; 628 NW2d 502 (2001).

In *Howes v Fields*, _____ US ___: 132 S Ct 1181; ___ L Ed 2d _____ (Feb 21, 2012), the United States Supreme Court held that a prison inmate was not in custody for purposes of Miranda when he was questioned about a crime unrelated to the reason for his incarceration. The prisoner had been taken from his prison cell to a conference room to talk to police officers who were not affiliated with the prison. The Court articulated the factors that formed the basis of their holding:

> Most important, respondent was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted. ... Moreover, respondent was not physically restrained or threatened and was interviewed in a well-lit, average sized conference room, where he was "not uncomfortable." He was offered food and water, and the door to the conference room was sometimes left open...All of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave.
>
> *Id.*, p 1193 (Citations omitted).

In *People v Elliott,* 494 Mich 292; 833 NW2d 284 (2013) this Court held that a parolee who was in jail during his interview with his parole officer was not in custody for purposes of Miranda.

In *People v Cortez*, ___ Mich App ___; ___ NW2d ___; 2013 WL 9151282 (March 12, 2013) the court held that a defendant who was a prison inmate was not in custody for purposes of Miranda when he was questioned about contraband found in his cell. The Court further found that transporting the inmate from one location in the prison to the area where he was interrogated did not render him "in custody" for the interrogation. The Court quoted *Fields* to explain why interrogating an individual who is an inmate on an unrelated case is different from an individual who is removed from his domicile and accustomed to his surroundings for the specific purpose of incarceration:

> Questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest. In the paradigmatic *Miranda* situation—a person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures. A person who is "cut off from his normal life and companions," *Shatzer*[1], [559 US] at ----; 130 S Ct at 1220, and abruptly transported from the street into a "police-dominated atmosphere," *Miranda,* 384 U.S. at 456, may feel coerced into answering questions.
>
> By contrast, when a person who is already serving a term of imprisonment is questioned, there is usually no such change. "Interrogated suspects who have previously been convicted of crime live in prison." *Shatzer,* 559 U.S. at ----; 130 S Ct at 1224. For a person serving a term of incarceration, we reasoned in *Shatzer,* the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same "inherently compelling pressures" that are often present when a suspect is yanked from familiar surroundings in the outside world and subjected to interrogation in a police station.

[1] *Maryland v Shatzer*, 599 US __; 130 S Ct 1213; 175 L Ed 2d 1045 (2010)

Id. at ----; 130 S Ct at 1219. [*Fields,* 565 U.S. at ----; 132 S Ct at 1190-1191.]

> Second, a prisoner is unlikely to agree to talk to police in the hopes that he will be able to go home if he cooperates. *Id.,* 565 U.S. at ----; 132 S Ct at 1191. "[W]hen a prisoner is questioned, he knows that when the questioning ceases, he will remain under confinement." *Id.* Third, a prisoner "knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence" or lack the power to give him early release on parole. *Id.* In contrast, a person who is not incarcerated might feel compelled to talk out of fear of reprisal for remaining silent or out of hope for lenient treatment.
>
> Id., at Slip Op.7-8

When Defendant met with Sgt. Brown, he had already been lodged in the Genesee County jail on an unrelated carjacking case since at least June 17, 2010.[2]. He had not been arrested, lodged, or charged on the present case at that time. At the time of his statement to Brown, his residence was the Genesee County jail. His attorney was present during the entire time and had advised him that if he were to make incriminating statements she would advise him to stop the interview. Defendant was under no police compulsion to make a statement and knew he had the power to stop the interview at any time. The facts in this case are analogous to the facts in *Fields* because the reason that the defendant was in the custody of law enforcement was completely unrelated to the crime about which he was talking to Sgt. Brown.

[2] Defendant was arraigned in circuit court for the carjacking case on June 17, 2010. See Attached Docket Entries for People v Smart, CC No 10-27149-FC/Neithercut

Therefore, Sgt. Brown had no obligation to advise defendant of his Miranda rights.

Relief

For the reasons stated above, the People ask this Honorable Court to grant leave to appeal and reverse the Court of Appeals majority opinion and reverse the trial court's order granting defendant's motion to suppress.

Dated: April 2, 2014

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