No. _____

In The
SUPREME COURT OF THE UNITED STATES

GARY PATRICK LEWIS,
***Petitioner*,**

v.

MICHIGAN,
***Respondent*.**

On Petition for a Writ of Certiorari
to the Supreme Court of Michigan

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Michigan Supreme Court Order After Remand 5-17-19

28232
CKG

Order

May 17, 2019

156806

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

GARY PATRICK LEWIS,
Defendant-Appellant.

SC: 156806
COA: 325782
Wayne CC: 14-006454-FH

/

On order of the Court, the application for leave to appeal the November 2, 2017 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MCCORMACK, C.J. (*concurring*).

I concur in the order denying leave to appeal and write separately to highlight two errors I believe the Court of Appeals made in its published opinion and to reiterate my hope that the United States Supreme Court will clarify the proper application of harmless-error analysis in this context. Given the current law, I cannot say that the Court of Appeals erred in its conclusion that the error here was harmless. I reluctantly agree with the order denying leave to appeal.

I think the Court of Appeals' analysis of the first factor that *Coleman v Alabama*, 399 US 1 (1970), identifies as important to the role for counsel at a preliminary examination is flawed. The first *Coleman* factor is "the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over." *Id.* at 9. The panel reasoned that "[g]iven that defendant was convicted at trial on the basis of sufficient evidence, the possibility that counsel could have detected preclusive flaws in the prosecution's probable-cause showing is moot." *People v Lewis (On Remand)*, 322 Mich App 22, 31 (2017). But in our prior opinion, we explained that *Coleman* does not permit a court to presume that if a defendant is ultimately convicted after a fair trial, he suffered no harm from the deprivation of counsel at the preliminary examination. *People v Lewis*, 501 Mich 1, 11 (2017). While the Court of Appeals cited that passage in its analysis, it nonetheless stated that the fact of the conviction "is relevant to our consideration of the first *Coleman* factor." *Lewis (On Remand)*, 322 Mich App at 31. Whatever the

correctness of that statement (and I express no opinion on it), the panel then said that the defendant's conviction made this factor *moot*. That is, the Court of Appeals seemingly made the fact of the conviction at trial dispositive to its analysis of the first factor, which this Court said is not permissible.[1]

The panel's analysis of the second *Coleman* factor is also flawed. That factor is "the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial." *Coleman*, 399 US at 9. The Court of Appeals relied heavily on the fact that trial counsel was given a transcript of the preliminary examination in concluding that this factor weighed in favor of finding the error harmless. But this misses the point: a transcript of a preliminary examination conducted without the benefit of defense counsel doesn't address the problem that the prosecution's witnesses were not cross-examined at that hearing. And like the panel's analysis of the first factor, this reasoning would result in finding error harmless in every case conducted in absence of defense counsel: preparing a transcript isn't the problem; it's that the transcript is unhelpful. Thus, counsel's possession of the preliminary examination transcript is entitled to little weight in the analysis.

Despite these flaws, I believe the Court of Appeals correctly concluded that any error in depriving the defendant of counsel at the preliminary examination was harmless. The panel correctly analyzed the remaining *Coleman* factors and specific circumstances of this case. But I reach this conclusion largely because *Coleman* takes "the two perhaps most intuitive options for assessing harm off the table," *Lewis*, 501 Mich at 12, leaving reviewing courts without much guidance about how to apply harmless-error review in this context. Guidance from the United States Supreme Court would be welcome. I hope that Court will either provide such guidance or clarify "whether the *Coleman* harmless-error review remains a sustainable rule when a defendant is denied counsel at a preliminary examination." *Lewis*, 501 Mich at 16 (MCCORMACK, J., concurring).

BERNSTEIN and CLEMENT, JJ., join the statement of MCCORMACK, C.J.

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[1] The Court of Appeals cited *Coleman* in support of its analysis of this factor, but its citation was to Justice White's concurring opinion, which of course is nonbinding. *Lewis (On Remand)*, 322 Mich App at 31, citing *Coleman*, 399 US at 18 (White, J., concurring).

APPENDIX B

Court of Appeals Opinion on Remand 11-2-17

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v GARY PATRICK LEWIS, Defendant-Appellant.	FOR PUBLICATION November 2, 2017 9:00 a.m. No. 325782 Wayne Circuit Court LC No. 14-006454-FH

ON REMAND

Before: TALBOT, C.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of third-degree arson, MCL 750.74, and one count of second-degree arson, MCL 750.73(1). The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 17 to 30 years' imprisonment for each conviction. On appeal, we vacated defendant's convictions and remanded for a new trial on the basis that the denial of counsel at defendant's preliminary examination amounted to a structural error requiring automatic reversal. *People v Lewis*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2016 (Docket No. 325782), pp 3, 10, vacated in part and remanded ___ Mich ___ (2017). However, the Michigan Supreme Court reversed our judgment and remanded for application of the harmless-error standard. *People v Lewis*, ___ Mich ___, ___; ___ NW2d ___ (2017) (Docket No. 154396); slip op at 8, 11. For the reasons stated herein, we affirm defendant's convictions, holding that any error resulting from the denial of counsel at his preliminary examination was harmless, but remand to the trial court for a determination regarding whether, in light of *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), it would have imposed a materially different sentence.

I. FACTS AND PROCEDURE

In our earlier opinion, we stated the relevant facts as follows:

> At the start of defendant's preliminary examination, the trial court asked defendant to state his full name on the record. In response, defendant stated, "I'm not talking. I don't have no attorney. This man disrespecting me. You all violating my rights. I'm through with it. I'm through with it." The trial court then stated that it had appointed lawyers for defendant on multiple occasions, that

> defendant had indicated his displeasure with each of the lawyers that were appointed, and that defendant had in fact grieved each of the prior counsel.
>
> In light of this, the trial court found that defendant had "elected that he would prefer not to have a lawyer to represent him and we're going to proceed." In response, defendant stated, "I never said that." The trial court then reiterated that the preliminary examination would proceed and that defendant's former trial counsel, Brian Scherer, would act as stand-by counsel.
>
> As the prosecution called Mollison Folson to testify, defendant stated, "I'm not going to participate in this legal bullshit." The court then warned defendant that he would be expelled from the courtroom if he continued his outburst. Defendant continued to interrupt the court while using profane language, so the trial court expelled defendant from the courtroom. After defendant was removed, the trial court told Scherer that he was free to leave as well. The court then continued with the preliminary examination, and after hearing testimony from six witnesses, the trial court held that there was sufficient probable cause to bind defendant over for trial. [*Lewis*, unpub op at 1-2.]

As provided above, defendant was subsequently convicted of four counts of third-degree arson and one count of second-degree arson following a jury trial, and appealed as of right. Bound by Michigan caselaw holding that the complete deprivation of counsel at a critical stage of a criminal proceeding requires automatic reversal, we concluded in our prior opinion that because defendant was denied counsel at his preliminary examination, a critical stage of the proceedings, reversal of his convictions was required. *Lewis*, unpub op at 3, 10. However, the two-judge majority in that opinion, citing the United States Supreme Court's decision in *Coleman v Alabama*, 399 US 1, 11; 90 S Ct 1999; 26 L Ed 2d 387 (1970), expressed the belief that the deprivation of counsel at a critical stage of a criminal proceeding should not always require reversal, and that harmless-error review should apply where the deprivation does not affect the entire proceedings. *Id*. at 4-5.

The Supreme Court agreed, relying on *Coleman* to reverse our judgment and hold that a claim of error based on the deprivation of counsel at a preliminary examination is subject to harmless-error review. *Lewis*, ___ Mich at ___; slip op at 7-8, 11.[1] It then directed us, on remand, to consider "the substantive criteria or the procedural framework that should attend" harmless-error review, and apply that standard to the facts at issue. *Id*. at ___; slip op at 10-11.

[1] Specifically, our Supreme Court stated: "Although it is short on explanation for its remedy, the [*Coleman*] Court plainly held that the deprivation of counsel at a preliminary examination is subject to harmless-error review under the federal Constitution. Accordingly, we apply that decision . . . ." *Lewis*, ___ Mich at ___; slip op at 7 (citations omitted).

II. HARMLESS-ERROR REVIEW

With regard to the procedural framework that should be applied, for preserved[2] non-structural constitutional errors, the prosecution must prove that the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). However, determining the substantive criteria that should attend harmless-error review under these circumstances – where a defendant has been denied counsel at a preliminary examination – is more difficult. The Supreme Court admitted that it was uncertain "about just how a court is to evaluate the effect of this error on a verdict," *Lewis*, ___ Mich at ___; slip op at 8, but provided "guideposts," stating:

> At each extreme, we know what is not permitted. At one end, a court may not simply presume, without more, that the deprivation of counsel at a preliminary examination must have caused the defendant harm. Although consistent with the presumption accorded to the complete denial of counsel at some other stages of a criminal proceeding, such an approach would be treating the error as structural – a result foreclosed by *Coleman*. Neither, however, may we presume the opposite. . . . *Coleman* does not permit us to presume that a defendant, who was ultimately convicted at an otherwise fair trial, suffered no harm from the absence of counsel at his preliminary examination. And that is true even if no evidence from the preliminary examination was used at trial, and even if defendant waived no rights or defenses because of the absence of counsel at the preliminary examination. [*Id*. at ___; slip op at 9 (citations omitted).]

Thus, contrary to the dicta in our earlier opinion, *Lewis*, unpub op at 3-5, we cannot conclude that the error here was harmless simply because defense counsel conceded that no evidence from the preliminary examination was used at trial, and no rights or defenses were waived by defendant's lack of participation in the preliminary examination.

The United States Supreme Court's decision in *Coleman* provides further guidance. There, the Court identified four reasons that having counsel at a preliminary hearing may be essential to protecting a defendant's rights:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at

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[2] In our prior opinion, we concluded that, despite defendant's conduct at the preliminary examination, defendant did not forfeit his argument regarding the denial of counsel because the prosecution failed to raise the issue on appeal. *Lewis*, unpub op at 3 n 4.

> the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail. [*Coleman*, 399 US at 9.]

These factors have been used by other courts to determine whether the deprivation of counsel at a preliminary hearing amounted to harmless error. See, e.g., *State v Canaday*, 117 Ariz 572, 575-576; 574 P2d 60 (1977); *State v Brown*, 279 Conn 493, 510; 903 A2d 169 (2006);[3] *People v Eddington*, 77 Mich App 177, 190-191; 258 NW2d 183 (1977).

Additionally, in her concurring opinion in this case, Justice McCormack opined that counsel's presence at the preliminary examination may be essential to negotiating plea deals. *Lewis*, ___ Mich at ___ (MCCORMACK, J., concurring); slip op at 2. And defendant suggests, in his brief on remand,[4] that counsel could discover the need to file pretrial motions at a preliminary examination. Based on the foregoing, we conclude that to determine whether the denial of counsel at a preliminary examination amounts to harmless error, courts must consider the factors discussed in *Coleman*, as well as any other factors relevant to the particular case, including the lost opportunity to negotiate a plea deal, and any prejudice resulting from the failure to file pretrial motions.

III. APPLICATION OF HARMLESS-ERROR REVIEW TO THE FACTS

Turning to the specific facts at issue and the arguments raised by defendant on remand, we hold that any error resulting from the denial of counsel at defendant's preliminary examination was harmless beyond a reasonable doubt.

Looking to the first *Coleman* factor, defendant appears to argue that counsel could have objected to his bindover on the basis that no evidence was presented regarding the "condition of the buildings" he was accused of damaging, or that the house on Russell Street qualified as a dwelling. However, a review of the preliminary examination transcript and the relevant law makes clear that no such arguments by counsel would have altered the court's decision to bind defendant over for trial. Defendant fails to explain what he means by the "condition of the buildings," but assuming that he is referring to the element of both second- and third-degree arson requiring that a defendant burn, damage, or destroy buildings or dwellings by fire or explosives to be convicted, MCL 750.73(1); MCL 750.74(1)(a), the prosecution presented testimony at the preliminary examination regarding fires at each address. Further, defendant was convicted of third-degree arson for 20527 Russell Street, which in contrast to second-degree

[3] We recognize that caselaw from foreign jurisdictions is not precedentially binding in Michigan, but it may be considered persuasive. *People v Blanton*, 317 Mich App 107, 122 n 6; 894 NW2d 613 (2016).

[4] On remand, this Court granted defendant's motion to file a supplemental brief. *People v Lewis*, unpublished order of the Court of Appeals, entered August 28, 2017 (Docket No. 325782).

arson (requiring that damage be done to a dwelling for conviction), requires only that damage be done to buildings or structures.[5]

Moreover, this Court has held that "the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless." *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010). Although "*Coleman* does not permit us to presume that a defendant, who was ultimately convicted at an otherwise fair trial, suffered no harm from the absence of counsel at his preliminary examination[,]" *Lewis*, ___ Mich at ___; slip op at 9, it is relevant to our consideration of the first *Coleman* factor. Given that defendant was convicted at trial on the basis of sufficient evidence, the possibility that counsel could have detected preclusive flaws in the prosecution's probable-cause showing is moot.

Defendant's arguments with regard to the second *Coleman* factor are no more persuasive. He asserts that he had no opportunity for cross-examination at the preliminary examination because the court precluded his participation, and that as a result, witnesses were never asked to provide a description of the person they saw committing the crimes, making impeachment impossible. But "[a] defendant's opportunity to cross-examine witnesses at a preliminary hearing is only a limited one." *Canaday*, 117 Ariz at 576. See also *Adams v Illinois*, 405 US 278, 282; 92 S Ct 916; 31 L Ed 2d 202 (1972) (recognizing limitations on the use of preliminary hearings for discovery and impeachment purposes). And although defendant was unrepresented at the preliminary examination, he was appointed new counsel at the next hearing, who it appears was given a transcript of the preliminary examination. This newly-appointed counsel could have used the transcript for impeachment at trial. See *Thomas v Kemp*, 796 F2d 1322, 1327 (CA 11, 1986) (concluding that the absence of counsel at a preliminary hearing was harmless error where, *inter alia*, the defendant's "counsel had access to the transcript of the preliminary hearing because he used the transcript to impeach the testimony of the State's main witnesses").

Further, defendant's argument that testimony about the perpetrator's identity at the preliminary examination would have been useful at trial for impeachment purposes, is purely speculative. Defendant references inconsistencies between the witnesses' descriptions at trial, but the jury heard this testimony, as well as defense counsel's closing argument calling attention to the inconsistencies, and still voted to convict. See *Ditch v Grace*, 479 F3d 249, 257 (CA 3, 2007) (concluding "that the denial of counsel ultimately did not have a substantial or injurious effect on the jury's ultimate verdict" because "[t]here was substantial evidence of guilt, and the jury was well-apprised of the weaknesses in [the witness's] identification testimony[,]" despite the fact that trained counsel could have conducted a cross-examination of the witness at the

[5] Specifically, MCL 750.74 provides, in pertinent part:

> (1) Except as provided in sections 72 and 73, a person who does any of the following is guilty of third degree arson:
>
> (a) Willfully or maliciously burns, damages, or destroys by fire or explosive any building or structure, or its contents, regardless of whether it is occupied, unoccupied, or vacant at the time of the fire or explosion.

preliminary hearing to expose weaknesses in his testimony and for use as an impeachment tool at trial).[6]

With respect to the third *Coleman* factor, defendant argues that his inability to cross-examine witnesses at the preliminary examination hampered his pretrial discovery, but fails to identify any evidence used at trial that counsel could have discovered by virtue of participation in the preliminary examination. And neither the fourth *Coleman* factor, nor the additional factor identified by Justice McCormack, affect our determination that the deprivation of counsel at defendant's preliminary examination was harmless error. Defendant does not argue that counsel could have requested an early psychiatric evaluation, and the record establishes that he was referred to the Forensic Center before the preliminary examination. Further, defendant lost no opportunity to negotiate a plea deal because he lacked counsel. At the August 8, 2014 hearing, the prosecutor stated that the plea deal offered to defendant would be available until the final conference.

Defendant's additional arguments related to the specific circumstances of his case also fail. He asserts first that he was denied the defense of misidentification because counsel could have moved for a corporeal lineup at the preliminary examination based on the fact that Folson had identified someone other than defendant in a photographic lineup. Folson was not, however, the only witness who identified defendant at the preliminary examination. Lieutenant Jamel Mayers testified that he apprehended defendant, who matched the description provided by Folson, and Lieutenant Daniel Richardson testified that he also apprehended defendant, who matched the description provided by Ronnie Blanton. Moreover, defendant merely speculates that the result of a corporeal lineup would have been favorable to his defense. But as we concluded in our earlier opinion, the use of a photographic lineup instead of a corporeal lineup did not affect defendant's substantial rights. *Lewis*, unpub op at 6-7.

Defendant also argues that counsel could have questioned the officers about the lighters and moved to suppress them if they were lost, asserting that the lighters were incapable of starting a fire. However, he fails to explain what such questioning would have revealed, and it is unclear how or why counsel would have moved to suppress lost items. Moreover, counsel appointed for defendant at the next hearing could have filed a motion to suppress such evidence before trial, but chose not to do so. And regardless, no prejudice could have resulted from the failure to suppress the lighters because they were not introduced at trial. Instead, photographs of the lighters were introduced, and defendant does not argue that the photographs were improperly admitted.

We note further that, as in *Canaday*, defendant was appointed new counsel at the hearing after the preliminary examination. Neither his newly appointed counsel, nor his counsel at trial, ever argued that defendant was prejudiced by the denial of counsel at the preliminary examination. This suggests that neither defendant, nor his attorneys, "immediately perceived

[6] We note that, unlike in *Ditch*, it cannot be said that the evidence of guilt at trial was substantial. The only evidence linking defendant to the crimes, other than the identifications, were the lighters found in his pocket. Nonetheless, the jury found defendant guilty.

any prejudice" stemming from defendant's failure to be represented at the preliminary examination. *Canaday*, 117 Ariz at 575.

Based on the foregoing, we hold that any error resulting from the denial of counsel at defendant's preliminary examination was harmless beyond a reasonable doubt. Accordingly, we affirm his convictions.

IV. SENTENCING

Because we conclude that the deprivation of counsel at the preliminary examination was harmless error, we must address the sentencing issue raised by defendant on appeal. See *Lewis*, ___ Mich at ___; slip op at 11 ("If the Court of Appeals concludes that the error was harmless, it must also address the sentencing issue raised in defendant's brief in that Court."). Prior record variable (PRV) 5 was scored correctly, but defendant was sentenced before our Supreme Court decided *Lockridge*, and the facts used to score offense variable (OV) 9 were not found beyond a reasonable doubt by the jury or admitted by defendant. Thus, the mandatory application of the guidelines at sentencing violated defendant's Sixth Amendment rights. And because the scoring affected the sentencing guidelines range, defendant is entitled to a remand to the trial court for a determination regarding whether it would have imposed a materially different sentence but for the unconstitutional restraint on its sentencing discretion. See *Lockridge*, 498 Mich at 395-397, 399.

V. CONCLUSION

We affirm defendant's convictions, holding that any error resulting from the denial of counsel at his preliminary examination was harmless, but remand to the trial court for a determination regarding whether it would have imposed a materially different sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Christopher M. Murray
/s/ Deborah A. Servitto

APPENDIX C

Michigan Supreme Court Opinion 7-31-17

Michigan Supreme Court
Lansing, Michigan

Syllabus

PEOPLE v LEWIS

Docket No. 154396. Argued on application for leave to appeal April 13, 2017. Decided July 31, 2017.

Gary P. Lewis was convicted after a jury trial in the Wayne Circuit Court of four counts of third-degree arson, MCL 750.74, and one count of second-degree arson, MCL 750.73(1). The court, Lawrence S. Talon, J., sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 17 to 30 years of imprisonment for each of his convictions. Lewis appealed his convictions as of right in the Court of Appeals, claiming that he was deprived of counsel at his preliminary examination and that this deprivation of counsel at a critical stage of the criminal proceedings against him amounted to a structural error requiring automatic reversal. In an unpublished per curiam opinion issued July 21, 2016, the Court of Appeals, TALBOT, C.J., and MURRAY and SERVITTO, JJ., concluding that automatic reversal was required under binding Michigan cases interpreting *United States v Cronic*, 466 US 648 (1984), vacated Lewis's convictions and remanded the case for a new trial. The Court of Appeals noted, however, that it did not believe reversal was required under a correct interpretation of federal law including *Coleman v Alabama*, 399 US 1 (1970), and that it would have applied a harmless-error test to determine whether reversal was required. The Supreme Court ordered and heard oral argument on whether to grant Lewis's application for leave to appeal or take other action. 500 Mich 918 (2016).

In a unanimous opinion by Justice LARSEN, in lieu of granting leave to appeal, the Supreme Court *held*:

The deprivation of defense counsel at a preliminary examination is subject to harmless-error review.

1. Under the Sixth Amendment of the United States Constitution, a defendant has a right to counsel during critical stages of a criminal prosecution. In this case, the prosecutor conceded that the preliminary examination is a critical stage. With regard to the proper remedy when the right to counsel at a preliminary examination is denied, *Coleman* held that a remand was necessary to determine whether that denial was harmless error, while *Cronic* stated that a trial is unfair if the accused is denied counsel at a critical stage of the trial, requiring automatic reversal. However, that statement in *Cronic*, a case involving an allegation of ineffective assistance of counsel, was dictum, whereas the holding in *Coleman* that the deprivation of counsel at a

preliminary examination is subject to harmless-error review was not. Accordingly, the holding in *Coleman* was binding.

2. In evaluating whether the deprivation of counsel at a preliminary examination was harmless, a court may not simply presume, without more, that the deprivation must have caused the defendant harm, nor may it presume that the error was harmless because of the subsequent conviction, even if no evidence from the preliminary examination was used at trial and the defendant waived no rights or defenses because of the absence of counsel. Given that the parties did not address either the substantive criteria or the procedural framework that should attend this review, the case was remanded to the Court of Appeals to consider those questions in the first instance.

Court of Appeals judgment reversed; Part II of the Court of Appeals opinion vacated; case remanded to the Court of Appeals for further proceedings.

Justice MCCORMACK, joined by Justice BERNSTEIN, concurring, signed the majority opinion in full and agreed that *Coleman* was controlling and binding in this case, but wrote separately to question whether harmless-error review under *Coleman* for cases in which counsel was denied at a preliminary examination was sustainable given the speculative nature of the inquiry, the evolution of and reasoning behind the United States Supreme Court's structural-error doctrine, and the unresolved tension between *Coleman* and *Cronic*.

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED July 31, 2017

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 154396

GARY PATRICK LEWIS,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

LARSEN, J.

This case confronts us with two precedents of the Supreme Court of the United States that initially seem to conflict. In one, the Supreme Court remarked that denial of counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal. See *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). In the other, the Court remanded for harmless-error analysis in a case in which it held that a defendant was denied counsel at a critical stage—his preliminary

examination. See *Coleman v Alabama*, 399 US 1, 11; 90 S Ct 1999; 26 L Ed 2d 387 (1970).[1] An error cannot be both structural and subject to harmless-error review. See *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

The defendant in this case was deprived of the right to counsel at his preliminary examination. Believing itself bound by precedent, the Court of Appeals resolved the conflict by holding, in effect, that *Cronic* controlled and granting defendant an automatic new trial. But *Cronic*'s discussion of the general remedy for complete denials of counsel was dictum; while *Coleman* held that the denial of counsel at a preliminary hearing—the very error at issue here—is subject to harmless-error review. When the Supreme Court's holdings and its dicta conflict, we are bound to follow its holdings. Accordingly, we reverse the judgment of the Court of Appeals, vacate Part II of its opinion, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Before his preliminary examination, defendant, Gary Lewis, had been appointed two lawyers. He was not pleased with either; indeed, the examining court noted that he had filed grievances against each of his previous attorneys. Defendant's most recently appointed attorney was present in the courtroom when defendant appeared for his preliminary examination. At the start of the hearing, the judge asked defendant to state

[1] Justice Brennan authored the plurality opinion in *Coleman*. Three other justices joined Justice Brennan's opinion in full, and one additional justice joined Part III of the opinion, which held that harmless error was the appropriate standard of review for a denial of counsel at a preliminary hearing. *Coleman*, 399 US at 10 n 4. Accordingly, Part III of Justice Brennan's opinion will be cited as the opinion of the Court throughout this opinion.

his name for the record. Defendant replied that he was "not talking"; that he didn't have an attorney; that he was being disrespected; that his rights were being violated; and that he was "through with it." The trial judge stated that he understood defendant to have "elected that he would prefer not to have a lawyer represent him" at the preliminary examination. Defendant explicitly disagreed: "I never said that." The court proceeded anyway, with defendant acting pro se, and appointed defendant's former attorney as standby counsel. Despite many warnings, defendant repeatedly disrupted the preliminary examination and was ultimately removed from the courtroom. At that point, the judge relieved standby counsel of his duties, and the prosecution continued with the preliminary examination unopposed. Defendant was bound over for trial.

Defendant was represented by counsel at trial and was convicted by jury of one count of second-degree arson and four counts of third-degree arson. He challenged his convictions in the Court of Appeals, arguing that the deprivation of counsel at his preliminary examination was a structural error requiring automatic reversal. Believing itself bound by precedent, the Court of Appeals agreed, overturned the convictions, and remanded for a new trial. *People v Lewis*, unpublished per curiam opinion of the Court of Appeals, issued July 21, 2016 (Docket No. 325782). The prosecution filed an application for leave to appeal in this Court, and we ordered oral argument on the application. *People v Lewis*, 500 Mich 897 (2016).

II. ANALYSIS

The prosecution concedes that defendant lacked counsel at his preliminary examination[2] and that the preliminary examination is a critical stage for the purposes of the Sixth Amendment right to counsel. US Const, Am VI. The prosecution's concession is unremarkable. In *Coleman v Alabama*, the Supreme Court of the United States held that Alabama's preliminary-hearing procedure was a critical stage. *Coleman*, 399 US 9-10 (opinion by Brennan, J.); *id.* at 12 (Black, J., concurring). Although there are variations in each state's preliminary-examination procedures, this Court has repeatedly commented that defendants have a constitutional right to counsel at preliminary examinations in Michigan. See, e.g., *People v Carter*, 412 Mich 214, 217; 313 NW2d 896 (1981); *People v Mitchell*, 454 Mich 145, 161 n 15; 560 NW2d 600 (1997). This case asks us to consider the remedy when that right to counsel is denied.

Two cases compete for our attention. The prosecution directs us to *Coleman*. In that case, the defendant was denied counsel at his preliminary hearing. The Supreme Court held that the hearing was a critical stage because of the "inability of the indigent accused on his own to realize the[] advantages of a lawyer's assistance" at such a

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[2] The prosecution also concedes that the examining court did not comply with the procedures set forth in MCR 6.005 or *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), citing *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975), for establishing an unequivocal waiver of the right to counsel. The prosecution does, however, raise two preliminary arguments related to defendant's ability to bring his denial-of-counsel claim. First, the prosecution argues that defendant did not preserve his claim because he did not raise in the circuit court his lack of counsel at the preliminary examination. The prosecution also argues that defendant's behavior in refusing to cooperate with his attorneys could be construed as a waiver of his right to counsel. We do not entertain these arguments, however, because they were not presented to the Court of Appeals.

proceeding.[3] *Coleman*, 399 US at 9-10 (opinion by Brennan, J.); *id.* at 12 (Black, J., concurring) (agreeing that "the preliminary hearing is a 'critical stage' "). A majority of the Court determined that the proper remedy was to remand the case to the Alabama courts to consider "whether the denial of counsel at the preliminary hearing was harmless error." *Id.* at 11, citing *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967).

Defendant points to *United States v Cronic*. There, the Court remarked that some "circumstances . . . are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 US at 658. The Court began with the "most obvious" of these circumstances—"complete denial of counsel"—and commented that "a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Id.* at 659.

Coleman's review for harmless error is obviously incompatible with the automatic reversal suggested by *Cronic*. Defendant asks us to hold, therefore, that *Cronic* silently abrogated *Coleman* and to automatically reverse his conviction. We decline to do so.

It is an elementary proposition that "state courts are bound by United States Supreme Court decisions construing federal law," including the Constitution. *People v Gillam*, 479 Mich 253, 261; 734 NW2d 585 (2007). But when two statements conflict,

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[3] These advantages, as articulated by the plurality in *Coleman*, include "expos[ing] fatal weaknesses in the State's case," cross-examining witnesses to generate potential impeachment evidence for use at trial, gaining discovery of the prosecution's case, and making arguments related to bail and psychiatric examinations. *Coleman*, 399 US at 9 (opinion by Brennan, J.).

we must prefer a holding of the Supreme Court to its dictum. See *Agostini v Felton*, 521 US 203, 237; 117 S Ct 1997; 138 L Ed 2d 391 (1997).

Cronic was a case about the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. The defendant was on trial in a mail-fraud case involving $9.4 million in transferred checks. *Cronic*, 466 US at 649. His retained counsel had withdrawn shortly before the scheduled trial and a young lawyer with a real-estate practice, and no criminal-trial experience, had been appointed to represent the defendant. *Id.* The Government's investigation had taken more than four years, but defense counsel was given only 25 days to prepare for trial. *Id.* The defendant challenged his conviction on the ground that, under the circumstances, he had been deprived of the effective assistance of counsel. The United States Court of Appeals for the Tenth Circuit agreed. *United States v Cronic*, 675 F2d 1126 (CA 10, 1982). Even though the defendant could not point to any specific errors in his counsel's performance, or prejudice flowing therefrom, the federal appellate court held that "no such showing is necessary 'when circumstances hamper a given lawyer's preparation of a defendant's case.' " *Cronic*, 466 US at 651. The Supreme Court reversed, holding that the defendant could "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." *Id.* at 666.

Along the way, the Court's opinion in *Cronic* contrasted claims of ineffective assistance with other errors "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. It deemed "[m]ost obvious" among them "the complete denial of counsel . . . at a critical stage of his trial." *Id.* at 659. But the question in *Cronic* was not whether the defendant had been denied counsel

completely, much less whether he had been completely denied counsel at a preliminary hearing. It was, instead, whether his counsel had provided effective assistance at trial. And so the Court's statements about the complete denial of counsel were dicta.[4]

The *Coleman* decision, by contrast, is directly on point. Although it is short on explanation for its remedy, the Court plainly held that the deprivation of counsel at a preliminary examination is subject to harmless-error review under the federal Constitution. See *Coleman*, 399 US at 11. Accordingly, we apply that decision, rather than the dictum in *Cronic*.[5]

We note that our resolution is consistent with that of other courts which have examined the tension between *Coleman* and *Cronic*. See, e.g., *Takacs v Engle*, 768 F2d 122, 124 (CA 6, 1985) (holding that "*Coleman's* harmless error analysis remains good law" despite the defendant's argument that it had been overruled by *Cronic* and *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)); *State v*

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[4] The same rationale applies to the Court of Appeals' reliance on *People v Arnold*, 477 Mich 852; 720 NW2d 740 (2006), and to our statement in *People v Russell*, 471 Mich 182, 194 n 29; 684 NW2d 745 (2004), that "[t]he complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal." *Arnold* was a sentencing case, and *Russell* addressed the denial of counsel at trial. As such, they are not binding in this case, which involves a preliminary examination. Nothing in those cases purported to rest on unique aspects of the Michigan, as opposed to the federal, Constitution. Accordingly, neither *Arnold* nor *Russell* could have held that the complete denial of counsel at *any* critical stage of a criminal proceeding is structural error requiring automatic reversal, when the Supreme Court of the United States has held otherwise.

[5] Because *Cronic*'s dictum could not have overruled *Coleman*'s holding, we need not address the prosecution's argument that *Satterwhite v Texas*, 486 US 249; 108 S Ct 1792; 100 L Ed 2d 284 (1988), implicitly overruled *Cronic*.

Brown, 279 Conn 493, 507 n 5; 903 A2d 169 (2006) ("We note that, since *Coleman*, the United States Supreme Court has indicated in dicta that denial of counsel at a critical stage renders a trial unfair, without regard to actual prejudice. . . . At no point, however, has the [C]ourt overruled explicitly *Coleman* or repudiated its conclusion that the case should be remanded for harmless error analysis, despite the denial of counsel at the preliminary hearing."). And our resolution is also consistent with the Supreme Court's admonition that other courts should not conclude that the Court's "more recent cases have, by implication, overruled an earlier precedent" but should instead leave to the Supreme Court "the prerogative of overruling its own decisions."[6] *Agostini*, 521 US at 237. Defendant has not argued that the state Constitution, Const 1963, art 1, § 20, provides him with any greater protection than the federal Constitution, US Const, Am VI.[7] Defendant's claim of error is, therefore, subject to harmless-error review.

While we have easily concluded that harmless-error review applies, we admit to being uncertain about just how a court is to evaluate the effect of this error on a verdict. *Coleman* does not tell us; there, the Supreme Court simply remanded to the Supreme Court of Alabama to review the effect of the error under *Chapman* without further

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[6] We have recently emphasized that a similar rule governs our own lower courts. See *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016).

[7] Defendant has argued that a ruling that this error is subject to harmless-error review would set a "dangerous precedent" encouraging trial courts to subject defendants to preliminary examinations without counsel. We emphasize that the courts of our State remain under an obligation to protect a defendant's right to counsel at the preliminary-hearing stage. Should they fail, trial counsel should bring the error to the circuit court's attention before trial so that it may be promptly remedied.

discussion. We do, however, have some guideposts. At each extreme, we know what is not permitted. At one end, a court may not simply presume, without more, that the deprivation of counsel at a preliminary examination must have caused the defendant harm. Although consistent with the presumption accorded to the complete denial of counsel at some other stages of a criminal proceeding, see, e.g, *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) (at trial); *Penson v Ohio*, 488 US 75; 109 S Ct 346; 102 L Ed 2d 300 (1988) (on first appeal as of right), such an approach would be treating the error as structural—a result foreclosed by *Coleman*. Neither, however, may we presume the opposite. Although it finds support by analogy in the Supreme Court's post-verdict evaluation of most grand-jury errors, see *United States v Mechanik*, 475 US 66, 73; 106 S Ct 938; 89 L Ed 2d 50 (1986), *Coleman* does not permit us to presume that a defendant, who was ultimately convicted at an otherwise fair trial, suffered no harm from the absence of counsel at his preliminary examination. And that is true even if no evidence from the preliminary examination was used at trial, and even if defendant waived no rights or defenses because of the absence of counsel at the preliminary examination. All of these things were true, and brought to the Court's attention,[8] in Mr.

[8] The lead opinion itself acknowledged the first two points. See *Coleman*, 399 US at 10 ("The trial transcript indicates that the prohibition against use by the State at trial of anything that occurred at the preliminary hearing was scrupulously observed."); *id.* at 8 (opinion by Brennan, J.) (" 'At the preliminary hearing . . . the accused is not required to advance any defenses, and failure to do so does not preclude him from availing himself of every defense he may have upon the trial of the case.' ") (citation omitted; ellipsis in original). And the Court was obviously aware that defendant had been convicted at trial. See *id.* at 18 (White, J., concurring) ("The possibility that counsel would have detected preclusive flaws in the State's probable-cause showing is for all practical purposes mooted by the trial where the State produced evidence satisfying the jury of the petitioners' guilt beyond a reasonable doubt."); *id.* at 28 (Stewart, J., dissenting) ("Since

Coleman's case, and yet the Supreme Court remanded his case for a determination, under *Chapman*, whether the deprivation of counsel at his preliminary examination was harmless. See *Coleman*, 399 US at 10 (remanding for harmless-error determination even though the "prohibition against use by the State at trial of anything that occurred at the preliminary hearing was scrupulously observed" and no rights or defenses were lost).[9]

And so, with the two perhaps most intuitive options for assessing harm off the table, courts are left to give meaning to the Supreme Court's command to determine whether defendant was "otherwise prejudiced by the absence of counsel at the preliminary hearing." *Coleman*, 399 US at 11. The parties have not addressed in this litigation either the substantive criteria or the procedural framework that should attend such review. Accordingly, we remand to the Court of Appeals to consider those questions in the first instance.

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the petitioners have now been found by a jury in a constitutional trial to be guilty beyond a reasonable doubt, the prevailing opinion understandably boggles at these logical consequences of the reasoning therein.").

[9] The Court of Appeals, believing itself bound by precedent, held that defendant was automatically entitled to a new trial because he was denied counsel at a critical stage of the proceeding. *Lewis*, unpub op at 3. The opinion proceeded, however, to set forth the panel's view that, under a proper interpretation of the law, the denial of counsel in this case should be evaluated for harmlessness. *Id.* at 3-5. It then conducted that evaluation and concluded, in dictum, that the error was harmless because "defense counsel conceded that no evidence from the preliminary exam was used at trial," defendant "did not waive any rights or defenses by not participating in the preliminary exam," and defendant was tried and convicted, with counsel, at trial. *Id.* at 5. For the reasons stated above, these findings, by themselves, were insufficient to compel the conclusion that the denial of counsel was harmless.

III. CONCLUSION

In accordance with *Coleman*, we hold that the deprivation of counsel at a preliminary examination is subject to harmless-error review. We, therefore, reverse the judgment of the Court of Appeals, vacate Part II of its opinion, and remand to that Court for further proceedings consistent with this opinion. If the Court of Appeals concludes that the error was harmless, it must also address the sentencing issue raised in defendant's brief in that Court.[10]

Joan L. Larsen
Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder

[10] Defendant has filed an application for leave to appeal as cross-appellant. That application is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 154396

GARY PARTICK LEWIS,

Defendant-Appellee.

MCCORMACK, J. (*concurring*).

I agree with the majority that we are bound to follow *Coleman v Alabama*, 399 US 1; 90 S Ct 1999; 26 L Ed 2d 387 (1970), because it is directly on point and has never been overruled. I write separately to call attention to the difficulties inherent in performing a harmless-error review in cases such as this and, relatedly, to the possibility that the United States Supreme Court should reexamine *Coleman* in light of *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

It is difficult for me to imagine what a harmless-error review will look like when, as in this case, a defendant was denied counsel at the preliminary examination. As the majority recognizes, *Coleman* excluded the most intuitive bases for finding prejudicial harm because it made plain that the question of harmless error does not depend on whether evidence from the preliminary hearing was presented at trial, and *Coleman* remanded for a harmless-error determination even though the defendants waived no rights or defenses because of the absence of counsel. *Coleman*, 399 US at 8, 10-11. Further, *Coleman* remanded for harmless-error review with little guidance; the court was

to determine whether the defendants were "otherwise prejudiced" by the deprivation of counsel at the preliminary hearing. *Id.* at 11.

There are, of course, many ways that the absence of counsel at a preliminary hearing might be harmful to a defendant apart from counsel's role in negating a showing of probable cause. Indeed, the *Coleman* Court identified many of these: counsel uses a preliminary hearing to expose weaknesses in the prosecution's case through cross-examination, lays the grounds for later impeachment at trial, effectively discovers the prosecution's case, and makes arguments related to bail or psychiatric examinations.[1] *Id.* at 9. I can think of others, too: the preliminary examination is often a critical client-counseling moment when plea deals can be negotiated, and additional formal and informal communications between defense counsel, the prosecutor, and the court give the defendant important information about the evidence against him or her. But I find it extremely problematic for a court to conduct a harmless-error review with reference to these factors. It will require courts to speculate whether counsel would have discovered a significant weakness in the prosecution's case through cross-examination, or how effectively counsel might have been able to lay the grounds for later impeachment of a witness at trial, and what other information might have been revealed in the examination of witnesses or discussions among counsel. It will require courts to speculate about the

[1] Other jurisdictions have referred to these four factors in their determination of harmless error. See, e.g., *State v Canaday*, 117 Ariz 572, 575-576; 574 P2d 60 (1977) (examining harmless error based on the purposes of a preliminary hearing delineated in *Coleman*); *State v Brown*, 279 Conn 493, 510; 903 A2d 169 (2006) (stating that deprivation of counsel at a probable-cause hearing is susceptible to harmless-error analysis through examination of the functions of a preliminary hearing listed in *Coleman*).

opportunities for negotiating a plea deal and counsel's advice about whether to accept a particular offer. And the speculation won't end there: next, courts will have to speculate about what result this hypothetical representation at the preliminary examination might have had at a subsequent trial.[2] In short, I am concerned that harmless-error review in cases such as this invites a potentially problematic level of speculation into judicial review.

All of this gives me reason to question whether *Coleman*'s holding remains viable in light of the evolution of the Supreme Court's structural-error doctrine. I agree with the majority that *Cronic*'s comment suggesting that courts should presume prejudice and automatically reverse upon complete denial of counsel at a critical stage was dictum. The issue addressed in *Cronic* was whether the defendant received effective assistance of counsel, not whether the defendant was denied counsel at a critical stage. But several subsequent cases have cited *Cronic* for the proposition that courts should presume prejudice if a defendant suffers complete denial of counsel at a critical stage. See, e.g., *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Mickens v Taylor*, 535 US 162, 166; 122 S Ct 1237; 152 L Ed 2d 291 (2002); *Woods v Donald*, 575 US ___, ___; 135 S Ct 1372, 1375-1376; 191 L Ed 2d 464 (2015). Indeed, in *Woods*, 575 US at ___; 135 S Ct 1375-1376, the Supreme Court reiterated the *Cronic*

[2] In determining what counsel might have accomplished had he or she been present at this hearing, is the reviewing court to assume that the preliminary-examination counsel would have been about as effective as trial counsel? Or more effective because counsel might have an incentive to work especially diligently at a preliminary exam because that work could pay off with a better and earlier resolution of the case? Or perhaps the reviewing court should assume counsel was simply minimally constitutionally competent?

dictum as a holding that the complete denial of counsel at a critical stage allows a presumption of unconstitutional prejudice. And the preliminary examination is a critical stage in criminal proceedings. *Coleman*, 399 US at 9. Thus, it seems *Cronic*'s reasoning would apply with equal force to a preliminary examination, but for *Coleman*'s holding to the contrary.

Further, the reasoning that animates the Court's structural-error jurisprudence seems to apply with full force in the context of a preliminary examination. The common strand I see in the Court's rationale for declaring an error structural and presuming prejudice requiring reversal is that the particular error makes assessing its effect exceptionally difficult. *United States v Marcus*, 560 US 258, 263; 130 S Ct 2159; 176 L Ed 2d 1012 (2010). Structural errors are characterized by "consequences that are necessarily unquantifiable and indeterminate . . . ." *Sullivan v Louisiana*, 508 US 275, 282; 113 S Ct 2078, 124 L Ed 2d 182 (1993). As explained above, that rationale seems on the nose here. Harmless-error review is impractical because of the difficulty in determining what might have gone differently if the defendant had the benefit of counsel at the preliminary examination. It is impossible to know with certainty what questions counsel might have posed and what answers witnesses might have provided, what other benefits the defendant might have derived from having counsel available, and how all of those considerations would have affected the subsequent trial. In my view, harmless-error analysis in cases in which counsel was denied at the preliminary examination risks becoming a "speculative inquiry into what might have occurred in an alternate universe." *United States v Gonzalez-Lopez*, 548 US 140, 150; 126 S Ct 2557; 165 L Ed 2d 409 (2006).

The development of the Supreme Court's structural-error doctrine, the reasoning that explains it, and the unresolved tension between *Cronic* and *Coleman*[3] make me question whether the *Coleman* harmless-error review remains a sustainable rule when a defendant is denied counsel at a preliminary examination. Nevertheless, *Coleman* is directly on point and has never been overruled, while the rule of *Cronic* has never been applied to denial of counsel at a preliminary examination. Therefore, I agree with the majority that *Coleman* is controlling, and we are bound to follow its holding.

Bridget M. McCormack
Richard H. Bernstein

[3] Compare *Ditch v Grace*, 479 F3d 249, 255-256 (CA 3, 2001) (reconciling *Coleman* and *Cronic* by reading *Cronic* in a limited fashion), with *French v Jones*, 332 F3d 430, 438 (CA 6, 2003) (stating that caselaw after *Cronic* has reiterated that harmless-error analysis does not apply to the absence of counsel at a critical stage, which requires automatic reversal).

APPENDIX D

Court of Appeals Unpublished Opinion 7-21-16

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APPELLATE DEFENDER OFFICE

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY PATRICK LEWIS,

Defendant-Appellant.

UNPUBLISHED
July 21, 2016

No. 325782
Wayne Circuit Court
LC No. 14-006454-FH

Before: TALBOT, C.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of third-degree arson, MCL 750.74, and one count of second-degree arson, MCL 750.73(1).[1] Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 17 to 30 years' imprisonment for each of his convictions. We vacate defendant's convictions and remand for a new trial.

I. FACTS AND PROCEEDINGS

A. PRELIMINARY EXAM

At the start of defendant's preliminary examination, the trial court asked defendant to state his full name on the record. In response, defendant stated, "I'm not talking. I don't have no attorney. This man disrespecting me. You all violating my rights. I'm through with it. I'm through with it." The trial court then stated that it had appointed lawyers for defendant on multiple occasions, that defendant had indicated his displeasure with each of the lawyers that were appointed, and that defendant had in fact grieved each of the prior counsel.

In light of this, the trial court found that defendant had "elected that he would prefer not to have a lawyer to represent him and we're going to proceed."[2] In response, defendant stated, "I

[1] Defendant was charged with, and acquitted of, one additional count of third-degree arson, MCL 750.74.

[2] At an earlier proceeding defendant had indicated that he wanted to represent himself, but apparently had a subsequent change of heart.

never said that." The trial court then reiterated that the preliminary examination would proceed and that defendant's former trial counsel, Brian Scherer, would act as stand-by counsel.

As the prosecution called Mollison Folson to testify, defendant stated, "I'm not going to participate in this legal bullshit." The court then warned defendant that he would be expelled from the courtroom if he continued his outburst. Defendant continued to interrupt the court while using profane language, so the trial court expelled defendant from the courtroom. After defendant was removed, the trial court told Scherer that he was free to leave as well. The court then continued with the preliminary examination, and after hearing testimony from six witnesses, the trial court held that there was sufficient probable cause to bind defendant over for trial.

B. TRIAL

After defendant was bound over for trial, the following evidence was presented to the jury. At 10:30 a.m. on March 2, 2014, Folson observed defendant walking down Russell Street in Detroit. Folson heard defendant yelling loudly about how he had observed a white man raping several women. Folson then observed defendant walk into a vacant home located at 20527 Russell for 10 minutes. When defendant exited the home, he spoke with Folson briefly and then left. An hour later, Folson observed firemen attempting to put out a fire at 20527 Russell.

At 11:30 a.m., Raven Jackson and her husband, Christopher Goward, were loading up a van in front of their home, located at 20514 Hull in Detroit. Jackson and Goward observed defendant yelling and walking down their street. They then observed defendant enter the vacant house next-door, located at 20520 Hull. Approximately four minutes later, Jackson and Goward observed smoke coming out of 20520 Hull. The home eventually began burning and the fire spread and damaged 20514 Hull.

On the same day, Ronnie Blanton was taking pictures of a vacant house located at 20438 Hawthorne in Detroit. While he was taking pictures, Blanton observed defendant walking down Hawthorne and yelling into a cellular phone. Defendant then walked into a vacant house next door, located at 20430 Hawthorne. After defendant exited the home, Blanton observed smoke coming from the home. Blanton's coworker, David Forman, approached defendant, at which point defendant threatened to shoot Forman. Blanton asked defendant if he set the home on fire, but defendant did not respond. The fire eventually spread to 20438 Hawthorne and damaged the home.

Lieutenant Jamel Mayers and Lieutenant Dennis Richardson were dispatched to Hawthorne Street to investigate the fires. Upon arriving, Blanton provided the officers with a description of defendant. Mayers and Richardson then began to search the area for defendant. After driving around, they spotted defendant and ordered him to stop. Defendant began to flee, but Mayers and Richardson were able to apprehend him. A search of defendant's pocket revealed four cigarette lighters.

II. ISSUES AND ANALYSIS

A. ABSENT COUNSEL

Defendant first argues that he was denied his Sixth Amendment right to counsel when the trial court dismissed both defendant and his counsel from the courtroom during defendant's preliminary examination. As the law in Michigan currently stands, he is correct.

A. MICHIGAN'S INTERPRETATION OF FEDERAL LAW

"The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration." *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004).[3] A preliminary examination is a critical stage at which a defendant has a right to counsel. *Coleman v Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1970); *Duncan v Michigan*, 284 Mich App 246, 264; 774 NW2d 89 (2009), rev'd on other grounds by 486 Mich 1071 (2010). Both our Court and the Supreme Court (albeit in an order) have unequivocally stated that it "is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal." *People v Buie*, 298 Mich App 50, 61-62; 825 NW2d 361 (2012), quoting *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005). See also *People v Arnold*, 477 Mich 852, 852-853; 720 NW2d 740 (2006). Because defendant did not have counsel[4] during the preliminary exam, which according to *Coleman* is a critical stage in the proceedings, a structural error has occurred that, according to *Buie*, *Willing* and *Arnold*, requires automatic reversal. Accordingly, we must reverse defendant's convictions and remand for a new trial.

2. THE CORRECT INTERPRETATION OF FEDERAL LAW

Although the principles articulated in *Buie*, *Willing* and *Arnold* appear to be absolute and thus require an automatic reversal, we express our belief that the denial of counsel at a critical stage of a criminal proceeding does not *always* require automatic reversal. Instead, when confronted with such a situation, a court must determine whether the denial of counsel at a critical stage constitutes a structural error that infects the entire proceedings, and if so, automatic

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[3] "The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *Williams*, 470 Mich at 641.

[4] It is possible to conclude that defendant's conduct at the preliminary exam forfeited his right to counsel, *People v Kammeraad*, 307 Mich App 98; 858 NW2d 490 (2014), but the prosecution has not made the argument. But the facts show that the trial court appointed multiple attorneys to represent defendant (all before the preliminary exam even took place), yet defendant rejected each one of them. The trial court also noted that defendant had already grieved each one of them, and reasonably determined that the same thing would occur if he continued to appoint counsel to represent defendant. Although defendant denied that he was refusing the assistance of counsel, his actions reflected a desire not to be represented. These actions also rebuked any waiver attempt, leaving the court (as it recognized) in a dilemma—either continue to appoint counsel and have defendant terminate them and further prolong the proceedings, or continue the exam without defense counsel to test the prosecution's case. The court chose the latter course, and on the basis of the forfeiture doctrine announced in *Kammeraad*, it could be argued that this did not violate defendant's Sixth Amendment right to counsel.

reversal is then required. However, if the denial of counsel at a critical stage does not infect the entire proceedings, then a court must determine whether the denial of counsel at a critical stage constitutes harmless error. Indeed, there is a wealth of both federal and state decisions that come to the same conclusion under very similar circumstances. We address those below.

Because we are addressing an alleged federal constitutional error, we are guided by federal precedent. *People v Anderson*, 446 Mich 392, 404; 521 NW2d 538 (1994). Under federal constitutional law, as our state courts have noted, "most constitutional errors can be harmless, but [] a limited class of constitutional errors are structural and are subject to automatic reversal." *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000), citing *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999). "Structural errors, as explained in *Neder*, are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal." *Duncan*, 462 Mich at 51. This hold true because "structural errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for a determination of guilt or innocence." *Id.* at 52. An error becomes a structural defect when it "infects the entire trial mechanism" *Anderson*, 446 Mich at 406. See also *Arizona v Fulminate*, 499 US 279, 309-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

We have previously defined a structural error as a defect "that affect[s] the framework of the trial, affect[s] the truth-gathering process and deprive[s] the trial constitutional protection without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001). As the *Watkins* Court noted, the United States Supreme Court has found very few errors that rise to the level of structural error, and those few found to be structural error include "(1) a complete denial of counsel, (2) a biased trial judge, (3) racial discrimination in grand jury selection, (4) denial of self-representation, (5) denial of a public trial, and (6) a defective reasonable doubt instruction." *Id.* A finding of structural error is the exception, rather than the rule. *Id.* at 26-27.

Contrary to the categorical statements by the *Buie* and *Willing* Courts regarding the need for automatic reversal, the United States Supreme Court concluded long ago that the failure to provide defendant with counsel at a preliminary examination does *not* require automatic reversal. In *Coleman*, where the Supreme Court first held that a preliminary exam is a critical stage of a criminal proceeding at which defendant has a right to counsel, the Court held that defendant was deprived of counsel during that critical stage, but nevertheless remanded the matter to the Alabama courts to determine whether trial counsel's absence constituted harmless error. See *Coleman*, 399 US at 11.

Defendant argues, and the *Buie* and *Willing* Courts seemed to hold, that *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), decided some 14 years after *Coleman*, now requires application of an automatic reversal standard *anytime* there is a denial of counsel at a critical stage in the proceeding. See *Willing*, 267 Mich App at 224 n 32. But as Justice MARKMAN has recognized, "every federal circuit court of appeals has stated, post-*Cronic*, that an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error." *People v Murphy*, 481 Mich 919, 923; 750 NW2d 582 (2008) (MARKMAN, J., concurring). State courts have also recognized that *Coleman* adopted a harmless error test for certain constitutional deprivations occurring at critical stages of criminal proceedings, and that *Cronic* has not altered *Coleman's* principle. *People v Tena*, 156 Cal App 4th 598, 613; 67 Cal

Rptr 3d 412 (2007); *State v Dennis*, 185 NJ 300, 302; 885 A2d 429 (NJ, 2005); *State v Brown*, 279 Conn 493, 506-507, 507 n 5; 903 A2d 169 (Conn, 2006); *Commonwealth v Carver*, 292 Pa Super 177, 179-180; 436 A2d 1209 (Pa, 1981).

In light of this plethora of case law, it is difficult to say that a structural error warrants automatic reversal *every time* a defendant is deprived of counsel at a critical stage of the proceedings, as both *Buie* and *Willing* stated. Not only is such a proposition contrary to the cases noted above (most especially *Coleman* and all those cited by Justice MARKMAN), but it also disregards what the Supreme Court has repeatedly said must be shown before automatic reversal is required: a defect that undermines the entire proceeding. See *United States v Dominguez Benitez*, 542 US 74, 81; 124 S Ct 2333; 159 L Ed 2d 157 (2004) ("It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding); *Fulminate*, 499 US at 310 (Referring to structural errors requiring automatic reversal, the Court stated that "[e]ach of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."); *Sweeney v United States*, 766 F3d 857, 860 (CA 8, 2014) (the court noted that "[o]nly structural defects that undermine 'the fairness of a criminal proceeding as a whole...require[] reversal without regard to the mistake's effect on the proceeding.' ").

As *Coleman* made clear, the absence of counsel at the preliminary hearing does not necessarily undermine the fairness of the entire criminal proceeding. It is one step in the criminal proceedings, and particularly when no evidence from that exam is used at trial, is not considered a "Sixth Amendment violation[] that *pervade[s] the entire proceeding*" that can "never be considered harmless." *Sweeney*, 766 F3d at 860-861, quoting *Satterwhite v Texas*, 486 US 249, 256; 108 S Ct 1792; 100 L Ed 2d 284 (1988). Accord: *Tena*, 156 Cal App 4th at 613 ("an error that would constitute a structural defect *at trial* is not invariably reversible per se when confined to the preliminary hearing."); *Norton v State*, 43 P3d 404, 408 (Ok App, 2002) ("We therefore hold, consistent with *Coleman*[], that the denial of counsel at a preliminary hearing is subject to harmless error analysis."). Accordingly, we would apply a harmless error test to the Sixth Amendment violation that occurred here.

At oral argument before this Court, defense counsel conceded that no evidence from the preliminary exam was used at trial. Defendant also did not waive any rights or defenses by not participating in the preliminary exam. There is also no doubt that defendant had counsel during the remainder of the proceedings, including the entire trial. We would therefore hold that the denial of defendant's Sixth Amendment right to counsel, though occurring at a critical stage, was harmless error. See *United States v Owen*, 407 F3d 222, 227 (CA 4, 2005) (discussing much of the same criteria and finding harmless error).

III. REMAINING ISSUES

Although we have already concluded that we are required to reverse defendant's convictions and remand for a new trial, for the sake of expediency we turn to those remaining issues raised by defendant that may arise at retrial.

A. PHOTOGRAPHIC LINE-UP

Defendant argues that he was denied a fair trial when evidence regarding a photographic line-up that was conducted while defendant was in custody was admitted at trial. Defendant argues that, because he was in custody, a corporeal lineup should have been used, and that at the very least, counsel should have been present at the photographic line-up. Defendant also argues that his trial counsel was ineffective for failing to move for suppression of the line-up and for failing to request a corporeal lineup.

In order to preserve an issue regarding suppression of identification, the defendant must move the trial court to suppress the identification or move for a hearing regarding the suggestiveness of the prior identification. *People v Daniels*, 163 Mich App 703, 710; 415 NW2d 282 (1987). Defendant did neither, so this issue is not preserved for appeal.

This Court reviews unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to avoid forfeiture of the issue, (1) error must have occurred (2) the error must have been plain, i.e., clear or obvious and (3) the plain error affected the defendant's substantial rights. *Id.* This third requirement is satisfied if the defendant can demonstrate prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.* If the defendant satisfies these three requirements, this Court will only grant reversal when the plain error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Under Michigan law, identification by a corporeal lineup is required when an accused is in custody unless a legitimate reason for holding a photographic line-up exists. *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993). Legitimate reasons for conducting a photographic line-up instead of a corporeal lineup when the defendant is in custody include (1) it is not possible to arrange a proper lineup, (2) there are an insufficient number of individuals available who have similar physical characteristics, (3) the nature of the case requires an immediate identification, (4) the witnesses are located too far away from the location of the accused, (5) the accused refuses to participate and would seek to destroy the value of the identification. *People v Anderson*, 389 Mich 155, 186 n 1, 187 n 2-5; 205 NW2d 461 (1973), overruled on other grounds by *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

Because defendant never raised this issue in the trial court, the record is devoid of any justification for using a photographic line-up instead of a corporeal line-up while defendant was in custody. We will therefore assure that the decision to admit the identification evidence resulting from the photographic line-up was plain error, because we conclude that defendant cannot demonstrate that any error affected his substantial rights i.e., that it affected the outcome of the lower court proceedings. While Jackson, Goward, and Folson were shown the photographic line-up, Blanton was not and still identified defendant as the man who set fire to 20438 Hawthorne. In addition, because Jackson, Goward, and Folson had an independent basis for their identifications of defendant, the in-court identification is still permissible if it can be demonstrated that the witness had a basis, independent of the line-up, for the identification. *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998).

The *Gray* Court stated that the following factors should be considered: (1) a prior relationship with or knowledge of the defendant, (2) the opportunity to observe the offense, (3)

the length of time between the offense and the disputed identification, (4) the accuracy or discrepancies in the line-up description and the defendant's actual description, (5) any previous proper identification or failure to identify the defendant, (6) any identification prior to the line-up of another person as defendant, (7) the nature of the alleged offense and the physical and psychological state of the victim, and (8) any idiosyncratic or special features of the defendant. *Id.* at 116. While Jackson, Goward, and Folson did not have a prior relationship with defendant, they all had an extended opportunity to observe defendant. They all testified that they watched as he walked down the street and into the homes that were eventually set on fire. In addition, the identifications made by Jackson and Goward were made within days of the fires.

While defendant notes minor discrepancies in Goward's and Folson's description of what defendant was wearing on the day in question, Goward accurately described defendant as wearing a hat and a blue hooded jacket. In addition, Folson was able to provide a voice identification of defendant. Finally, both Mayers and Richardson testified that when they encountered defendant, he began to flee. Once defendant was apprehended, four cigarette lighters were found in his pocket. Therefore, it cannot be said that the use of a photographic line-up instead of a corporeal lineup affected defendant's substantial rights.

B. ABSENCE OF COUNSEL AT PHOTOGRAPHIC LINE-UP

In order to preserve a claim regarding denial of counsel at a photographic line-up, defendant must challenge the line-up before or during the preliminary examination or make a pretrial motion to suppress. *People v Solomon*, 82 Mich App 502, 506; 266 NW2d 453 (1978). Defendant failed to do so, and this issue is not preserved for appeal. This Court reviews unpreserved issues for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763.

The right to counsel at a photographic line-up attaches with custody. *Anderson*, 389 Mich at 186-187. However, in *Hickman*, 470 Mich at 603, the Court subsequently held that at corporeal lineups the right to counsel does not attach until "the initiation of adversarial criminal proceedings." Adversarial criminal proceedings are considered to have commenced after a "formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v Illinois*, 406 US 682, 689; 92 S Ct 1877; 32 L Ed 2d 411 (1972).

The Court in *Hickman* ruled that *Anderson*'s expansion of the right to counsel to the period before the initiation of adversarial criminal proceedings was not supported by either the United States Constitution or the Michigan Constitution. *Hickman*, 470 Mich at 603-604. While *Hickman* involved a corporeal line-up, it stands to reason that no such right exists in the context of photographic line-ups either. At the time of the line-up, defendant had been arrested, booked into custody, and fingerprinted. However, because adversarial criminal proceedings had not commenced at the time of the identification, the right of counsel had not yet attached to defendant. Defendant was not entitled to counsel at the time of the photographic line-up.

C. VOICE IDENTIFICATION

Defendant next argues that he was denied due process of law when a voice identification by Folson was admitted at trial, because the voice identification was suggestive and lacked a sufficient foundation for admission.

In order to preserve an issue regarding suppression of identification, the defendant must move the trial court to suppress the identification or move for a hearing regarding the suggestiveness of the prior identification. *Daniels*, 163 Mich App at 710. While defense counsel objected to Folson's testimony on the ground that it would be inflammatory under MRE 403, she did not move to suppress Folson's identification or move for a hearing regarding the suggestiveness of the identification. Because this issue is not preserved for appeal, we review for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

"The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). "Vocal identification evidence is competent if the identifying witness demonstrates certainty . . . in the mind . . . by testimony that is positive and unequivocal." *Id.* In addition, voice identification must be based on a peculiarity in the voice or on sufficient previous knowledge by the witness of the person's voice. *Id.*

The voice identification procedure was not so impermissibly suggestive that it led to a substantial likelihood of misidentification. *Id.* Folson testified that defendant was yelling that a white man had been raping several women and defendant asked Folson if he had seen the man. Nothing has been offered to establish that the voice identification was impermissibly objective, and the totality of the circumstances do not suggest otherwise. Folson then observed defendant go into the home. When defendant emerged from the home, he again approached Folson and asked if he had seen the man. This demonstrates that Folson had a high degree of attention to defendant's voice. Folson also testified that he was certain that defendant's voice matched the voice of the individual who walked into the home when he heard it just under five months later. The totality of the circumstances, as well as Folson's certainty that defendant was the perpetrator, indicate that the voice identification was permissible.

Defendant also argues that Folson's vocal identification lacked an adequate foundation. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Therefore, defendant's objection to Folson's testimony on MRE 403 grounds was insufficient to preserve a foundational challenge on appeal. This Court reviews unpreserved issues for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763.

MRE 901(a) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The evidentiary rule provides examples of proper authentication. In the context of voice identification, MRE 901(b)(5) provides that "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker" is an acceptable method of authentication.

As already noted, Folson had ample opportunity to hear defendant's voice on the day in question. Defendant was yelling and approached Folson twice to talk to him. Folson was of the opinion that it was defendant's voice given that he had the opportunity to hear it first hand from a short distance away. Folson's voice identification of defendant did not lack foundation and any issues with the identification would affect only the weight of the identification, not its admissibility. *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991). Therefore, the trial court did not commit plain error in allowing Folson's voice identification testimony.

D. *BRADY v MARYLAND*

Defendant also argues that he was denied due process of law pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), when the lighters found in his pocket were lost or destroyed. In order to preserve for appeal an issue regarding the prosecution's suppression of evidence, defendant must have moved for a new trial or for relief from judgment in the trial court. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Defendant did not move for a new trial or for relief from judgment in the trial court or raise the issue of a *Brady* violation at any time in the trial court. Therefore, this issue is not preserved for appeal. Again, this Court reviews unpreserved issues for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 US at 87. The Michigan Supreme Court has since articulated a three-part test to determine whether a *Brady* violation has occurred: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014). In addition, MCR 6.201(B)(1) requires disclosure, upon request, of "any exculpatory information or evidence known to the prosecuting attorney."

Here, the evidence showed that Richardson discovered four lighters in defendant's pocket, took a picture of the lighters, and handed them over to police officers. However, the lighters were lost and never placed in evidence. Therefore, regardless of the government's good faith or bad faith in losing the lighters, they are considered suppressed for purposes of *Brady*.

Evidence is considered to be favorable to the defense when "it is either exculpatory or impeaching." *Id.* Defendant contends that if he had possession of the lighters, he could demonstrate that they were inoperable, and could not have been used to start the fires. Defendant does not provide any corroboration for this claim or explain why he would be carrying around multiple inoperable lighters while fleeing from the scene of a fire. If, contrary to defendant's claim, the lighters were operable, their introduction at trial would have been harmful to defendant. Thus, defendant cannot satisfy the materiality requirement because it cannot be said that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*

Defendant's convictions are vacated and the matter is remanded for a new trial. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Christopher M. Murray

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY PATRICK LEWIS,

Defendant-Appellant.

UNPUBLISHED
July 21, 2016

No. 325782
Wayne Circuit Court
LC No. 14-006454-FH

Before: TALBOT, C.J., and MURRAY and SERVITTO, JJ.

SERVITTO, J. (*concurring*).

I concur in the result reached by the majority—that defendant's convictions should be vacated. However, I believe that because Michigan law holds that the complete denial of representation of counsel at a critical stage of the proceeding (here, the preliminary examination), is a structural error requiring automatic reversal (see, e.g., *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551(2000)), that holding alone should represent the entirety of our opinion. The remaining analysis regarding structural error and the analyses of the remaining issues raised by defendant are unnecessary to our resolution of this case.

/s/ Deborah A. Servitto

APPENDIX E

Preliminary Examination Transcript

STATE OF MICHIGAN

IN THE 36th DISTRICT COURT FOR THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN,

-vs- dc# 14-56725

Cc# 14-006454

GARY PATRICK LEWIS,

Defendant:

_____/

PRELIMINARY 3EXAMINATION

BEFORE THE HONORABLE JOSEPH N. BALTIMORE

36TH District Court Judge

Detroit, Michigan - Wednesday, July 30, 2014

APPEARANCES:

For the People:
KELLY CASPER, ATTORNEY, P-69012
Wayne County Prosecutor's Office
1441 St. Antoine, 12th Floor
Detroit, Michigan 48226-2302
(313) 224-5777

DEFENDANT APPEARING IN PRO PER
ALSO PRESENT: ATTORNEY BRIAN SCHERER

Court Reporter:
BETH A. TOMASI, CSR-3098
(313) 965-6187

I N D E X

WITNESS

EXHIBITS

Detroit, Michigan

July 30, 2014

10:45 a.m.

* * *

THE COURT: This is the matter of People of the State of Michigan versus Gary Patrick Lewis. The defendant is charged with Count 1, second degree arson; Count 2, second degree arson; Count 3 third degree arson; Count 4, third degree arson; Count 5, third degree arson; Count 6, third degree arson. Madam Prosecutor, your name for the record.

MS. CASPER: Good morning, Kelly Casper on behalf of People.

THE COURT: All right. Mr. Lewis, please put your full name on the record.

DEFENDANT LEWIS: I'm not talking. I don't have no attorney. This man disrespecting me. You all violating my rights. I'm through with it. I'm through with it.

THE COURT: Are you -- you don't even want to put your name on the record, right? I think that the record -- you may have a seat, please.

I think that the record should reflect that the Court has, on -- on a couple of occasions, appointed lawyers for Mr. Lewis and he has indicated

his displeasure for each of the lawyers that this Court has appointed. And I might say additionally, for the record, that the lawyers that I appointed are very experienced lawyers, numbers of years of practice, lawyers of great and good and excellent representations, but he has elected that he would prefer not to have a lawyer to represent him and we're going to proceed.

DEFENDANT LEWIS: I never said that.

THE COURT: We're going to proceed without him being represented. The record should reflect that I have Mr. Sherer, that I had previously appointed, but I have him on standby in case Mr. Lewis needs some advice. The record should be clear Mr. Sherer is not representing Mr. Lewis. Very well. Let us proceed.

MS. CASPER: Your Honor, if the People may for the record, Mr. Lewis and as the Court is aware because your Honor was on the bench, Mr. Lewis when he expressed his displeasure with his last attorney indicated that he would just represent himself. Louisa Papalas, who stood in for me at the last hearing indicated that Mr. Lewis said he was being forced to represent himself. As the Court's aware, we know it has to be an unequivocable intelligent made waiver, at the same time, although he is entitled to

an attorney, he's not entitled to the attorney of his choice. He is entitled to an attorney that will protect his interests and defend him. If he is not going to participate in the exam, the People do have some concerns about what will happen at a later date, so I don't know if the Court wants to -- in light of the prior circumstances, have Mr. Sherer defend him or Mr. Lewis is going to defend himself.

THE COURT: The reason why I cannot force Mr. Sherer or any lawyer to expose themselves to liabilities with regards to -- Mr. Lewis has filed grievances against these lawyers. It is not reasonable or fair for me to try to force a lawyer to expose his reputation with someone who obviously has demonstrated that he does not desire to have lawyers representing him. There is nothing else I can do. I have informed him that we want to go forward. The longer Mr. Lewis sits in jail, the longer it is going to be for the system to determine whether or not he is guilty or innocent or should be released. His conduct is prolonging, probably, his time in jail. So you know, whatever happens in the future, it will happen.

MS. CASPER: Okay.

THE COURT: But I cannot -- I cannot expose

lawyers or I don't think it's fair to expose lawyers to this kind of distraction. They cannot represent, intelligently represent somebody and also have to feign off bar complaints. Now we will proceed.

MS. CASPER: Thank you, your Honor. The People would ask for a mutual sequestration order of any witnesses that will be testifying at the exam.

THE COURT: That order is granted.

MS. CASPER: If there are any witnesses in the courtroom that will testify in this matter, please step out in the hall. Mr. Folson, you're the first--

THE COURT: If there are witnesses that are going to testify, please step out until such time we're ready for you. That includes both witnesses for the prosecution and for the defense. Your first witness is going to be --

MS. CASPER: Mollison Folson, your Honor.

THE COURT: Would you like to have a pencil, sir? Give him -- and give him a pad and a pencil so he's able to --

DEFENDANT LEWIS: Is the hearing -- He needs a hearing aid. I'm not going to participate in this legal bullshit.

DEPUTY: Knock it off.

THE COURT: Mr. Lewis, Mr. Lewis.

THE DEFENDANT: You're violating my rights. They're going to know it.

DEPUTY: Knock it off.

THE DEFENDANT: Stop asking me questions. I'm not going to answer questions. Leave me alone. Just do what you're going to do.

THE DEPUTY: Mr. Lewis--

THE COURT: Let me handle this, Brian.

THE DEFENDANT: He keep pestering me. That man talk to my family like a dog. You want me to be with that cracker?

THE COURT: We can handle this two ways.

THE DEFENDANT: Any way you want.

THE COURT: The easy way is to have him sit there. The hard way is we can have you excluded.

MR. EUFPLT: Disrespect my family.

THE COURT: The hard way is we can have you excused.

THE DEPUTY: Sir stop.

THE DEFENDANT: Sure. Hurry up. Get it out of my short * * out /-FR /-R court, please.

THE COURT: I'm not going to have these outbursts.

THE DEFENDANT: That man keep harassing me. Leave me alone. You're not my lawyer, talking about

my mother, my mother dead.

THE COURT: Mr. Sherer, do not sit at the table.

THE DEFENDANT: Thank you. You disrespect my dead mother.

THE COURT: Listen, I'm about ready to start the hearing.

THE DEFENDANT: Hurry up. This is bullshit.

THE COURT: Another outburst --

THE DEFENDANT: He put his hands on me. He touching me. He's not my attorney.

THE COURT: Another outburst from you, I will remove you from the courtroom. I'm not going to --

THE DEFENDANT: Well, remove me. I'd rather be in hell with the devil.

THE COURT: Well, one more you shall be.

THE DEFENDANT: I'd rather be in the hell with the devil.

THE COURT: Take him out. Take him out.

THE DEFENDANT: I don't have time for this shit. Crooked. Crooked. The whole city crooked.

THE DEPUTY: Knock it off. Knock it off.

THE DEFENDANT: Crooked cops. Crooked --

Crooked lawyers.

THE DEPUTY: Knock it off Lewis.

THE COURT: Just take him out.

MS. CASPER: Your Honor, I don't know how the Court wants to proceed.

THE COURT: We shall proceed with the testimony. Okay.

(Whereupon the defendant has been taken out of the courtroom)

MR. SHERER: Judge, can we go off the record?

THE COURT: No, I want everything on the record.

MR. SHERER: Okay. Well, if I'm standby counsel and there is nobody to stand by to --

THE COURT: Listen, this is a man that's obviously have demonstrated that he is disruptive, he is using profane language in court.

MR. SHERER: I agree, Judge. My question to you is if I'm not representing him and I'm supposed to --

THE COURT: You may leave.

MR. SHERER: Okay. That's what I'm asking.

THE COURT: You may leave. Goodbye.

MR. SHERER: Okay.

THE COURT: But I'm not going to have someone cursing and cutting up in the courtroom. Sir, give your name to the court reporter.

DIRECT EXAMINATION

BY MS. CASPER:

Q. Good morning.

A. Good morning.

Q. Can you please state your name for the record?

A. Mollison Folson.

Q. And Mr. Folson, do you live in the area of Russell Street in the City of Detroit?

A. Yes.

Q. And do you live near 20527 Russell Street?

A. Uh, 20527?

Q. Yes.

THE COURT: Do you want to rephrase the question? He's having trouble --

THE WITNESS: I'm at 16.

BY MS. CASPER:

Q. It's 20527?

A. Right.

Q. Is that near your home?

THE COURT: Hold on. I'm not sure -- because of all this confusion, I'm not sure if I swore you in.

THE WITNESS: No.

THE COURT: Would you raise your right hand?

M O L L I S O N F O L S O N,

after been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE WITNESS: Yes.

THE COURT: Now that's why we were having a problem. Let us start over on this.

DIRECT EXAMINATION

BY MS. CASPER:

Q. Can you please state your name for the record?

A. Mollison Folson.

Q. Do you live in the area of 20527 Russell Street?

A. I would say yes, if the address is correct.

Q. I'll rephrase. Back on --

A. Well, no, it's only another house next to me and I'm 20516.

Q. Okay. Do you remember March 3rd, 2014?

A. Yeah.

Q. Did anything that day happen out of the ordinary?

A. Yes.

Q. What happened that you remember on that date?

A. While shoveling snow, Mr. Lewis came around the

corner. I'm only a block away from 8 Mile, I mean a house away from 8 Mile, so he came around the corner screaming, there's a white boy raping women and as he comes, he goes into an abandoned house.

Q. Okay. And where was the abandoned house located?

A. Across the street.

Q. From your house?

A. (No response)

THE COURT: What is your answer? What was your answer to her last question?

THE WITNESS: Mr. Lewis -- I was shoveling snow. Mr. Lewis came around from east --

THE COURT: No, the question is was the house across from you?

THE WITNESS: Yes.

THE COURT: Okay. I didn't hear the answer.

THE WITNESS: All right.

BY MS. CASPER:

Q. And do you know if he stayed in the house? Do you know if he stayed in the house or lived in the house?

A. Nobody did. It's an abandoned house.

Q. And what did you do after you saw him go into the house, if anything?

A. Continued shoveling until he came out.

Q. Do you know, approximately, how much time passed from the time you saw him go in, till the time you saw him go out?
A. Approximately 15 minutes.
Q. Did anything happen that caught your attention after you saw him leave the house?
A. Well, he reiterated about the white guy, that's what he called white boy and he told me to look out for him and I suggested he do it, he's looking for him. And a good 30 minutes later, the fire trucks pull up.
Q. Did you -- were you outside for that 30 minutes or did you, at some point, go back into your house?
A. No, I went back in.
Q. Okay. And when fire trucks pulled up, did you see where the fire trucks pulled up to?
A. The house.
Q. The house that he went into?
A. Yes.
Q. And when he was screaming about the white boy raping women, was he still across the street?
A. Well, he said that as he -- I guess he didn't plan on seeing somebody so he made a quick conversation, which was the white boys and went up in the house.
MS. CASPER: That's all for this witness, your Honor.

THE COURT: The record should reflect that Mr. Lewis is not in the courtroom. Thank you.

MS. CASPER: Your Honor, just so the record can reflect due to the confusion and the delay in getting here, my officer in charge, Lieutenant Dennis Richardson from the Detroit Arson is present in the courtroom.

THE COURT: Fine.

MS. CASPER: People's next witness will be Lieutenant Jamal Mayers.

THE COURT: Witness, please come forward and give your name to the reporter.

THE WITNESS: Jamal Mayers.

J A M A L M A Y E R S,

after been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE WITNESS: Yes, sir.

THE COURT: Hold on. Let me finish with this. Off the record for a minute.

(Pause in proceedings).

THE COURT: Proceed.

MS. CASPER: Thank you, your Honor.

DIRECT EXAMINATION

BY MS. CASPER:

Q. Will you please state your name for the record?
A. Jamal Mayers.
Q. And where are you employed?
A. Detroit Fire Department Arson Section.
Q. And what is your rank?
A. Lieutenant.
Q. Okay. And Lieutenant Mayers, how long have you been with the Detroit Fire Department as a whole?
A. It will be 20 years on August 8th.
Q. How long have you been in the arson unit?
A. Since February 14th, 2011.
Q. And did you have to go through any specialized training to become a member of the arson unit?
A. Yes, I did.
Q. Did you participate in that training?
A. Yes, I did.
Q. What types of training did you participate in?
A. State of Michigan Fire Investigation School. I'm certified Fire Investigator through NAFI which is National Association of Fire Investigators, as well as internal training.
Q. Okay. And do you have to continue your training throughout your career in the arson unit?
A. Yes, we do.
Q. And have you continued your training?

A. Yes, I have.
Q. And what are some of your duties as a lieutenant in the arson unit?
A. Some of my duties are to investigate fires to determine their origin and cause, as well as to determine whether or not they are accidental or criminal in nature.
Q. And do you also have police powers as a member of the arson unit?
A. Yes, I do.
Q. And did you attend the police academy to do that?
A. Yes, I did.
Q. Which academy?
A. Detroit Police Academy.
Q. And when you investigate fires, is there a protocol that you -- or a method that you utilize?
A. Yes, I do.
Q. What is that?
A. Science Method?
Q. Do you utilize that in all the fires you investigate?
A. Yes, I do.
Q. Were you on duty on the -- with the Arson Unit on March 14th, 2013?
A. Yes, I was.
Q. Were you assigned an investigation that occur at 20527

Russell?
A. Yes, I did.
Q. And is that in the City of Detroit, County of Wayne?
A. Yes, it is.
Q. And what did you do when you received that assignment?
A. I responded to the -- responded to the location. At the time there was a series of fires, so we were in the area. We got word that there was a suspect. We apprehended the suspect and then we went back and investigate the fires, at which time we developed a witness.
Q. Okay. When you say we were, you -- did you have partners or crew members that day?
A. Yes, I did.
Q. And who was with you that day?
A. Lieutenant Richardson.
Q. Deputy Richardson?
A. Yes.
Q. Anybody else?
A. Matthew Crouch, Lieutenant Omar Davison.
Q. You said there were a series of fires. Were they all in the same area?
A. Yes. They were a block apart, I think three to four blocks.
Q. And you indicated that there was a suspect before you

even -- before you arrived. How did that come to your attention?

A. Once we arrived on the scene, we were informed by fire fighters, as well as civilians that were at the scene, that they had -- they had seen someone come from one of the dwellings and had actually photographed that person.

Q. Okay. And now was that information given to you at the Russell scene or one of the other scenes?

A. That was at the other scene. I believe it was Hawthorne.

Q. Hawthorne. Okay. Now as far as the Russell -- I'm sorry, strike that. When you -- you indicated that you and your fellow crew members had apprehended the suspect?

A. Yes.

Q. Is that based, in part, on the information that you received at the Hawthrone scene?

A. Correct.

Q. And was Lieutenant Richardson with you when you obtained that information at the Hawthorne scene?

A. Yes, he was.

Q. You apprehended a suspect. Do you remember who that suspect was?

A. That suspect was later identified as Gary Lewis.

Q. And after you apprehended him, what did you do with him?
A. Once we apprehend him, we turned him over to the Detroit Police, a uniformed unit who transported him to DDC. And then went back to investigate all the fires. At the time when we received the information, all of these fires were still in progress.
Q. Okay. You investigate the 20527 Russell?
A. Yes.
Q. What did you do when you first arrived at that scene after you apprehend Mr. Lewis, to begin your investigation?
A. Well, we first did a walk through of the scene to determine, you know, where the fire's origin was, then we began systematically going around taking photographs of the house and the utilities and surroundings.
Q. And you said it was a house, the structure type was a dwelling?
A. It was a dwelling, yes.
Q. Do you know if it was occupied or vacant?
A. At the time it was vacant.
Q. And did you examine the exterior of the structure?
A. Yes, we did.
Q. Did you find anything that indicated a cause or origin

of the fire on the exterior of the structure?
A. No, we didn't.
Q. And when you went to the inside of the structure, when you enter a structure to do an investigation, is there a certain method that you use?
A. Yes, we do.
Q. And what is that?
A. 'Um, the method is-- depends on the investigator. As long as he maintains that same system on all of his investigations, you know, he can apply. Basically, what I do is exterior circuit around the house, take photographs, you know, the different sides, photograph the external utilities such as the gas meter, electrical box that's on the rear of the dwelling, the supply, electrical supply running from the pole to the dwelling and then enter through, either you know, the front door or the rear door, whichever one is more assessable. On this dwelling, I entered through the front door.

MS. CASPER: Your Honor based on his testimony, training, experience and method, we ask that he be allowed to apply his opinion as an expert as to cause and orgin of subject fire.

THE COURT: Your motion is granted, I so find.

BY MS. CASPER:

Q. So when you entered this house, were you able to identify a possible area of origin of the fire?

A. Yes, I was.

Q. And what area did you identify?

A. The rear bedroom.

Q. And were you able to identify a cause of the fire?

A. Not -- well, we were able to exclude that it was from electrical. We were able to exclude mechanical causes, although the dwelling was open to tresspass, we weren't able to narrow it down to an exact cause.

Q. Okay. Well how many causes of fire are there?

A. Accidental, there are mechanical, electrical or incendiary.

Q. And you were able to eliminate electrical?

A. Electrical.

Q. And you were able to eliminate mechanical?

A. Correct.

Q. Did you observe any possible accidental cause --

A. No, we did not.

Q. -- of the fire?

A. No, we did not.

Q. Were you able to make a determination about whether or not this fire was incendiary?

A. Yes.

Q. What was your determination?
A. That fire was intentionally set.
Q. And during your investigation did you speak with a Mr. Mollison Folson?
A. Yes, I did.
Q. And did he -- without saying what he said, was he able to provide you with information that was useful in your investigation?
A. Yes, it was.
Q. And you indicated that when you apprehended Mr. Lewis his appearance was consistent with information that you had been given?
A. Yes, it was.
Q. Did Mr. Folson provide you with information regarding the appearance of the individual he saw go into the subject house?
A. Yes, he did.
Q. Was Mr. Lewis' appearance consistent with Mr. Folson's description?
A. Yes, it was.

MS. CASPER: That's all for this witness.

THE COURT: Thank you, very much. You may step down.

Sir, please come forward and give your name.

M A T T H E W C R O U C H,

after been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE WITNESS: I do, sir.

THE COURT: Please have a seat. Keep your voice up. You may continue.

DIRECT EXAMINATION

BY MS. CASPER:

Q. Good morning.

A. Good morning.

Q. Can you please state your name for the record?

A. Matthew Crouch.

Q. Where are you employed?

A. Detroit Fire Department, Fire Investigation Unit.

Q. And how long have you been with the Detroit Fire Department?

A. Fourteen years.

Q. And how long have you been with the Fire Investigation Unit?

A. Six years.

Q. Is that sometimes called the arson unit?

A. Yes.

Q. And did you go through specialized training to become a member of the Fire Investigation Unit?

A. Yes, ma'am.
Q. And what training did you go through?
A. It was a Michigan State Police Fire Investigation course at Pelkin (ph), for 80 hours, I believe.
Q. And any other training?
A. There was a NAFI, National Association of Fire Investigation that was a course I did and --
Q. Did you go through any police academies?
A. Yes, not related to fire investigation.
Q. But as a fire investigator do you have police powers?
A. Yes.
Q. So you're required to go through the police academy?
A. Yes.
Q. What police academy did you go through?
A. Detroit.
Q. And how many fires have you investigated, approximately, since becoming a member of the Fire Investigation Unit?
A. Six hundred.
Q. And are you required to go through ongoing training during your career as a fire investigator?
A. Yes, ma'am.
Q. And have you ever been certificated as an expert and to testify in your opinion as origin and cause of a fire in a Court in the State of Michigan?

A. Yes, ma'am.
Q. Which courts?
A. It was federal court on -- I can't remember the fire right off, the defendant.
Q. Was it Eastern District Court, Eastern District of Michigan, downtown?
A. Yes.
Q. What about in the Wayne County Circuit Court?
A. I don't know if I have.
Q. And in 36th District Court?
A. No.
Q. Just in federal court?
A. Yes.
Q. Okay. And when you investigate a fire, is there a particular methodology or procedure that you utilize?
A. Yes.
Q. What is that?
A. If you're referring to the scientific method through the NFPA 921, I follow that or -- is that what you're asking?
Q. Well, any methods that you utilize on a continuous basis in investigating a fire.
A. Yes.
Q. Did you utilize the methods that you used in your training and experience on a fire occurring at 20502

Greeley in the City of Detroit?
A. Yes.
MS. CASPER: Your Honor, we would ask that he be allowed to testify in the expert area of origin and cause.
THE COURT: Your motion is granted. I admit him as an expert.
BY MS. CASPER:
Q. Lieutenant, were you dispatched to a fire at 20502 Greeley on or about March 2nd, 2014?
A. Yes.
Q. And what did you do when you first received that assignment to go investigate that fire?
A. I -- the first thing I met up with Lieutenant Richardson and Lieutenant Mayers, who were on their -- in the area on several other fires.
Q. Okay. And did you -- why did you meet up with them?
A. At that time they had made an arrest.
Q. And after you met with them, did you go to the Greeley scene?
A. Yes.
Q. That's in Detroit, County of Wayne?
A. Yes.
Q. And what did you do when you first arrived at the scene?

A. Upon arrival at that scene, I -- it was very, very snowy, if I remember correctly. Getting up to the scene, you know, the scene -- survey the parameter, the outside of the house and photographed that scene. Then upon entering, I went through the first floor, photographing that area, the second floor and the basement.
Q. And what type of structure was this Greeley scene?
A. It was a one and-a-half story converted attic.
Q. A dwelling?
A. Correct.
Q. Do you recall if it was abandoned or vacant -- abandoned door or occupied?
A. It was an idle dwelling, yes.
Q. So you indicate that you took pictures of the exterior?
A. Yes.
Q. And pictures of the interior?
A. Yes.
Q. And then what did you do?
A. At that point there was a -- there was a part of a cabinet that had been broken off from the interior of the house and it had some writing on it and that's when I contacted Lieutenant Richardson if it meant anything to him.

MS. CASPER: Your Honor, may I approach the witness?

THE COURT: Yes.

By MS. CASPER:

Q. I'm showing you what's been marked as People's Proposed Exhibit Number 1. Do you recognize this?

A. Yes, ma'am.

Q. And what is that?

A. It appears to be the photo that I took of the broken cabinet door.

Q. And is there writing on that?

A. Yes.

Q. And what -- if you could let the Court know what the writing says?

A. I Mister Pieter Folscher blank fire, with a cell phone number 248-762-6466. And it says crook med 911, owe me 120 dollars and fuck you.

MS. CASPER: Would the Court like to see the exhibit?

THE COURT: You may publish.

BY MS. CASPER:

Q. You indicate that you had contacted Officer Richardson and see if this meant anything to him?

A. Yes.

Q. And was there any particular reason that you did that?

A. It was just an odd thing to have at a fire scene, whether -- I didn't know what it meant at that time.
Q. Okay. And after you found that cabinet, did you proceed with your investigation as to the orgin and cause of the fire?
A. Yes.
Q. And were you able to identify an area of origin within 20502 Greeley?
A. Yes.
Q. And was that the area of origin that you identified?
A. It was in the basement, underneath the stairwell. There's a -- it look like a storage space underneath the stairwell with a wooden door that was shut and it was within that.
Q. Were you able to identify a cause of the fire?
A. As far as the cause, no.
Q. Well, were you able to -- is it correct there's four causes of a fire? Is it true in fire investigation there's four causes of a fire?
A. Yes.
Q. What are those causes?
A. There's incendiary, accidental and then unnatural.
Q. Mechanical?
A. Yes.
Q. Were you able to eliminate a mechanical cause of this

fire?
A. Yes.
Q. How about electrical?
A. Yes. There was no electrical. There was nothing in that area.
Q. And were you able to eliminate natural causes?
A. Yes.
Q. And just for the court's reference, what's considered a natural cause of a fire?
A. Lightening would be a very good one.
Q. So that would leave accidental and incendiary?
A. Yes.
Q. Were you able to identify any potential accidental causes in the area of origin?
A. No.
Q. And then how about incendiary?
A. That's -- it appears to be an incendiary fire, but within combustible materials, newspaper within -- underneath that stairwell area.

MS. CASPER: That's all for this witness.

THE COURT: Just one question. When the prosecutor was asking you questions about cause, you appeared to hesitate in your reporting on your investigation. Do you use a different word to cover the same kind of fires or types of fires?

THE WITNESS: I was unclear if she was asking me as far as a lighter or an open flamed device or matches, 'cuz I did not recover that type of stuff.

THE COURT: Okay. So you excluded a number of things that were not the cause of this fire, right?

THE WITNESS: Yes.

THE COURT: Okay. All right.

MS. CASPER: Your Honor, if I could, just to clarify --

THE COURT: Who's this guy? Do you know him?

THE WITNESS: No.

THE COURT: Go ahead, Ms. Prosecutor.

BY MS. CASPER:

Q. Lieutenant Crouch, in the area of fire investigation, when lay people refer to a cause of a fire, in your experience are they asking if somebody lit a match to a piece of paper?

A. The lay person, no.

Q. Okay. In fire investigation, is it true that fires are classified into certain categories of causes?

A. Yes.

Q. And is it possible, based on your training and experience as a fire investigator to determine whether

or not a fire is accidental without having the exact ignition source?
A. Yes.
Q. And is it possible for you to determine whether or not a fire is intentional or incendiary, without knowing the exact ignition source, i.e., a lighter or a match?
A. Yes.
Q. And how are you able to do that?
A. Given the -- where the fire is, looking at the whole totality of that incident, like was it occupied, wasn't occupied, did -- you know, what could have been the possible causes for that, there was -- it was not a place for a warming fire. It would not have been -- you know, that would have been -- there was no accidental means for that spot to be in there. It was not an easily inhabitable spot for a person to be in and then the other thing would have been a warming fire and it's -- it was -- once again, it was two small a spot to be utilized as a warming fire in that area.
Q. Okay. And did you -- were you made aware of whether or not anybody was seen coming or going from that structure prior to the fire?
A. Upon finishing with that scene -- that dwelling, I canvassed the area, the houses and I did talk to --

there was one other person and they had not seen anybody prior to the fire.

Q. Did you speak with a Chris Buckingham?

A. That's -- I believe so. He lived across the street.

Q. Would it assist you to refresh your memory if you looked at your report?

A. Yes. In my report I'm stating that he had seen a black male enter the dwelling on February 26th.

MS. CASPER: Okay. That's all for this witness, your Honor.

THE COURT: You only investigated the one fire, the Greeley fire?

THE WITNESS: Yes, sir.

MS. CASPER: Yes, your Honor.

THE COURT: Do you happen to have knowledge of how far is Greeley from Hawthorne, do you know or would you not have any idea?

THE WITNESS: On that day I was part of -- Greeley was my assigned fire. I know there was several fires. They were all consecutive streets.

THE COURT: How far were they apart?

THE WITNESS: It was like the next street over. Hawthorne was -- I believe Hull was the next street west.

MS. CASPER: Your Honor, we do have a map

that will be introduced through Lieutenant Richardson, which shows the fires.

THE COURT: Thank you. You may step down. Are you asking for it to be admitted, the exhibit?

MS. CASPER: Yes, I am.

THE COURT: Would you make a motion then?

MS. CASPER: Your Honor, the People would move to admit People's Exhibit Number 1.

THE COURT: It will be admitted.

R O N N I E B L A N T O N,

after been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE WITNESS: Yes.

THE COURT: She's going to ask you some questions.

DIRECT EXAMINATION

BY MS. CASPER:

Q. Can you state your name for the record?

A. Ronnie Blanton.

Q. Okay. And Mr. Blanton, I want to go back to March of -- March 2nd of 2014. Do you remember that day?

A. Yes.

Q. And what, if anything, occurred that you remember on that date?

A. I was at a house working and a guy walked into the abandoned house across the street and set it on fire and walked out.
Q. Okay. And when you say that you were at a house working, what's your -- what's your employment?
A. I work for U.S. bank. We were at a house getting pictures of it.
Q. Do you do maintenance work for the bank?
A. Maintenance, property preservation, keep them boarded up, locks changed, things like that.
Q. Were you by yourself that day?
A. No, I had another guy with me.
Q. Who was that?
A. David.
Q. Okay. And would that be David Foreman?
A. Yes.
Q. And do you recall which address you were at or what street you were on when you observed --
A. I was on Hawthorne, Hawthorne and 8 Mile.
Q. That's in the City of Detroit, County of Wayne?
A. Yes.
Q. And you observe somebody walking down the street that day?
A. Yes.
Q. Was he doing anything or saying anything that caught

your attention?
A. Yes. He kept taking a phone out of his pocket and you know, yelling into it and holding it back up and putting it back in his pocket.
Q. Did you see if he continued to walk down the street or did he approach a structure?
A. Yes. He went into the house across the street from us. He was in there for about ten minutes or so and then he walk out.
Q. Okay. And what, if anything, was he doing when he walked out?
A. Still talk on his phone, flipping it out, talking to no one, really. And he was yelling in it and the guy that was with me approached him after that.
Q. Okay. Did you ever approach him?
A. Towards the end, yes.
Q. Okay and so David approached him and did you hear the man say anything to David when David approached him?
A. Yes. He told him he had a gun and he was gonna shoot him if he came any closer.
Q. And was he still doing the phone thing?
A. Yeah, continuously the phone thing, kept flipping a little flip phone out of his pocket saying that I'm going to have CIA and FBI and everybody over there. He just kept saying that over and over again.

Q. And did David continue to be by him or did David come back to you?
A. In the beginning David kept approaching him, until he said he had a gun, then David turned around and start walking back and then once he realized he didn't have anything, that we both, you know, started to approach him.
Q. And did you say anything to him when you started to approach him?
A. No. We just asked him what he was doing in the house.
Q. Did he saying anything to you, respond at all?
A. Just kept saying the same thing. Then he looked at the house we was at, flipped out his phone and gave the address we was at.
Q. When you say gave the address that you were at, did he do that --
A. On his phone.
Q. -- on his phone. At this time did you notice anything unusual about the house that he came out of?
A. Yes.
Q. What did you see?
A. I saw smoke coming up out of the house. Because the windows didn't have any doors or windows. You could see everything in it. We saw a rug or something smoldering in the middle of the house, then all of a

sudden, the whole house was engulfed in flames.
Q. Do you know how much time passed, between the time you saw him come out of the house and you saw smoke?
A. Couldn't have been no more than three minutes.
Q. And did you continue to try to approach him or did you finally leave?
A. Continued to approach him, until after the fact that he says that he has a gun and once we realized he didn't have one, we continued to approach him more and then we thought about it, he didn't have a gun, he might have something so we let him go, went to the truck and got the camera and just started taking pictures of it.
Q. Were you taking the pictures of him?
A. Yes.
MS. CASPER: Your Honor, may I approach?
THE COURT: Yes.
By MS. CASPER:
Q. I'm going to show you what's been marked as People's Proposed Exhibits Numbers 2 and 3. And if you could, let me know if you recognize those?
A. Yes.
Q. What were those?
A. Pictures I took.
MS. CASPER: Request to admit Proposed

Exhibits 2 and 3, your Honor.

THE COURT: Granted.

MS. CASPER: Would your Honor want to see them?

THE COURT: You may.

MS. CASPER: Would your Honor like to see?

THE COURT: You may publish.

MS. CASEPR: That's all I have for this witness, your Honor.

THE COURT: Very well. You may step down.

THE WITNESS: Thank you.

MS. CASPER: Your Honor, the People's next witness is Christopher Goward.

THE COURT: Give your name to the reporter, please.

THE WITNESS: Up here?

C H R I S T O P H E R G O W A R D, after been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE WITNESS: I do.

THE COURT: Please have a seat. Miss Casper is going to be asking you some questions.

THE WITNESS: Okay.

THE COURT: Proceed.

DIRECT EXAMINATION

BY MS. CASPER:

Q. Can you state your name for the record, please?

A. Christopher Goward.

Q. Mr. Goward, where were you living back in March of 2014?

A. At 20514 Hull Street.

Q. Is that H-u-l-l?

A. It's -- yes.

Q. And is that in the City of Detroit, County of Wayne?

A. It's Highland Park.

Q. Hull Street is --

A. Yes.

Q. Is it near 8 Mile?

A. Yes. That's what the address says, Highland Park.

THE COURT: It's probably a mailing address. That's -- is that the local mailing post office?

THE WITNESS: Yes.

MS. CASPER: Oh, the post office.

BY MS. CASPER:

Q. And who lived at 20514 Hull Street with you?

A. My wife, myself and our two kids, my mother-in-law, her boyfriend, my sister-in-law and her boyfriend and

baby.
Q. Was this a single family house?
A. Yes, it was -- had five rooms.
Q. Had, okay. And I want to take you back to March 2nd of this year, do you remember that day?
A. Yes.
Q. Is there anything that causes you to stand out?
A. Yes. We were moving stuff into storage in our Penske van.
Q. When you say we, who is that?
A. My wife and I.
Q. What's your wife's name?
A. Raven Goward.
Q. And were you moving things into a Penske van?
A. Yes.
Q. And what happened that you remember doing that?
A. We were actually getting ready to move stuff into storage and we happened to notice a fire to the east of us, probably a couple blocks over. There was smoke coming up and that's what caught our attention. So we stopped what we were doing and we said hey, look at the smoke up over there. It must be a fire. Right about that time is when we seen a gentleman coming from 8 Mile, swearing and we didn't know what he was carrying on about, but we noticed him right away 'cuz

he was loud and carrying on about something.
Q. And do you recall any specifics of what he was yelling about?
A. Didn't really understand what he was saying but I just remember that he was carrying on about something. I just assume that was about the fire, 'cuz we noticed the same thing, you know, the fire. So I thought maybe he might have been cussing about that, I'm not sure. Didn't really hear exactly what he was saying, but I could tell he was angry about something.
Q. And do you know if he continued to walk down the street or did you see him go anywhere?
A. Yeah. He came from -- he turned off, came down our street from 8 Mile and he walked down the street towards us. He had -- like, he was carrying a brown paper bag and some kind of grocery bag and he ended up stepping into the house next to our's.
Q. Okay. And the house -- so if I'm facing your house, is it to the house to the right or left of your house?
A. If you're looking straight at my house, it's the house to the left.
Q. Okay. And were you in the -- your -- did you and your wife remain outside after you saw him enter the house next door to you?
A. Yes. We were outside for, probably, a couple minutes.

After we seen him go in the house, we stepped in -- the house didn't have any windows and he stepped in the front window of the house and we went inside, 'cuz we were trying to decide well, should we go in there and ask him to leave, 'cuz there was nothing living in the house at that time. So we stepped in the house, probably a couple minutes after that, trying to decide if we should approach him or not and we're inside, probably one or two minutes and then I came back outside.

Q. What, if anything, did you see when you came back outside?

A. When I came back outside, I noticed there was smoke coming from the house, so I came out before my wife and I started heading over there to look. I see smoke coming from the windows. I asked my wife to call 911 because the house was on fire.

Q. And did your -- as far as you know, your wife called 911?

A. Yes. It was actually my wife called 911 and I was outside, kept telling her hey, tell them the house is burning, you know. So that was the second house I had seen burning, one a few blocks over and now this one.

Q. And did the fire department come to the house next door to you, if you remember?

A. Yes. They-- actually they were putting out the other fire and they had to back down, it looked like 8 Mile and they were in a rush because they said oh, we had another fire and when my wife called 911, they said they were already at the fire. She said no, there was another fire on Hull Street. So they had come from that one to this one.
Q. That was Detroit Fire Department that responded?
A. Yes.
Q. Did your home sustain any damage?
A. It did. It took him a little bit to get set up because they were already on a call, so by the time they got over, the house was fully engulfed and it actually caught our house, partially, on fire. The side and the roof sustained damage. They had to go into our home to make sure it didn't go inside.
Q. Did you ever provide a statement or information to members of the Detroit Fire Department Fire Investigation or Arson Unit?
A. Yes.
Q. And were you asked if you could identify the individual?
A. I was.
Q. And did you provide a -- what's called a photo lineup?
A. Yes.

MS. CASPER: Your Honor, may I approach?

THE COURT: You may.

BY MS. CASPER:

Q. I'm going to show you what's been marked as People's Proposed Exhibit 4. If you could let me know if you recognize this?

A. Yes.

Q. And is that a six picture photo lineup?

A. Yes, it is.

Q. Were you able to identify --

A. I was.

Q. And which number did you identify as the individual you saw entering the house next to your's?

A. One.

MS. CASPER: Request to publish and admit, your Honor.

THE COURT: Yes. Your motion is granted.

MS. CASPER: That's all for this witness, your Honor.

THE COURT: You may step down. Thank you.

MS. CASPER: Your Honor, the People would call Lieutenant Richardson.

THE COURT: Very well.

D E N N I S R I C H A R D S O N,

after been first duly sworn to tell the truth, the

whole truth and nothing but the truth, was examined and testified as follows:

THE WITNESS: Yes, sir.

THE COURT: Please have a seat. Keep your voice up. Proceed.

DIRECT EXAMINATION

BY MS. CASPER:

Q. Can you state your name for the record?

A. Dennis Richardson.

Q. And where are you employed?

A. City of Detroit Fire Department.

Q. And in a particular unit?

A. Fire Investigation Unit.

Q. How long have you been with the fire department?

A. Eighteen years.

Q. And how long have you been with the Fire Investigation Unit?

A. Eleven.

Q. And what is your rank in the department?

A. Lieutenant.

Q. And in order to be a lieutenant in the Fire Investigation Unit are you required to go through any specialized training?

A. Yes.

Q. And did you do that?

A. Yes.
Q. What training have you gone through in order to be with the Fire Investigation Unit?
A. 'Um, I've been to the Michigan State Police Basic Fire Investigation School. I attended or I'm certified through them. I also hold a certification with the International Association of Fire Investigation -- Fire Investigators, 'um and internal training also.
Q. And the training that you go through, is that continuous?
A. Yes.
Q. Did you also attend the Detroit Police Academy?
A. Oakland Police Academy.
Q. Oakland?
A. Yes.
Q. And have you ever been certified as an expert in the area of fire investigation before?
A. Yes.
Q. And in which court's?
A. This court, Eastern District, Federal, 36th District.
Q. And you said this Court, we're at Frank Murphy?
A. Yes.
Q. But you mean Third Circuit?
A. Yes.
Q. Do you know, approximately, how many fires you've

investigated in your time with Detroit Fire Department?

A. It's been over a thousand.

Q. And what are your general duties as a member of the Fire Investigation Unit?

A. 'Um, basic one is to determine origin and cause of fire incidents, then also determining who the responsibility, criminal or otherwise and prosecuting people we determine are criminally responsible.

Q. And do you identify every fire as an incendiary fire?

A. No.

MS. CASPER: Requesting Lieutenant Richardson to testify as an expert in the field of fire investigation.

THE COURT: Your motion is granted.

BY MS. CASPER:

Q. I'm going to take you back to March 2nd or 3rd of this year. Were you with the Fire Investigation Unit?

A. Yes.

Q. And did you receive a call to a group of fires located near 8 Mile and the I-75 service road?

A. Yes.

MS. CASPER: Request to approach, your Honor.

THE COURT: Yes.

By MS. CASPER:
Q. I'm going to show you what's been marked as People's Exhibit -- Proposed Exhibit number 7. Can you recognize that?
A. Yes.
Q. What is that?
A. This is a map of the area of fire incidents that took place at the time I went out.
MS. CASPER: Request to admit, your Honor.
THE COURT: Granted.
By MS. CASPER:
Q. And were you out investigating those fires by yourself or did you have people with you?
A. I had -- initially I had a partner.
Q. Who was that?
A. Lieutenant Mayers.
Q. Were you assigned to investigate a fire that occurred at 20438 Hawthorne?
A. Yes.
Q. And what type of structure was that?
A. It was a dwelling.
Q. And was that the only structure that was involved in-- in the 20438 Hawthorne or did it extend?
A. It extended to the dwelling next to it.
Q. Do you know, is that 20430 Hawthorne?

A. Yes.
Q. Were those occupied or vacant structures, do you know?
A. The 20438 was vacant, but 20430 was occupied.
Q. And was there charring to both those structures?
A. Yes.
Q. In regards to 20438 Hawthorne, did you conduct an orgin and cause investigation?
A. It was limited, but best I could, yes.
Q. Why was it limited?
A. The house totally collapsed.
Q. Okay. And have you had to investigate other fires where the structure's totally collapsed?
A. Yes.
Q. And does that alter your normal course of investigation?
A. Yes.
Q. And in what way?
A. 'Um, you have to rely on other sources of information to gather a fire origin and then a totality of the circumstance may give you a fire cause.
Q. And so what did you do to determine the area of orgin of 20438 Hawthorne?
A. Well, when I arrived on the scene, the fire was in it's beginning stages, so I could actually see the fire started in the inside of the dwelling on the

first floor, but fire fighters, I believe had problems getting water and that's why the whole house ended up collapsing, that delay in suppression.

Q. Did you speak with any witnesses regarding the fire at 20438 Hawthorne?

A. Yes.

Q. And were they able to -- without saying what they said, were they able to provide you with any information regarding where -- whether they saw the fire start in the particular area?

A. Yes.

Q. Was that consistent with what you had observed?

A. Yes.

Q. Were you able to determine a cause of that fire?

A. 'Um, I was able to determine that it was intentionally set.

Q. Incedniery?

A. Yes, incedniery, yes.

Q. And when it spread to 20430 Hawthorne, it charred--

A. Yes.

Q. -- the building next door?

A. Yes.

Q. Was the 20430 totally demolished, totally destroyed or partially?

A. Partially.

Q. And you indicated that was an occupied home?
A. Yes.
Q. And in regards to the fire on Hull Street, H-u-l-l were you also assigned to that fire?
A. Yes.
Q. And did you respond to that scene?
A. Yes.
Q. And did that fire stay contained to 20520 or did it spread to another structure?
A. It extended to the house next to it also.
Q. And would that be Mr. Goward's house?
A. Correct.
Q. And was 20520 Hull occupied or vacant?
A. Vacant.
Q. And it's rented or occupied?
A. Correct.
Q. Were you able to determine an area of orgin for the fire that originated at the 20520 and spread to 20514?
A. Yes.
Q. What was your area of orgin?
A. In the stairwell and the basement or going into the basement, rather.
Q. Were you able to determine a cause?
A. Yes.
Q. What was the cause?

A. It was incendiary, as well.
Q. Now for either the Hawthorne or Hull fire, were you able to determine an ignition source?
A. No.
Q. Were you able to eliminate mechanical, electrical or accidental causes?
A. Yes.
Q. Were you able to eliminate natural causes?
A. Yes.
Q. Now with the Hawthorne fire, you indicated because of the damage you could not do your standard investigation protocal?
A. Correct.
Q. Were you able to do a standard investigation with the Hull address?
A. Yes.
Q. What did that entail?
A. 'Um, I canvassed the area. There were witnesses next door and then me, myself, I do an exterior walk around and then I progress into the inside and I go room by room, noting if there is any fire damage or fire travel and then I narrow down an area of origin and then at that point I determine what could have, possibly, caused a fire in that area.
Q. Okay. Now during the -- I'm sorry, strike that.

Approximately how long did it take you to investigate these two fires that spread to additional structures, if you remember?

A. I was out there for an extended period of time only because I was -- all those fires combined, I was trying to order -- manage all those scenes. These two seasons, in particular, I can't remember how long I was out there.

Q. When you say you were trying to manage these scenes, are you referring to, not only, the four fires on Hawthorne and Hull, but also the Greeley and Russell?

A. Yes.

Q. Were you keeping in touch with the other fire investigators that were at other scenes?

A. Yes.

Q. Were you contacted by Lieutenant Crouch from the Greeley scene?

A. Yes.

MS. CASPER: Your Honor, may I approach?

THE COURT: You may.

By MS. CASPER:

Q. I'm going to show you what's been admitted as People's Exhibit 1. Do you recognize that?

A. Yes.

Q. What is that?

A. That is a note found at, I believe, the Greeley scene. Lieutenant Crouch had sent me a picture of it, texted me a picture of it.
Q. Did he ask you if you -- did he ask you anything or he send you a picture?
A. He initially sent me a picture of it.
Q. And did that have any significance to you?
A. Yes.
Q. Why did that have significance to you?
A. One week prior to this, I was at another fire scene and I saw a note very similar to this written on the wall -- actually two fire scenes, one a week prior to this one where a note very similar to this was written.

MS. CASPER: May I approach, your Honor?

THE COURT: You may.

BY MS. CASPER:
Q. This is People's Proposed Exhibit Number 5. Do you recognize that? What is that?
A. This is the note that I saw written prior to -- a week prior to this incident.
Q. Can you read that into the record?
A. It's me, Mr. Pieter Folscher. My cell 248-762-6466. I killed those men and took drugs at Rio Grand Motel crook Med 911 rescue owe me money and police who work

area three nights ago, yesterday, they took money from drug boys using badge. I lite (sic) this fire. My address is 32414 Hawthorne, Warren, Michigan.

MS. CASPER: Request to admit and publish, your Honor.

THE COURT: Very well. Your motion to admit is granted.

BY MS. CASPER:

Q. And when you saw the picture of the note that was marked People's Exhibit 1 and then compare that to the note that you had found that was marked as People's Exhibit 5. What did you do, if anything?

A. I immediately recognized that the handwriting was the same.

Q. And did you do any investigation into the Hawthorne address in Warren?

A. Yes.

Q. And what did you do?

A. I talked to -- I actually talked to Mr. Folson -- or I'm sorry, I did not, one of my partners did.

Q. Who talked to Mr. Folson?

A. Captain Farrell.

Q. And was -- did Lieutenant Farrell or Captain Farrell give you information that assisted you with your investigation?

A. Yes.
Q. As far as you know there is a Mr. Folscher?
A. Yes.
Q. Is that Mr. Lewis?
A. No.
Q. Now Lieutenant Mayers, Lieutenant Crouch testified that Mr. Lewis was apprehended at the scene?
A. Yes.
Q. After he was taken into custody, did you attempt to speak with him at all?
A. Yes.
Q. Did you provide him with his Miranda Rights when you attempted to speak to him?
A. Yes.
MS. CASPER: And may I approach, your Honor.
THE COURT: Yes, you may.
BY MS. CASPER:
Q. And showing you what's been marked as People's Proposed Exhibit number 6, do you recognize that?
A. Yes.
Q. What is that?
A. That is his verification of -- notification of constituional rights form.
MS. CASPER: Request to admit, your Honor?

THE COURT: Granted.

By MS. CASPER:

Q. Was there anything -- did Mr. Lewis sign his Miranda?

A. He did not sign it, no.

Q. Did he do anything with it?

A. He wrote on it, yes.

Q. And when he wrote on it. Was there anything about that that caught your attention or was significant to your investigation?

A. Yes.

Q. What was that?

A. His writing matched the notes found on the incident of that day and the incident a week prior.

MS. CASPER: Request to publish, your Honor.

THE COURT: Granted.

BY MS. CASPER:

Q. Did you speak with any -- and I'm sorry, I believe I might have asked this already, did you speak with any of the witnesses at Hull or Hawthorne?

A. I spoke to Mr. Goward briefly.

Q. Do you recall if you spoke with Mr. Blanton or Mr. Folson?

A. Yes, I talked to Mr. Blanton.

Q. Did any of them provide you with a description, other

than Mr. Goward's photo line-up, did any of them provide you with a description of the individual they saw?

A. Yes. Mr. Blanton provided me with a verbal description and also some photographs.

Q. When you encountered Mr. Lewis, did Mr. Lewis match that description?

A. Yes.

MS. CASPER: That's all, your Honor.

THE COURT: On this Certificate of Constitutional Rights, can you make out what he said here?

THE WITNESS: Yes.

THE COURT: All right. What is he saying?

THE WITNESS: I have to read it.

THE COURT: Here. Give this back to him. What did he write?

THE WITNESS: I wish lawyer present before talking.

THE COURT: All right. And that's when you ceased any questions of him?

THE WITNESS: Yes.

THE COURT: Okay. Very well. Anymore questions? You may step down.

MS. CASPER: Your Honor, at this point

People would rest and ask that Mr. Lewis be bound over on the information to Third Circuit Court.

THE COURT: Having heard the testimony herein, the Court finds one, crimes were committed, two, that there is sufficient probable cause, will bind him over on the allegations contained in the complaint. Arraignment on the information date is August 6th, 2014, 9 a.m.. The bond is continued.

MS. CASPER: Thank you, your Honor.

(Proceedings concluded at approximately 12:03 p.m.)

CERTIFICATE OF COURT REPORTER

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

I, BETH A. TOMASI, CSR-3098, Official Court Reporter in and for the 36th District Court for the City of Detroit, County of Wayne, State of Michigan, do hereby certify that the foregoing pages, 1 through 61, comprises a complete, true and accurate transcript of the proceedings had in the above-entitled cause.

Beth A. Tomasi

BETH A. TOMASI, CSR-3098

CERTIFIED SHORTHAND REPORTER

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DATED: September 5, 2014