

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

KATHERINE LINDSEY HENRY,  
Defendant-Appellant.

Court of Appeals No. 356828  
Circuit Court No. 21-64004-AR  
Lower Court No. 20-3569-SM

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[REDACTED], MI 49426  
(redacted per MCR 1.109)

REPLY BRIEF IN SUPPORT OF APPELLANT'S  
APPLICATION FOR LEAVE  
ON SUBSTANTIVE DUE PROCESS GROUNDS  
(LACK OF SUBJECT MATTER JURISDICTION)

ORAL ARGUMENT REQUESTED

Respectfully Submitted: April 21, 2021

/s/ Katherine L. Henry  
Katherine L. Henry (P71954)  
Defendant In Pro Per  
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(redacted per MCR 1.109)

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## ARGUMENT

Henry files this Reply Brief per MCR 7.205(D) and 7.212(G). Henry largely stands on the legal arguments of the Application for Leave (and the MCR 7.205(G)(1) Statement and Motion for Immediate Consideration), and the transcripts, affidavits, and other documentation submitted earlier to this court. However, Henry addresses herein the few issues raised by Prosecutor's recent filings.

### A. Prosecutor's Lack of Candor to Courts Undermines Integrity of Adjudicative Process

Prosecutor claims "the district court has stated that it is unable to begin hearing jury trials until at least June 1, 2021." Prosecutor often receives court information days before Henry, but as of now, Henry has no such schedule. The 4/28/21 jury trial, app 204, has not been re-noticed with a different date, nor been adjourned by court order. Even the district court's website says *nothing* on cancelling jury trials until June. App 369. Indeed, reverting to Phase 1 on 4/8/21, app 374-78, the court still issued a *zoom* notice, app 371-72, for a 4/22/21 hearing and 4/23/21 settlement conference (despite Henry's objections). The court denied staying the trial pending Henry's appeals on 4/6/21, app 216, despite violating her rights by holding a trial having *no* subject matter jurisdiction, and continuing the violations described in her *procedural* due process appeal. Further, guaranteed a speedy trial in MCR 6.004(A), US Const Am VI, and Const 1963, art I, § 20, Henry's trial for a case that began Election Day, 5 ½ months ago, cannot be extended indefinitely.

Prosecutor also refers to Henry's appeals as *both* stemming from the 2/4/21 motion hearing or *earlier*. However, while Henry's subject matter jurisdiction appeal stems from the court's decision on 2/5/21 to deny Henry's motion to dismiss, the *procedural* due process application for leave clearly states it is appealing the district court's outright denial of assistance of counsel at the 2/4/21 hearing (which now stands as a jurisdictional bar to any further proceedings against Henry on this charge)<sup>1</sup>, *but also* the *continued denial* of Henry's rights to reasonable requests for disability accommodation (in not only the 2/4/21 motion hearing, but also the 2/9/21 pretrial hearing, 4/8/21

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<sup>1</sup> See, app 304, 307-310, 320-322, 326-327, et. seq.

motion hearing, and the *upcoming* 4/22/21 motion hearing, 4/23/21 settlement conference, and 4/28/21 jury trial), to *public* hearings, to in-person hearings, to redaction of Henry's personal identifying information per MCR 1.109(D)(9), and to discovery under MCR 6.610(E). In fact, since the initial hearing held 4/8/21 on Henry's motion to compel discovery, Prosecutor has filed a motion to dismiss Henry's *procedural* due process appeal in circuit court, app 381-382, and these responses to Henry's motion for immediate consideration and application for leave, but still has provided *no* response whatsoever to Henry's 2/15/21 discovery request. App 191-194. As the court has a continuing duty to provide reasonable disability accommodations, hearings open to the public, in-person hearings, redaction of Henry's personal identifying information, and the discovery requested by Henry, it is clear that the *procedural* due process appeal is based on several proceedings *after* the 2/5/21 order was entered, including those that have yet to take place.

Further, Henry's *procedural* due process appeal challenges the lower court's and Prosecutor's denial of e-service upon Henry, pursuant to MCR 2.107(C), as amended by AO 2020-9 (extended indefinitely by AO 2020-12 and 2020-19). In fact, Prosecutor recently filed a proof of service claiming to mail Henry the motion to dismiss Henry's *procedural* due process appeal, app 381-382, on 4/9/21 while the postmark shows it wasn't mailed until 4/12/21, app 429, thus not arriving until late on 4/14/21. Thus, Henry worked on her response on 4/15/21 - 4/20/21, filing it yesterday afternoon by email, app 384-429, only to see right afterwards that the circuit court had just entered an order granting Prosecutor's motion. App 430-433. So, although the lower courts are *now* serving Henry by email, Prosecutor still refuses to do so which has direct negative impacts on Henry's having proper notice and opportunity to be heard, as required by our constitutions.

Moreover, throughout Prosecutor's responses, she states Henry's subject matter jurisdiction appeal is "untimely," yet she admits that "jurisdiction of a court is an 'absolute requirement'," so "questions of subject matter jurisdiction may be raised at any time." Prosecutor Response p 3. Prosecutor then fails to state, as required in MCR 7.212(D)(2), whether the standard of review

stated in Henry's appeal (on p 17, 46, 53) is complete and correct. Prosecutor agrees appellate review of a decision on a motion for summary disposition, and review in relation to a claim of lack of subject matter jurisdiction is done de novo, Pros Resp at 3, but then claims an appeal - this appeal, based entirely on the law and hinging on *no* disputed facts - is to be reviewed only for an abuse of discretion. *Id.* Prosecutor then implies that the lower court has made findings of fact in this case, and that those should only be reviewed for clear error. *Id.* However, Prosecutor also admits that no proofs have been taken in this matter, *id at iv*, nor did she file *any* documents showing that the trial court has made any such findings. Prosecutor then implies that since Henry's "arguments are fact driven," and the lower court's findings can only be reviewed for clear error, *this* court must deny Henry's appeal for lack of subject matter jurisdiction. *Id* at 4.

This is just as nonsensical as Prosecutor's argument that Henry "employs 'lack of subject matter jurisdiction' in a non-technical, hyperbolic sense." *Id* at 2. Under what rule or statute do appeals for lack of subject matter jurisdiction get labeled as "non-technical hyperbole" to be treated as disputes of fact, rather than disputes of law that a judge *must* determine *prior* to trial? None.

Prosecutor then uses an unpublished opinion (violating MCR 7.215(C)) to argue this case must proceed to trial to (presumably) resolve contested factual issues before it can be dismissed. *Id* at 3. Yet it's unclear *which* facts are allegedly disputed. MCR 7.212(D)(3)(b) requires Prosecutor to point out any alleged inaccuracies and deficiencies in Henry's statement of facts "with specific page references to the transcript, the pleadings, or other document or paper filed with the trial court, to support [Prosecutor's] assertions," while 7.212(C)(7) also requires using those page references, yet Prosecutor did not do that. Moreover, MCR 7.212(C)(6)(c) (applicable through 7.212(D)(1)), requires Prosecutor's statement of facts to be a chronological narrative containing "the substance of proof in sufficient detail to make intelligible, indicating the facts that are in controversy and those that are not," but Prosecutor fails to do this, as well. Even in responding to Henry's motion for immediate consideration, Prosecutor fails to comply with MCR 2.111(C) and (D) by *not* responding

to each allegation, stating for each denial the substance of the matters on which Prosecutor will rely to support the denial. Prosecutor did the same thing in responding to Henry's MCR 2.116 motion to dismiss, app 157-159, meaning *all* allegations Henry made in *both* motions are admitted per MCR 2.111(C)(1) and (3), and Prosecutor is precluded from asserting any defenses that have not been properly raised, pursuant to MCR 2.111(F)(2). Likewise, Prosecutor failed to set forth *specific facts* showing that there is a genuine issue for trial, by affidavits or other admissible evidence, as required by MCR 2.116(C)(10)(G)(4). Consequently, Prosecutor has intentionally foregone all *requirements*, let alone opportunities, to demonstrate even one genuine, material disputed fact for trial.

Prosecutor argues "a question of fact exists as to her actual service at the time of her arrest, and, if serving, whether she engaged in breach of peace, one of the exception [sic] of privilege from arrest." Pros Resp at 3. However, *nothing* the deputies said that day, nor that Prosecutor has put in pleadings until now, indicates any genuine dispute on that fact. And Prosecutor has substantiated *none* of her claims, such as this one, while Henry has substantiated *every* claim by affidavits, transcripts, and other documents, therefore, the prosecution should "lose its right to raise factual issues . . . [because] it has failed to raise such . . . in a timely fashion during the litigation."<sup>2</sup>

And although MCL 600.1825 allows for the arrest of a public officer in the course of their duties for felonies, treason, or breach of the peace, Henry is charged with *trespassing on property open to the general public* (where her mere presence is alleged as illegal), *not* with breaching the peace. As pointed out in Henry's brief, no one even *alleged* that Henry blocked ingress or egress, harassed or bothered township employees or voters, impeded town hall operations, or caused any breach of the peace. She was simply there to discuss the law with the deputy to ensure her clients were able to exercise their First Amendment rights, being in full compliance with state election law.

Prosecutor also alleges that "in all filings [Henry] has exceeded the page allotment set forth in MCR 7.212(B)." But, Henry's application for leave is obviously *not* in excess of the page limits

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<sup>2</sup> *People v Trapp*, \_\_\_ Mich App \_\_\_, \_\_\_ (2020) (Docket No. 345239), slip op at 2, n 1, quoting *Steagald v US*, 451 US 204, 209 (1981).

of MCR 7.212(B), which allows 50 pages *exclusive of* tables, indexes and appendixes. Although in typical motion practice, under MCR 2.119(A)(2)(a), a motion and supporting brief share the same page limit, that is not applicable here. MCR 2.119 shared page limits apply to a motion and the required supportive brief. But MCR 7.212(B) page limits apply to the brief (or application) only. Henry's motion for immediate consideration of the application is *not* required to have a supportive brief filed, per MCR 7.211(A)(3), so the application should not be confused with a supportive brief, with which it shares page limits. Further, skipping over the excluded tables and indexes, Henry's brief begins on page 11 and ends  $\frac{3}{4}$  of the way down onto page 60, which makes it just shy of 50 pages, obviously not *exceeding* the 50 page limit. Prosecutor *and the circuit court judge* argued the same thing about Henry's application for leave to appeal *procedural* due process violations, yet that brief is even shorter (from page 9 to halfway into page 57, which equals 48.5 pages).

#### **B. Prosecutor Tramples Henry's Rights, Not Protecting Them as Required**

As if it wasn't egregious enough that Prosecutor, duty-bound "to see that the defendant is accorded procedural justice" and "assure that the defendant's rights are protected,"<sup>3</sup> argues Henry has *no* right to raise legal challenges to *either* the original charges *or* the subsequent manner in which the case is handled by Prosecutor and the court, Prosecutor *also* argues Henry's *substantive* and *procedural* due process appeals create "unreasonable confusion and wasted resources." Here, the unreasonable confusion and wasted resources directly resulted from the deputies and Prosecutor pursuing the trespassing charge against Henry despite the countless ways in which the arrest was prohibited, the prosecution is prohibited, and the court completely lacks subject matter jurisdiction. The deputies caused Henry, her young child, and the petition circulators unreasonable confusion when they violently arrested Henry (causing documented injuries, app 110-123), telling her they were taking her to the jail, CPS was taking her child, and her car was being towed, app 81-82. Henry certainly felt overwhelmingly confused as she sat, in pain and handcuffed, in the back of the

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<sup>3</sup> MRPC 3.8, Special Responsibilities of a Prosecutor, Official Comment

deputy's SUV trying to figure out why these public officers would do such a thing. App 80-82. She was even more confused when she, still handcuffed in the back of the deputy's SUV, was told over the phone by the Sheriff that the township clerk had the right to request the trespassing charges because the clerk had control over the property, app 83, with the deputy repeating several times that the township clerk in fact *owned* the township property and that it was *private*. App 79-80.

Wasted resources? Prosecutor can't even begin to understand the resources Henry has been forced to waste in responding to this illegal and unconstitutional charge against her, let alone in battling the illegal *and* unconstitutional manner in which the case has proceeded. Henry spent most days between Election Day and the 2/4/21 hearing on Henry's motion to dismiss working 18-20 hours each day to research and draft pleadings for the hearing. From the deputy not filing the ticket timely, to him substantially modifying it *after* serving on Henry but *before* filing it with the court, to the court not allowing Henry an in-person arraignment until 2 ½ months after the incident, there were plenty of legal issues to address. Then, with Prosecutor's continual refusal to serve Henry by email (despite requiring the public to email them, app 435), the court taking Henry's motion to compel hearing off the calendar with *no* notice to her,<sup>4</sup> court being intermittently closed to the public,<sup>5</sup> the court violating several of Henry's other statutorily and constitutionally protected rights, and the unbelievable manner in which it ruled the accused may *never* raise potentially dispositive pretrial legal or constitutional issues, Henry had her legal research and writing cut out for her.

As Henry mentioned in prior pleadings, the legal research and writing for *all* of these substantive and procedural due process issues has taken Henry literally every single day since February 5th - seven days a week, on average 20 hours each day. Henry's husband has also been working every day to assist with the research and writing of these appeals, and their family has suffered significantly. Henry does not have paid staff, ICLE, WestLaw, LexisNexis, or other similar services, as she does all her work for the people of Michigan on a donation basis, receiving no

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<sup>4</sup> Henry Email to Court re Motion Hearing Removed from Calendar, App 428.

<sup>5</sup> See, e.g., App 372, and statement on court's website, first highlighted portion, App 435.

hourly or flat fees for such services, and that has also added significant time to the completion of these appeals. The longer this case drags on, the more Henry's personal life, legal work and political efforts are substantially harmed and her resources wasted. These certain emotional and financial costs of defending a charge that cannot properly be brought are addressed by ICLE in Michigan Criminal Procedure § 2.3; Circuit Court Judge Dennis Kolenda in *Potentially Dispositive Pre-Trial Motions* (2015), app 279-84; and *People v Sierb*, 456 Mich 519, n 19 (1998), quoting *US v MacDonald*, 456 US 1, 8-9 (1982).

MCR 1.109(D)(3) states that in “addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under this subrule may be found in contempt of court.” Here, Prosecutor knowingly made multiple false statements and declarations to the court, as described above. Further, MCR 1.109(E)(5)(b) states signing pleadings *certifies* that “to the best of his or her knowledge, information, and belief formed *after reasonable inquiry*, the document is *well grounded in fact* and is *warranted by existing law or a good-faith argument* for the extension, modification, or reversal of existing law.” Yet the arguments asserted by Prosecutor throughout this case (in district court, circuit court, and now this court) have *no* basis in fact or law, and Prosecutor has never even attempted to substantiate any of these factual or legal claims with proper documentation, such as *required* briefs and affidavits.<sup>6</sup> Prosecutor hasn't even bothered responding to Henry's motion to stay proceedings, motion to compel discovery, or either application for leave in circuit court. Additionally, the pleadings show Prosecutor is either not conducting a reasonable inquiry into the law involved or is purposely putting forth groundless arguments, or both.

Further, MCR 1.109(E)(5)(c) states Prosecutor's signature on court documents certifies “the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Yet, Prosecutor constantly puts forward the least effort possible to comply with court procedures while also doing everything possible to ensure

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<sup>6</sup> Prosecutor files *this* brief in response to this court of appeals appeal for *lack of subject matter jurisdiction*, but failed to file *any* briefs (or affidavits) for *any* of motions or appeals in district court or circuit court.

Henry does *not* receive fair treatment by the justice system. Certainly this response to Henry's application for leave to appeal is no exception. (The 9-sentence motion to dismiss Henry's circuit court appeal filed in violation of countless court rules and constitutional protections is another very recent example). Prosecutor's response to Henry's application for leave completely fails to address more than  $\frac{3}{4}$  of the legal arguments presented by Henry. And Prosecutor (and the lower court) refuses to include Henry's state bar number on *any* of the pleadings filed, despite it being required by MCR 1.109(D)(1)(b)(v), as Henry is a Michigan-licensed attorney appearing in the case. This might seem like no big deal, but it is just another way for Prosecutor (and the lower court) to show utter disrespect for Henry as a fellow officer of the court. All in all, Prosecutor's pleading serves an entirely improper purpose, including harassment of Henry, and delay and increase of costs in this litigation. Any way you look at Prosecutor's pleadings and actions, MCR 1.109(E)(6) provides for mandatory sanctions for violating these requirements: "If a document is signed in violation of this rule, the court, on the motion of a party or on **its own initiative**, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction."

Prosecutor and the lower courts may think of this whole situation as just another "misdemeanor file," as referenced in Prosecutor's Statement of Question Presented, but this is a *Constitutional Catastrophe* that has greatly impacted Henry's entire life, and that of her family.

### CONCLUSION

Prosecutor's response to Henry's application for appeal ignores several firmly established legal principles regarding preemption, constitutionally-protected activities, statutory prohibitions against arrest and prosecution, and procedural protections for Henry (like the ability to file an MCR 2.116 motion to dismiss). Prosecutor refers to Henry's appeal for lack of subject matter jurisdiction as being "untimely," yet such an appeal can literally be made at *any* time between the beginning of the case and extending through 6 months *after* the trial and final judgment. Prosecutor also argues Henry's *procedural* due process appeal is untimely, thereby ignoring the court's (and often times,

Prosecutor's) continuing duty to observe and protect Henry's right to *public* hearings, assistance of counsel, reasonable disability accommodations, in-person hearings, sharing the videos of court proceedings, redaction of her personal identifying information, e-filing and e-service, and mandatory discovery. Prosecutor further blatantly lies to the court about the substance of Henry's appeal (alleging it's comprised *only* of challenges to events from 2/4/21 and earlier), and ignores Henry's right to challenge *both* the illegality of the charge *and* the continuing due process violations by Prosecutor and the court. Further, Prosecutor seeks a grossly inappropriate remedy (a criminal record, fines, and possible jail time) for an alleged parking violation.

Prosecutor's continual lack of truthfulness and candor with the courts severely undermine the integrity of the adjudicative process, while Prosecutor's actions demonstrate the trampling, instead of the protection, of Henry's constitutionally and statutorily protected rights. It is for situations precisely like this that the rules provide for **the court, on its own initiative**, to assess damages and take other disciplinary action because Prosecutor's pleadings are "grossly lacking in the requirements of propriety, violate[] court rules, [and] grossly disregard[] the requirements of a fair presentation of the issues to the court." MCR 7.216(C)(1)(b); MCR 7.112.

Further, unless this Court grants Henry's requests for relief before the trial date, Henry will be *substantially* and *irreparably* harmed by going to trial on unsupported charges, with significant detrimental impacts on her personal life, legal work, and political efforts. Moreover, failure to immediately correct the due process violations addressed herein will subject Henry to *additional imminent* deprivations of procedural rights, although the "constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial." *Cox v Louisiana*, 379 US 559, 574 (1965).

Indeed, when government officials violate the Constitution, it "does not permit judges to look the other way; [rather, they] must call foul when the constitutional lines are crossed."<sup>7</sup> Here,

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<sup>7</sup> *In re Certified Questions*, \_\_ Mich \_\_, \_\_ (2020) (Docket No. 161492), slip op at 41 (citations omitted).

those lines were undoubtedly crossed. So, although the deputies and Prosecutor act “on behalf of” The People, it is Henry who is fighting nonstop to protect not only her rights, but the rights of We The People. What value do our state and federal constitutions have if the officers sworn to uphold them are allowed to diminish, abridge or deprive the God-given rights guaranteed therein?<sup>8</sup>

### REQUEST FOR RELIEF

Thus, since the court has the authority, and *the duty*, to enter injunctive relief against a constitutional violation,<sup>9</sup> Henry asks this court to grant her motion on or before the 8:00am 4/23/21 settlement conference, ordering the trial court to dismiss the case with prejudice. Accordingly, Henry asks for an order that “the arrest record shall be removed from the internet criminal history access tool (ICHAT),” per MCL 764.26a(1)(a), and that 60 days from the dismissal order the “arrest record, all biometric data, and fingerprints shall be expunged or destroyed, or both, as appropriate,” and “any entry concerning the charge shall be removed from LEIN,” per MCL 764.26a(1)(b).

With Prosecutor addressing Henry’s *procedural* due process appeal in her response here, and continuing to violate Henry’s rights in *both* appeals (and in matters before the district court), Henry asks this court<sup>10</sup> to order that for all proceedings related to this charge: participants *shall not* wear face coverings (to reasonably accommodate Henry’s lip-reading); *all* participants shall be physically present, *not* participating by Zoom (per statutory and constitutional requirements, and to reasonably accommodate Henry’s disability); media access and the public’s physical presence *shall not* be denied or abridged. Henry also asks to publicly share the hearing videos, and for her personal identifying information to be redacted immediately from all court orders and pleadings pursuant to her motion on the record at the 2/4/21 hearing. Finally, Henry also asks this court to enter an order clarifying that e-filing and e-service must be used to the greatest extent possible during COVID 19.

**Respectfully Submitted:** April 21, 2021 /s/ Katherine Henry **Katherine L. Henry (P71954)**

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<sup>8</sup> Rights may not be diminished (Const 1963, Preamble, art I § 4, art V § 29), abridged (Const 1963, art I, § 5; US Const, Am I, XIV, XV, XIX, XXIV, XXVI), or deprived (Const 1963, art I, § 17; US Const, Am V and Am XIV).

<sup>9</sup> *MI Coalition of State Empl Unions v Civil Serv Com'n*, 465 Mich 212, 219 (2001).

<sup>10</sup> Per all the AOs, SCAO Memos, MJI Benchcards, and cases cited by Henry in prior pleadings in this court