

# MICHIGAN CRIMINAL LAW ANNUAL JOURNAL

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The *Michigan Criminal Law Annual Journal* is the official journal of the Criminal Law Section of the State Bar of Michigan. This *Journal* is the second annual journal of the Section. In keeping with the Section's mission statement, it is a significant addition to the Section's extensive program of publications, seminars, conferences, legislative liaison and other activities of the Section for the professional development and education of its members and the Bar.

The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by

attorneys experienced in the subject matter covered.

Readers are invited to submit articles, comments, and correspondence to Karen Dunne Woodside, Editor, State Bar of Michigan Criminal Law Annual Journal, Wayne County Prosecutor's Office, Frank Murphy Hall of Justice, 1441 St. Antoine, Detroit, Michigan 48226. The publication and editing thereof are at the discretion of the editor. A cumulative index of articles will be printed in future journals, and will be available on the Criminal Law website: [www.michbar.org/sections/crimlaw](http://www.michbar.org/sections/crimlaw)

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## Criminal Law Section 2001-2002 Annual Report

This has been a very exciting and busy year for the Criminal Law Section. We began with our Mid-winter Ski Conference in February of 2003. The educational program dealt with voir dire, preserving a record for appeal and creative sentencing.

Sometime after the February Mid-winter Conference the first Criminal Law Section Journal was published. The articles were enthusiastically received by all of the members. We received a great deal of response concerning some of the articles. One or two were controversial. They opened communication and the exchange of ideas.

We owe special thanks to Karen Woodside and Kimberly Reed-Thompson for making sure that this publication took place. The Criminal Law Section intends to continue publishing its journal on an annual basis.

In June we had our Policy Conference at the Grand Hotel on Mackinaw Island.

The discussion drew a large number of participants. The topic was should Michigan adopt a state wide state funded public defender system. We had speakers Robert

I. Spangenberg, National Consultant on Criminal Defense Services; Mark E. Stevens, Public Defender, Knoxville, TN; Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law. Honorable George W. Crockett III, 3rd Circuit Judge, Detroit; Matthew M. Evans, President, Wayne County Criminal Bar Association. The result of the discussion was that the Criminal Law Section will do everything in its power to see that more funding is provided for criminal defendants and the attorneys who represent indigents will meet the highest standards.

Thank you Norris Thomas and Graham Teall for putting together such an exciting Policy Conference. Our year would not have been as successful without the help of James Shonkwiler.

We finalized the year with our September annual meeting in Lansing. The topic, which is of interest to all of our members, concerns the de-institutionalization of mental illness and its impact on the criminal justice system.

Hon. Vera Massey Jones

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### Criminal Law Section Publications Committee

Karen M. Woodside, Editor of Journal

Kimberly Reed Thompson, Assistant Co-Editor of Journal

James Shonkwiler, Editor, News and Views

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### Statement of Editorial Policy

Michigan Criminal Law Annual Journal is printed annually by the Criminal Law Section of the State Bar of Michigan. Views expressed in articles and case commentaries are those of the authors, and not necessarily those of the Council, the Section or the State Bar. We encourage Section members and others interested in criminal law to submit articles, letters, and other material for possible publication.

To submit an article please contact Karen M. Woodside, Editor. See page one preamble.

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## The Lawyer's Oath

I do solemnly swear:

I will support the Constitution of the United States and the Constitution of the State of Michigan;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which appears unjust, nor any defense unless it is honestly debatable under the law of the land;

I will employ, for the purpose of maintaining the causes confided to me means that are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless, or oppressed, or delay anyone's cause for lucre or malice;

I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed on members of the bar as conditions for the privilege to practice law in this state.

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# Barriers to Reentry:

## Legal Strategies to Reduce Recidivism and Promote the Success of Ex-offenders

By Miriam J. Aukerman

When Clara was fifteen, she and her best friend discovered that they were being “two-timed” by the same boy. Outraged, the girls went over to the boy’s house, entered through an open door, and placed the boy’s collection of Playboy magazines on the kitchen table so that he would get in trouble when his mother got home. But it was the girls who got in trouble. Clara ended up with a felony-level juvenile adjudication for breaking and entering. Now, almost thirteen years later, Clara – whose only other run-in with the law was a failure to get a dog license – is married, has three kids, and wants to work as a nurse’s aid to support her family. But Clara cannot even get her nursing degree, because her school requires clinical work in a nursing home, and under a new Michigan law, individuals with felony records cannot work in nursing homes.<sup>1</sup>

### THE PICTURE IN MICHIGAN

Clara, like millions of other ex-offenders, has discovered that if you make a mistake, society will continue to punish you long after your sentence is done. Ex-offenders face not only the social stigma of a criminal conviction, but also tremendous legal obstacles. This combination of social and legal barriers prevents many ex-offenders from finding employment, reuniting with their families, or securing stable housing. Unsurprisingly, 40% of released inmates in Michigan are unable to overcome these hurdles, and return to prison within four years. Each such cycle costs the state \$224 million dollars per year.<sup>2</sup>

How many people suffer the consequences of a criminal record? While exact figures are difficult to come by, the U.S. Department of Labor has estimated that about one-quarter of the adult population lives a substantial portion of their lives having a criminal record.<sup>3</sup> One in 37 Americans has had prison experience, with 17 percent of African-American men, 7.7 percent of Hispanic men, and 2.6 percent of white men having served prison time.<sup>4</sup> In Michigan, the prison population has grown since 1975 at 38 times the rate of the general population, with approximately 48,000 people now behind bars.<sup>5</sup> Almost 1,000 Michigan prisoners return to the community each month.<sup>6</sup> In addition, some 16,000 Michiganders are on parole,<sup>7</sup> almost 174,000 Michiganders are on probation,<sup>8</sup> and an untold number still struggle with the consequences of convictions that are years or even decades old.

Because there are so many potential civil consequences to a criminal conviction, this article can only provide an overview of a few of the most serious issues ex-offenders

face in the areas of employment, family law, and housing.<sup>9</sup> The article also discusses some of the existing legal strategies that counsel can adopt to minimize the civil consequences of criminal convictions, and then considers what the bar, courts, and policy makers can do to reduce recidivism and encourage reintegration of ex-offenders.

### PROMOTING THE EMPLOYMENT OF EX-OFFENDERS

Employment at a decent wage is strongly correlated with lower rates of reoffending. According to one estimate, a 10 percent decrease in an individual’s wages is associated with a 10-20 percent increase in criminal activity and likelihood of incarceration.<sup>10</sup> Unfortunately, studies show that two-thirds of all employers will not knowingly hire an ex-offender.<sup>11</sup> Moreover, by law many former offenders are barred from a variety of professions. In order to maximize the employment prospects and reduce the recidivism risk of ex-offenders, counsel assisting such individuals should be aware of (1) the limited employment rights that ex-offenders do have, (2) the statutory restrictions on ex-offender employment, and (3) the federal financial incentives to encourage the hiring of ex-offenders.

#### 1. Employment Rights of Ex-Offenders

Although it is widely assumed that employers have an absolute right to reject job applicants based on their criminal records, in fact there are several legal protections available to ex-offenders. First, with the exception of law enforcement, an employer or employment agency “shall not in connection with an application for employment ..., or in connection with the terms, conditions, or privileges of employment . . . request, make, or maintain a record of information regarding a misdemeanor arrest, detention or disposition where a conviction did not result.”<sup>12</sup> This statutory prohibition does not extend to “information relative to a felony charge before conviction or dismissal.”<sup>13</sup>

Second, for African-American and Hispanic ex-offenders, adverse employment decisions based on criminal records may constitute race discrimination in violation of Title VII of the Civil Rights Act of 1964.<sup>14</sup> Because African-Americans and Hispanics are disproportionately represented within the criminal justice system, courts have held that blanket policies prohibiting the employment of ex-offenders have a disparate impact on minority job seekers.<sup>15</sup> Accordingly, the Equal Employment Opportunity Commission has issued several policy statements under which the exclusion of persons from employment based on their

conviction records violates Title VII unless the employer demonstrates a business necessity for the exclusion. Three factors are relevant to business necessity:

- (A) The nature and gravity of the offense;
- (B) The time that has passed since the conviction and/or completion of the sentence; and
- (C) The nature of the job held or sought.<sup>16</sup>

In other words, under most circumstances an employer cannot adopt an outright prohibition on the employment of ex-offenders, but must consider the individualized circumstances of potential employees.

A third legal protection for ex-offenders in Michigan is that there are limits on the use of criminal records in licensing decisions. Under MCL 338.42, a criminal conviction shall not be used, in and of itself, by a licensing board or agency as proof of a person's lack of good moral character. It may be used as evidence in the determination, and when so used the person shall be notified and shall be permitted to rebut the evidence by showing that at the current time he or she has the ability to, and is likely to, serve the public in a fair, honest, and open manner, that he or she is rehabilitated, or that the substance of the offense is not reasonably related to the occupation or profession for which her or she seeks to be licensed.

In addition, licensing boards or agencies cannot use certain criminal records at all in determining good moral character.<sup>17</sup> Moreover, rules must be promulgated for each licensing board or agency prescribing the offenses that the department considers indicate that the person is not likely to serve the public in a fair, honest, and open manner.<sup>18</sup>

To summarize, while the employment rights of ex-offenders are limited, neither employers nor governmental agencies can adopt blanket policies discriminating against ex-offenders.

## **2. Statutory Barriers to Employment: The Example of Michigan's New Nursing Home Law**

The employment prospects of ex-offenders are hampered not only by the reluctance of employers to hire individuals with criminal records, but also by outright prohibitions on employment of ex-offenders in certain fields. These restrictions stem both from federal<sup>19</sup> and Michigan law. Since a survey of these restrictions is beyond the scope of this article, an example of one such statute will be analyzed to demonstrate the impact of occupational restrictions on ex-offenders, the necessity of reviewing such legislation carefully to determine its reach, and the potential for challenging such laws and policies.

In May 2002, a new Michigan statute went into effect preventing persons with any felony conviction within the last 15 years or one of several specified misdemeanor

convictions within the last 10 years from working in nursing homes, county medical care facilities or homes for the aged.<sup>20</sup> Based on the experience of Western Michigan Legal Services, which has been flooded with requests for assistance from low-income clients like Clara, the law has forced many qualified and experienced caregivers out of the nursing home field, while simultaneously preventing many promising candidates from starting careers in this area. In many cases those clients, who are typically low-income mothers, are unable to find other work, and end up on welfare.

Despite the draconian impact of the new law, counsel who advise either nursing home facilities or their employees should recognize that some ex-offenders can continue to work in the health care field. First, the law "grandfathers in" employees who were employed by a health facility before the effective date of the act, that is before May 10, 2002.<sup>21</sup> Second, the law applies only to individuals "who regularly provide" direct services to patients or residents.<sup>22</sup> Thus nursing homes should not disqualify ex-offenders from positions where they have limited patient contact. Third, the law applies only to "convictions," and therefore should not be applied to juvenile adjudications, which by definition are not convictions. Finally, although many hospitals and home health care agencies appear to be relying on this law to justify prohibitions on ex-offender employment, in fact that law applies only to nursing homes, county medical care facilities, and homes for the aged, not to hospitals.<sup>23</sup>

It is questionable whether this law – or similar laws, which place broad restrictions on an individual's ability to pursue a chosen profession and do not provide for individualized assessments – pass constitutional muster. In Pennsylvania, a law that prohibited ex-offenders from working in nursing homes was struck down by the state Supreme Court because it "does not bear a real and substantial relationship to the Commonwealth's interest in protecting the elderly, disabled, and infirm from victimization, and therefore unconstitutionally infringes on the Employees' right to pursue an occupation."<sup>24</sup> Similarly, a Massachusetts court struck down a state policy providing that persons convicted of certain crimes were subject to a mandatory disqualification for jobs within the Office of Health and Human Services.<sup>25</sup> The court found a procedural due process violation in the failure to provide an opportunity for ex-offenders to rebut the inference that they are unfit to work in the human services field.

## **3. Encouraging Employers to Hire Ex-Offenders**

Attorneys working with either employers or ex-offenders should be aware of several programs that provide financial incentives for the hiring of ex-offenders. First, the Work Opportunity Tax Credit provides a federal tax incentive for employers to hire former offenders. Employ-

ers who hire low-income ex-felons who were convicted or released within one year of hire are eligible for the credit, which is worth up to \$2,400 per worker. Ex-felons who were convicted or released more than a year ago may fall under one of the other target groups for the credit, which include physically or mentally disabled individuals and recipients of welfare, food stamps or SSI.<sup>26</sup>

A second program is designed to address the fact that private bonding agencies often reject job applicants with criminal histories, thereby preventing ex-offenders from obtaining positions with companies that require bonding. The Federal Bonding Program makes no-cost fidelity bonds available to protect employers who hire ex-offenders. The bond is typically for \$5,000 (although coverage up to \$25,000 may be allowed) and insures the employer against theft, forgery, larceny or embezzlement. Of the 40,000 job applicants who have been bonded through the program, 99% have turned out to be honest employees.<sup>27</sup>

## THE FAMILY LAW CONSEQUENCES OF CRIMINAL CONVICTIONS

Over 10 million children in the United States have parents who were imprisoned at some point in their children's lives, and about 1.5 million children have parents who are currently in prison.<sup>28</sup> In Michigan, 53% of males and 59% of female prisoners have minor children.<sup>29</sup> Imprisonment results in a range of family law consequences which may represent a greater loss to the parent than the loss of freedom itself. Two of the most common issues are termination of parental rights and the accumulation of unwarranted, incarceration-related child support arrears.

### 1. Keeping Families Together through Appropriate Pre-Incarceration Planning

Parents who are incarcerated risk losing their children forever. As one commentator has noted, "particularly with respect to incarcerated mothers, imprisonment of a parent disrupts intact, viable families. The overwhelming majority of incarcerated mothers were active parents to their children prior to their incarceration and intend to continue in that role after release."<sup>30</sup> Whether or not these parents will have the opportunity to reunite with their children depends not just on the length and nature of the sentence, but also on the child's placement during the parent's incarceration. Legal advice at this stage can be critical in ensuring that families can be reestablished upon the parent's release.

MCL 712A.19(3)(h) provides that a parent's rights may be terminated if "[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody within a reasonable time considering the child's age."<sup>31</sup> Thus, while there are

also many other grounds for termination,<sup>32</sup> parents who will be imprisoned in excess of two years are in particular danger of termination.

The risk that incarceration will permanently tear apart a family can be greatly reduced through appropriate pre-incarceration child placements, which keep the child out of foster care. In order for a termination to occur, the probate court must have jurisdiction over the child. The probate court has jurisdiction, *inter alia*, over a child "who is without proper custody or guardianship."<sup>33</sup> Significantly, Michigan's appellate courts have repeatedly found that if a parent makes satisfactory arrangements for the child's welfare during the parent's incarceration, the child is not "without proper custody."<sup>34</sup> Since the court lacks jurisdiction over the child, the parents' rights cannot be terminated.

The best placement for the child will depend on each parent's specific circumstances. In a marital family, children may be left with the other parent, though there is always a risk that the incarcerated parent's rights will be terminated either because the non-incarcerated parent runs into problems with the law or child protective system, or because the non-incarcerated parent seeks a divorce and, subsequently, a step-parent adoption.

A non-custodial parent generally will have little say about the child's placement. A custodial parent facing incarceration in excess of two years will generally be well-advised to place his or her children with alternate caregivers. This may involve agreeing to a change of custody, if the other parent is an appropriate caregiver. If placement with the other parent is inappropriate or impossible, a custodial parent should consider granting a limited guardianship to grandparents, relatives, or other potential caretakers. While each client's situation will be different, placing a child under a limited guardianship rather than a regular guardianship will often make it easier for the parent and child to be reunified once the parent is released from incarceration. Limited guardianships are based on the consent of the parents, and require the parties to develop a limited guardianship placement plan.<sup>35</sup> By contrast, regular guardians may be appointed over the parents' objections under a variety of statutorily-prescribed circumstances, including parental incarceration.<sup>36</sup> While limited guardianships can be terminated upon a showing that the parents have substantially complied with the limited guardianship placement plan,<sup>37</sup> termination of a regular guardianship is more complicated, and generally requires a showing that this is in the child's best interests.<sup>38</sup>

Since guardianships can be difficult to set aside once issued, and since they involve the suspension of parental rights, parents facing shorter periods of incarceration are often better off not placing their children under a guardianship. In order to reduce the risk that a guardianship will be issued over the parent's objections, parents should provide

a power of attorney to the child's temporary caregiver. If the parent fails to provide a power of attorney, the parent is "permit[ing] the minor to reside with another person and ... not provid[ing] the other person with legal authority for the minor's care and maintenance," which is one of the bases for authorizing a guardianship.<sup>39</sup>

Regardless of where a child is placed during the parent's incarceration, parents should be advised that if they want to avoid termination of their parental rights and if they want to retrieve their children from a guardianship upon release, the parents must maintain contact with the child during the parent's incarceration. Parents should keep records not only of any financial support they provide, but also of their efforts to remain involved in their children's lives, whether through calls, letters, or prison visits.

## **2. Easing the Burden of Huge Child Support Arrears**

Many of the parents who enter prison, particularly fathers, are non-custodial parents with existing support orders. These parents are almost always financially unable to pay support while incarcerated, and therefore typically leave prison with huge arrearages. Ex-offenders who do find work often discover that much of their meager paycheck is going to pay back support. This is not only a huge disincentive to lawful employment, but may make it difficult or impossible for the ex-offender to survive on what little of the paycheck is left. Moreover, show causes and bench warrants are common, which may cause ex-offenders to get in trouble with their probation or parole officers, and may even result in reincarceration.

In principle, since support obligations are based on an ability to pay, incarcerated parents who lack the ability to pay should not be required to pay support. Thus, the Court of Appeals has held that "where a noncustodial parent is imprisoned for a crime other than nonsupport that parent is not liable for child support while incarcerated unless it is affirmatively shown that he or she has income or assets to make such payments."<sup>40</sup> The difficulty arises under MCL 552.603(2), which provides that a support payment "is not, on and after the date it is due, subject to retroactive modification." Thus, although a prisoner has no obligation to pay support, once the support has accrued, a prisoner usually cannot get the arrearage modified.<sup>41</sup>

In order to avoid ending up with a huge child support arrearage, an offender simply needs to file a motion to modify support when the offender is first incarcerated. Defense counsel should routinely advise clients who are non-custodial parents to file such motions.<sup>42</sup> Unfortunately, offenders who already have accumulated large support arrearages while incarcerated have few options for eliminating this back support obligation, no matter how unwarranted it is. The first step is to determine whether the arrearage is

owed to the state or to the other parent (or another private individual, such as a guardian). If the support is owed to a private individual, the parties may be able to reach an agreement to waive part or all of the back support. If the back support is owed to the State of Michigan, the payor should contact his or her Friend of the Court office to determine whether the Friend of the Court can assist in reducing back support or modifying ongoing payments.

So long as Michigan does not automatically suspend child support upon a non-custodial parent's incarceration, many parents are likely to leave prison owing thousands of dollars in back support, even though that support obligation should never have accrued in the first place. The ex-offender's inability to get out from under this crushing financial burden represents yet another barrier to reentry.

## **LOSING ACCESS TO AFFORDABLE HOUSING**

As of 1999, there was no jurisdiction in the United States where a full-time minimum-wage worker could afford the fair market rent for a one-bedroom in his or her community.<sup>43</sup> Access to affordable housing can be a particular problem for ex-offenders, many of whom are homeless upon release from prison, are unable to find stable employment, and are rejected by private landlords. While subsidized housing provides a limited safety net for other low-income people – though demand far outstrips supply – many ex-offenders, and their families, are ineligible for federally subsidized housing.

Criminal convictions affect both admissions and evictions decisions. Managers of federally funded housing must deny admission to individuals who were evicted from federally-assisted housing for drug-related criminal activity within the last three years.<sup>44</sup> Denials are also mandatory where a household member is currently using illegal drugs or abusing alcohol in a manner that interferes with other residents.<sup>45</sup> However, the household can be admitted if the offending individual has successfully completed a drug rehabilitation program or if the circumstances leading to the eviction no longer exist (i.e. the offending household member is no longer part of the household).<sup>46</sup>

Federal regulations permit, but do not require, public housing agencies to deny housing if a household member has engaged in (1) drug-related criminal activity; (2) violent criminal activity; or (3) other criminal activity that would adversely affect health, safety or the peaceful enjoyment of the premises.<sup>47</sup> In order to serve as a basis for a denial, past criminal conduct must have occurred "during a reasonable time" prior to the admission decision.<sup>48</sup> While the regulations are silent on how recent a conviction must be in order to have occurred within a reasonable time, commentary by the Department of Housing and Urban Development suggests that a reasonable time period is five years.<sup>49</sup>

Public housing authorities must include a provision in the lease agreement that both the tenant and the tenant's family can be evicted for "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off the premises" by a tenant, household member, guest, or other person "under the tenant's control."<sup>50</sup> In *Department of Housing and Urban Development v. Rucker*, the United States Supreme Court recently decided that this language allows public housing authorities to evict innocent tenants for the criminal behavior of household members or guests, whether or not the tenant knew, or should have known, about the illegal activity.<sup>51</sup> For example, one of the tenants in *Rucker* was a grandmother whose mentally disabled daughter was found with drugs three blocks from the apartment. The Court held the eviction to be authorized, even though the tenant had regularly searched her daughter's room for drugs and had never found anything.<sup>52</sup> Thus, evictions based on criminal conduct can result in homelessness not just for the offender, but also for that offender's entire family.

In most screening and eviction actions, public housing authorities may consider a variety of circumstances, such as the seriousness of the offending action, the effect that denial of admission or termination of tenancy would have on non-offending household members, and the rehabilitation of the offender.<sup>53</sup> Therefore, attorneys working with ex-offenders to secure housing should seek to ensure that housing authorities exercise their discretion in those cases where exclusion is not mandatory.

### **EXPUNGEMENT: HOPE FOR THE LUCKY FEW**

Expungements provide one of the only forms of relief from the severe civil consequences attached to criminal convictions.<sup>54,55</sup> Because the statutory criteria for expungements are narrowly drawn, and because the ultimate decision is a discretionary one, most ex-offenders will be unable to clear their records. Still, where applicable, expungement is a powerful tool to free eligible ex-offenders from the burdens of a criminal record.<sup>56</sup>

A motion to set aside a conviction may only be brought by a person "who is convicted of not more than 1 offense."<sup>57</sup> The term "offense" has been interpreted broadly to apply to both felonies and misdemeanors.<sup>58</sup> Thus, a person who merely has two misdemeanors is ineligible for an expungement. Multiple convictions arising out of the same incident are considered separate offenses, and once again make the petitioner ineligible for an expungement.<sup>59</sup>

A person is not eligible for an expungement until five years after sentencing, or five years following the completion of any term of imprisonment, whichever occurs later.<sup>60</sup> Moreover, certain offenses are never expungable. Those

offenses are: (a) a felony or attempt to commit a felony for which the maximum punishment is life imprisonment; (b) a conviction for a violation or attempted violation of MCL 750.520c, 750.520d, or 750.520g (criminal sexual conduct in the first, second, or third degree, or assault with intent to commit criminal sexual conduct); or (c) a conviction for a traffic offense.

If a person meets the statutory criteria, then it is within the court's discretion to grant an expungement. The nature of the offense alone does not preclude setting aside an offender's record.<sup>61</sup> Rather, in exercising its discretion, the court must balance the "circumstances and behavior" of the petitioner against the "public welfare."<sup>62</sup> Thus, the Court of Appeals has regularly reversed lower courts that have focused on the nature of a defendant's conviction, rather than the defendant's conduct subsequent to conviction.<sup>63</sup>

### **THE TASK AHEAD**

Because the social and legal barriers faced by persons with criminal records severely diminish the chances that these individuals will successfully reestablish themselves, prosecutors, defense attorneys, and the courts should attempt to ensure that decisions made at the front end of the criminal justice system do not place unnecessary burdens on the ability of defendants to become productive citizens upon release. Similarly, civil legal aid offices and private civil counsel should be prepared to address the unique legal problems faced by ex-offenders. Finally, policy makers should seek to encourage reintegration rather than recidivism by reducing the social and legal barriers to reentry.

### **What Defense Counsel Can Do**

- Research the occupational consequences of particular convictions in order to maximize an offender's employment opportunities post-conviction. Structure plea deals, where possible, so that a client's conviction will not prevent him or her from working in his or her chosen field.
- Advise custodial parents regarding placement of their children during incarceration, or refer such clients to the private bar or civil legal aid offices for pre-incarceration child placement planning.
- Press for sentences and custodial placements that will maximize a client's opportunities for family contact during incarceration.
- Advise non-custodial parents that upon incarceration they should file motions to eliminate or modify child support.
- Determine whether a particular conviction will cause the client to lose access to public housing, or cause the client's family to be evicted.
- Ensure, if possible, that first-time offenders will be

eligible for expungements by insisting that there is only one conviction on one count.

### **What Prosecutors Can Do**

- Structure charging decisions and plea agreements in order to maximize an offender's opportunities for employment upon release. Particularly where offenders do not have a prior felony record, consider whether the benefits of obtaining a felony conviction are worthwhile, given the likely impact of a felony record on the offender's ability to reintegrate successfully upon release.
- Press for sentences and custodial placements that will maximize an offender's opportunities for family contact during incarceration.
- Assist civil legal aid offices and private counsel seeking to prevent the eviction of entire families based on the offender's conduct by clarifying where culpability lies.
- Structure charging decisions and plea agreements for first time offenders in ways that leave open the opportunity for a later expungement if the offender is rehabilitated. Seek a single conviction, rather than multiple counts, for offenses arising out of one transaction.
- Support expungements for eligible, rehabilitated offenders.

### **What Judges Can Do**

- Advise criminal defendants of the civil consequences of their convictions before accepting a plea or when imposing judgment. In the alternative, advise defendants to discuss the civil consequences of the conviction with counsel before agreeing to a plea.
- Devise sentences that are structured to maximize the chance that an offender, after receiving an appropriate punishment, will be able to find work, obtain stable housing, and reconnect with family.
- Structure sentences in order to maximize a client's opportunities for family contact during incarceration.
- Order reunification services and parenting time for incarcerated parents before deciding whether to terminate those parents' rights.
- Insist that managers of federally-funded housing exercise their discretion to consider each household's circumstances in making admission and eviction decisions based on criminal conduct.
- Encourage plea agreements that preserve the possibility of expungement for first time offenders.
- Exercise discretion in favor of ex-offenders by granting expungements where there is evidence of rehabilitation.

### **What Civil Legal Aid Offices and Private Civil Counsel Can Do**

- Educate employers, job placement agencies, and clients about the employment rights of ex-offenders.
- Advise employers to develop hiring policies that conform with the Title VII requirements; i.e. to consider the nature, age, and relevance of an applicant's convictions.
- Challenge occupational barriers, licensing restrictions, and company policies that represent blanket prohibitions on the employment of ex-offenders.
- Provide pre-incarceration child placement planning assistance.
- Help ex-offenders to clear up incarceration-related child support arrears.
- Assist ex-offenders who are denied access to public housing, by encouraging public housing authorities to use their discretion, where applicable, to consider such factors as the age of the conviction and the offender's rehabilitation.
- Assist ex-offenders in obtaining expungements where eligible.

### **What Policy Makers Can Do**

- Encourage the employment of ex-offenders by ensuring that state laws and policies do not unnecessarily restrict ex-offenders' employment opportunities; require consideration of the age of the conviction, the relationship of the offense to the job, and the offender's rehabilitation.
- Improve tax credits, bonding, and other programs to encourage employers to hire ex-offenders.
- Provide resources for employment programs targeted at the special needs of ex-offenders.
- Fund programs to preserve family ties between offenders and their children; require child welfare workers to remain in touch with incarcerated parents.
- Require that the DOC and local Friend of the Court offices communicate so that child support payments are automatically suspended upon imprisonment in a DOC facility.
- Provide financial support for transitional housing for ex-offenders.
- Work with public housing authorities to develop reasonable policies to allow rehabilitated ex-offenders access to subsidized housing; require public housing authorities to consider household circumstances before evicting entire families based on one individual's criminal conduct.
- Expand access to expungements so that individuals who have more than one conviction but can demonstrate rehabilitation have the opportunity to clear their records.
- Develop a process for the restoration of an ex-offender's civil rights – such as the certificates of rehabilitation used

in some states – to free rehabilitated ex-offenders from the civil liabilities associated with past convictions.

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#### Endnotes

- <sup>1</sup> The author is currently representing Clara (not her real name) on the question of whether the statute applies to juvenile felony adjudications.
- <sup>2</sup> This figure assumes a two year stay upon reincarceration. See Michigan Office of the Governor & the Department of Corrections, Summary of Technical Assistance Initiatives for Prisoner Reentry (July 1, 2003), at 2.
- <sup>3</sup> Debbie Mukamal, From Hard Time to Full Time: Strategies to Help Move Ex-Offenders from Welfare to Work 3 (U.S. Department of Labor, Employment and Training Administration, Division of Welfare-To-Work, June 2001), <http://www.doleta.gov/documents/hard.html>.
- <sup>4</sup> Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974-2001, Aug. 2003, NCJ 197976, [www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf).
- <sup>5</sup> Some Facts About Michigan Prisons, PRISONS AND CORRECTIONS FORUM (State Bar of Michigan Prisons and Corrections Section, Lansing, MI) Winter 2001, at 12.
- <sup>6</sup> Bill Johnson, Judge puts educating inmates to test?, DETROIT NEWS, Aug. 23, 2002, <[www.detroitnews.com/2002/editorial/0208/239/a11-569044.htm](http://www.detroitnews.com/2002/editorial/0208/239/a11-569044.htm)>.
- <sup>7</sup> Figures are for 2000. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, TRENDS IN STATE PAROLE, 1990-2000 (NCJ 184735) 3 (2001).
- <sup>8</sup> Figures are for 2000. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2000 (NCJ 188208) 4 (2001).
- <sup>9</sup> There are a wide variety of other civil liabilities resulting from criminal convictions, including severe immigration consequences, restrictions on public benefits, loss of drivers' licenses, loss of access to public benefits, limitations on gun ownership, limitations on the right to vote or serve on a jury, etc.
- <sup>10</sup> See Urban Institute, From Prison to Home: The Dimensions and Consequences of Prisoner Reentry (2001) at 31.
- <sup>11</sup> Jeremy Travis et al., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 35 (2001).
- <sup>12</sup> MCL 37.2205(a)(1).
- <sup>13</sup> Id.
- <sup>14</sup> 42 U.S.C. §2000e-2(k).
- <sup>15</sup> See, e.g., *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401(C.D. Cal. 1970), modified on other grounds, 472 F.2d 631 (9<sup>th</sup> Cir. 1972); *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290 (8<sup>th</sup> Cir. 1971).
- <sup>16</sup> Policy Statement on the Issue of Criminal Records Under Title VII of the Civil Rights Act of 1964, as amended, 42

U.S.C. §2000e et seq. (1982) (Feb. 4, 1987); in II EEOC Compliance Manual § 604; Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (July 29, 1987), in II EEOC Compliance Manual App. § 604-B.

- <sup>17</sup> See MCL 338.43(1). Records which may not be considered include records of arrests not followed by convictions; records of convictions that have been vacated or reversed; records of arrests or convictions unrelated to the person's likelihood to serve the public in a fair, honest and open manner; and records of an arrest or conviction for a misdemeanor for which a person may not be incarcerated.
- <sup>18</sup> See MCL 338.43(3). In the absence of such rules, all felonies are considered relevant to likelihood of a person to serve the public in a fair, honest, and open manner.
- <sup>19</sup> See, e.g., 49 U.S.C. §§44935(e)(2)(B) and 44936 (airport security screeners); 15 U.S.C. §5902 (armored car crew members); 29 U.S.C. §1111 (positions in employee benefit plans).
- <sup>20</sup> MCL 333.20173. The relevant misdemeanor convictions are those "involving abuse, neglect, assault, battery, or criminal sexual conduct or involving fraud or theft against a vulnerable adult." MCL 333.21073(1)(b).
- <sup>21</sup> MCL 333.20173(2). Although the statute is not explicit, a plain reading of its language suggests that an individual is "grandfathered in" not just for a position held before May 10, 2002, but also for subsequent job changes. This interpretation also makes sense from a policy perspective, as employees with criminal records would otherwise be chained to a particular job, with no ability to change positions in light of their personal or professional circumstances.
- <sup>22</sup> MCL 333.20173(1).
- <sup>23</sup> MCL 333.20173(1).
- <sup>24</sup> *Nixon v. Commonwealth of Pennsylvania*, 2003 Pa. LEXIS 2604, at \*30-31 (Dec. 30, 2003).
- <sup>25</sup> *Cronin v. O'Leary*, NO 00-1713-F, slip op. at 6-9 (Mass Super. Ct. Aug 9, 2001), [www.sociallaw.com/superior/00-1713-F.html](http://www.sociallaw.com/superior/00-1713-F.html).
- <sup>26</sup> See Department of Consumer and Industry Services, Employers: 9 New Ways Employers Can Earn Federal Income Tax Credits, [www.michigan.gov/documents/ua\\_wotc-brc\\_3108\\_7.pdf](http://www.michigan.gov/documents/ua_wotc-brc_3108_7.pdf); Department of Consumer and Industry Services, Employers: 9 New Ways Employers Can Earn Federal Income Tax Credits, [http://www.michigan.gov/documents/ua\\_wotc-brc\\_3108\\_7.pdf](http://www.michigan.gov/documents/ua_wotc-brc_3108_7.pdf). The credit is currently authorized only through December 31, 2003, although it is anticipated that the credit will be renewed.
- <sup>27</sup> See U.S. Department of Labor, Federal Bonding Program, [www.doleta.gov/documents/fedbonding.asp](http://www.doleta.gov/documents/fedbonding.asp); National HIRE Network, Federal Bonding Program, [www.hirenetwork.org/fe\\_bonding.html](http://www.hirenetwork.org/fe_bonding.html).
- <sup>28</sup> Amy Hirsch, et al., EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS, Center for Law and Social Policy (2002), at 1, 7.
- <sup>29</sup> Michigan Office of the Governor & the Department of Corrections, Summary of Technical Assistance Initiatives for Prisoner Reentry (July 1, 2003), at 2.
- <sup>30</sup> Philip M. Genty, Procedural Due Process Rights of

Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis, 30 J. FAM. LAW 757, 759 (1991-92).

31 MCL 712A.19b(3)(h).

32 See MCL 712A.19b(3).

33 MCL 712A.2(b)(1).

34 See, e.g., *In re Taurus F.*, 415 Mich 512, 535 (1982); *In re Curry*, 113 Mich App 821 (1982); see also MCL 712A.2(b)(1)(B).

35 See MCL 700.5205.

36 See MCL 700.5204.

37 MCL 700.5209(1).

38 See MCL 700.5209.

39 MCL 700.5204(2)(b).

40 *Pierce v. Pierce*, 162 Mich. App. 367, 370 (1987).

41 See *McLaughlin v. McLaughlin*, 255 Mich. App. 475, 476 (2003).

42 In pro per packets which address the relationship between child support and incarceration, and which provide information on how to file a motion to modify support are available from Western Michigan Legal Services.

43 Hirsch, *supra* at 43.

44 24 C.F.R. §5.854; 24 C.F.R. §882.518; 24 C.F.R. §960.204(a)(1).

45 24 C.F.R. §5.857; 24 C.F.R. §882.518(a)(1)(iii) and (b)(4); 24 C.F.R. §960.204(a)(2) and (b). Housing authorities must also deny admission to persons who are subject to a lifetime registration requirement under a state sex offender registration program, see 24 C.F.R. §5.856; 24 C.F.R. §882.518(a)(2); or who have ever been convicted of methamphetamine production on public housing premises, see 24 C.F.R. §882.518(a)(1)(ii); 24 C.F.R. §960.204(a)(3).

46 24 C.F.R. §5.854(a); 24 C.F.R. §882.518(a)(1)(i); 24 C.F.R. §960.204(a).

47 24 C.F.R. §5.855; 24 C.F.R. §882.518(b); 24 C.F.R. §982.553(a)(2)(ii).

48 24 C.F.R. §5.855(a); 24 C.F.R. §882.518(b); 24 C.F.R. §982.553(a)(2)(ii).

49 Final Rule, Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 FR 28776 (May 24, 2001) (“The reasonable time period is still left up to the owner (or PHA) to determine in its admissions policies....While HUD considers that five years may be a reasonable period for serious offenses, depending on the offense, some PHAs or owners may not agree.”).

50 42 U.S.C. §1437d(l)(6).

51 *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 130 (2002).

52 *Rucker v. Davis*, 203 F.3d 1113, 1117 (9<sup>th</sup> Cir. 2001).

53 24 C.F.R. §5.852; 24 C.F.R. §960.203.

54 In pro per packets for expungements can be obtained by contacting Western Michigan Legal Services.

55 Like adult convictions, juvenile adjudications can be set aside. The applicant must not only meet the same criteria as for an adult expungement, but must also be at least 24 years old. See MCL 712A.18e.

56 When a conviction is set aside the petitioner is considered not to have been previously convicted for most, but not all, purposes. For example, the conviction can still be considered for sentencing purposes if there

are subsequent offenses. Nor does an expungement prevent an action by a victim for civil damages or allow for the remission of any fines or costs. See MCL 780.622; 780.623.

57 MCL 780.621(1).

58 *People v. Grier*, 239 Mich. App. 521, 523 (2000); *People v. McCullough*, 221 Mich. App. 253 (1997).

59 *People v. Blachura*, 176 Mich. App. 717, 719 (1989).

60 MCL 780.621(3).

61 *People v. Boulding*, 160 Mich. App. 156, 158 (1986).

62 MCL 780.621(9).

63 *People v. Rosen*, 201 Mich. App. 621, 623 (1993); *People v. Van Heck*, 252 Mich. App. 207 (2002).

# Evaluating Witness Credibility In Preliminary Examinations

By Judge Mark A. Randon and Timothy Gardner, Jr.

A judge hearing a preliminary examination is authorized to assess the credibility of witnesses.<sup>1</sup> At the same time, an examining judge must not invade the province of the jury by refusing to bind a matter over for trial when the evidence conflicts or raises a reasonable doubt of the defendant's guilt.<sup>2</sup> In *People v Yost*, the Michigan Supreme Court acknowledged the obvious "tension" between these two principles but declined to "clarify the interplay" between them.<sup>3</sup> The purpose of this article is to offer a "bright-line" approach to reconciling these competing principles. The authors contend that an examining judge should not engage in a jury-like evaluation of witness credibility, but instead should accept the testimony unless it is incredible or implausible as a matter of law.<sup>4</sup> Further, guidelines are suggested for evaluating witness credibility in preliminary examinations in three potential scenarios: (1) conflicting single witness testimony, (2) competing lay witness testimony, and (3) competing expert witness testimony.

## BACKGROUND

In Michigan, a defendant charged with a felony or a two-year misdemeanor has a statutory right to a preliminary examination, unless the defendant has been indicted by a grand jury.<sup>5</sup> The preliminary examination is a "probable cause hearing" at which the district court judge must determine whether a crime was committed and if there is probable cause to believe the defendant committed the crime.<sup>6</sup> The procedure serves, in part, to cut off "groundless" or "unsupported" prosecutions yet leave juries to decide questions of fact at trial.<sup>7</sup> This "weeding out" process properly requires that the gap between this preliminary threshold requirement of probable cause (the "preliminary examination standard") and proof beyond a reasonable doubt (the "trial standard") be broad.<sup>8</sup>

The Michigan Supreme Court recently reaffirmed the principle that a judge at a preliminary examination does not sit as a trier of fact.<sup>9</sup> Although, as compared to appellate courts, an examining judge is in the advantageous position of hearing live testimony, the evaluation of credibility by an examining judge is nonetheless different than the credibility evaluation of a jury.<sup>10</sup> In Michigan, a jury may choose to resolve conflicts in testimony by dividing portions of credible testimony from that testimony which it may choose to reject as false.<sup>11</sup> It may also reject a witness' entire testimony because of a single falsehood.<sup>12</sup> In contrast, an examining judge should avoid such an analysis of witness credibility. Instead, for the purpose of the pre-

liminary examination, testimony should be credited unless it is incredible or implausible as a matter of law. Without this limitation, an examining judge could assume the role of the jury and reject entirely the otherwise credible testimony of a witness because of a single inconsistent or untruthful statement.

## THE JURY'S PREROGATIVE IN EVALUATING CREDIBILITY

Michigan is among the overwhelming majority of states that have rejected the maxim of *falsus in uno, falsus in omnibus* in criminal jury instructions on the issue of credibility.<sup>13</sup> That is, a jury may accept portions of a witness' testimony even if it concludes that the witness deliberately lied about another important matter. This issue was first raised in *Knowles, supra*, where the defendant was convicted of larceny based on the testimony of a witness who claimed to have been present and to have committed the crime with the defendant.<sup>14</sup> During the trial, testimony was admitted that indicated that on material issues the witness had previously made statements in direct contradiction to his testimony under oath. Therefore, the defense counsel requested that the jury be instructed to reject all of the involved witness' testimony if the jury determined that the witness had lied to them on any material matter. The trial judge rejected the proposed instruction and issued a precautionary instruction. After being convicted, the defendant appealed. In finding no error in the court's refusal to give the instruction, the Michigan Supreme Court held:

There has never been any positive rule of law which excluded evidence from consideration entirely, on account of the willful falsehood of a witness as to some portions of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification. . . but when the testimony is once before the jury, the weight and credibility of every portion of it is for them, and not for the court, to determine. . . if the testimony produces a clear and undoubted conviction in their minds, they may act upon that conviction, whether the evidence comes from an honest or corrupt source.<sup>15</sup>

This case forms the basis of *Michigan Standard Jury Instruction 3.6*.<sup>16</sup> Michigan law makes clear that it remains the jury's prerogative to accept those parts of testimony it believes even if the witness deliberately lied about another important aspect of the case.<sup>17</sup>

## THE EXAMINING JUDGE'S EVALUATION OF CREDIBILITY

To what extent, then, may an examining judge evaluate witness credibility without invading the province of the jury? On this issue, the often-cited case of *People v Paille #2* is instructive.<sup>18</sup> In *Paille #2*, three defendants, two Detroit police officers and a private security guard were charged with conspiring with a third party to commit a legal act in an illegal manner. Specifically, the three officers were accused of coercing and beating motel occupants in their effort to locate a sniper and his weapon during the 1967 riots in Detroit. The examining judge found the testimony of the motel occupants to be "incredible" such that they "could not possibly convince a disinterested arbiter of facts of their good faith or truthfulness."<sup>19</sup> The judge concluded that the testimony of the motel residents was so blatantly deceptive it amounted to "perjury." On appeal, the defendants argued that the examining judge placed "excessive weight on the credibility of the witnesses." However, the Michigan Supreme Court ruled that the judge had not only the right, but also the duty, to pass judgment on the credibility of the witnesses and further held that the preliminary examination judge did not abuse his discretion in dismissing the warrant and discharging the defendants.

In *Paille #2*, the examining judge essentially found the witnesses' testimony incredible as a matter of law. The judge's finding on credibility eliminated any potential conflict in evidence for the jury to resolve. Although the witnesses testified to events that would have raised at least an inference of criminal agency by the officers,<sup>20</sup> the judge rejected the witnesses' entire testimony, as that which would clearly be found "incredible" by a jury. Therefore, in light of *Knowles*, *Paille #2*, *Yost*, and legal authority from other jurisdictions, having preliminary examination standards similar to Michigan,<sup>21</sup> the following conclusion becomes apparent: testimony is "incredible or implausible as a matter of law" where no fair-minded jury would believe any portion of the witness' testimony, which would be necessary to establish at least an inference of criminal responsibility by the defendant. With this in mind, we now turn to a discussion of three potential preliminary examination scenarios with apparent conflicts.

### EVALUATING CREDIBILITY IN CONFLICTING SINGLE WITNESS TESTIMONY

A conflict can exist in the preliminary examination testimony of a single witness. This may occur where by impeachment or the witness' own admission, the examining judge is confronted with a material falsehood in the witness' testimony. A conflict arises if other portions of the testimony, which are not implausible, exist from which at least an inference can be drawn establishing the elements of the crime. For example, let us assume the following facts:

#### Example 1

Defendant is accused of raping his 4 year-old niece. At the preliminary examination, the niece testifies using anatomically correct dolls that defendant sexually penetrated her with his penis while at his house. On cross-examination, when asked whether many people had done this to her and whether defense counsel had done this to her, she said 'yes'. When asked whether defendant did it, she said 'no'.<sup>22</sup>

In this case, a jury should resolve the conflict in the witness' testimony. The jury could either reject all of the witness' testimony or accept that portion which it finds to be true. If, however, the examining judge rejects the entire testimony of the witness because of the material falsehood, the judge has invaded the province of the jury. The testimony was not completely incredible or implausible as a matter of law, and therefore, the material falsehood is insufficient to prevent the matter from being bound over for trial.<sup>23</sup>

### EVALUATING COMPETING LAY WITNESS TESTIMONY

A defendant who holds a preliminary examination is permitted to call witnesses on his or her behalf.<sup>24</sup> In this instance, an examining judge may be confronted with credible testimony, which both supports and undermines the charges. On this issue the law is clear that where a conflict in credible evidence exists, a jury must resolve that conflict.<sup>25</sup> This is true whether or not witnesses for the opposing party outnumber the credible witness.<sup>26</sup>

A more difficult case arises where, as above, a single prosecution witness testifies falsely on a material issue, but otherwise provides a plausible account that supports the criminal charge. The difference is the additional testimony of a defense witness or witnesses who provide credible evidence that the defendant could not have committed the crime. Let us re-evaluate Example 1, above, with the additional credible testimony of the niece's parent or guardian who states that the niece has never been to the home of the defendant or that the niece was never left alone with the defendant. Does this still present a conflict, or has the additional testimony rendered the niece's already conflicted testimony implausible or incredible as a matter of law? Under the approach set forth above, this preliminary examination testimony still presents a conflict, which should be resolved by the jury.

### Evaluating Competing Expert Witness Testimony

In Michigan, it is well established that the qualifications of an expert to render an opinion is a matter that rests in the discretion of the court.<sup>27</sup> That is, "if the court determines that a recognized scientific, technical, or other specialized

knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”<sup>28</sup> After an examining judge has properly qualified an expert witness, credibility determinations are generally handled in the same manner as lay witnesses.<sup>29</sup> Therefore, the opinion testimony of a witness qualified as an expert should be credited unless it is incredible or implausible as a matter of law.<sup>30</sup>

A conflict in expert testimony at the preliminary examination may exist where a judge qualifies two or more experts who then offer opposing expert opinions on the same subject matter. This was the case in two recent opinions of the Michigan Supreme Court, *People v Yost*, *supra* and *People v Richardson*.<sup>31</sup> In both cases, after qualifying medical personnel rendered expert testimony, the district judges rejected the expert testimony as either “not credible” or that which “lacked credibility” and refused to bind the cases over for trial.<sup>32</sup>

In *Yost*, the circuit court judge found that the medical opinion, which was rejected by the district court, was not “incredible or unbelievable” and that the matter should have been bound over for trial because of the competing expert testimony.<sup>33</sup> The circuit court decision was affirmed by the Michigan Court of Appeals and in affirming its decision the Michigan Supreme Court said:

In sum, we agree with the circuit court that the expert testimony in tandem with the circumstantial evidence. . . was sufficient to warrant a bindover. We conclude that the magistrate failed to give any weight to Dr. Evans [the prosecution’s] expert testimony when he should have. . . and gave undue weight to [one of the defendant’s experts].<sup>34</sup>

Similarly, in *Richardson*, the Michigan Supreme Court found that the examining judge had improperly made a credibility choice between the competing medical experts. In denying defendant’s leave to appeal, the court found that by refusing to bind the matter over for trial, “[t]he magistrate improperly invaded the jury’s domain in resolving these issues.”<sup>35</sup>

Once a witness is qualified to offer testimony as an expert, an examining judge is required to accept the testimony unless it is incredible or implausible as a matter of law. As such, the rejection of a qualified expert’s opinion should be rarely justifiable. There may be a basis for rejecting an expert opinion, which is based upon a significant factual assumption that turns out to be false. For example, consider a preliminary examination where one medical expert in a murder case bases his

opinion that the victim did not die of a stroke on the factual assumption that the victim never had high blood pressure. However, the victim’s medical records, the authenticity and admissibility of which are unchallenged, demonstrate that the victim did in fact have a history of high blood pressure. In this case, the factual assumption upon which the expert opinion is based has been proven false, and that expert opinion may now be deemed incredible or implausible as a matter of law.<sup>36</sup>

## Conclusion

A judge at a preliminary examination may be faced with competing legal principles in deciding whether or not to bind a defendant over for trial. A judge is duty bound to pass judgment on the credibility of the witnesses at the preliminary examination, yet he or she must also allow a jury to decide criminal cases where the evidence conflicts. The tension between these principles can be reconciled by adopting the bright-line rule suggested by Michigan case law and followed in other jurisdictions. That is, with regard to the credibility evaluation, testimony at a preliminary examination should be credited unless that testimony is incredible or implausible as a matter of law. This bright-line rule provides guidance to district court judges and attorneys in evaluating witness credibility at preliminary examinations. It also preserves a jury’s right to meticulously evaluate witness credibility and retains the examining judge’s discretion to terminate unsupported or groundless prosecutions.

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*The authors would like to acknowledge Arti Shah, a second year law student at Wayne State University, for her assistance in editing this article.*

## Endnotes

<sup>1</sup> *People v Yost*, 468 Mich 122; 659 NW2d 604 (2003) and *People v Paille #2*, 383 Mich 621, 627; 178 NW2d 465 (1970).

<sup>2</sup> *Yost* at 128; *People v Goecke*, 457 Mich 442, 469-470; 579 NW2d 868 (1998).

<sup>3</sup> *Yost*, at n 8.

<sup>4</sup> This standard is followed in Colorado and is similar to the

standard used in Wisconsin. See, for example, *Hunter v District Court*, 543 P2d 1265 (Colo 1975) (“We hold that a judge in a preliminary hearing has jurisdiction to consider the credibility of witnesses only when, as a matter of law, the testimony is implausible or incredible.”) and *State v Sorenson*, 449 NW2d 280 (Wis App 1989) (If ‘believable or plausible’ grounds exist to support charges, the defendant must be bound over for trial, even if a contrary but believable or plausible account also exists.).

5 MCL 766.1; MSA 28.919. A defendant indicted by a grand jury is not entitled to a preliminary examination. *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001) overruling *People v Duncan*, 388 Mich 489; 201 NW2d 629 (1972)

6 MCL 766.13; MSA 28.931.

7 In *People v Duncan*, 388 Mich 489, 501; 201 NW2d 629 (1972), the court described the purpose of the preliminary examination as follows: “[To] perpetuate testimony, to determine the amount of bail to be given by the prisoner in case he is held for trial, to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial and the deprivation of his liberty if there is no probable cause for believing he is guilty of the crime.”

8 *People v Justice* (After Remand), 454 Mich 334, 344; 562 NW2d 652 (1997).

9 *People v Richardson*, \_\_\_ Mich \_\_\_; 669 NW2d 797 (2003).

10 The use of the word ‘jury’ is for the purpose of clarity and could be substituted with ‘trier of fact’ which would include a bench trial.

11 *People v Knowles*, 15 Mich 408, 412 (1867).

12 CJI2d 3.6.

13 Literally interpreted the maxim “means false in one thing, false in everything.” Georgia is currently the only state, which, by statute, requires a jury to disregard all of the testimony of a witness who has testified falsely to any material matter. See, 4 ALR2d 1077 and 2003 updates.

14 See, note 11.

15 *Knowles*, supra at 412.

16 CJI2d 3.6, Commentary.

17 Id.

18 383 Mich 621; 178 NW2d 465 (1970).

19 Id. at 624.

20 At the preliminary examination, evidence from which at least the elements of the crime charge can be inferred is sufficient to find probable cause. See, e.g., *People v Doss*, 406 Mich 90, 276 NW2d 9 (1979).

21 See, note 4.

22 This example was taken from *State v Sorenson*, supra at note 4. The only fact changed was the child’s age from 7 to 4 (her mental age).

23 On these facts, the Wisconsin Supreme Court affirmed the examining judge’s bind-over of the defendant, and a jury found defendant guilty of first-degree sexual assault. MCL 766.12; MSA 28.930

24 Yost at 128.

25 All questions of conflicting evidence must be left for the trier of fact. *People v King*, 412 Mich 145; 312 NW2d 629 (1981).

27 *Mulholland v DEC International Corp*, 432 Mich 395,

402; 443 NW2d 240 (1989).

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MRE 402.

Yost at 128.

This proposition finds support in Yost at 130-133. *Richardson*, supra, at note 9.

Yost at 129 and *Richardson*, 669 NW2d at 800.

Yost at 130.

Id. at 133

*Richardson*, 669 NW2d at 798

Justice Markman’s dissent in *Richardson* noted that the examining judge determined that one of the prosecutor’s medical experts lacked credibility because the supporting facts for finding the victim’s cause of death were flawed. While this is similar to the authors’ example, a key distinction is that in *Richardson*, the challenged expert did not condition his opinion on these “flawed” facts. This distinction may have been the reason the majority of the court denied leave to appeal. The expert testimony was not incredible or implausible as a matter of law.

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# Keeping Habeas in Mind: What State Judges and Prosecutors Don't Know Can Hurt Them

By Jerrold Schrotenboer

## INTRODUCTION

This article is neither a refutation nor a response to David Moran's and Martin Tieber's excellent article on habeas from last year. Instead, this article complements their article. Their article explains just how important what the defense does in State court is to any subsequent habeas challenge. This article explains how what the State prosecutor and/or judge does also impacts any subsequent habeas decision.

Former Eastern District Court Magistrate Marc Goldman stated at the 2001 appellate bench/bar conference that the Eastern District had granted more writs in the two preceding years than in the previous ten years combined. Nothing has changed in the intervening years. Despite 1996's AEDPA's being intended to restrict habeas availability,<sup>1</sup> in Michigan at least, precisely the opposite has happened. Federal courts are granting writs at record levels. Rather than explaining why so many writs are being granted, this article will concentrate on what prosecutors and State judges can do at the State level to make it less likely that the federal court will later grant a writ.

Every now and then someone who once worked in a Michigan appellate court and now either works in a federal court or does habeas tells me what I myself have said: "I wish I knew then what I know now." Just how the Michigan courts write the opinion really matters. An opinion affirming on one ground may be overturned in habeas, while the same opinion affirming on another ground might not.

I am writing this article for Michigan's judges telling them how best to avoid having a writ subsequently granted and the opinion overturned. Although anyone writing an opinion should do so based on his own perception of what the law and justice require, he should at least keep this article's advice in mind. After all, few judges wake up each morning and say: "Oh boy, I hope some federal judge grants a writ in one of my cases today."

I am also writing this article for Michigan's appellate prosecutors. Although a prosecutor can do little directly about how the opinion is written, he can hardly complain about the appellate court missing something if his own brief missed it too. Additionally, possibly, the more that prosecutors argue these points, the more the appellate courts might pick up on them.

## FACTS

The federal district court, of course, being the trial level court, has inherent fact finding powers. Those fact finding

powers do not disappear merely because the original civil lawsuit is a habeas action. On the other hand, to preserve federal/state comity, the district court's fact finding powers have been limited. 28 USC 2254(e)(1) states that any State court factual finding "shall be presumed to be correct." This presumption can be overcome by only "clear and convincing evidence."

Therefore, to protect the State decision on habeas, the State's court should at least consider (when feasible) basing its decision on factual findings, rather than exclusively on the law. Legal decisions, of course, are far more likely to be second-guessed than factual findings.

An additional way for the State courts to protect themselves deals with allowing a criminal defendant to develop a factual record. A habeas petitioner may not present evidence in a habeas proceeding that he did not present to the State courts unless he exercised due diligence in trying to present that evidence to the State courts.<sup>2</sup> For example, a petitioner claiming the ineffective assistance of counsel will not receive an evidentiary hearing in federal court if he did not bother making such a request in the State court.

Matters become a little tricky, however, where the habeas petitioner actually requested an evidentiary hearing in the State court. Michigan's rules require "an affidavit or offer of proof regarding the facts to be established at a hearing."<sup>3</sup> Hence, a person who does not file an adequate offer of proof has not exercised due diligence.

Yet, the federal courts might conceivably disagree with the State courts as to what is an adequate offer of proof. In *Sanyer v Hofbauer*,<sup>4</sup> the Sixth Circuit concluded that the Michigan courts had unreasonably declined to give the petitioner an evidentiary hearing. It concluded that the petitioner was in fact diligent in pursuing his claim in the State courts. It then granted the writ.<sup>5</sup>

In other words, where the defendant requests an evidentiary hearing and supplies some type of an offer of proof, the prosecutor should not necessarily oppose the motion. In addition, the courts should not necessarily deny it. When in doubt, on a close question, the State courts should probably order an evidentiary hearing. After all, fact findings in the State courts are entitled to the presumption of correctness, while fact findings in federal court are not. Further, if an evidentiary hearing is going to be held anyway, a prosecutor might conceivably prefer it to be held in his own circuit court rather than, a few years later, in federal court. To summarize, where a raised issue requires additional facts, the court and prosecutor should follow these steps:

- 1) If defendant is not asking to develop a factual record, fault him for it.<sup>6</sup>
- 2) If defendant is asking for an evidentiary hearing but has not attached an offer of proof, fault him for it.
- 3) If defendant has provided an offer of proof for his request for an evidentiary hearing, ask whether or not the offer of proof is adequate. If not, fault him for it. If so, give him the evidentiary hearing. In the close case, everyone is probably better off just holding the hearing now.

## PROCEDURAL DEFAULT

Procedural default affords even more opportunities for the State courts to protect their decisions from habeas review. On a direct appeal, a procedural default is a failure to preserve an issue on appeal. To once again preserve federal/state comity, the federal rules, to a certain extent, recognize State procedural defaults.

The common misconception that constitutional claims are always preserved for appeal is just that—a misconception. As stated in *Greer v Mitchell*,<sup>7</sup> “even constitutional errors will not be noticed if an adequate and independent state-law ground [a procedural default] exists for upholding the conviction.” Thus, as pointed out in *Simpson v Jones*,<sup>8</sup> “if a petitioner procedurally defaults a claim in State court, that procedural default carries over to federal court and precludes habeas review of that claim in federal court.” To obtain the preclusion, however, four things have to occur.<sup>9</sup>

First, the State must have a firmly established and regularly followed procedural default rule that the petitioner failed to comply with. A procedural default rule established in that case<sup>10</sup> or subsequently established<sup>11</sup> is not good enough. It must have been firmly established in State law when the procedural default occurred.

Second, the last reasoned State decision must have relied on the procedural default in denying relief. In other words, it really does matter how the opinion is written. In fact, this is the area where the State courts fail the most to protect themselves.<sup>12</sup>

To put it simply, if the last reasoned State court decision relies on the procedural default, habeas review is barred. If, on the other hand, it ignores the procedural default (as often happens), then habeas review is wide open. In other words, no matter how badly the criminal defendant procedurally defaulted and no matter that the federal courts would have barred relief if the case were a direct appeal, the federal courts will ignore a procedural default if the State courts earlier ignored it. In other words, where the State directly addresses the merits despite a procedural default, the issue “is ripe for federal habeas review.”<sup>13</sup> Such wide open review, of course, is not good news for the State

courts. Such cases as *Boyle v Million*,<sup>14</sup> have granted habeas relief despite a procedural default merely because the highest State court addressing the issue relied exclusively on the merits and ignored the procedural default.

Where the State courts say no more than the issue has not been preserved for appeal, federal procedural default analysis applies. Further, where the State courts deny relief in the alternative (the issue is not preserved and, in any event, has no merit), procedural default analysis applies.<sup>15</sup> It applies if the appellate courts either deny relief for failure to show manifest injustice<sup>16</sup> or find no plain error.<sup>17</sup> On the other hand, it does not apply when the decision merely mentions procedural default and then actually decides on the merits.<sup>18</sup>

Unfortunately, occasionally some opinions are ambiguous. They do not clearly state one way or the other that relief is being denied based on the procedural default (at least in part) as opposed to on the merits. For example, on what ground does an opinion that says nothing more than “[w]e conclude that the court did not commit error, plain or otherwise,” rest? For procedural default analysis to apply, the last reasoned State opinion must have “clearly and expressly” relied on it. Hence, in this situation, the Sixth Circuit concluded that the State’s opinion was based on the merits, rather than on the procedural default.<sup>19</sup>

One often (till lately) overlooked procedural default is objecting on one ground and then appealing on another. For example, a defendant may object on hearsay grounds and then appeal on both hearsay and Confrontation Clause grounds. In this situation, however, the constitutional claim is not preserved for appeal.<sup>20</sup> Enforcing this particular procedural default will do a lot to barring subsequent habeas review.<sup>21</sup>

Third, a procedural default must be based on a rule that is both adequate and independent. In other words, it must be fair.<sup>22</sup> As a general rule, the State courts need not worry about the federal courts declaring a State procedural default rule inadequate if the federal courts themselves have the same rule.

Fourth, the petitioner must show both “cause and prejudice.” As anyone familiar with the “cause and prejudice” standard knows, this is a very difficult standard to meet. Thus, for all intents and purposes, if procedural analysis applies, the issue is barred in federal court.

## FEDERAL REVIEW

Under normal circumstances, a federal court, in a habeas lawsuit, will not review the State courts’ decision de novo. Instead, it will grant the writ only if the State court’s decision is contrary to or an unreasonable application of Supreme Court case law.<sup>23</sup> In other words, a writ will not be granted merely because the decision is incorrect. It must be objectively unreasonable.<sup>24</sup>

This deferential standard, however, conceivably does not apply where the State courts fail to address the claim at all.<sup>25</sup> In such a situation, the federal courts might review the issue de novo. Therefore, to conceivably avoid losing the very favorable review standard, the State courts should be careful to not just ignore a federal constitutional issue that is being raised.

## SUMMARY

Therefore, in sum, whenever a State reviews a criminal defendant's appellate issue, it should follow this checklist:

- 1) Is the defendant in any way raising a constitutional issue? If not, then do not worry about anything. Non-constitutional claims are not cognizable in habeas.<sup>26</sup> If he is, proceed to the next step.
- 2) Is the constitutional claim defaulted? If so, at least in the alternative, deny relief based on the procedural default. If not, proceed to the next step.
- 3) Does the constitutional claim entitle the defendant to relief? If not, specifically address it as a constitutional claim and explain why not.

State court opinions affirming a defendant's criminal conviction that follow this advice will less likely be later overturned in federal court. Opinion writers (and appellate prosecutors) ignore this advice at their own risk.

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## Endnotes

- <sup>1</sup> *Miller-El v Cockrell*, 537 US 322; 123 S Ct 1029, 1039-1040; 154 L Ed 2d 931 (2003).
- <sup>2</sup> *Cooley v Coyle*, 289 F3d 882, 893 (CA 6, 2002).
- <sup>3</sup> MCR 7.211(C)(1)(a)(ii). A motion for a new trial under MCR 7.208(B) is similar. MCR 2.611(D)(1) requires, in a motion for a new trial, that any facts outside the record "must be supported by affidavit."
- <sup>4</sup> 299 F3d 605, 610 (CA 6, 2002).
- <sup>5</sup> Thus, in essence, it vacated *People v Sawyer*, 215 Mich App 183; 545 NW2d 6 (1996), lv den 451 Mich 851; 546 NW2d 254 (1996).
- <sup>6</sup> Ineffective assistance of counsel claims come to mind. The United States Supreme Court, the Sixth Circuit, and the Michigan Supreme Court have all pointed out that, because the trial counsel's reasons for doing what he did are not part of the record, without an evidentiary hearing, the appellate court will have no real way of knowing

whether sound strategy was involved or not. *Massaro v United States*, \_\_ US \_\_; 123 S Ct 1690, 1694; 155 L Ed 2d 714 (2003); *Hutchison v Bell*, 303 F3d 720, 749 (CA 6, 2002); *People v Mitchell*, 454 Mich 145, 169-170; 560 NW2d 600 (1997). Therefore, on appeal, a defendant who does not request an evidentiary hearing should be faulted for not doing so.

- <sup>7</sup> 264 F3d 663, 672 (CA 6, 2001), cert den 535 US 940; 122 S Ct 1323; 152 L Ed 2d 231 (2002).
- <sup>8</sup> 238 F3d 399, 406 (CA 6, 2000).
- <sup>9</sup> *Maupin v Smith*, 785 2d 135, 138 (CA 6, 1986), set up this four-step test.
- <sup>10</sup> *Mitchell v Mason*, 325 F3d 732, 739 (CA 6, 2003).
- <sup>11</sup> *Rogers v Howes*, 144 F3d 990, 994 (CA 6, 1998).
- <sup>12</sup> On the other hand, procedural default analysis works the same whether the State courts find a waiver or a forfeiture.
- <sup>13</sup> *Manning v Huffman*, 269 F3d 720, 724 (CA 6, 2001).
- <sup>14</sup> 201 F3d 711 (CA 6, 2000).
- <sup>15</sup> *Clifford v Chandler*, \_\_ F3d \_\_ (CA 6, #01-5296, 06/25/03).
- <sup>16</sup> *Paprocki v Foltz*, 869 F2d 281, 285 (CA 6, 1989).
- <sup>17</sup> *Lancaster v Adams*, 323 F3d 423, 437 (CA 6, 2003).
- <sup>18</sup> *Williams v Coyle*, 260 F3d 684, 696-697 (CA 6, 2001), cert den 536 US 947; 122 S Ct 2635; 153 L Ed 2d 816 (2002).
- <sup>19</sup> *Patterson v Haskins*, 316 F3d 596, 604 (CA 6, 2003). Of course, because the State courts had accordingly not relied on the procedural default, the Sixth Circuit in *Patterson* decided the matter on the merits as well. It then granted habeas relief (something that might conceivably have not occurred had the Ohio Court of Appeals been a little clearer in denying relief based on the procedural default).
- <sup>20</sup> *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001), lv den 467 Mich 854; 650 NW2d 338 (2002).
- <sup>21</sup> I am not the only one making this point. Moran's and Tieber's article says:

If, for example, the prosecution attempts to introduce a statement from a non-testifying co-defendant, the defense attorney would have to do more than simply say, "objection," or "objection, hearsay," since these objections would not alert the trial judge to the constitutional nature of the error.

- <sup>22</sup> *Lee v Kemna*, 534 US 362; 122 S Ct 877; 151 L Ed 2d 820 (2002).
- <sup>23</sup> *Woodford v Visciotti*, 537 US 19; 123 S Ct 357, 360; 154 L Ed 2d 279 (2002).
- <sup>24</sup> *Price v Vincent*, 538 US \_\_; 123 S Ct 1848; 155 L Ed 2d 877 (2003).
- <sup>25</sup> *Mc Kenzie v Smith*, 326 F3d 721, 727 (CA 6, 2003), (de novo review) is difficult to reconcile with *Clifford*, supra (AEDPA standard), on this point.
- <sup>26</sup> *Pulley v Harris*, 465 US 37, 41; 104 S Ct 871; 79 L Ed 2d 29 (1984).

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# Computer Generated Visual Evidence:

The Future is Now

By William M. Worden

As the Florida Court of Appeal observed in *Pierce v State*, 718 So.2d 806, 808 (Fla. Dist. Ct. App. 1998),<sup>1</sup> civil litigants have used computer animations in the courtroom for reconstructing car and truck collisions, plane crashes, construction equipment and industrial accidents, and patent litigation. In recent years, computer-animated visual evidence has been used increasingly in criminal cases throughout the United States.

Michigan criminal jurisprudence recently joined this growing trend.<sup>2</sup> In *People v Bulmer*, 256 Mich App 33; 662 NW2d 117 (2003), the Michigan Court of Appeals affirmed the defendant's conviction of second-degree murder. The *Bulmer* case involved the propriety of showing the jury a computer-animated slideshow simulation, used to demonstrate what happens to a child's brain during a shaken baby episode. The Court of Appeals concluded that the prosecutor offered the slideshow simulation solely as demonstrative evidence under MRE 702 and 703, not to show specifically what happened to the victim, but to illustrate the effect of shaking a baby, and to explain the testimony of a prosecution expert witness.

The *Bulmer* Court held that demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case. Demonstrative evidence must be relevant and probative. When evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event.

While there are a few cases that uphold the use of demonstrative exhibits, e.g., *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998), there was no reported Michigan decision that considered the use of computer-generated visual evidence. The *Bulmer* decision assists the bench and bar of this State because it illustrates that demonstrative evidence can include computer animations when offered for a proper purpose and with proper instructions to the jury.

After reviewing the slideshow, the *Bulmer* Court concluded that it simply demonstrated what the expert witness, a pathologist, described in her testimony. Defendant did not object to the doctor's testimony that described in detail the shaken-baby syndrome. The trial court also clearly advised the jury that the slideshow was a demonstration and not a reenactment of what happened to the victim. The brief slideshow was relevant and probative in refuting defendant's claim that he only "gently" shook the victim.

The slideshow illustrated the doctor's testimony regarding a material issue relating to the case, i.e., whether defendant gently or severely shook the victim.

Other states have allowed computer-generated visual evidence to be viewed by juries in criminal cases. In *Gosser v Commonwealth*, 31 S.W.3d 897 (Ky. 2000), the Supreme Court of Kentucky considered the admission of computer-generated visual evidence, which it abbreviated as CGVE. A *Pulaski* Circuit Court jury convicted defendant Gosser of wanton murder for firing a gun into a crowd that had gathered to watch a fight involving the defendant's acquaintance and another man who was defendant's enemy. The *Gosser* Court, at 901, wrote: "The use of computer-generated graphics and animation as evidence is a growing trend in the Commonwealth, as it is in courtrooms all across the land. Heretofore, this Court has not addressed any of the many issues concerning the admission of this type of evidence. However, there is a growing body of case law and law review articles concerning these issues."

As the Kentucky High Court in *Gosser* explained, CGVE is usually divided into two broad categories: (1) demonstrative; and (2) substantive. *Id.*, at 901-902. Demonstrative CGVE usually consists of still images or animation, which merely illustrates a witness's testimony. Substantive CGVE usually consists of computer simulations or recreations, which are prepared by experts and which are based on mathematical models in order to recreate or reconstruct an incident or event. The standard of admissibility depends on how the CGVE is categorized.

This situation is much like Kentucky's approach to the introduction of photographs. Photos are most commonly admitted into evidence as demonstrative evidence on the theory either that they are merely a graphic portrayal of oral testimony or that a qualified witness adopts the photograph as a substitute for words. When a photograph is used as demonstrative evidence, the witness need not be the photographer, nor must he have any personal knowledge of the time, method, or mechanics of the taking of the photographs. The witness is only required to state whether the photograph fairly and accurately depicts the scene about which he is testifying.

While classifying a particular type or piece of CGVE as either "demonstrative" or "real" might be helpful as a starting point, the question of admissibility is ultimately determined under the rules of evidence. The admissibility of computer-generated diagrams, like those at issue in the *Gosser* case, are analyzed the same as diagrams drawn

by hand or photographically created. The *Gosser* Court found that computer-generated diagrams have to be relevant (Rule 402); are subject to exclusion (Rule 403); are subject to the trial court's discretion over the mode and order of the presentation of evidence (Rule 611); and have to be authenticated by testimony of a witness who has personal knowledge of the diagram's subject matter and the diagram is accurate (Rule 901). Because a computer-generated diagram, like any diagram, is merely illustrative of a witness's testimony, its admission normally does not depend on testimony as to how the diagram was prepared, e.g., how the data was gathered or inputted into the computer. Where a diagram purports to contain exact measurements, to be drawn to scale, etc., then testimony as to how the data was obtained and inputted into the computer would be relevant and could be necessary to the admission of the diagram.

In *Gosser*, the computer-generated exhibits were introduced through the testimony of a detective who lacked personal knowledge of the most relevant parts of the diagrams' subject matter. The detective's testimony, as illustrated in the diagrams, concerning where persons were located at the time of the shooting was based on hearsay and should not have been admitted, but the Kentucky High Court ruled that the error was harmless because other witnesses sufficiently authenticated the diagrams. The Kentucky Supreme Court did not believe that the result in *Gosser* would have been any different had the diagrams been properly introduced through the witnesses who were present at the scene of the shooting rather than through the detective.

In *State v. Farner*, 2000 WL 872488 (Tenn. Crim. App. 2000), the Tennessee Court of Criminal Appeals held that the computer-generated videotape of a multi-vehicle, fatal crash was inadmissible. Defendant appealed his negligent homicide and reckless endangerment convictions in this case, which involved drag racing. A police officer testified as an expert in accident reconstruction. He gave a copy of his report and photographs of the scene to a college professor who created a computer-generated visualization of the crash. The professor testified as an expert in computer visualization. He said that a visualization is based upon information from an expert whereas a simulation or reconstruction uses the laws of physics to recreate exactly what happened physically. The prosecution played the visualization for the jury. The visualization showed the accident from five viewpoints: an overview; defendant's Camaro; and separate views from the other three vehicles containing the four victims.

The admissibility of a computer-generated depiction of a witness's testimony was an issue of first impression in this Tennessee Court of Criminal Appeals case. The Tennessee appellate court observed that other jurisdictions addressing the admissibility of a computer-generated videotape differed in their analysis based upon whether they viewed

the videotape to be demonstrative evidence or a scientific experiment or test. Courts and commentators make the distinction between a computer-generated animation, which illustrates a witness's testimony and is demonstrative evidence, and a computer simulation, in which one enters scientific or physical principles and data into a computer program, which analyzes the data and draws a conclusion from it. *Farner, supra*.

The Tennessee appellate court further observed that jurisdictions viewing the computer-generated videotape as merely illustrating the expert witness's testimony require only that the animation meet the rules of admissibility for demonstrative evidence and do not delve into the reliability of the underlying computer program. In *Farner*, the college professor used the computer to illustrate the officer's reconstruction of the crash and not to reconstruct the crash itself. The Tennessee Court believed that the videotape was demonstrative evidence illustrating the officer's testimony. But, the trial court erred in admitting the visualization because it failed to meet the foundational requirement that it be a true and accurate portrayal of the accident it sought to depict under Rule 901(a).

The visualization's depiction of the defendant's Camaro was speculative; the officer testified he could not calculate the Camaro's speed because it left no yaw marks or skid marks at the scene. The college professor testified that the crash could have occurred either behind the undamaged Camaro, as depicted in the visualization, or in front of the defendant's car. The fact that these two possibilities exist coupled with a lack of physical evidence from the Camaro at the scene and witnesses to the accident itself made the visualization's portrayal of the Camaro's actions speculative. The trial court erred in admitting the visualization because no evidence existed that its portrayal of the actions of the Camaro were a true and accurate depiction of the events in question, although it showed the Camaro going at a particular rate of speed. Nevertheless, the Tennessee appellate court believed that the admission of the videotape was harmless because, considering the record as a whole, the judges could not conclude that the error more probably than not affected the judgment.

In *State v. Bauer*, 598 NW2d 352 (Minn. 1999), Dr. Dan Davis, M.D., testified and his expert opinion was illustrated by a graphic poster showing the defendant's leg brace matched to scale with a mark on the murder victim's leg. Dr. Davis, the Hennepin County Medical Examiner in Minneapolis, Minnesota, produced "Mechanism of Shaken Baby Syndrome," which was the demonstrative evidence involved in Michigan's *Bulmer* decision. In *Bauer*, the Minnesota Supreme Court held that such a graphic demonstration was admissible because it simply illustrated the expert's opinion, which was supported by sufficient evidence in the case.

Authorities found defendant's estranged wife on the living room sofa bed with a telephone cord and a metal coat hanger wrapped tightly around her neck. In addition to the injuries caused by these ligatures, investigators observed multiple soft tissue injuries on the victim's face, neck, chest, and hands, and an L-shaped abrasion on her left calf. In the course of their investigation, police also seized leg braces that belonged to defendant, who had polio as a child and needed the braces to walk.

During the autopsy, the coroner observed and photographed an L-shaped abrasion on the victim's left calf that had been inflicted near the time of her death. After the autopsy, the coroner compared the scaled photograph of this abrasion to the hinges of the right leg braces seized from defendant. From this comparison, the coroner concluded that either defendant's brace or one of similar configuration and manufacture caused the L-shaped abrasion.

The state offered the testimony of Dr. Davis, who like the coroner, compared the hinges on the defendant's right leg braces to the autopsy photograph of the L-shaped abrasion on the victim's left calf. In connection with Dr. Davis' testimony, the state sought to introduce a computer-generated 26 inch by 36 inch "poster" made by Dr. Davis that showed a scaled comparison of the hinge on defendant's leg brace and the L-shaped abrasion on the victim's calf. Claiming that the state had failed to lay sufficient foundation to establish the poster's credibility and validity, the defense objected to the use or admission of this poster.

Dr. Davis' poster was not admitted as substantive evidence that defendant's brace caused the abrasion on the victim's leg. Rather, the poster was used only as illustrative evidence to assist Dr. Davis in explaining his independent comparison of the actual brace hinge to the autopsy photograph of the L-shaped abrasion.

Dr. Davis actually placed defendant's brace on the autopsy photograph. Both he and the coroner testified that such comparisons are a common practice among medical examiners seeking to determine the cause of an injury. In subsequently creating the poster, Dr. Davis used rulers and scales to ensure that size and proportion were depicted accurately. Dr. Davis verified, from first-hand knowledge, that the image depicted on the poster was a substantially accurate representation of the important elements of his independent comparison of the brace hinge and the autopsy photograph. The Minnesota Supreme Court held that Dr. Davis, a competent and knowledgeable witness, laid the proper foundation to use the poster to illustrate his testimony concerning that independent comparison. Because the trial court did not receive the poster as substantive evidence of a scientific or medical fact, the Court found that it need not decide whether the proper foundation was laid to admit the poster for such purposes.

Defendant argued that the poster should have been

excluded under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice. Specifically, defendant argued that the jury may have been misled into believing that the poster was actually a photograph of the brace hinge placed on the victim's leg. The trial court could have helped clarify the issue by instructing the jury on the illustrative nature of the poster. But, on direct examination, Dr. Davis testified at length as to how the poster was created and what it depicted. With extensive cross-examination and in closing argument, the defense had ample opportunity to, and did, point out the relative weaknesses of the image depicted on the poster. The trial court's ruling excluding the poster from the jury deliberation room largely alleviated any danger that the poster would be used in a context other than to illustrate Dr. Davis' testimony. The Minnesota Supreme Court held that the probative value of the poster was not outweighed by the danger of unfair prejudice.

*State v Harvey*, 649 So. 2d 783 (La. Ct. App. 1995), a Louisiana Second Circuit Court of Appeals case, involved a police officer accused of shooting his wife in their home. The couple's two young sons were watching television in another room and did not witness the shooting. The central issue of this case was whether the defendant shot his wife in self-defense.

Defendant, *inter alia*, contended that the Caddo Parish trial court erred in admitting into evidence computer-generated, still animations depicting the shooting incident and the placement of the victim's body. The Caddo Parish coroner testified that three of the four animations accurately depicted his conclusions as to the sequence of the three shots fired at the victim. The fourth animation depicted the position of the victim's body in relation to the clothes dryer and freezer in the laundry room. This animation also accurately showed where a .22 caliber revolver was found, under the victim's right armpit. Defendant shot his wife with a 9 mm Glock handgun issued by the Shreveport Police Department.

Defendant objected that the animations could be inflammatory. He argued that by admitting these exhibits, the state was introducing into evidence the coroner's conclusion of how the incident occurred. The state argued that the animations illustrated the positions of the victim and the defendant and the path of the bullets. There was no blood depicted. After determining that the animations were demonstrative of the coroner's testimony, the trial court overruled the defendant's objection and admitted the animations.

The appellate court found that the trial judge did not err in admitting the animations into evidence. The coroner conducted the autopsy on the victim. Qualified as an expert witness in forensic pathology, the coroner concluded that the first shot went through the victim's elbow as she

turned, which twisted her to the side. That first bullet then re-entered the right side of her abdomen and exited her right lower back. The second shot entered her left breast and again turned her to the side. The third shot was fired at extremely close range (within inches) and grazed her right hand before striking her in the middle of the chest. The downward angle of the last two bullets indicated that the victim was either bent over or on her knees when they were fired. The coroner offered his expert opinion that the victim was not holding anything in her right hand when she was shot and that it was impossible for her to have been reaching for a gun at that time.

The animations had strong probative value, providing a visual demonstration of the shooting as described by the coroner. The jury was aware that the coroner did not witness the shooting and that his testimony was based upon the autopsy and tests he performed. The jury could weigh this factor when considering the animations, which illustrated the coroner's version of how the shooting most likely occurred. Thus, they enhanced the jury's understanding of the autopsy report and pictures as to the direction of the bullets and the position of the shooter.

In *Mintun v State*, 966 P.2d 954 (Wyo. 1998), the Wyoming Supreme Court considered whether the trial court properly admitted a computer animation of the automobile crash that killed the victim. The defendant was charged with aggravated homicide by vehicle. Both the victim and defendant were ejected from the vehicle during the crash. Seriously injured, the victim had no recollection of the crash or prior events leading up to the crash. The only issue at trial was who was driving the car when it crashed. The jury determined the defendant was driving, and found him guilty.

A police sergeant investigated the accident. None of those who stopped to assist witnessed the crash. At trial, the sergeant testified about his investigation and crash reconstruction. The State used a computer-generated video animation of the accident as a demonstrative exhibit during the sergeant's testimony. The animation showed the accident from three different vantage points: a top, or helicopter view; a side view; and what was termed the witness view.

The animator responsible for creating this exhibit testified that he used measurements and other information provided by the sergeant, and the animation was intended to present the sergeant's reconstruction of the crash from the three different vantage points.

The "witness view" was intended to present what the sergeant believed an eyewitness would have seen from Nathaniel Huff's vantage point. Huff, an eyewitness to the crash who did not come forward until shortly before trial, testified that he saw defendant ejected from the passenger side of the car, and that he saw the victim gripping the steering wheel while the crash was in progress.

The "witness view" was inconsistent with Huff's testimony, showing the car spinning before Mintun was ejected. The sergeant explained his theory that, although Huff accurately placed the point and time of ejection, Mintun was actually ejected from the driver's side after the car had spun around.

The Wyoming Supreme Court had not previously considered the admissibility of a computer-generated animation. However, the Court saw no reason to depart from long-standing rules of evidence in determining whether such an exhibit was admissible. Evidence is admissible when it is authenticated, relevant, and not subject to an exclusionary rule. Under Rule 901(a), authentication is accomplished by showing that the evidence in question is what its proponent claims. The State offered the computer animation to show the sergeant's reconstruction of the crash from three vantage points, including the point at which Huff watched it occur. The animator's testimony as to how the animation was created, combined with the sergeant's testimony on the methods used in reconstructing the accident and his intent to show only his reconstruction, not Huff's version, were sufficient to authenticate this exhibit. The Wyoming Supreme Court wrote: "Joining those jurisdictions which hold that an animated reconstruction of an accident is admissible so long as it does not offend the rules of evidence, we find no abuse of discretion in the admission of such evidence here." *Id.*, at 959.

In *People v Hood*, 53 Cal App 4th 965; 62 Cal Rptr 2d 137 (1997), the California Court of Appeal reviewed a first-degree murder conviction based, in part, upon a computer animated re-enactment of the crime. The California appellate court held there was no abuse of discretion by the trial court, which determined that the probative value of the prosecution's computer animation outweighed the animation's prejudicial impact. The animation was clinical and emotionless and the trial court gave an instruction that the animation was only an aid based on particular interpretations of the evidence.

The defense contended that the victim had threatened Hood beforehand and was in the process of pulling out a gun when Hood shot him in self-defense. The prosecution based its computer animation of the shooting upon information supplied by Hood's secretary and the detective who did measurements at the scene, and on reports and opinions of the pathologist who performed the victim's autopsy, prosecution ballistics and gunshot residue experts. The trial court ruled that the animation was illustrative, similar to an expert who draws on a board, and was not being introduced as evidence in and of itself, but only to illustrate the testimony of various prosecution experts. The defense introduced its own computer animations of the shooting at both of defendant's trials. Hood's first trial resulted in a hung jury.

Before the prosecution's computer animation was played at defendant's second trial, the judge instructed the jury that the computer animation was nothing more than an expert opinion being demonstrated or illustrated by the computer animation, as opposed to charts and diagrams. The trial judge further instructed jurors that all of the animated video re-enactments or re-creations were only designed to be an aid to testimony or reconstruction, the same as if an expert testified and drew certain diagrams on the board. They were not intended to be a film of what actually occurred or an exact re-creation.

The California Court of Appeals agreed with the trial court's ruling. The prosecution and defense computer animations were tantamount to drawings by the experts from both sides to illustrate their testimony. Given the nature of the testimony at trial as to how the prosecution's animation had been prepared, the introduction of the defense's contradictory animation and the instructions given the jury concerning both animations, there was no danger that the jury was swept away by the presentation of a new scientific technique, which it could not understand and, therefore, would not challenge. Addressing defendant's contention that the trial court abused its discretion in determining that the probative value of the prosecution's computer animation outweighed its prejudicial impact, the California Court found that the animation was clinical and emotionless. This fact, combined with the instruction given jurors about how they were to utilize both animations, persuaded the appellate court that the trial court did not abuse its discretion.

This cursory survey of American criminal jurisprudence reveals that Michigan practice and procedure mirrors other states regarding the admission of computer-generated visual evidence. American humorist Mark Twain once expounded on the importance of evidence to forming an opinion: "I think there is no sense in forming an opinion when there is no evidence to form it on. If you build a person without any bones in him he may look fair enough to the eye, but he will be limber and cannot stand up; and I consider that evidence is the bones of an opinion." So it goes with CGVE. If computer-generated visual evidence illustrates your expert witness' testimony, it will make your argument stand up, even under the closest appellate scrutiny.

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#### Endnotes

- <sup>1</sup> In *Pierce v State*, *supra*, defendant's pickup truck hit three children, killing one, while they were walking through a residential neighborhood. Without stopping, defendant fled in his pickup. Convicted, *inter alia*, of vehicular homicide, defendant objected to the admission of a computer-generated animation that illustrated the lead investigator's reconstruction of the accident and was published to the jury as a demonstrative exhibit. The Florida Court of Appeal, Fourth District, found the animation was properly admitted as a demonstrative exhibit because a proper foundation was established, the facts or data on which the expert relied in forming the opinion expressed by the computer animation was of a type reasonably relied upon by experts in the subject area, and the computer animation was a fair and accurate depiction.
- <sup>2</sup> For an excellent discussion of how the Michigan Rules of Evidence work in conjunction with computer data, cf. Norman C. Ankers & Ronald S. Longhofer, *Computer-Based Evidence Under the Michigan Evidence Rules*, 78 Mich. B.J. 678, July 1999 at 685.

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# Assessment of Competency to Stand Trial & Criminal Responsibility

By Daniel H. Swerdlow-Freed

Criminal attorneys, prosecutors and judges, immersed in their case and court schedules are not always able to identify a mental condition that renders a defendant incompetent to stand trial or legally insane. This article discusses relevant case law and Michigan statutes related to the issues of competency to stand trial and criminal responsibility, and identifies psychological conditions commonly associated with the issue of adjudicative competency. Finally, the basic elements of thorough competency and criminal responsibility evaluations are discussed.

There is a long-standing tradition in American jurisprudence that requires a defendant in a criminal proceeding to be competent to stand trial. The U. S. Supreme Court, in *Dusky v. United States* (1960) stated that competency exists when a defendant "... has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and ... has a rational as well as factual understanding of the proceedings against him" (p. 789). In Michigan, as in most jurisdictions, a criminal defendant is presumed competent unless the court is presented with evidence to the contrary. M.C.L. 330.2020(1) states that a defendant is incompetent to stand trial "... only if he is incapable because of a mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner."

Pretrial competency evaluations are sought in a small proportion of felony cases, typically no more than 8% (Hoge, Bonnie, Poythress, and Monahan, 1992), and approximately one-third of defendants whose competency is legitimately in question are never referred for evaluation (LaFortune and Nicholson, 1995). Constitutional and societal problems arise when incompetent defendants are made to stand trial because they are unable to assist in their own defense (Wulack, 1980). Incompetent defendants may not be able to exercise appropriately their right to due process, including selecting and assisting defense counsel, confronting witnesses and testifying in their own behalf. Finally, no credible social or rehabilitative purpose is achieved by punishing a defendant who cannot understand the nature and purpose of a legal proceeding, and who is unable to understand the reason for which a sentence has been imposed.

The U. S. Supreme Court, in *Pate v. Robinson* (1960), ruled that a trial judge bears responsibility for raising the issue of a criminal defendant's competency if the court has reason to believe that the defendant may not be competent to proceed with adjudication, or if it is presented with evi-

dence by either the prosecution or defense that calls into question this issue. Similarly, case law in Michigan (*People v. Harris*, 1990) holds that a trial judge is obligated to raise the issue of a defendant's competency if "bona fide doubt" exists regarding this issue. These rulings create a duty for trial judges, prosecutors and defense attorneys to be cognizant of a defendant's mental state, and to initiate a referral for evaluation when evidence suggests that a defendant has a mental condition that impairs competency to proceed with adjudication.

Those who are unfamiliar with the area where law and mental health intersect may not readily recognize abnormal psychological conditions that are associated with incompetency. The three clinical populations where the question of competency to stand trial most often arises include defendants with schizophrenic-spectrum, and severe mood disorders, and defendants who possess significantly below average intelligence and can be classified as mentally retarded. Defendants who have schizophrenic-spectrum disorders, who experience fixed and false beliefs typically of a grandiose or persecutory nature, may display superficial capacity for rational and factual understanding of their legal situation and may be capable of limited cooperation with defense counsel. However, because these individuals do not possess stable, enduring contact with external, conventional reality, their delusional beliefs may surface only during extended interview regarding their legal situation or during adjudication proceedings, and they are liable to lack the ability to knowingly and intelligently weigh the defense strategies, and legal options that are available. Defense counsel must remain cognizant of the possibility that a defendant's mental state might deteriorate during the course of a trial because of the stress involved, and that the defendant might not be able to tolerate cross-examination without being overwhelmed.

Defendants whose mental condition is impaired by severely elevated or depressed mood also experience significant problems in thinking rationally and reasoning logically and, consequently, may not be capable of rational and factual understanding of the nature and purpose of adjudication proceedings. Furthermore, such individuals may lack the ability to sustain focused attention and concentration, sufficient to collaborate with defense counsel.

Defendants who are mentally retarded often lack the cognitive skills needed to understand the nature and object of a legal proceeding, yet some research has shown that these individuals are likely not to be referred for compe-

tency evaluations (Bonnie, 1990). The frequency with which mentally retarded defendants are not referred for evaluation is a legitimate social and legal concern, particularly in light of one study that found almost 60% of mentally retarded defendants referred for evaluation were incompetent to stand trial (Everington and Dunn, 1995). Still other research found that mentally retarded defendants with IQs ranging from 50 to 75 frequently did not understand legal terms and concepts, despite reporting familiarity with legal terminology (Ericson and Perlman, 2001).

Referral for a competency evaluation might be initiated for a variety of reasons. A defendant with a history of psychological problems who is currently evidencing serious symptoms or abnormal behavior should be evaluated, as should a defendant who has been diagnosed with below normal intelligence, and a history of significant limitations in adaptive functioning in the areas of school, work, communication, interpersonal relationships, or age-appropriate independence. Defendants reporting amnesia, displaying disturbances in conscious awareness or memory impairment would also be candidates for evaluation. Finally, if it is unusually difficult to communicate with a defendant and there is no apparent reason for this difficulty, a competency evaluation should be undertaken.

A thorough competency evaluation would inquire into several areas including, but not limited to, the defendant's ability to understand the nature of the charges, the relevant facts of the case, the available legal defenses, ability to plan and implement legal strategy, and the plea options that are available and the disposition associated with each one. A defendant's understanding of the roles of judge, prosecutor, defense counsel, and jury should also be determined, as well as defendant's ability to identify and locate witnesses, to appraise their testimony and to communicate this understanding to defense counsel. The defendant's ability to relate to defense counsel is another important area of inquiry, and involves assessing the defendant's "... ability to trust and communicate with the attorney in a relevant and coherent manner" (Shapiro, 1984, p. 5).

Since not all criminal defendants have had previous experience with the legal system, varying levels of understanding of court proceedings are common. For defendants with mental conditions that call into question their competency to stand trial, it is important to assess their capacity to learn and retain new information, and make certain that their mental condition does not impede comprehension. This inquiry assesses the defendant's ability to comprehend and grasp the meaning and significance of relevant legal issues and related matters, once these have been explained, and to retain this information until it is needed.

It is the standard of practice in forensic psychology to conduct evaluations using multiple sources of information, and multiple methods of data collection. Consequently,

when conducting a competency evaluation, in addition to interviewing the defendant, it would be appropriate to gather relevant information about the defendant's behavior and current mental state from defense counsel, from medical and/or mental health records, from police and/or prosecution reports, from direct observation, and from any other relevant source. Comprehensive evaluations are also likely to utilize forensic assessment instruments, such as The MacArthur Competence Assessment Tool - Criminal Adjudication (Otto, et. al., 1998) or The Competence Assessment for Standing Trial for Defendants with Mental Retardation (Everington and Luckasson, 1992). These and other competency instruments are designed to assess knowledge-based competence and provide a means to relate a defendant's mental condition to his/her competency to stand trial (Stafford, 2003). (A thorough review of competency instruments is beyond the scope of this article, but can be found in Stafford (2003).)

Forensic assessment instruments are not designed to answer all questions that might be relevant in a competency evaluation. Clinical assessment instruments can also be employed to address certain other questions, such as whether a defendant is experiencing symptoms consistent with a known abnormal psychological condition or possesses below normal intelligence, and are appropriate to use because that can they provide information that is relevant to a defendant's competency. Examples of clinical assessment instruments that might be utilized in competency evaluations include the Minnesota Multiphasic Personality Inventory-2 (1989) and the Wechsler Adult Intelligence Scale-III (1997). Finally, if a defendant were suspected of malingering, forensically relevant instruments such as the Validity Indicator Profile (Frederick, 1997) the Recognition Memory Test (Warrington, 1984) or the Structured Interview of Reported Symptoms (Rogers, Bagby & Dickens, 1992) could be used to investigate this possibility.

Once a showing has been made that a defendant may be incompetent to stand trial, M.C.L. Section 330.2026(1) provides that the court must order an examination performed by personnel from the Center for Forensic Psychiatry, or other facility certified by the Department of Mental Health to perform competency evaluations. At the present time, the only other facility certified to perform competency to stand trial evaluations is the Third Circuit Criminal Court Psychiatric Clinic in Wayne County. Consequently, the Forensic Center and the Psychiatric Clinic provide the vast majority of first-opinion evaluations regarding the issue of competency. There is no prohibition against the court, prosecuting attorney or defense counsel obtaining a second-opinion evaluation from a private forensic psychologist, and, in fact, M.C.L. Section 330.2030(3) provides that the court or the attorneys may file a motion to present additional evidence relevant to the issue of a defendant's competency. In view

of the duty to pursue all reasonable avenues of defense, defense counsel is most likely to obtain a private examination, particularly in cases where defense counsel wishes to have reviewed the methods and procedures utilized during the first evaluation to make certain they were appropriate and comprehensive, or where there are significant questions regarding the examiner's conclusion. Second-opinions might also be useful if there has been a significant change in a defendant's mental condition after the first evaluation that might render those findings invalid.

If a defendant is ordered to undergo a competency evaluation pursuant to M.C.L. Section 330.2026(1), the examiner from the Forensic Center or Psychiatric Clinic is required to consult with defense counsel and defense counsel is required to make him/herself available for consultation, as directed in M.C.L. Section 330.2028(1). In addition, this Section requires that the examiner submit a written report to the court, the prosecuting attorney and defense counsel, within 60 days of the date of the order for the evaluation. Thus, the report must contain: (a) the examiner's clinical findings; (b) the facts, in reasonable detail, upon which the findings are based, and other facts pertinent to the findings, if requested by the court or the attorneys; and (c) the examiner's opinion on the issue of the defendant's competency to stand trial.

If the defendant has been determined incompetent to stand trial, the examiner must also state an opinion regarding the likelihood the defendant would be restored to competency, if provided treatment, within the time limit established by M.C.L. Section 330.2034(1). If the court concludes there is a substantial probability that, with treatment, a defendant can be restored to competency within the time frame provided by statute, the court is required to order the defendant to undergo treatment, pursuant to M.C.L. Section 330.2032(1). Such order involves admitting the defendant to the Forensic Center, where periodic reviews are conducted, until a defendant has been restored to competency.

While a competency to stand trial evaluation involves the assessment of a defendant's current mental state, the assessment of criminal responsibility focuses on a defendant's state of mind at the time the alleged offense was committed. As such, insanity evaluations can occur weeks, months or even years after the alleged offense and, consequently, these assessments are retrospective in nature, and involve consideration of a defendant's state of mind in the weeks, days and hours immediately preceding the criminal act.

In order to establish guilt beyond a reasonable doubt, the prosecution must prove all the elements of the alleged offense, including any mental state elements that might apply. In any given case, a forensic evaluation may provide probative information regarding claims that a defendant's psychological state negated a mental state element of a

crime or if the psychological condition establishes an affirmative defense that provides a legally acceptable excuse for the conduct.

Research indicates that insanity defenses in felony cases occur at varying levels across states, ranging from as low as .1% to as high as 8% (*Melton, Petrila, Poytbress, & Slobogin, 1997*), and are successful no more than 25% of the time (*Golding, Skeem, Roesch, & Zapf, 1999*). A study in British Columbia (*Golding, Eaves, & Kowatz, 1989*) involving NGRI acqutees found that almost 79% of its subjects had at least one psychiatric hospitalization, and that over half had been discharged from a psychiatric hospital within one year prior to committing their crime. These statistics show that the insanity defense is infrequently invoked and more often than not, fails to result in exoneration, and that a majority of NGRI acqutees have a history of psychological problems that have required hospitalization, often close in time to the criminal act. As a practical matter, these studies suggest that, as a group, criminal defendants who have been hospitalized for psychological problems should undergo an evaluation to determine whether there is evidence to support an defense of insanity, and that as a matter of public policy, there is little reason to be concerned that conducting these evaluations will result in defendant's going free who are guilty but not mentally ill.

The legal test of criminal responsibility has a long history, and the case of Daniel M'Naghten has often been cited as the initial dominant legal standard. The "M'Naghten test" fell out of favor because, among other reasons, it was never adequately defined, and it gave way to the "irresistible impulse" rule (*Melton, Petrila, Poytbress, & Slobogin, 1997*). In Michigan, irresistible impulse was defined as "the policeman at the elbow" test because a criminal act was deemed irresistible if the impulse was so overwhelming that a person would commit it even in the presence of a police officer. Today, in Michigan, a defendant is legally insane according to M.C.L. Section 761.21a(1), if, as a result of mental illness or mental retardation as defined in M.C.L. Sections 330.1400-1401, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Additionally, M.C.L. Section 761.21a(2) provides that a person who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of the alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substance. Thus, in its current iteration in Michigan as in many other state jurisdictions, the insanity statute comprises a cognitive component defined as the capacity to appreciate the nature and quality or the wrongfulness of one's conduct, and a volitional component defined as the capacity to conform one's conduct to the requirement of the law.

M.C.L. Section 761.21a(1) can be further conceptualized as consisting of two broad required elements. The first element is that a defendant must have a statutorily defined mental illness, (see M.C.L. Sections 330.1400-1401) which is defined as a “substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.” That a disorder must be “substantial” and must “significantly impair” indicates that not all psychological problems are equal and, therefore, some will meet this threshold test while others will fall short. Also, Michigan’s criminal statutes have not defined the terms “substantial” or “significantly impairs” and, consequently, these determinations result in subjective judgments that, depending on the circumstance, might be open to dispute. This point notwithstanding, severe affective disturbances and severe psychotic-spectrum disorders marked by fixed and false grandiose or persecutory beliefs or false auditory sensations, are more likely than not to meet the statute’s language without generating controversy. In contrast, symptoms such as mild anxiety and moderate depression are unlikely to meet this threshold requirement and are more vulnerable to successful challenge, as are situations where a defendant with a history of psychological problems was not manifesting acute symptoms of disturbance at the time of the alleged offense.

If the initial threshold question is answered affirmatively, the second element involves whether there is a connection between a defendant’s psychological problems and the capacity to either to appreciate the nature and quality or the wrongfulness of their conduct, or to conform their conduct to the requirements of the law. In some cases, the relationship may be obvious, while in others the connection may be less certain or open to dispute like, for example, in the case of the mother in Dallas who killed her five children. Since criminal responsibility evaluations are retrospective inquiries, how does a forensic psychologist determine whether there is a connection between the defendant’s mental state and behavior at the time of the instant offense?

As previously mentioned, it is the standard of practice in forensic psychology to conduct multi-source, multi-method assessments. When conducting a criminal responsibility evaluation it is important to review all the police and prosecution records, and statements from any witnesses who saw what transpired and observed the defendant’s behavior. This information can provide understanding of the nature of the defendant’s behavior at the time of the offense. In addition, if the defendant gave a statement, this should be reviewed for the same reason. Given the particular circumstances of a case, it might be useful to interview family members, friends and associates of the defendant’s, as well as other individuals who had direct contact with the defendant immediately preceding the instant offense for the

information they can provide regarding the nature of his thought processes and behavior.

Jail records should be reviewed for all incarcerated defendants. For inmates treated in the jail’s mental health unit, psychiatric intake assessments, medication logs and written observations can provide important documentation concerning a defendant’s behavior and mental state. While these data do not address the defendant’s mental state at the time of the offense, they can be used to corroborate the defendant’s self-report. For example, when a defendant reports that he was hearing voices that contributed to the alleged act, one would expect notation of this behavior included in the initial police narrative or at the time of incarceration. Furthermore, because this symptom would typically occur until treated with medication, one would expect that the defendant’s behavior brought him to the attention of the jail’s mental health personnel, and that appropriate medical treatment was instituted. In legitimate claims of disturbance, these factors should be in evidence and documented, and their existence would substantiate the defendant’s report, and support an insanity defense.

Some inmates are hospitalized at the time of or subsequent to incarceration, and these records should be reviewed for information that would corroborate claims of psychological impairment. Hospital staff closely monitor and document every patient’s clinical status, and this information can be extremely valuable for deciding whether or not a defendant’s behavior is consistent with the known phenomenology of a particular psychological disorder. Similarly, an examiner’s direct observations of a defendant can be utilized to corroborate a defendant’s self-report.

An evaluation must also include the defendant’s account of the instant event and the circumstances immediately preceding it. If a statement has already been given to police or a previous examiner, it can be compared to the current one for consistencies and inconsistencies. Furthermore, attempt should be made to corroborate the defendant’s self-report with each of the above sources of information. Generally speaking, the most important aspect of a defendant’s self-report is the reason given for his actions. This means that specific attention should be devoted to the defendant’s thoughts, feelings and perceptions immediately preceding the offense, and any attempts made to refrain from the criminal act.

Psychological testing may also play a vital role in evaluation, and instruments designed to assess malingering and intellectual functioning are the most common ones used to assess claims of cognitive impairment, mental retardation and memory disturbances. Malingering falls on a continuum from purely feigned symptoms to exaggeration of real symptoms, and malingering and the presence of actual psychological disturbance are not mutually exclusive and should not be conceptualized as an either-or phenomenon.

Some defendants with bona fide psychological problems may exaggerate their symptoms to avoid or lessen criminal responsibility, and this possibility should not be overlooked.

The data derived from clinical interview, direct observation, history taking, psychological testing, and review of records provide individual means that are used to form hypotheses about a defendant's state of mind at the time of the offense. Hypotheses supported by multiple data sources should serve as the basis for a final opinion. Finally, if there are important discrepancies between the defendant's present behavior and behavior reported at the time of the instant offense, this should be reported and explained.

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# Parole Board Interpretation of Lifer Law Unfair, Unwise, Unconstitutional

By Paul C. Louisell

As of October, 2001, 1,740 prisoners were serving “parolable” life offenses in Michigan.<sup>1</sup> Some of these prisoners need to be in prison. Many do not. Under current Parole Board policy, all are being treated as if they received non-parolable life sentences in apparent defiance of the legislative scheme and the intent of the sentencing judges.

The Parole Board has publicly stated in response to legislative inquiries that no prisoner receiving a “life sentence” should ever expect to be paroled.<sup>2</sup> In other words, a person receiving a parolable life sentence is no more likely to be paroled than a person serving a mandatory life sentence.<sup>3</sup> Persons convicted of such crimes as armed robbery, CSC 1 and second degree murder, who are sentenced to life imprisonment, have little or no chance of being released from prison under current Parole Board policies.

During the 70’s and 80’s, it was generally believed by judges, defense attorneys and prosecutors that persons sentenced to parolable life sentences had a good chance of being released within 15 years of incarceration.<sup>4</sup> In fact, defendants charged with capital crimes in the 70’s and 80’s would typically plea bargain for “parolable life” sentences rather than risk lengthy indeterminate sentences under the general belief that there would be a realistic opportunity for parole after serving the mandatory minimum sentence. After serving 20 or more years in prison, these defendants are just now realizing that their plea bargains were no bargains at all.

The “lifer law”, MCL 791.234, was originally enacted in 1941 to provide a mechanism for the early release of prisoners serving life sentences and long minimum terms.<sup>5</sup> The original purpose of the law has been subverted to ensure most of those serving parolable life sentences die in prison.

In 1992, the legislature amended the statute to require that all persons sentenced to parolable life after October 1, 1992, serve a minimum of 15 years in prison before becoming subject to the jurisdiction of the Parole Board. At the same time, the makeup of the Parole Board was changed from a panel of civil service employees consisting of corrections professionals to a politically appointed board serving at the whim of the MDOC Director.<sup>6</sup>

In 1999, the lifer law was again amended by eliminating a prisoner’s statutory right to appeal parole board decisions to circuit court. In addition, the language of the statute was subtly altered so that the Parole Board’s decision not to proceed to public hearing does not constitute a “decision to deny parole.”

Currently, after ten years of incarceration, a person serving a parolable life sentence is afforded a single face-to-face interview with a member of the Parole Board. For the statutory parole process to even begin, that member must recommend the case for review by the entire board **and** a majority of the ten person board must then express interest in parole. If no interest is expressed by either the individual member or a majority of the board, the prisoner receives a letter indicating “no interest”. No explanation is provided. No appeal can be taken. No further interview need be granted. The process is repeated every five (5) years.

The 1999 legislation gives the Parole Board absolute power to block a prisoner serving a parolable life sentence from ever receiving a parole hearing. In a statement expressing its approval of the new legislation, the Parole Board stated to the Michigan Judges Association:

“...There are many misconceptions about the lifer law process, and what exactly constitutes a life sentence. There are some who believe a life sentence equates to a number of years of confinement; i.e. life sentence equals 10, 20, 30 years, etc. The parole board believes a life sentence means life in prison...”

“There are usually good reasons why a life sentence was imposed versus an indeterminate (sic) sentence. When a judge hands down a life sentence, the parole board reviews that case very carefully. The parole board will not “re-sentence” the prisoner. Rather, the parole board makes a determination whether the prisoner has earned parole....”<sup>7</sup>

The above sentiments sound almost reasonable until you consider that the Parole Board is addressing its remarks to judges in 2001. How many defendants were sentenced to “parolable life” from 1980 on where the judge, prosecutor, defense attorney and defendant expected them to be paroled within 15 years?

In January, 2002, current and former circuit court criminal trial judges were asked to state their understanding of the lifer law, their intentions when they imposed life sentences and their reaction to current Parole Board policies. Of the 95 judges who responded, the majority thought parolable lifers would actually serve 20 years or less; many thought life imprisonment was less harsh than a 15-year minimum; and some noted they gave life sentences, as opposed to very

long minimum terms, when they wanted the defendant to receive parole consideration.<sup>8</sup>

The Parole Board couldn't care less about what the judges intended. Recently, an unpublished opinion by the Court of Appeals adopted the argument that a parolable life sentence imposed by a trial judge who was acting under the mistaken belief that the defendant would be eligible for parole consideration after 10 years must be set aside because of a misapprehension of the law.<sup>9</sup> There are currently several cases pending where the sentencing judge has granted Rule 6.500 motions and re-sentenced defendants to a term of years so that they can be seriously considered for parole.<sup>10</sup> Most of these decisions are being appealed by the respective county prosecutor.

### CONCLUSION

Unless there is a drastic change in the policy of the Parole Board with respect to inmates serving parolable life sentences, the MDOC budget is going to continue to expand out of control and our prisons will become increasingly overcrowded. In the meantime, parolable lifers who were promised a realistic chance for parole when sentenced, must rely on MCR 6.500 motions and a strong trial judge to change their sentences from life to a term of years.

Note: The author acknowledges the assistance of **Barbara R. Levine** of Grand Ledge, Michigan, Director of the "Lifer Parole Project". The project compiles information from prisoners serving parolable life sentences for use in legal, educational and political efforts to effect a change in the current Parole Board policy denying parole to anyone serving a life sentence. This article also incorporates material provided by **Daniel E. Manville** of the Criminal Defense Resource Center, a recent speaker at the MCBA criminal law seminar on parole policies in Michigan.

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### Footnotes

- <sup>1</sup> Martin, Steinman, and Marschke, "MDOC, Field Operations Administration, Office of the Parole Board", prepared for Michigan Judges Association Annual Judicial Conference, Traverse City, Michigan, October 1-3, 2001.
- <sup>2</sup> Letter from Richard Barker, Executive Assistant to the Director of the MDOC, to the Legislature's Corrections Ombudsman's Office, May 9, 1991.
- <sup>3</sup> In a 1991 memo from the executive director of the DOC to the legislature, Richard M. McKeon wrote: "You are incorrect in your assumption that we think murder second lifers are required to serve 20 calendar years. Clearly, they are required to serve LIFE..." Testimony by the Chairman of the Parole Board to the legislature in 1999 states: "It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that - life in prison."
- <sup>4</sup> Prisons and Corrections Sections, State Bar of Michigan, "What should 'Parolable Life' Mean? Judges Respond to the Controversy" (Lansing, March, 2002)
- <sup>5</sup> "Corrections In War Time", Third Biennial Report, 1941-1942, State of Michigan Department of Corrections.
- <sup>6</sup> "Does A Politically Appointed Parole Board Cost Michigan Citizens Hundreds of Millions of Dollars?", Manville, p. 2.
- <sup>7</sup> see footnote 1, supra.
- <sup>8</sup> see footnote 4, supra.
- <sup>9</sup> *People v Louis Moore*, Court of Appeals No. 228323, decided July 9, 2002.
- <sup>10</sup> *People v Davey*, Oakland County Circuit Court No. 74-19410-FY (J. Schnelz), Opinion and Order dated 7/20/99; *People v Bazzetts*, Oakland Circuit No. 88-086394-FC (J. Schnelz) Order dated October 24, 2001, COA No. 237756 (lv.grtd. 11/20/01); *People v Kenneth Foster-Bey*, Wayne Circuit No. 74-000994, COA No. 240140 (lv.grtd. 4/3/02); *People v Hughes*, Wayne Circuit No. 76-01434 (J. Drain) Order for Resentencing Grtd 6/4/02 COA No. 242449 (lv.grntd. 6/13/02)

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# State of the Law 2002-2003: Criminal Law and Criminal Procedure

Timothy A. Baughman

## A. ARRESTS AND STOPS

A seizure only occurs when either a person is physically subdued, or when, because of a show of force and authority, the person yields or submits. In *United States v Harris*, 313 F3d 1228 (CA 3, 2002) the court found that where an officer requested defendant's identification and defendant continued to walk, even if the request could be deemed an assertion of authority, defendant was not seized, as he did not submit to it. The same case also concerned frisk doctrine. The purpose of a frisk is solely for protection. If an officer making a frisk of a suspect's outer clothing feels what he or she believes is a weapon, the officer may reach inside the suspect's clothing and remove it. The court held that an officer did not exceed the permissible scope of a frisk by reaching into defendant's boot to retrieve what turned out to be a package of cocaine base where the officer felt a bulge and thought it might be a gun, and was not sure that the item was not a gun even after he lifted defendant's pantleg and saw a package wrapped in Saran Wrap.

The court in *United States v Schaafsma*, 318 F3d 718 (CA 7, 2003) reiterated the principle that though mere suspicion is not enough for probable cause, probable cause to arrest need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief that the suspect committed or is committing a crime is more likely true than false.

## B. WARRANTLESS SEARCHES

### (1) Arrest; Scope of Search

When an arrest is made in a dwelling, those places immediately adjacent the place of arrest may be searched for persons who may cause the officers harm; a search beyond these places requires reasonable suspicion. In *People v Gonzalez*, 256 Mich App 212 (2003) the court found a protective sweep extending beyond the areas adjacent to the place of arrest was permissible:

When the officers executed the arrest warrant against defendant Guerra, Lieutenant Hagler knew that he was a member of the Spanish Cobras, who sold narcotics and used guns. Lieutenant Hagler was also aware of threats made to the police by Spanish Cobra members, including defendant Guerra's cousin. Additionally, some of the arrest warrants against defendant Guerra were for violent offenses. When Hagler approached defendant Guerra's house, he noticed defendant Guerra behind an Armorguard door. After

Hagler announced his purpose and ordered defendant Guerra to comply, defendant Guerra ran in the opposite direction through the house, taking a zigzag path going through other rooms. Lieutenant Hagler entered the house and chased defendant Guerra running past other people in the home, to the back door where defendant Guerra stepped outside and was apprehended. Given these circumstances, the trial court did not err in determining that the police conduct was reasonable. Lieutenant Hagler articulated facts that would form "a reasonable belief" that there may be individuals in defendant Guerra's home who posed a danger to the arresting officers. The officers knew that other individuals affiliated with the Spanish Cobras, including some wanted for assaultive crimes and murder, were still at large and could be hiding in defendant Guerra's home. It was reasonable to perform a protective sweep of the house, including the basement, to ensure that no individuals were hiding in these areas. The officers also noted Sandra Fierros' presence and checked her person and the area immediately around her for firearms. While performing this protective sweep, the officers observed an ashtray containing marijuana seeds and stems on the dining room table. In addition, the officers found a marijuana cigarette on the floor in front of a couch in the basement. Both of these items were immediately recognizable as contraband and were located in plain view. Because the officers' conduct was reasonable, it was not improper to list these items of contraband on the request for a search warrant. Accordingly, the evidence found under the warrant was admissible against defendant Guerra at trial. Therefore, the trial court did not err in denying defendant Guerra's motion to suppress.

### (2) Automobiles

An automobile may be searched without a warrant when probable cause exists. The panel in *People v Wilson*, \_\_\_Mich App\_\_\_ (No. 232495, 7-1-2003), though rejecting the prosecution's argument that there is no privacy interest in a VIN no matter where it is within the vehicle (or thus what it takes to get at it), noted that no warrant is needed to search a vehicle on probable cause, and found that probable cause existed here to search for the hidden VIN once the officers had probable cause to believe there were stolen parts on the vehicle.

### (3) Emergency Circumstances

The emergency circumstances rule is distinct from exigent circumstances, and involves the “community care-taking” function of the police. The ninth circuit in *United States v Bradley*, 321 F3d 1212 (CA 9, 2003) found that where the police acted out of concern for a nine-year-old child in entering the dwelling after the defendant and the child’s mother had been arrested in the middle of the night, entering to be sure the child was supervised by a responsible adult, and asking neighbors about the child before entering, the entry was proper, as was walking through the house to assist the child in dressing.

### (4) Expectations of Privacy

An expectation of privacy issue was before the court in *People v Taylor*, 253 Mich App 399 (2002), involving an entry into dwelling that appeared abandoned. The police had been dispatched to this structure approximately 15 times to investigate drug complaints, and drugs had been recovered there, though the defendant had never been seen nor arrested. The officer on an occasion just prior to the incident leading to the charges investigated a complaint and “believed that the house was unoccupied and vacant due to the condition of the premises. There were no doors whatsoever on the house and only the windows on the north side of the house were boarded up. There was no running water or working gas in the house. Because the electrical meter box was disconnected and there was an orange 110-volt extension cord running from the house to a neighboring property, Ashford believed that the electricity servicing the house was illegally procured. There was raw sewage in the basement and a card table was the only furniture found in the house.” On the occasion in question the officer “noticed that more windows were boarded up but no doors hung in the doorways. The officers exited their vehicle and approached the south side of the house. While the officers traveled down the south side, they heard a cell phone ringing and proceeded to the rear entrance. Officer Ashford testified that there was no door at the rear entrance to the house but at one time, it had been boarded up. On this particular instance, Ashford testified that the board was moved away from the doorway, allowing the officers an unobstructed view into the basement.” “The officers did not have a search warrant. Notwithstanding, they proceeded through the rear entrance way and up the stairs into the kitchen where they observed defendant seated in front of a card table with packaging bags which officer Ashford believed contained crack cocaine. A cell phone and a firearm were also on the card table along with the suspected crack cocaine.”

Defendant at the motion to suppress “produced a lease for the premises ....The prosecutor argued that defendant did not have a legitimate expectation of privacy in the prop-

erty despite the lease because the property was obviously abandoned, and furthermore, defendant was not actually living at the house.” The Court of Appeals reversed the order of suppression. “At best, the record reveals that defendant nailed up additional boards on the windows but otherwise neglected to erect doors in the doorways for purposes of excluding the general public. Indeed, a “normal precaution” to maintain privacy, at a bare minimum, certainly includes installing functional doors on the outside of the premises, replacing shattered windows, and erecting signs against trespass to discourage would-be intruders from entering. When the officers went to the vacant house to investigate the complaint, they did not observe any signs posted against trespass, or any other measure taken to exclude members of the public in general....Though defendant contends that he displayed a subjective expectation of privacy by nailing up a board or two, that alone was insufficient to “maintain his privacy” and is not, as a matter of law, an expectation that society is prepared to accept as reasonable....Although the Fourth Amendment viciously protects one’s privacy interest in the home as against warrantless governmental intrusions, that expectation is considerably reduced while in a structure that by all objective indications appears abandoned.”

“With respect to abandoned or vacant structures, objective factors pertinent to the totality of the circumstances inquiry must be evaluated. On a case by case basis, these factors will become relevant to determine whether police officers must secure a warrant before entering: 1) the outward appearance; 2) the overall condition; 3) the state of the vegetation on the premises; 4) barriers erected and securely fastened in all openings; 5) indications that the home is not being independently serviced with gas or electricity; 6) the lack of appliances, furniture or other furnishings typically found in a dwelling house; 7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows; 8) the history surrounding the premises and prior use; 9) complaints of illicit activity occurring in the structure. Although the foregoing factors are not finite, exhaustive, or otherwise dispositive, a trial court must necessarily place them into the totality of the circumstances equation where a vacant structure is at issue.”

“Applying these objective factors to the case at bar, leads to the reasonable inference that the Ferguson house was indeed abandoned. On its exterior, it appeared to be vacant, i.e. unoccupied, abandoned. Either boards hung in place of windows and doors or the openings remained entirely exposed. In fact, police could see directly into the interior of the house through the vacant rear doorway. On its interior, the house had no running water, no apparent legitimate source of electricity, no gas, and in the basement stood raw sewage. Additionally, not even the most basic of appliances were found in the house and the only furniture was a card table and a few boxes upon which to

sit, providing further, objective indicia that the house was abandoned.”

“In addition, Ashford’s testimony established that over the past six years, he had been at 17387 Ferguson approximately fifteen times for purposes of responding to various narcotic complaints and recovered drugs out of the house during the previous year. Two weeks prior to the date at issue, Ashford answered a narcotic complaint at 17387 Ferguson. At that time, there were no doors hanging in the doorways. In other words, all doorways were completely vacant. Additionally, the windows on the north side of the house were all boarded up and there was no running water or working gas servicing the house. When Ashford returned on February 7, 2001, the condition of the house remained largely unchanged except, in addition to the boarded up windows on the north side of the house, additional boards appeared on the front window and in the front doorway. Also, a board that appeared to have, at one time, covered the rear doorway, was removed allowing Ashford to have an unobstructed view into the house. Importantly, the history surrounding the house lends further credence to the belief that this home was abandoned.”

### C. SEARCHES AUTHORIZED BY WARRANT

The scope of the search permitted by a warrant for a dwelling was before the court in *People v McGhee*, 255 Mich App 623 (2003). The search warrant allowed the search of “All rooms, compartments, crawlspaces, hallways, storage areas, porches and any attic or basement accessible therefrom of 483 Montana, City of Pontiac, County of Oakland, State of Michigan. It is described as a single story, single-family dwelling with white siding. It is the fifth house east of Motor on the south side of Montana, with the numbers “483” clearly visible on the front of the residence.” The police searched an unattached garage during the search. The Court of Appeals held the search proper:

...the Michigan Supreme Court has held that Const 1963, “art 1, § 11, is to be construed to provide the same protection as that secured by the Fourth Amendment, absent ‘compelling reason’ to impose a different interpretation.” *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991). United States Courts of Appeals and state courts addressing the propriety of searches of outbuildings... have held that the Fourth Amendment is not violated by a search of the grounds or outbuildings within a residence’s curtilage where a warrant authorizes a search of the residence. It is thus to be anticipated that the Michigan Supreme Court would adopt a similar analysis, and... declare that the protection provided by Const 1963, art 1, § 11 does not render the instant searches unconstitutional.

In *People v Wilson*, \_\_Mich App\_\_ (No. 232495, 7-1-2003) the defendant claimed that a search warrant for tax records was a pretext to get into his home to examine vehicles that were believed to be stolen or have stolen parts. Citing *United States v Ewain*, 88 F3d 689 (CA 9, 1996) and *United States v Van Dreef*, 155 F3d 902 (CA 7, 1998), the panel held that if a police officer has a valid warrant for an item, and fully expects to find another item, the officer’s suspicion or expectation does not defeat the lawfulness of the seizure. After all, the “inadvertence” requirement of the plain view doctrine has been abolished, as has any subjective “pretext” doctrine, a search or stop turning on the objective facts.

*People v Sobczak-Obetts*, 253 Mich App 97 (2002) was back before the Court of Appeals on remand after decision by the Michigan Supreme Court. A federal search warrant was executed by both federal and state law-enforcement officials. The affidavit was ordered sealed by the issuing federal magistrate, and provided to the defense several weeks after the preliminary examination. The trial judge suppressed on the ground of the failure to supply the grounds for the search, by way of the affidavit or otherwise, at the time of the search, as then required by MCL 780.654 and 780.655 (which have now been amended to allow suppression for a period of time). The Michigan Supreme Court reversed this ruling, and the trial judge again suppressed on the ground that the affidavit failed to show the reliability of the confidential informants used, also finding the information both stale and insufficient to show probable cause. The Court of Appeal, though continuing to insist that a federal search warrant, when executed by both federal and state agents, must be both issued and executed in conformance with state statutory requirements, disagreed with the conclusions of the trial judge, and reversed the order of suppression.

### D. EXCLUSIONARY RULE

Several decisions this year addressed the reach of the exclusionary rule. In a combined case, *People v Hawkins* and *People v Scherf*, \_\_Mich\_\_ (No.120437, 121698, 6-20-2003), the court granted leave to determine whether the exclusionary rule should apply to evidence seized pursuant to (1) a search warrant that was issued in violation of MCL 780.653’s statutory probable cause provisions, and (2) a bench warrant that was issued in violation of MCR 3.606(A) because unaccompanied by an affidavit. The court concluded that in neither case is exclusion appropriate; for statutory violations, a legislative intent to exclude must be found, which the court found absent, also finding exclusion inappropriate for the court rule violation in the second case. This case does not reach the good-faith exception for warrants lacking constitutional probable cause, a question to be argued in the fall (*People v Goldston*). *People v Sherbine* and *People v Sloan* were overruled.

Several years ago the Michigan Supreme Court in *People v Stevens*, 460 Mich 626 (1999) held that no exclusionary sanction is appropriate for a knock-and-announce violation, as any evidence discovered in a search of proper scope is the fruit of the warrant, not the improper manner of entry (unless a purpose of knocking and announcing is to allow those inside to destroy or hide the evidence, and this is clearly not the purpose of the rule); there simply is not a causal connection between the impropriety and the evidence discovered. The seventh circuit has reached the same conclusion in *United States v Langford*, 314 F3d 892 (CA 7, 2002). The court there held that the exclusionary rule is not applicable to items seized under a valid search warrant discovered in a proper search for a knock-and-announce “failure,” as the evidence would inevitably have been discovered.

## II. CONFESSIONS/FIFTH AMENDMENT

A Miranda-warning question was presented in *Clark v Murphy*, 317 F3d 1038 (CA 9, 2003). The court held that neither the statement after defendant was read Miranda warnings that “I think I would like to talk to a lawyer” nor the later question “should I be telling you, or should I talk to an attorney?” constituted an unambiguous and unequivocal request for counsel so as to preclude further questioning.

The question was one of voluntariness in *United States v Santos-Garcia*, 313 F3d 1073 (CA 8, 2002). The eighth circuit there held that tactics by the police such as a raised voice, deception, or a sympathetic attitude will not render a confession involuntary unless the overall affect of the interrogation caused the defendant’s will to be overborne; nor will a promise of leniency, an expressed disbelief in the statements of a suspect, or lies to the accused about the evidence against him necessarily render a confession involuntary.

A “promise of leniency/voluntariness” issue was raised in *People v Shipley*, 256 Mich App 367 (2003). Defendant confessed to three offenses, but claimed that the officer promised him that if he “cleared everything up” after confessing to the first offense that he would only be charged with the one offense; the officer denied making any such promise, saying that he told the defendant only that it would be “in his best interest” for him to clear up everything at once. The trial court’s finding of voluntariness was affirmed.

The issue was one of “fruit of the poisonous tree” in *Kaupp v Texas*, \_\_US\_\_, 123 S Ct 1843, 155 L Ed 2d 814 (2003). The state court found that the defendant’s confession was admissible because he had not been arrested at the time it was given, so it could not have been the fruit of an illegal arrest. But when an officer said “we need to go and talk” and defendant said “OK,” defendant was then

handcuffed and taken to the station in a patrol car, dressed only in his underwear, without shoes, in January. The United States Supreme Court found that he had been arrested, and without probable cause. The Court found no factors in the *Brown v Illinois* test that would save the confession, and held that it must be suppressed on remand “unless the state can point to testimony undisclosed on the record before us, and weighty enough to carry the state’s burden....”

*People v Goodin*, \_\_Mich App\_\_ (No. 239280, 7-8-2003) is a Fifth Amendment case, but not a confession case. Defendant claimed that prosecuting him for both negligent homicide and failure to stop at the scene of an accident causing injury or death violated his right against self-incrimination, on the ground that compliance with the failure to stop statute would have incriminated him in the negligent homicide. The Court of Appeals rejected the claim; the failure to stop statute does not require incriminating information, requiring the driver involved in an accident to give his name, address, registration number of the vehicle being driven, name and address of the vehicle’s owner, and display his driver’s license, and further requires him to render injured persons reasonable assistance in securing medical aid or transportation. Further, “inferences that could be drawn from the act of stopping are ‘not testimonial in the Fifth Amendment sense’ and disclosure of one’s name and address is a neutral act that ‘identifies but does not implicate anyone in criminal conduct.’”

## III. CONSTITUTIONAL LAW

Several cases involved vagueness issues in First Amendment contexts. In *People v Barton*, 253 Mich App 601 (2002) defendant was convicted under an ordinance for engaging in “any indecent, insulting, immoral or obscene conduct in any public place”; she had referred to fellow employees as “spics.” While the court found the statute not unconstitutional as limited by the lower court only to “fighting words,” the defendant was charged under the “insulting” portion of the ordinance, and the court found that the limiting construction could not save this prosecution, for failure to give fair notice of the conduct that was prohibited by the ordinance.

In *People v Pouillon*, 254 Mich App 210 (2002) the defendant was charged with causing public disorder under a local ordinance; he had “stood, on city property, approximately thirty feet from the front of a dentist’s office and approximately three hundred feet away from a church. As mothers were dropping off their children at the day care/pre-school operated by the church, defendant yelled, ‘They kill babies in that church. Why are you going in there?’” According to the police report used to establish the factual basis of the no contest plea, the children became frightened and visibly upset. Defendant claimed that he chose his location near

the dentist office because the dentist publicly supported Planned Parenthood and abortion.” The ordinance referred to “such person willfully uses abusive or obscene language or makes an obscene gesture to any other person when such words by their very utterance inflict injury or tend to incite an immediate breach of the peace.” The court found the ordinance not unconstitutional on its face, but unconstitutional as applied to defendant’s conduct. “Defendant’s words had no tendency to incite an imminent breach of the peace. Defendant’s message was in the form of grotesque exaggeration that was more likely to frighten children than to impart information. However, the children’s mere fright, though an unfortunate consequence of defendant’s speech, did not rise to the level of violence or a disturbance of public order nor was such a result likely. If the purpose of the prohibition on “fighting words” is to preserve public safety and order, then unprotected “fighting words” do not encompass words that would emotionally upset children who are unlikely to retaliate.”

#### IV. COUNSEL AND SELF-REPRESENTATION

The Michigan Supreme Court has held that the constitution does not require appointment of counsel for a defendant who pleads guilty and wishes to file an application for leave to appeal (*People v Bulger*), but the Sixth Circuit en banc in *Tesmer v Granholm*, 333 F3d 683 (CA 6, 2003) enjoined certain Saginaw County judges from following the Michigan statute in this regard, finding the statute unconstitutional. This leaves the matter in a very odd situation; these judges are enjoined, but the judges in the rest of the state must follow the ruling of the Michigan Supreme Court (even on matters of federal constitutional law, state courts are not inferior to federal courts, save one—the United States Supreme Court). There is a fair chance that Court, which denied certiorari to the defendant in *Bulger*, will take this case.

*People v Fett*, \_\_\_Mich App\_\_\_ (No. 238781, 6-10-2003) is also a right to counsel case. Defendant, through counsel, sought admission *pro hac vice* (for the case only) of an Ohio attorney as co-counsel, that attorney to be the lead attorney for trial. The trial court declined, simply on the ground that it was a fairly simple OUIL case, and the court was sure the Michigan attorney could handle it. The Court of Appeals reversed: “we hold that a trial court may not arbitrarily and unreasonably refuse to grant admission *pro hac vice* of an otherwise qualified out-of-jurisdiction attorney. To do so violates the defendant’s right to counsel guaranteed by both the Sixth Amendment and by Michigan’s Constitution” because the “right to retain counsel of choice is an essential element of the right to counsel.” Though this right is not absolute, and permission can be denied if, for example, the right is exercised in an untimely fashion so as

to require a continuance if granted, denial of out-of-state counsel cannot be arbitrary, and the court held that the trial court’s decision here was arbitrary.

The issue was waiver of counsel by conduct of the defendant in *People v Russell*, 254 Mich App 11 (2002). Defendant repeatedly complained about his court-appointed counsel. Counsel was allowed to withdraw. On the first day of trial defendant requested that the substitute counsel be removed and new counsel appointed. The trial court refused, finding no good cause, the problems between counsel and defendant being of defendant’s making. The trial court informed defendant that an option was self-representation, warning him of the dangers, and urging him to continue with his appointed counsel. “Defendant made his unequivocal choice, not by explicitly demanding to represent himself, but implicitly by repeatedly rejecting representation by court-appointed counsel in the face of numerous warnings and advice to the contrary. Thus, by his own conduct defendant demonstrated his unequivocal choice to proceed in *propria persona*.” But the court found a failure to follow MCR 6.005(E) by obtaining a waiver at “every proceeding,” including sentencing, so that the case was remanded for appointment of counsel, if defendant desired, for a resentencing proceeding.

The Michigan Supreme Court in *People v Riley*, 468 Mich 135 (2003) peremptorily reversed the Court of Appeals for the second time in the same case, this time on an ineffective assistance claim. After the Court of Appeals decision finding insufficient evidence of murder 1 was reversed, the Supreme Court rejecting that court’s finding that hearsay evidence admitted by the defense could not be considered, the Court of Appeals reversed on ineffective assistance grounds, finding insufficient evidence in the prosecution’s case, and ineffective assistance for failure to move for a directed verdict. The Supreme Court again peremptorily reversed, finding that there was sufficient evidence to survive a directed verdict motion had one been made.

#### V. DISCOVERY

In *People v Phillips*, \_\_\_Mich\_\_\_ (No. 119429, 6-25-2003) the court considered whether a trial court has authority to direct a party to have his or her expert prepare a report to be turned over to the other side. Contrary to some published reports, the case does not hold that a trial judge has no such authority; this would be especially appropriate if the trial court found the lack of a report to be gamesmanship. The authority to so order exists under MCR 6.201(I), which provides: “On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.” The court held here that a party cannot provide a report it does not have, and that *good cause was not shown* to invoke 6.201(I)’s authority to modify the requirements of

the rule to order the preparation of a report. “We recognize that there may be circumstances where good cause does exist to permit a trial court to compel a party to create expert witness reports. For example, good cause may exist when a trial court believes a party is intentionally suppressing reports by an expert witness. However, such circumstances are not present here. Therefore, we conclude that the trial court abused its discretion in ordering defendant to create expert reports with the experts’ findings and conclusions.”

Discovery of criminal records was the issue in *People v Elkhoja*, 251 Mich App 417 (2002). The defense requested and received a discovery order requiring the prosecutor to run CCH’s on all witnesses it intended to call and who the defense requested assistance in producing. The police department/city intervened in the case, on the ground they could not be directed to take action by a discovery order, not being parties to the case. The panel held that the information may be supplied when ordered by a court without violating LEIN rules. The panel also held that the prosecutor was only required to turn over convictions discovered that could be used under MRE 609 or that was otherwise exculpatory. After granting leave to appeal and hearing oral argument, however, the Michigan Supreme Court reversed the Court of Appeals for the reasons stated by the dissenting judge in the Court of Appeals. *People v Elkhoja*, \_\_\_Mich\_\_\_ (3-28-2003). Judge Sawyer’s opinion thus governs:

By statute, LEIN information may not be given to a private person for any purpose and doing so is a criminal offense under M.C.L. § 28.214, which provides in relevant part:

- (2) A person shall not disclose information from the law enforcement information network to a private entity for any purpose, including, but not limited to, the enforcement of child support programs. (3) A person shall not disclose information from the law enforcement information network in a manner that is not authorized by law or rule. (4) A person who violates subsection (2) or (3) is: (a) For a first offense, guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$500.00, or both. (b) For a second or subsequent offense, guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both.

No law or rule has been identified that authorizes the disclosure of the LEIN information as ordered by the trial court. Thus, the trial court commanded the city and its employees to commit criminal offenses. *People v Elkhoja*, 251 Mich App 417, 451 (2002)

## VI. DOUBLE JEOPARDY

### A. Multiple Prosecutions

The Supreme Court has granted leave from an unpublished opinion in *People v Nutt* to decide whether the same transaction jeopardy test is supported by the text and history of the Michigan jeopardy provision. The case will be argued next term.

A statutory multiple-prosecutions issue was considered in *People v Zubke*, \_\_\_Mich\_\_\_ (No. 122183, 7-16-2003). Defendant pled guilty to conspiracy in federal court, and was prosecuted in state court for the substantive offense of possession with intent to deliver. MCL 333.7409 provides:

If a violation of this article [the controlled-substances act] is a violation of federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the *same act* is a bar to prosecution in this state.

The court held that a conspiracy, which is an unlawful agreement, complete upon the agreement, is not the same act as possessing drugs with intent to deliver.

### Multiple Convictions

Several cases considered the propriety of multiple convictions at one prosecution. In *People v Barber*, 255 Mich App 288 (2003) defendant and a codefendant fire set to a vacant house in Detroit, which spread from that house to another vacant house, and then to an occupied dwelling. Defendant was convicted of two counts of burning other real property and one count of burning a dwelling house, and claimed a violation of double jeopardy. The Court of Appeals said that the question was “whether the Legislature intended multiple convictions of arson stemming from a single fire that spread to two other buildings. This question implicates the ‘unit of prosecution’ rule....The question is whether the proper unit of prosecution is the number of fires set by defendant or the number of dwellings burned.” The court answered that “the proper unit of prosecution in this case is each separate house.”

## VII. PRELIMINARY EXAMINATION

In a decision that had been expected to clarify the role of the examining magistrate in considering the credibility of witnesses in the probable-cause determination, the court in *People v Yost*, 468 Mich 122 (2003) held that the magistrate should have bound over. The court had granted leave to clarify the authority of a magistrate to weigh credibility at a preliminary examination, but, after specifying the issue as one to be briefed, did not resolve it, instead simply holding that in the case before it: “we agree with the circuit court that the expert testimony in tandem with the circumstan-

tial evidence, which included evidence relating to motive and opportunity, was sufficient to warrant a bindover. We conclude that the magistrate failed to give any weight to Dr. Evans's expert testimony when he should have, failed to give any weight to the lay testimony related to defendant's possible motive, and opportunity, and gave undue weight to the testimony regarding the propensity of children to commit suicide. Thus, the magistrate abused his discretion when he concluded from all the evidence that probable cause to bind defendant over for trial did not exist."

## VIII. SENTENCING

### A. Alteration

The Michigan Supreme Court in *People v Moore*, \_\_Mich\_\_ (No. 122367, 6-24-2003) considered the alteration of a paroleable life sentence on the ground that the sentence was invalid because the judge "expected" that the defendant would be paroled within some period of time, but the defendant had not yet been paroled. Certainly judges are presumed to know the law, and that parole is up to the parole board, so that all that could be expected with a paroleable life sentence is *consideration* of the defendant for parole, not the granting of parole. Here the trial judge had specifically stated his intent that the defendant be eligible for parole. Because the parole board stated, when defendant became eligible, that it had at that time "no interest" in paroling defendant, defendant alleged the trial judge should alter the sentence. The Supreme Court, reversing the Court of Appeals, which had held the trial court had authority to resentence in this circumstance, noted that "The principle argued by defendant and the Court of Appeals majority would alter the whole framework of our sentencing and corrections system. If a judge's conclusion that the Parole Board's later action renders the sentence subject to change, virtually any sentence could be revised at the whim of the sentencing judge." Under the law the parole board unquestionably had the authority to consider the defendants for parole and to grant them parole, as contemplated (as a matter of law) when a trial judge imposes a paroleable life sentence. Where the trial judge indicates no misunderstanding that the defendant would be subject to the jurisdiction of the Parole Board and could be paroled after the board completed the requisite procedures and exercised its discretion to grant parole, there is no basis for a resentencing.

### B. Guidelines Issues

A knotty guidelines issue was addressed in *People v Martin*, \_\_Mich App\_\_ (No. 243008, 7-8-2003). MCL 750.357 authorizes a trial court to sentence a violator to "imprisonment in the state prison not more than 10 years." MCL 769.10(1)a provides that a trial court sentencing a

second-offense habitual offender "may place the person on probation or sentence the person to imprisonment for a maximum term that is not more than 1-1/2 times the longest term prescribed for a first conviction of that offense or for a lesser term." Thus, for violating MCL 750.357, defendant faced a maximum term of imprisonment of fifteen years. The appropriate sentencing guidelines range was five to twenty-eight months' imprisonment. MCL 769.34(4) provides:

- (c) If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:
  - (i) To imprisonment with a minimum term within that range.
  - (ii) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

The court held that this provision gives the trial court discretion to either sentence a defendant to a term of imprisonment within the guidelines range or impose an intermediate sanction. MCL 769.31(b) defines "intermediate sanction" as "probation or any other sanction, other than imprisonment in a state prison or state reformatory, that may be lawfully imposed." The provision lists specific examples of an intermediate sanction, such as "[p]robation with jail," MCL 769.31(b)(iv), and "jail," MCL 769.31(b)(viii). Therefore, the trial court did not err as a matter of law in imposing a ten-month term of imprisonment in jail. This was a prosecution appeal, and the prosecutor argued the trial court erred in imposing a *determinate* jail sentence because MCL 769.8 provides that where a "punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment . . ." But, held the court, "by expressly providing for 'intermediate sanctions' in a subcategory of cases with a relative lack of severity, our Legislature plainly created an exception to MCL 769.8 by enlarging the trial court's sentencing discretion to impose 'intermediate sanctions' for offenses that otherwise might have required imprisonment in state prison."

Several cases raised the appropriate scoring of different variables. The defendant in *People v Spanke*, 254 Mich App 642 (2002) was scored for OV 8. OV 8 is scored at 15 for movement of the victim; here, the defendant claimed the points should not have been scored because the movement (of children here) was not involuntary. The court held that asportation as used in the statute, MCL 777.38(1)(a) does not have to be forceful.

OV 10 was considered in *People v Witherspoon*, \_\_Mich App\_\_ (No. 233774, 6-24-2003). Though also noting that

the issue was likely forfeited, if not waived, the court also found no impropriety in the trial court's scoring of OV 10 for "predatory conduct." The victim in this sexual assault was nine-years-old, and testified that defendant was her mother's boyfriend who at the time of the sexual assault was not living with them but would visit and often spend the night. When no one else was present and she was folding clothes in the basement, defendant committed a sexual assault. The court concluded that "the *timing* of the assault, (when no other persons were present) and its *location* (in the isolation and seclusion of the basement), is evidence of preoffense predatory conduct...it may be inferred from the evidence that defendant *watched* his victim and *waited* for any opportunity to be alone with her in a isolated location. Based on such evidence, the trial court's scoring of OV 10 at fifteen points for predatory conduct was not clearly erroneous."

*People v Mutchie*, 468 Mich 50 (2003) considered OV 11. Though holding that the scoring issue was moot because the trial judge indicated he would have given the same sentence no matter how the OV was scored, the Court of Appeals nonetheless gave a detailed analysis of how to score OV 11 in *People v Mutchie*, 251 Mich App 273 (2002). But the Supreme Court, while affirming the sentence, noted that the Court of Appeals analysis of the OV was dicta and is therefore not binding.

OV 13 was considered in *People v McDaniel*, 256 Mich App 165 (2003). Though the claim was not preserved in the trial court (and arguably, under the language of the statute, could not even be raised on appeal, the majority found no plain error because it found no error at all; the dissent disagreed.

In scoring OV 13, the court is required to score ten points where "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person or property." MCL 777.43(1)(c). At issue is the interpretation of the scoring instructions in § 43(2)(a):

For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Defendant asserts, without authority or analysis, that this provision requires the sentencing court to look to the five-year period immediately preceding the offense. The prosecutor, on the other hand, argues that *any* five-year period may be utilized. We agree with the prosecutor's interpretation.

Because there was a five-year period during which defendant had three such convictions, though not the five years immediately preceding this crime, the majority affirmed.

The court construed OV 19 in *People v Deline*, 254 Mich App 595 (2002). Defendant was convicted of OUIL, and contended the passenger was the driver. The officer testified he saw the two switch seats, and the jury convicted. Defendant was scored points for OV 19, which is scored if the defendant "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). The Court of Appeals agreed that this was error: "Defendant here did not engage in any conduct aimed at undermining the judicial process by which the charges against him would be determined. Instead, he tried to evade those charges altogether by switching seats with his passenger and refusing an immediate blood alcohol content test. If we were to conclude that this evasive and noncooperative behavior justified the imposition of points under OV 19, that variable would apply in almost every criminal case. Defendants almost always seek to hide their criminal behavior and rarely step forward to offer evidence proving their guilt. Accordingly, the imposition of ten sentencing points against defendant under OV 19 was error." The error was found harmless, however.

OV 19 was also considered in *People v Cook*, 254 Mich App 635 (2003). MCL 777.49 states:

Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

\* \* \*

(c) The offender otherwise interfered with or attempted to interfere with the administration of justice 10 points[.]

Defendant argued that MCL 777.21(2)[1] requires a separate sentence calculation for each offense, and thus does not permit conduct pertinent to the commission of one offense to be used in calculating the sentence guideline range for an entirely *separate* offense. He argued that MCL 777.21(2) restricts the trial court's ability to consider flight from the police in calculating his sentence guidelines range for an assault conviction where the flight from the police did not occur during the assault or underlying offense. The Court of Appeals disagree; "where the crimes involved constitute one continuum of conduct, as here, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range as to each offense."

In *People v Kimble*, 252 Mich App 269 (2002) defendant argued on appeal that OV 16 does not apply to a murder conviction, but had not made that argument in the trial court (OV 16 applies only to the home invasion statute). The majority held that the defendant was entitled to relief (a resentencing) because error had occurred, that was plain under the statute, that affected substantial rights, to a degree that affected the fairness, integrity, or public reputation of judicial proceedings, because when the guidelines were properly scored the defendant's sentence became a departure. The court noted that on remand the trial court could impose the same sentence if that sentence was justified by substantial and compelling reasons for the departure. Judge Griffin dissented from the remand, finding that the issue was not preserved in the trial court in the manner required by statute, precluding raising the issue on appeal. Leave has been granted on this question by the Michigan Supreme Court.

The Michigan Supreme Court in *People v Babcock*, \_\_\_ Mich\_\_ (No. 121310, 7-31-2003) issue a fractured opinion concerning proper sentencing under the legislative guidelines and the appropriate review of guidelines departures. At least four members of the court agreed with the following propositions, contained in an "appendix" to the lead opinion of Justice Markman:

1. A trial court is required to choose a minimum sentence within the guidelines range, unless there is a substantial and compelling reason for departing from this range. MCL 769.34(2), (3).
2. If a trial court's sentence is within the guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. MCL 769.34(10).
3. A substantial and compelling reason must be "objective and verifiable"; must " 'keenly' or 'irresistibly' grab our attention"; and must be "of 'considerable worth' in deciding the length of a sentence." *Fields, supra* at 62, 67.
4. A trial court must articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies that departure. MCL 769.34(3); *People v. Daniel*, 462 Mich. 1, 9; 609 NW2d 557 (2000).
5. A trial court "shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds ... that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).
6. In considering whether, and to what extent, to depart from the guidelines range, a trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range. MCL 769.34(3).
7. In reviewing sentencing decisions, the Court of Appeals may not affirm a sentence on the basis that, although the trial court

did not articulate a substantial and compelling reason for a departure, one nonetheless exists in the judgment of the Court of Appeals. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing. MCL 769.34(3); MCL 769.34(11).

8. If a trial court articulates multiple "substantial and compelling" reasons for a departure from the guidelines, and the Court of Appeals determines that some of these reasons are substantial and compelling and others are not, the panel must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the substantial and compelling reasons alone. MCL 769.34(3).
9. If a trial court departs from the guidelines range, and its sentence is not based on a substantial and compelling reason to justify the *particular* departure, i.e., the sentence is not proportionate to the seriousness of the defendant's conduct and his criminal history, the Court of Appeals must remand to the trial court for resentencing. MCL 769.34(11).
10. "[T]he existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error." *Babcock I, supra* at 75-76, quoting *Fields, supra* at 77.11. "The determination that a particular [sentencing] factor is objective and verifiable should be reviewed by the appellate court as a matter of law." *Babcock I, supra* at 76, quoting *Fields, supra* at 78.12. "A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion." *Babcock I, supra* at 76, quoting *Fields, supra* at 78. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.

### C. S.O.R.A.

The *United States Supreme Court in Connecticut Department of Public Safety v Doe*, \_\_\_US\_\_\_, 123 S Ct 1160, 155 L Ed 2d 98 (2003) held that due process does not require that an individual required to register as a sex offender be given an opportunity to demonstrate that he or she is not "currently dangerous" as a prerequisite to requiring continued registration after conviction for a listed sexual offense. This would undo the decision of a federal district judge in *Fullmer v Michigan Department of State Police*, 207 F Supp 2d 650 (2002), which held the Sexual Offender Registry Act unconstitutional.

In *People v Lockett (On Rehearing)*, 253 Mich App 652 (2002) the court observed that under MCL 28.725(1)(a) defendant is required to notify a "local law enforcement agency" or sheriff's department or the state police within ten days of changing his address. "Local law enforcement agency" is defined as "the police department of a municipal-

ity.” The district court held that the defendant satisfied this requirement by telling his probation officer of his change of address; the court did not find that this satisfied the statute, but that defendant’s conduct rendered his failure to change his address properly not “willful.” The Court of Appeals held that “The probation officer testified that he specifically told the probationers that the update must be made at the police station, not with the probation office where they were originally registered. This testimony is sufficient to establish probable cause to believe that defendant knew he was required to update his address with the police department whenever he moved and that he purposely failed to do so.”

#### D. OTHER

An overruling occurred in *People v Petit*, 466 Mich 624 (2002). The court rule requires that “At sentencing the court...must: (c) give the defendant, the defendant’s lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence . . . .” Notably, the rule does not say the court must “personally address” the defendant, as the rules do in other places. When the judge said “anything further” and defense counsel said “no,” defendant was provided an opportunity, which is all the rule requires. *People v Berry*, 409 Mich 774 (1980) was overruled.

In *People v Cooper*, 252 Mich App 515 (2002) defendant was sentenced to a special alternative incarceration (“SAI”) program under MCL 771.3b. The offense of delivery of less than fifty grams of cocaine is punishable by imprisonment “for not less than 1 year nor more than 20 years, and may be fined not more than \$25,000.00, or placed on probation for life.” MCL 333.7401(2)(a)(iv).” The sentencing guidelines statute expressly provides:

(4) Intermediate sanctions shall be imposed under this chapter as follows:

\* \* \*

(b) If the offense is a violation of section 7401(2)(a)(iv) . . . of the public health code, 1978 PA 368, MCL 333.7401 . . . and the upper limit of the recommended minimum sentence range is 18 months or less, the court shall impose a sentence of life probation absent a departure. [MCL 769.34(4)(b).]

In the case before the court the sentencing guidelines provided a range of zero to eleven months, and thus the trial court was authorized to impose a sentence of lifetime probation. The question presented was whether the additional placement of defendant in the SAI program is authorized by statute. The Court of Appeals held the

placement is precluded by the language of MCL 771.3b: a person is eligible for an SAI program if “the felony sentencing guidelines upper limit for the recommended minimum sentence for the person’s offense is 12 months or more.” The court did not consider the prosecutor’s argument that an SAI sentence would be a valid departure, as the trial judge stated no intent to depart from the guidelines/statutory requirements.

The reach of the restitution statute was considered in *People v Newton*, \_\_\_Mich App\_\_\_ (No. 238085, 6-10-2003), where costs of the investigation were imposed as a part of the order of restitution. But the Court of Appeals held that the cost of an investigation would have been incurred without regard to whether the ultimate defendant was found to have engaged in criminal activity. The court concluded that under the plain language of the restitution statute, the general cost of investigating and prosecuting criminal activity is not “direct financial harm as a result of a crime.”

#### IX. SPEEDY TRIAL

A question of construction of the statutory “180-day rule” was considered in *People v Perez*, 255 Mich App 703 (2003). That rule, said the court, only applies where the defendant has two cases: 1)he or she is an inmate of the Department of Corrections; and 2)there is a separate pending case. Where there is only *one* case the rule cannot apply. Where an inmate has his conviction reversed, on that case he becomes a pretrial detainee, no matter where housed before the retrial.

#### X. POSTCONVICTION REMEDIES

##### A. Preservation and Harmless Error

The Michigan Supreme Court considered a variant of the invited-error doctrine in *People v Jones*, \_\_\_Mich\_\_\_ (No. 119818, 6-11-2003). While cross-examining a police officer, defense counsel sought to demonstrate that a prosecution eyewitness to the murder had given multiple versions of the event to the police during the investigation, and asked an officer “In fact, you gave Mr. Jones a polygraph on two different occasions, is that correct?” The prosecutor objected, and the question was not answered. A prosecution motion for mistrial was denied. Fearing that the jury would speculate regarding the polygraph (and might conclude that one was given, and failed), the prosecutor asked Jones if he was given a polygraph, and if he had passed, the answer being “yes.” Defense counsel objected only after the answer was given; the objection was sustained, and no curative instruction was requested. The Supreme Court held that under what it termed the doctrine of “invited response” the court must consider the “invitation” and the proportionality of the response. Because the prosecutor’s original objection had been sustained, and no curative instruction requested by

the prosecutor, the court found the prosecutor's "self-help" improper here. But given the lateness of an objection, the court reviewed the error under the more stringent plain error standards, and found the prejudice prong not to have been met given the substantial evidence in the case.

Last year, in a factually complex case, *People v Cress*, 466 Mich. 882 (2002), the trial judge, after first granting it, denied a motion for new trial based on newly discovered evidence, part of that evidence being a confession to the crime by someone else. The trial court believed that medical evidence precluded the confession from being true; the Court of Appeals found this to be error, holding that the medical evidence did not rule out the confession. The majority also professed itself "troubled" by the trial court's decision to give no weight to the fact that this person had passed a polygraph. The majority recognized it was within the discretion of the trial judge to consider the results, but found that in not considering them the trial court had not "exercised its discretion" at all (the panel did find the trial court did not err in declining to consider a polygraph of the defendant himself). There was also a claim that the prosecutor destroyed potentially exculpatory evidence. The crime occurred in 1985. The opinion states that in 1992 a Detective informed the prosecutor that he believed someone else (the individual who ultimately confessed) may have committed the crime, and the detective was authorized to go to Arkansas to interview this person. The trip was fruitful, and this was reported to the prosecutor. The prosecutor indicated he would assign someone to the matter. Several weeks later the prosecutor authorized the destruction of the evidence in the case because the direct appeal was over. Included was hair and sperm evidence. Because the prosecutor contested the issue of bad faith destruction, and because reversal was occurring on a different ground, the court directed that this matter be resolved in the trial court.

After the trial court denied the motion for new trial, the Court of Appeals reversed, and the case returned to the Michigan Supreme Court. In *People v Cress*, \_\_\_Mich\_\_\_ (No. 121189, 7-9-2003) the court, 6-1, reversed the decision of the Court of Appeals that reversed the trial court's denial of the defendant's motion for new trial, finding no abuse of discretion. The trial court had concluded, after hearing much evidence, that the newly-discovered evidence in the form of someone confessing to the crime was false, as it deviated sharply from the established facts of the crime. This was not an abuse of discretion, held the court, and the Court of Appeals erred in finding otherwise.

## B. Other

An expungement issue was presented in *People v Vanbeck*, 252 Mich App 207 (2002). The trial judge held that defendant could not have had felonious assault conviction

expunged because he was ineligible due to having more than one conviction. Defendant had five misdemeanor convictions in the state of Connecticut, but had received a full and absolute pardon on those in that state. The prosecutor argued that the pardons were the equivalent of an expungement under Michigan law, and defendant was entitled only to one expungement. Because some legal disabilities continue after expungement in Michigan, but not so for a pardon in Connecticut, the majority held the pardon is not equivalent to a Michigan expungement, and found defendant eligible for expungement of his Michigan conviction.

## C. Federal Habeas Corpus

Computation of the AEDPA's statute of limitations—when the clock starts running—was decided by the United States Supreme Court, at least with regard to habeas corpus actions brought from federal convictions. In *Clay v United States*, \_\_\_US\_\_\_, 123 S Ct 1072, 155 L Ed 2d 88 (2003) the Court held that the clock starts—a conviction becomes "final"—on expiration of the time for filing a petition for certiorari, or, if one is filed, from its denial.

In *Miller-El v Cockrel*, 537 US 322, 123 S Ct 1029, 154 L Ed 2d 931 (2003) the Court held that when an unsuccessful habeas applicant seeks a certificate of appealability, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. This inquiry does not require full consideration of the factual or legal bases supporting the claims. The prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." He or she satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. The applicant need not convince a judge, or, for that matter, three judges, that he or she will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. In the context of the threshold examination in this *Batson* claim, held the Court, it can suffice to support the issuance of a COA to adduce evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based.

## CRIMINAL LAW

### I. Assaultive Offenses

The Michigan Supreme Court in *People v Clay*, 468 Mich 261 (2003) considered the offense of assault on a corrections official while in lawful custody. Defendant was arrested for several misdemeanor violations, and a gun found concealed on his person. He was taken to the county jail where he assaulted a guard (unknown to the arresting officers at this time, defendant also had an outstanding bench

warrant for his arrest). He was charged with assaulting a corrections official while in lawful custody. Later, his arrest on the misdemeanor charges was held invalid, and the CCW conviction for the gun found on his person reversed on this basis. He then filed for relief from judgment from the assault conviction, arguing that, given the holding in the CCW case, he was not in lawful custody when he assaulted the guard. The Supreme Court held that the custody was lawful based on probable cause to arrest for CCW; whether the exclusionary rule will apply to exclude evidence is a different question: "To say that an action is 'lawful' is to say that it is authorized by law. ... In this case, defendant committed, in an officer's presence, the felony of carrying a concealed weapon without a permit. ...As a result, by the authority granted to him by MCL 764.15(1)(a), the police officer was authorized to imprison defendant. Accordingly, defendant's imprisonment was 'lawful' as contemplated by MCL 750.197c. ...a subsequent determination concerning a defendant's prosecution cannot and does not serve to retroactively render 'unlawful' the actions of a law enforcement officer where those actions are authorized by law."

## II. Offenses Against Children/Sexual Offenses

In the highly-publicized case of *Lanrence v Texas*, \_\_\_ US \_\_\_, (No. 02-102, 6-26-2003), the United States Supreme Court held that the Texas statute prohibiting certain sexual acts between persons of the same sex is unconstitutional as applied to private acts between consenting adults.

*People v Schaub*, 254 Mich App 110 (2002) lead to a new statute. Defendant attempted to sell her child to an undercover officer, and was charged with child abandonment. At the time that the alleged offense occurred, the child abandonment statute, MCL 750.135, provided:

Any father or mother of a child under the age of 6 years, or any other person who shall expose such child in any street, field, house or other place, with intent to injure or wholly to abandon it, shall be guilty of felony, punishable by imprisonment in the state prison not more than 10 years.

The elements are (1) exposing the child, and (2) the intent to wholly abandon the child. The Court of Appeals held that there was no showing of exposure, so that the charge could not be made out in these circumstances. The panel noted that "In response to this case and the publicity it generated, the Legislature enacted with unusual quickness a specific criminal statute that prohibits the sale or purchase of people, MCL 750.136c."

A factual question concerning force or coercion was decided by the Michigan Supreme Court in *People v Perkins*, \_\_\_ Mich \_\_\_ (No. 120453, 6-18-2003). Defendant, a deputy sheriff, was charged with CSC 1 with a 16-year-old girl, under a theory of force or coercion through use of a position of authority under these facts.

At the time of the charged incident, the girl had known defendant and his family for approximately four years. Defendant's wife had been her basketball coach and defendant often had assisted his wife when the team practiced. From the date that the complainant met defendant until the incident involved here, the complainant regularly babysat for defendant's children, attended church with the family, and, for a time, resided with them. During that period, the complainant and defendant began having sexual relations. On the date of the charged incident, the girl was living with her mother and had just returned from a month-long excursion in Mexico. While she was in Mexico, defendant telephoned her twice. During one call, defendant told her that he had left a present for her under her mother's porch. She discovered that defendant had placed a ring under the porch. She then called defendant and left a voice mail message for him. They agreed to meet on the following Sunday in an industrial park while she was on her way to church. On Sunday, the complainant drove to the industrial park, found defendant, who was on duty in a marked police cruiser, and got into the car with him. The complainant and defendant hugged and talked about her trip to Mexico. Finally, the complainant fellated defendant.

The Supreme Court found insufficient proof of a crime. The prosecutor had argued that defendant's sexual relationship with the girl had established a pattern of abuse that eroded the complainant's ability to resist his sexual advances during the incident in question, as a child can be psychologically subjugated in this manner. But the court found that there was no evidence the girl had been so subjugated in this case, and no evidence that she was coerced, in any sense of that term, to fellate defendant on the occasion in question. "The un rebutted preliminary examination facts indicate that, on the date of the incident in question, the relationship was consensual and the complainant was involved in it of her own volition. If it were true that the complainant's actions were the result of defendant's subjugation of her will, then or at an earlier date, the prosecutor failed to present evidence of it." The court also found the charge of misconduct in office unsupported by the proofs, for although defendant was a deputy sheriff, there was no evidence that his alleged conduct arose from the performance of his official duties.

A question regarding admission of evidence of prior sexual activity of the victim—here, that the child-victim had previously been the victim of another person—was decided by the first circuit in *Ellsworth v Warden*, 318 F3d 285 (CA 1, 2003). The court held that defendant's rights to confrontation were violated when the trial judge refused to allow cross-examination of the 11-year-old victim of alleged sexual abuse about earlier sexual abuse by a different

perpetrator, to show why he could describe sexual acts in such detail (“age inappropriate knowledge”) and that he might have been fabricating this claim. NOTE: in Michigan, see, *People v Morse*, 231 Mich App 424 (1998) which allows admission of this evidence on a foundation that someone has been convicted of the alleged prior abuse.

A most unusual indecent exposure charge was considered in *People v Williams*, 256 Mich App 576 (2003). Defendant went into the bathroom where his 8-year-old niece was bathing, and refused to leave. He also drew an indecent picture of her. Ultimately, he was charged with indecent exposure. The statute provides: “[a]ny person who shall knowingly make any *open or indecent* exposure of his or her person or *of the person of another* shall be guilty of a misdemeanor . . .” Williams moved to dismiss the indecent exposure charge, arguing that the exposure of his niece was not “open” because it occurred in their home rather than a public place. The district court held that the crime of indecent exposure need not be open to public view and that Williams’ act of causing the girl to expose herself to him long enough for him to draw her “anatomically correct features” fell within the statute. The circuit court on appeal held that the exposure need not necessarily have taken place in what is commonly thought of as a public place, but may occur in a private place, such as the bathroom of a private residence, so long as it occurs under circumstances in which another person might reasonably have been expected to observe it. That court concluded that the other person witnessing the exposure could be Williams, reasoning that “there is simply no requirement in the language of MCL 750.335a that when a person knowingly makes an open or indecent exposure of the person of another, that exposure must be witnessed by someone other than the person causing the exposure.” Said the court: “[W]hen someone causes an open or indecent exposure of the person of another, it is more than just ‘reasonably likely’ that someone will observe it: it is a *fait accompli*, because the person causing the exposure himself observes what he has exposed, and the person who is offended is not some innocent bystander, but the very person whose private anatomy has been exposed to the eyes of the person causing the exposure.” The Court of Appeals disagreed. “Implicit in this formulation, from a purely grammatical standpoint, is the notion that the underlying concern of the statute is whether the *viewer* might have been offended upon viewing the exposure. We can find no justification, either in the language of the statute or the cases interpreting it, that the test for whether a punishable open exposure occurred is whether the *person being viewed* might have been offended by his or her own exposure. In our view, the definition of ‘open exposure’ suggested by Justice Boyle and adopted in *Vronko* supports the conclusion that the Legislature’s aim was to punish exposures that would be offensive to *viewers*, actual or potential, and not to

the person exposed.” For similar reasons, the court found the exposure not indecent under the statute.

### III. Homicide

The crime of felony-murder, where the predicate felony is child abuse in the first degree, was challenged in *People v Knox*, 256 Mich App 175 (2003). Following *People v Magyar*, 250 Mich App 408 (2002), the court held that one may be convicted of felony-murder where the predicate felony is a child abuse causing death, as that is what the legislature has enacted.

In another felony-murder/child abuse in the 1st degree case, and one receiving much publicity, in *People v Maynor*, 256 Mich App 238 (2003) a mother intentionally left her children in her automobile on a hot summer day while she shopped and had her hair done, and the children died. Though the holding of the Court of Appeals in *People v Gould*, 225 Mich App 79, 86 (1999) that first-degree child abuse is a specific intent crime was later vacated by the Michigan Supreme Court, that court did not hold that the offense is a general-intent crime, simply finding that *Gould* unnecessarily reached the issue, and the panel majority here found it to be a specific-intent offense, based on the use of the word “knowingly” in the statute. But the court also upheld the circuit court’s reinstatement of the 1st -degree murder charges: “the evidence indicated that defendant left her children in a hot car for approximately 3½ hours. In fact, regardless of the weather, leaving the children unattended in a car for such a long period of time raises considerable doubt as to whether she was merely negligent. Moreover, even though defendant did not check on her children, the evidence indicated that she left the salon to get herself something to eat and drink. In addition, although defendant’s statement suggested that she might not have known that the children were at risk, it is noteworthy that the evidence also suggested that she rolled down at least one of the car windows about an inch and one-half. These acts belie her claim of ignorance of the risks.” The Supreme Court has granted leave on the question of whether the child-abuse charge is one requiring proof of a specific intent.

The defendant in *People v Werner*, 254 Mich App 528 (2002) claimed that the evidence was insufficient to show “wantonness” for malice for murder in this vehicular homicide. The Court of Appeals did not agree: “plaintiff showed that defendant drove after becoming seriously intoxicated. Moreover, defendant knew from a recent incident that if he drank, he might experience a black-out and drive recklessly and irresponsibly.... This is not a case where a defendant merely undertook the risk of driving after drinking. Defendant knew, from a recent prior incident, that his drinking did more than simply impair his judgment and reflexes. He knew that he might actually become so overwhelmed by

the effects of alcohol that he would completely lose track of what he was doing with his vehicle. If defendant knew that drinking before driving could cause him to crash on boulders in front of a house, without any knowledge of where he was or what he was doing, he knew that another drunk driving episode could cause him to make another major mistake, one that would have tragic consequences.”

#### IV. Robbery And Carjacking

A fractured Michigan Supreme Court in *People v Randolph*, 466 Mich 532 (2002) rejected a “transactional” approach to the crime of robbery, holding that force must be employed at the time of the taking, and not to prevent the victim from retaking the property, or in aid of escape. An application of the case occurred promptly in *People v Scruggs*, 256 Mich App 303 (2003). On remand to reconsider in light of *People v Randolph*, 466 Mich 532 (2002), the panel found no pertinent difference between the armed robbery and unarmed robbery statutes, so that the holding in *Randolph* rejecting the “continuous offense/place of temporary safety” doctrine applies also to armed robbery.

Several cases considered carjacking issues. In *People v Small*, 467 Mich 259 (2002) the defendant alleged that the fact that the person he carjacked was himself not in lawful possession of the car should have been admissible. The Court of Appeals disagreed, and so did the Michigan Supreme Court in this opinion on the defendant’s application—whether the victim was in lawful possession of the vehicle him or herself is irrelevant to the charge. In *People v Davis*, 468 Mich 77 (2003) the Supreme Court answered the question of the “unit of prosecution” in carjacking cases. When a vehicle is carjacked from both driver and passenger(s), only one conviction is permissible; “[T]he core and focus of the offense... are the taking of a motor vehicle. Because defendant took one motor vehicle, the language of the carjacking statute allows only one carjacking conviction.”

#### V. Stalking

In Michigan *People v Threatt*, 254 Mich App 504 (2002) defendant claimed he did not have actual notice of the PPO as required by statute. The court held that in order to show actual knowledge the prosecutor need not show the defendant was actually served with the PPO; here, “The complainant’s testimony demonstrated that defendant made several statements from which his knowledge of the PPO could reasonably be inferred, that he had evaded service, and that defendant spoke with both the complainant and an investigator about the personal protection order.”

#### VI. Weapons

Application of the felony-firearm statute to guns taken in a home invasion was before the court in *People v Shipley*,

256 Mich App 367 (2003). In *People v Mitchell*, 431 Mich 744 (1988) the Supreme Court held that a gun stolen in a breaking and entering would not support a felony-firearm with a predicate felony of breaking and entering with intent to commit larceny. Nonetheless, the court here affirmed. The panel found the home invasion statute different from the breaking and entering statute; under the home invasion statute the home invasion is in the first degree if at “any time” while the person is entering, present in, or exiting the premises the person is armed with a dangerous weapon. See MCL 750.110a(2). The offense is thus not complete at the time of the breaking and entering, and possession of a gun stolen in the crime itself will support a felony-firearm charge. In the same case the court also upheld convictions for both home invasion and larceny of a firearm.

#### VII. Other

##### A. OUIL

The admissibility of blood-alcohol evidence was challenged in *People v Callon*, 256 Mich App 312 (2003). Because the blood was taken by search warrant here, the statutory requirements regarding the blood being drawn by a licensed physician or someone under his or her direction did not apply. Moreover:

if MCL 257.625a(6)(c) applied to this case through its incorporation in the search warrant, the trial court did not err by concluding it had not been violated. The statute requires that blood be drawn only by “a licensed physician, or an individual operating under the delegation of a licensed physician” under MCL 333.16215, which authorizes licensed physicians to delegate selected acts, tasks or functions to individuals who are qualified by education, training, or experience to perform the acts, tasks or functions within the scope of the practice of the licensee’s profession, and that will be performed under the licensee’s supervision. The Public Health Code defines “supervision” as requiring the licensee to be continuously available directly or through electronic means, to regularly review, consult and educate the supervised individual, and further requires that procedures and a drug protocol be established. MCL 333.16109. Thus, the statute does not require direct supervision by a licensed physician of the qualified person to whom the task of drawing blood has been delegated, nor does the statute require that a licensed physician specifically delegate an individual to draw blood in each individual case. Rather, the statute permits delegation of “acts, tasks or functions,” in this case the function of drawing blood, the task of phlebotomy. This interpretation is consistent both with the plain language of the statute, *Borchard-Rubland*, *supra*, 284, and also with the ordinary definition of “delegation.” The *Random House Webster’s College*

*Dictionary* (1997) defines “delegation” as “the state of being delegated,” and “delegate,” as “to commit (powers, functions, etc.) to another as agent.” In this case, there was ample evidence from which the trial court could conclude that Daniel Quinn, the phlebotomist on duty in the emergency room of Botsford Hospital, was “operating under the delegation of a licensed physician” when he withdrew blood from defendant. A doctor was present in the emergency room of the hospital when officer Parsons arrived and presented the search warrant. After the doctor directed Parsons and defendant to a room, Quinn drew defendant’s blood. Quinn’s testimony established that he had been employed by the hospital for several years and regularly engaged in assisting patient care, including acting as a phlebotomist on numerous occasions. Further, one doctor dictated and signed a report concerning the blood draw. Nothing in the statute requires that a physician have specifically directed Quinn to draw defendant’s blood, but only that he be delegated to perform that task.

The defendant in *People v Haynes*, 256 Mich App 341 (2003) raised an ex post facto claim. A prior offense employed to aggravate defendant’s OUIL was a “zero tolerance”/minor operating in possession of alcohol, and that conviction occurred before that offense could be employed to aggravate a later OUIL. The court rejected due process, equal protection, and ex post facto challenges to use of the offense as a prior offense under the statute as amended. *People v Callon*, 256 Mich App 312 (2003) also raised a similar ex post facto claim. Before defendant’s conduct, but after his prior conviction for impaired, the definition of prior offense was expanded to include impaired driving. So long as this occurred prior to the conduct here, there is no ex post facto problem, held the court..

Operating was the question in *People v Burton*, 252 Mich App 130 (2002). The defendant was found in a pickup truck with the engine running in a golf course parking lot. An employee of the course could not wake the defendant. Defendant told the police that he had been stranded there, and had driven his truck from one side of the parking lot to the other, where it was parked. He was intoxicated. He was convicted at trial of attempt OUIL, and attempt operating with license suspended. The court held that attempts are prosecuted under the general attempt statute, and that former MCL 257.625(17)’s provision that “a person who is convicted of an attempted violation....shall be punished as if the offense had been completed” then operated as to sentence (unlike the drug offenses, where an attempt to deliver is prosecuted under the drug statute itself, as the definition of delivery includes an attempt to deliver). But the court found insufficient evidence of attempt, for, held the court, there was no evidence from which a jury could conclude the defendant intended to drive the vehicle on the roadway,

rather than use it as a shelter where he had parked it.

An enhancement issue was considered in *People v Clement*, 254 Mich App 389 (2002). After being charged in Oakland County with OUIL 3rd, defendant filed a motion to withdraw a years-old guilty plea in a Wayne County case that was a predicate for the OUIL 3rd, which the Wayne County judge granted. The Oakland County judge refused to dismiss the OUIL 3rd, finding this action improper. MCR 6.610(E)(7) provides that a motion to withdraw a guilty plea in the district court may be made within the time for taking an appeal, which is 6 months by MCR 7.103(B)(6). But that time limit was not added until 2000, and did not apply to defendant. But the Court of Appeals held that the 6-month period began to run on September 1, 2000, the date of the court rule amendment. Defendant missed the period, and the Wayne County judge had no jurisdiction to vacate the plea, and so that act was void.

### **B. Resisting and Obstructing/ Obstruction of Justice**

The defendant in *People v Macleod*, 254 Mich App 222 (2002) argued that his resistance was permissible because his arrest was unlawful. A group of young men were out for a night of carousing. One stopped to urinate behind a wall, activity that was noticed by the police. When the police investigated, they told the others to move along, and the group, while doing so, became “boisterous,” defendant calling an officer “you F\_\_\_\_\_ pig.” Further like comments ensued, and defendant was arrested. Defendant struggled with the officers, spitting on one, and the officers were attacked by the crowd. Defendant argued that his arrest was unlawful, and so he could not be convicted of resisting and obstructing. The claim was that the disorderly conduct ordinance was unconstitutionally vague. The ordinance provided it was a crime to:

Engage in any disturbance, fight, or quarrel in a public place or encourage such activity; disturb the public peace and quiet by loud, boisterous or vulgar conduct or conduct himself or herself in any manner to disturb a meeting of municipal or public officials or allow any place, public or private, occupied or controlled by him or her to be a resort of noisy, boisterous or disorderly conduct. [Cheboygan, Michigan Code of Ordinances, § 20.062(10).]

The Court of Appeals held: “Here, defendant was yelling “at the top of his lungs” in a continuous manner, in a public place. Officer White could hear defendant “as clear as day” from down the street. In response to a question about why he arrested defendant, when he had not arrested people in the past for swearing at him, Officer White responded, “Because it wasn’t just the ‘F You,’ it was the voice that he

used--the constant screaming a block away.” Considering this evidence in the light most favorable to the prosecution and leaving questions of credibility to the jury, Officer White had probable cause to justify an arrest pursuant to the ordinance.” The court also held that a finding the ordinance was unconstitutional would not affect the validity of the arrest, and so defendant was properly charged with resisting and obstructing.

Another resisting issue was decided in *People v McKinley*, 255 Mich App 20 (2003). An officer ran a LEIN check of a vehicle he saw being driven. The ownership came back to defendant’s mother, and the officer knew defendant had an outstanding warrant. An officer investigating in the community where defendant lived was given defendant’s description, and saw the auto, being driven by a male with defendant’s description. The officer stopped defendant, approached him, told him he believed he was wanted, and asked for his license. Defendant refused to provide it or identify himself, and the officer told him he was under arrest. Instead, defendant maneuvered his auto around the police vehicle and left. He was later arrested for resisting an officer during the investigation of an outstanding felony warrant. Though the officer, a deputy, had been in uniform, and though the defendant had said on his cell phone to someone at the time “it’s the police,” the district court found there was insufficient evidence the defendant knew the officer was an officer, and the circuit court agreed that the officer’s “failure” to identify himself verbally was fatal to the prosecution, and found the initial stop unsupported by reasonable suspicion. The Court of Appeals disagreed: on the facts there was reasonable suspicion for the stop, and there was no requirement for proof of guilty of the substantive offense that the officer verbally identify himself.

The witness-tampering statute was before the court in *People v Greene*, 255 Mich App 426 (2003). Michigan has created a specific “witness-tampering” statute. A portion of the statute, MCL 750.122(6), provides:

A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding.

The charge here was based on notes from defendant to a witness, who was going to testify that she saw defendant strike her brother in the underlying assault case, attempting to persuade her not to testify, but no threats were made. The Court of Appeals held that to prove that a defendant has violated MCL 750.122(6), the prosecutor must prove that the defendant (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case

law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness’s ability (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding. “In this last part of the definition we use the word interference to include all types of conduct proscribed in subsection 6.” On the facts before it, the court found a jury question:

We agree that the evidence adduced at the preliminary examination presented a dispute concerning whether Greene’s appeals to Hughbanks not to attend the preliminary examination constituted interference. As we noted, the dictionary includes among the definitions of the word “ability” the “capacity” to act “morally.” The transcripts of the telephone conversations include several statements from Hughbanks indicating that she had received a subpoena to appear at a hearing (presumably the preliminary examination) that she knew she was supposed to appear at the hearing, and she was concerned about the consequences of failing to appear as ordered. Greene, however, dismissed Hughbanks’ fear that the district court would issue an arrest warrant if she failed to appear at the hearing, saying that failing to appear would only result in a \$150 fine. This comment arguably had an effect on Hughbanks at the moment; despite her early hesitation to carry out Greene’s request not to appear at the hearing, after Greene minimized the potential consequence of disobeying the subpoena, she replied, “That’s it?” This suggested that the result of failing to appear would be sufficiently insignificant for her to comply with Greene’s directive and disobey the subpoena. When, later in the telephone conversation, Hughbanks appeared to be unconvinced that skipping the preliminary examination was what she should do, Greene resorted to a different tactic. He told her that he had consulted his attorney and that the subpoena issued to her was ineffective, therefore implying that missing the hearing would not get Hughbanks into any trouble with the law. This evidence created a question of fact concerning whether Greene’s conduct was an attempt to convince Hughbanks to ignore the “distinction between right” – obeying the subpoena – “and wrong” – failing to appear at the hearing – and thereby overcome her initial, moral inclination to appear at the preliminary examination. We do not hold that a request, alone, not to attend a hearing or a stated desire that a witness not attend a hearing would be unlawful under MCL 750.122(6). Neither act would necessarily affect a witness’s *ability* to attend a hearing. Nor do we intend to imply that Greene will be convicted of this offense. Rather, in sum, the evidence presented at the preliminary

examination would allow a reasonable person to infer that Greene knew Hughbanks would be attending the preliminary examination to provide testimony against him; Greene did not want Hughbanks to attend the hearing; Greene chose not to use bribery, threats or intimidation, or retaliation to dissuade Hughbanks from attending the hearings; Greene then willfully attempted to interfere with Hughbanks' intention to attend that hearing by telling her explicitly not to attend, playing to her feelings for him, and assuring her that the consequences would be minor, or nonexistent; and this interference attempted to affect her ability to attend the hearing by impairing her ability to choose to do the right thing, which was to obey the subpoena.

### C. Miscellaneous

In a sense related to the offense of obstruction of justice is the filing of a false police report. The question in *People v Chavis*, 468 Mich 84 (2003) was whether one can file a false report of a "real" crime by misstating material facts, or whether the report must be of a crime that never occurred. The court held that a false report may be of a "real" crime, the statute not requiring a report of a "false crime," but a "false report" of a crime.

In *People v Abramski*, \_\_\_Mich App\_\_\_ (No. 237810, 6-10-2003) the defendant was convicted of fleeing and eluding, and the court held that the crime is a general intent crime: "Specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself." The fleeing and eluding statute provides that a driver "shall not willfully fail to obey" the direction of a police officer. "The word 'willfulness' has been called a 'word of many meanings, depending upon the context in which it is used.' ... Use of such terms as 'knowingly' or 'willfully' in a statute does not mean that a crime requires specific intent." The court concluded that "The fleeing and eluding statute only requires intent to do the physical act of fleeing and eluding a police officer; it does not require intent beyond the act of fleeing and eluding. ... The fleeing and eluding statute does not require proof of the intent to cause a particular result or intent that specific consequences occur... Rather, the statute only requires a general intent, and voluntary intoxication is not a defense to a general intent crime."

An officer was convicted of misconduct in office in *People v Milton*, \_\_\_Mich App\_\_\_ (No. 234080, 7-8-2003), as well as assault and battery, for mistreatment of a prisoner. Misconduct in office is a common-law offense, codified under MCL 7540.505. The statute makes it a felony to commit any offense that was an offense at the common law and "for the punishment of which no provision is expressly made by any statute of this state." Defendant claimed that since assault and battery is punished under a specific statute,

he could not be prosecuted for misconduct in office. The Court of Appeals disagreed. "The misconduct in office charge is the 'indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state.' There is no statute that expressly provides punishment for misconduct in office; therefore, defendant's argument is without merit." 750.505 does not preclude prosecution for the common-law offense whenever the *conduct* at issue is covered by another statute; it precludes use of the common-law offense when that *offense* has been codified by the legislature.

The defendant in *People v Ish*, 252 Mich App 115 (2002) was convicted of first-degree home invasion, and his statement that he was "looking for food" was proof of his intent in entering the dwelling. Defendant was found in the family room of the home watching television, and had ripped out a screen to get through the window. The court said that the corpus delicti is not some proof of every element, but proof of a specific injury or loss and criminal agency. A statement can then be used to proof elements/fix the degree. This is what happened here.

The trial judge in *People v Lively*, 254 Mich App 249 (2002) decided that as a matter of law the claimed perjurious statements were material, and did not instruct the jury on materiality. Finding this error, and on an issue the jury could have gone the other way on, the Court of Appeals reversed. Leave has been granted in this case.

In *People v Pratt*, 254 Mich App 425 (2002) the court held that: "An owner of a car is qualified to testify as to the value of his property unless his valuation is based on personal or sentimental value. *People v Watts*, 133 Mich App 80, 84; 348 NW2d 39 1984). The phrase "personal value" means subjective value to the owner, or a value which cannot be objectively substantiated. *People v Dyer*, 157 Mich App 606, 611; 403 NW2d 84 (1986). Here, the ex-girlfriend's father, who had purchased the car, testified to its value. There was no evidence admitted to suggest that his perception of the Buick's value was based on his personal or sentimental value; therefore, a jury could conclude that the car was valued at more than \$1,000. Defendant's assertion that the prosecution should have provided an appraiser's testimony is without merit. Case law is clear that a prosecutor has the discretion to prove his case by whatever admissible evidence he chooses."

In a case that required much construction of the statute, the defendant in *People v Hill*, \_\_\_Mich App\_\_\_ (No. 237014, 6-17-2003) robbed a gas station. The weapon used in the robbery was a sawed-off shotgun, which was held on the station clerk by one of the robbers, while the other robber sprayed gasoline from a small container over the entire bulletproof glass barrier that separated customers from station personnel. The person spraying the gasoline also held a lighter and flicked it during the robbery. In addition to

armed robbery and other counts, defendant was convicted of violation of MCL 750.209(1)(b), which provides:

(1) A person who places an offensive or injurious substance or compound in or near to any real or personal property with intent to wrongfully injure or coerce another person or to injure the property or business of another person, or to interfere with another person's use, management, conduct, or control of his or her business or property is guilty of a crime as follows:

\* \* \*

(b) If the violation damages the property of another person, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$15,000.00, or both.

The gasoline was clearly used in this case as an offensive and injurious substance, where it was sprayed on the bulletproof glass. But, said the court, the difficult issue was whether the "the Legislature intended § 209 to be applicable in cases involving gasoline in light of the language contained in § 210." That section provides in part that

(1) A person shall not carry or possess an explosive or combustible substance or a substance or compound that when combined with another substance or compound will become explosive or combustible or an article containing an explosive or combustible substance or a substance or compound that when combined with another substance or compound will become explosive or combustible, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property without the permission of the property owner or, if the property is public property, without the permission of the governmental agency having authority over that property.

(2) A person who violates this subsection is guilty of a crime as follows:

(a) Except as provided in subdivisions (b) to (e), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$10,000.00, or both.

Gasoline is a combustible substance, and that there was sufficient evidence to support defendant's conviction under § 210. Thus, the question was whether the Legislature intended § 209 to be operable where the offensive or injurious substance or compound is also an explosive or combustible substance. Because gasoline could be used in an illegal manner under § 209 where the intent is to interfere with another person's business or to annoy or alarm another person, as is arguably the case here, yet no similar intent provisions are

found in § 210, the court concluded that liability can arise under 209 where the substance is gasoline. The court also found no double jeopardy violation for convicting under both 209 and 210.

## VIII. DEFENSES

### A. Entrapment

Though the court in *People v Johnson*, 466 Mich 491 (2002) had directed briefing on whether it should modify the entrapment test in Michigan to the federal test or something like it, it decided not to reach that question. Instead, the court found the defendant – a police officer – had not been entrapped, reversing the Court of Appeals. The court stated the Michigan test as either 1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or 2) the police engaged in conduct so reprehensible that it cannot be tolerated. The court found these tests not met, and urged the legislature to take a look at whether it wished to codify an entrapment defense.

### B. Self-Defense/Defense of Others

The Michigan Supreme Court in *People v Riddle*, 467 Mich 116 (2002) held that the "no-retreat" rule regarding the dwelling extends only to the physical structure and any attached appurtenances, but not to the curtilage or other structures on the property. Of course, one need never retreat if retreat cannot be undertaken in safety (generally a jury question).

An unusual situation was presented in *People v Kurr*, 253 Mich App 317 (2002). The deceased punched defendant several times in the stomach, and she warned him not to hit her because she was carrying his babies. Defendant stated that when he came towards her again, she stabbed him in the chest. The Court of Appeals held that the trial judge should have given the defendant's requested defense of others instruction: "We conclude that in this state, the defense should also extend to the protection of a fetus, viable or nonviable, from an assault against the mother."

## IX. EVIDENCE

### A. Demonstrative/Scientific

A question on the admissibility of demonstrative evidence was decided in *People v Bullmer*, 256 Mich App 33 (2003), involving modern technology. The prosecutor was allowed to introduce a computer-animated slideshow showing "shaken-baby" syndrome as it would occur, in a case charging injuries occurring that way. The demonstrative evidence was offered to illustrate the opinion of the People's expert witness. The Court of Appeals found no abuse of discretion in admitting the exhibit: "The brief slideshow was relevant and probative in refuting defendant's claim that he only "gently" shook the victim. The slideshow

was not a reenactment. It illustrated Dr. DeJong's testimony regarding a material issue."

## B. Hearsay

That any relevant statement of the defendant is substantive evidence was made clear in *People v Lundy*, 467 Mich 254 (2002). The Supreme Court reversed the Court of Appeals, which had held that the only evidence supporting the felony in this felony-murder conviction was a prior inconsistent statement of the defendant, introduced by the prosecution, which was hearsay, because not a prior statement under oath. As the Supreme Court pointed out, however, anything said by the defendant is an admission, and thus not hearsay, so the statement, which may have had an impeachment use, was also admissible as substantive evidence, and the evidence was thus sufficient to convict.

Two cases involving the use of a codefendant's declaration against penal interest against the defendant were decided during the year. In *People v Rodriguez*, 252 Mich App 10 (2002) a statement of a codefendant that defendant was "the biggest drug dealer in Oakland County" came in, though the codefendant did not testify. The statement was not made to the police, but to a mutual friend of both defendants. The court found the statement admissible under MRE 804(b)(3) as a declaration against penal interest, possessing sufficient indicia of reliability to satisfy confrontation clause concerns.

On the other hand, the statement in *People v Washington*, 252 Mich App 10 (2002) had no "carryover" portion that incriminated defendant. The codefendant made a declaration against penal interest – "I did it-I'm the shooter" – that had no portion incriminating the defendant. The statement was admitted and used as substantive evidence against the defendant. Because of an assertion by defense counsel that the codefendant suffered from mental illness and had a history of psychiatric treatment—though no evidence was offered on the point—the majority of the panel found that there were "insufficient indicia of trustworthiness" to allow the statement under Confrontation Clause principles. The dissent took the view that a declaration against penal interest with no "carryover" is a firmly rooted exception requiring no foundation for admission beyond that specified in the rule of evidence. The Supreme Court reversed in *People v Washington*, \_\_\_ Mich \_\_\_ (No. 121864, 7-9-2003). Finding no need to decide whether this sort of declaration against penal interest is a "firmly rooted" hearsay exception, the court found

sufficient indicia of reliability to satisfy Confrontation Clause concerns and to allow its admission as substantive evidence at trial. The statement was voluntarily given and made contemporaneously with the events referenced. It was uttered spontaneously by Mathis and

without prompting or inquiry by the officers. In fact, the officers had just heard of the robbery when Mathis made the statement. Mathis did not minimize his role in the crimes, admitting that he shot the victim, and he had no motive to lie or distort the truth. In addition, there is nothing in the statement indicating that the declarant was attempting to curry favor at the time he made the statement.

The defendant in *People v Bowman*, 254 Mich App 142 (2002) wished to introduce hearsay evidence on the ground that it was present sense impression. While the caselaw does not require the statement be made instantaneously after the observation, it must be very close in time, and defendant's offered hearsay was not close.

Use of the so-called "catch-all" exception was considered in *People v Katt*, 468 Mich 272 (2003). The court rejected the notion that a statement that is a "near miss" to a traditional hearsay exception cannot fall within the "catch-all" exception of MRE 803(24), so long as its foundational requirements are truly met.

## C. Impeachment

In *People v McDaniel*, 256 Mich App 165 (2003) prior larceny convictions were allowed to impeach defendant's credibility in a retail fraud case. The court found error in the trial court's failure to articulate its reasons for allowing the impeachment, but found the error harmless.

## D. Privileges

An ex post facto claim was brought in *People v Dolph*, 256 Mich App 587 (2003). The amendment of the spousal privilege to put the decision whether to testify about a confidential communication in the hands of the witness spouse does not violate ex post facto principles when applied to a communication made before the amendment of the statute, held the court.

## E. Rebuttal

In *People v Spanke*, 254 Mich App 642 (2002) "Defendant testified on direct examination that in his capacity as a mentor he took several boys to the swimming pools to swim and that he had never inappropriately touched any of them. On cross-examination, defendant was asked if he specifically denied inappropriately touching a specific boy. In response to defendant's testimony reiterating his denial in that specific instance, the prosecution introduced testimony from a witness who testified he observed defendant touch the specific boy inappropriately. Although MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters, a party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regard-

ing matters germane to the issue, if the rebuttal evidence is narrowly focused on refuting the statement. *People v Vasber*, 449 Mich 494, 504; 537 NW2d 168 (1995). The testimony challenged by defendant fits within this narrow exception, and therefore it was not plain error to admit it.”

#### F. Relevance

Whether certain evidence was relevant given the elements of the crime was decided in *People v Gonzalez*, 256 Mich App 212 (2003). Defendant was convicted of racketeering. The statute provides:

A person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity.

MCL 750.159f(a) defines “enterprise” as “an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group or persons associated in fact although not a legal entity. Enterprise includes illicit as well as licit enterprises.” MCL 750.159g defines “racketeering”, in relevant part, as follows:

As used in this chapter, “racketeering” means committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain, involving any of the following:

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(c) A felony violation of part 74 or section 17766a of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461 and 333.7766a, concerning controlled substances or androgenic anabolic steroids.

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(r) A violation of section 213, concerning extortion.

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(ff) A violation of section 529, 529a, 530, 531, concerning robbery.

(gg) A felony violation of section 535, 535a, 536a, concerning stolen, embezzled, or converted property.

MCL 750.159f(c) defines a “pattern of racketeering activity” as follows:

Pattern or racketeering activity means not less than 2 incidents of racketeering to which all of the following characteristics apply:

(i) The incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts.

(ii) The incidents amount to or pose a threat of continued criminal activity.(iii) At least 1 of the incidents occurred within this state on or after the effective date of the amendatory act that added this section, and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity.

Given the statutory requirements and definitions, evidence of the criminal activity of others may well be relevant—as here—to “establish the existence of the enterprise and the participation of its members in a pattern of criminal activity.”

The defendant in *People v Taylor*, 252 Mich App 519 (2002) was arrested on an outstanding warrant, and escaped from jail. He was charged with escape, and wished to stipulate there had been an outstanding warrant, so as to preclude details of the pending charge on which he was arrested. The Court of Appeals agreed that the evidence was relevant and not unduly prejudicial. “Evidence of the warrant tended to prove that defendant was legally in custody when he was placed in the Saginaw County Jail. The specific charges suggested that defendant could not have been legally discharged from jail after such a short period. Moreover, the seriousness of the charges tended to show that defendant had motive to escape police custody.”

#### G. Uncharged Misconduct/Similar Acts

MRE 404(b) continued to be fertile field for litigation during the year. In *People v Hine*, 467 Mich 242 (2002) the Court of Appeals had reversed because of the admission of uncharged misconduct evidence. Paramedics found a two-and-a-half-year-old girl who was not breathing, had no pulse, and appeared to be dead, and was pronounced dead at the hospital. An autopsy determined that the child had several internal injuries including a subdural hematoma, a healing tear of the liver, hemorrhage in the region of the pancreas, another area of bleeding in the colon (near the appendix), and a large amount of fluid in the abdomen. She had numerous circular bruises on her abdomen and a bruise across the bridge of her nose. The injuries were of varying ages, from less than half a dozen hours up to five to seven days old. The cause of death was multiple blunt force injuries. Defendant had been the child’s sole provider while her mother was at work in the week before her death. Three witness were called to testify to defendant’s physically abusive behavior toward them, some of it similar in terms of the specific injuries caused. In reversing the Court of Appeals, the Supreme Court said:

The approach taken by the Court of Appeals, however, failed to take into account the evidence presented to the trial court in support of the prosecutor's theory that Caitlan died as a result of multiple, nonaccidental, blunt force injuries. The evidence presented at the evidentiary hearing and at trial supported the trial court's conclusion that there was a common plan, scheme, or system in the defendant's assaults on the women and on the child. Indeed, the Court of Appeals panel's recitation of the facts is perplexing. Rather than viewing the evidence in a light most favorable to the prosecution, as it was required to do, the panel discounted the prosecution's evidence and accorded undue weight to defendant's version of the events.

The case was applied in *People v Knox*, 256 Mich App 175 (2003), where there was the added obstacle of a lack of proper objection. The Court of Appeals began by stating that "the Supreme Court's opinion in [*People v*] *Hine* presents a formidable obstacle to reversing on the basis of a trial court's error in admitting prior bad acts evidence. That obstacle certainly looms large in cases, such as this one, in which the party claiming error has failed to preserve the issue for appeal and thus must demonstrate plain error affecting a substantial right before being afforded relief. If the abuse of discretion standard of review makes a trial court's decision on a close evidentiary matter virtually beyond review, then it is hardly possible that an evidentiary matter that presents a close call will ever constitute an error that is sufficiently "clear or obvious" to satisfy the plain error standard." The court also noted that "the Supreme Court in *Hine* indicated that appellate courts 'are required' to look at the 'evidence in the light most favorable to the prosecution' to determine whether it was an abuse of discretion to admit the prior bad acts evidence." And where the theory of admissibility is common scheme or plan, but offered to prove the charged act occurred rather than intent or identity, "The *Sabin* Court adopted an intermediate level of similarity between the charged offense and prior bad acts evidence introduced under this common plan, scheme, or system theory, which must be more than the similarity required to prove intent but may be less than the similarity necessary to prove identity." There is thus in a sense of "hierarchy" of degree of similarity of common scheme evidence, with the greatest degree required for identity, then a lower level for actus reus, and a lower level for intent. With this in mind, the court upheld admission of evidence of defendant's abuse of the child's mother and other violent acts.

The defendant in *People v Ackerman*, \_\_\_ Mich App \_\_\_ (No. 228526, 7-8-2003) was convicted of sexually abusing three girls less than 13 years of age; at the time he was the mayor of Port Huron. The Court of Appeals reviewed for

abuse of discretion the admission of other acts evidence to show defendant's scheme (included were acts of indecent exposure). Defendant allegedly "groomed" victims out of a community facility known as "Clear Choices" where youths would gather and socialize. The court found the acts of exposure admissible as part of a system of "desensitizing" the girls to this conduct; though his acts of consensual sex with two young women who had reached the age of consent presented a "closer question," the court found them admissible given that they were youthful visitors to Clear Choices with similar experiences to the victims.

The first circuit in *United States v Weems*, 322 F3d 18 (CA 1, 2003) found that evidence of drug dealing at the house where defendant was arrested was relevant to his prosecution for felon in possession of a firearm, as it gave him a motive to carry the weapon; further, there was no abuse of discretion in finding that the probative value was not substantially outweighed by the danger of unfair prejudice. And in *United States v Givan*, 320 F3d 452 (CA 3, 2003) the panel reiterated that admission of evidence of uncharged misconduct is favored if the evidence is relevant for any purpose other than to show propensity or disposition on the part of the defendant to commit crime.

## X. GUILTY PLEAS

The issue was rather unusual in *People v Watkins*, 468 Mich 233 (2003). Defendant pled guilty to open murder, and the trial judge called him to the stand at the degree hearing, held to determine the appropriate degree of murder for conviction. Defendant claimed for the first time on appeal that this violated his Fifth Amendment rights. But the Supreme Court held that defendant was not forced to the stand, and had simply not asserted any Fifth Amendment right. There was thus no violation.

## XI. INSTRUCTIONS

Our Supreme Court in *People v Gonzales*, \_\_\_ Mich \_\_\_ (No. 120363, 7-2-2003) considered a request for an accomplice instruction. Defendant alleged that the case was "closely drawn" so that the trial court had an obligation to give a cautionary instruction regarding accomplice testimony sua sponte. But the Supreme Court found that because there was no evidence that the alleged "accomplice" was involved in the crime in any way, an accomplice instruction was not required.

Last year in the *Cornell* decision the court held that an included offense is one of the elements which are a subset of the elements of the greater offense. During the "cognate"-offense regime, the court had held that manslaughter is a cognate offense of murder, and under *Cornell* an instruction on manslaughter would not be permitted—without the consent of the parties—because it is not an included offense of

murder on a “subset” analysis. But was the prior decision that manslaughter is not included within murder correct? The Supreme Court answered that question in *People v Mendoza*, \_\_\_Mich\_\_\_ (No. 120630, 6-20-2003). Manslaughter, in both of its forms—voluntary and involuntary—is an included offense of murder under the Cornell “subset” analysis, and thus an instruction is appropriate on request where supported by evidence that would support a rational factfinder in concluding that the lesser offense was committed rather than the greater, evidence the court found lacking here. *People v Van Wyck* was overruled. NOTE: the holding that the mental state of involuntary manslaughter—gross negligence—is included within the mental state for murder—wanton and wilful disregard—should plainly apply to other circumstances with lesser mental states. For example, assault with intent to do great bodily harm is an included offense under this analysis of assault with intent to murder (though felonious assault is not, as it contains the additional element of a weapon). It should also be noted that the retroactive reach of *Cornell* will be before the court in the fall, the court having granted leave on that question from an unpublished case.

The new rules were also applied in *People v Alter*, 255 Mich App 194 (2003). Though affirming two CSC 2 convictions, the court here reversed two convictions for CSC under the pretext of medical treatment. The defendant was the victim’s therapist, and the two began a sexual relationship. Defendant was ultimately charged with counts of CSC I, and the trial judge, over defense objection, gave CSC under the pretext of medical treatment as lesser included for two counts that charged CSC 1 for sexual penetration accomplished by “medical treatment . . . recognized as unethical or unacceptable” and causing personal injury (mental anguish).” The court found that the “pretext offense” is not a lesser included offense of the medical treatment charge, under *Cornell*, as not a subset of the elements of the greater offense. NOTE: but is not *Cornell* a rule of construction for offenses that are not *formally* divided into degrees; for those that are, such as criminal sexual conduct, the legislature has spoken, and no analysis is needed to determine that which is a lesser offense of the greater—the statutory scheme itself answers the question.

*Cornell* was also the issue in *People v Hall*, \_\_\_Mich App\_\_\_ (No. 223182, 5-29-2003). Where pre-*Cornell* defendant agreed not to have the jury instructed on second-degree murder in a murder case, post-*Cornell* the instruction is only required if supported by the evidence, and defendant by his actions waived any claim of error.

The propriety of the trial court’s reasonable doubt instruction was challenged in *People v Hill*, \_\_\_Mich App\_\_\_ (No. 237014, 6-17-2003). The trial court instructed:

A reasonable doubt is a fair honest doubt growing out of the evidence or lack of evidence. It is not merely an

imaginary doubt or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considerate examination of the facts and circumstances of this case.

The trial court’s instruction on reasonable doubt was taken verbatim from CJI2d 3.2, and the CJI instruction is proper.

## XII. JUDGE

A most important ruling was issued by our Supreme Court in *People v Ellis*, 468 Mich 25 (2003). The Supreme Court held that giving a “waiver break”—that is a verdict inconsistent with the court’s factfinding, such as guilty of FA for shooting at someone, but not guilty of felony-firearm —“violates the law and a trial judge’s ethical obligations” and is grounds for referral to the Tenure Commission.

## XIII. JURY

A question of juror misconduct was considered in *United States v Hodge*, 321 F3d 429 (CA 3, 2003). To receive a new trial because of a false statement by a juror on voir dire, the court held, defendant must first demonstrate that the juror failed to answer honestly a material question, and must then also show that a correct answer would have provided grounds for a challenge for cause.

## XIV. JUVENILES

In *People v Petty*, \_\_\_Mich\_\_\_ (No. 121584, 7-17-2003) a juvenile was convicted of murder 1, and under the procedure used was entitled to a hearing to determine whether he should be sentenced as an adult or juvenile. The judge sentenced as an adult, but failed to allow allocution before the mandatory penalty (which is error). The Court of Appeals held that the judge also should have made specific findings on each statutory factor regarding sentencing as an adult or juvenile, and should have allowed allocution before the decision on that point, as well as before the sentence. The Michigan Supreme Court held that findings on each statutory factor are not required, that allocution before the decision was not required, but, the court was adopting a new court rule to require it in the future, that the failure to allow allocution before sentencing was not harmless, and so a resentencing is required, at which the new court rule should also be followed.

## XV. PROSECUTOR

A closing argument claim was raised in *People v Abraham*, 256 Mich App 265 (2003). In rebuttal the prosecution argued:

[Prosecutor]: . . . [A]fter taking pause and looking at everything, there is an underlying determination that Ronnie Green deserves justice – [Objection overruled.]

Ronnie Green deserves justice whether or not the bullet that killed him was fired from the gun of someone other than Nathaniel Abraham, or from the gun of Nathaniel Abraham. And when the facts support his guilt beyond a reasonable doubt that's why with all that pause I stand before you.

Defendant argued this was an improper "civic duty" argument. The court found the first paragraph to be a fair response to defense argument attacking the prosecution for charging the defendant as an adult. The second paragraph it found to be "poorly worded" and "unnecessary" as there was no dispute on causation of the victim's death by defendant, but harmless.

A challenge to the prosecutor's closing argument was also made in *People v Goodin*, \_\_Mich App\_\_ (No. 239280, 7-8-2003). The prosecutor elicited testimony from witnesses that defendant was not seen at the scene of the accident, nor did he contact the police in the days following, and emphasized this testimony during his closing argument. The court held that this was entirely proper. "First, the right against self-incrimination prohibits a prosecutor from commenting upon the defendant's silence in the face of accusation, but does not curtail his conduct when the silence occurred before any police contact....A prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true." "Second, evidence of flight is admissible to support an inference of 'consciousness of guilt' and the term 'flight' includes such actions as fleeing the scene of the crime.... Also, this Court has held that evidence of flight does not infringe on a defendant's privilege against self-incrimination and the prosecutor is entitled to comment on the evidence of flight and its inferences."

The question was one of charging in *People v Abraham*, 256 Mich App 265 (2003). The court rejected defendant's challenge to the constitutionality of MCL 712A.2d on a number of grounds, the principal ground being the authority given the prosecution to exercise discretion as to which juveniles to charge as adults.

## XVI. TRIAL

The use of medication to render the accused competent to stand trial was before the United States Supreme Court in *Sell v United States*, \_\_US\_\_ (No. 02-5664, 6-16-2003). A federal magistrate found defendant mentally incompetent to stand trial, and ordered his hospitalization to determine whether he would attain the capacity to allow his trial to proceed. While there, Sell refused the staff's recommendation to take antipsychotic medication. Medical Center authorities decided to allow involuntary medication, which Sell challenged in court. The Magistrate authorized forced

administration of antipsychotic drugs, finding that Sell was a danger to himself and others, that medication was the only way to render him less dangerous, that any serious side effects could be ameliorated, that the benefits to Sell outweighed the risks, and that the drugs were substantially likely to return Sell to competence. In affirming, the District Court found the Magistrate's *dangerousness finding clearly erroneous* but concluded that medication was the only viable hope of rendering Sell competent to stand trial and was necessary to serve the Government's interest in obtaining an adjudication of his guilt or innocence. The Supreme Court held that the Constitution permits the Government to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial on serious criminal charges without his or her permission if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. Here, the Eighth Circuit erred in approving forced medication solely to render Sell competent to stand trial given that court and the District Court held the Magistrate's dangerousness finding clearly erroneous, and that the medication decision had been based in part on dangerousness, the magistrate not having found forced medication legally justified on trial competence grounds alone. Moreover, the experts at the Magistrate's hearing focused mainly on dangerousness. The failure to focus on trial competence could well have mattered, for the Court stated that it could not tell whether the medication's side effects were likely to undermine the fairness of Sell's trial, a question not necessarily relevant when dangerousness is primarily at issue. The issue was to be resolved on remand.

A critical witness for the prosecution, who had been served with a subpoena, failed to appear in *People v Jackson*, 467 Mich 272. Rather than granting a continuance, the trial judge dismissed, and the Court of Appeals affirmed. The Supreme Court reversed, finding the dismissal "palpably and grossly violative of fact and logic." Where a subpoena has been served, a reasonable continuance to find the witness should be granted (and a bench warrant should be issued).

## XVII. WITNESSES

MCL 767.40a(5) provides that on request the prosecution must assist the defendant in locating and serving process on a witness. In *People v Koonce*, 466 Mich 515 (2002) the prosecution argued that at the least, less strenuous efforts were required if the witness was an accomplice. The court found no such accomplice exception in the statute, overruling *People v O'Quinn*, 185 Mich App 40 (1990) on the point.

The defendant in *People v Tanner*, 255 Mich App 369 (2003) claimed that the trial court denied her due process by not appointing a DNA expert or a serology expert to as-

sist her defense. Defendant argued that she was entitled to expert assistance in order to respond to the trial testimony of the prosecution's expert witnesses who were qualified in the areas of DNA analysis and serology. The court held that to determine whether a defendant is entitled to expert assistance it must first consider whether the defendant could otherwise proceed safely to trial without the expert. If defendant could not do so, the court then considers whether the defendant was prejudiced and received a fundamentally unfair trial as the result of not having expert assistance. If defendant was so prejudiced, then reversal is required. In this case the court concluded that the trial court erred in depriving defendant of expert assistance in the areas of DNA and serology because she could not otherwise proceed safely to trial without such assistance. "Here, defendant was facing various charges, including felony murder, an offense punishable by life imprisonment without parole, the maximum penalty under law in the State of Michigan. Notwithstanding the severity of the charges, the prosecution's case against defendant was quite tenuous. As the parties recognized at the motion hearing, the DNA evidence excluded defendant as a contributor to the DNA found on the evidence samples. Moreover, there was expert testimony at trial that the blood found on the victim's shirt contained the DNA profile of an unknown female. Even though the DNA evidence exculpated defendant, the prosecution's experts determined that the serological evidence linked her to the crime scene because her blood type and PGM subtype were the same as those on the diluted blood stain found on the sink behind the bar. In fact, this blood stain, as interpreted by the prosecution's expert witnesses, was the only physical evidence that linked defendant to the crime scene. Thus, the prosecution's case against defendant rested very heavily upon the serological analysis and testimony of the prosecution's expert witnesses. The Court of Appeals concluded that

Given the critical role of the DNA and blood evidence in this case, it was absolutely essential for defendant to have been provided with expert assistance in the areas of both DNA analysis and serology in order to have a meaningful opportunity in which to prepare her defense against the charges and to respond to the prosecution's three expert witnesses at trial. While the trial court suggested that defendant did not need a DNA expert because the DNA evidence was exculpatory to defendant, defense counsel rightly pointed out at the motion hearing that defendant nonetheless had the constitutional right to put on her own defense and not simply rely upon what the prosecution had developed in seeking to prove the charges against her. By having her own DNA expert, defendant would have been able to develop and argue the point that the DNA evidence exculpated her. Moreover, given the complex nature of DNA evidence, expert

assistance was necessary to ensure that defendant was properly represented, especially since defense counsel acknowledged that the subject matter was beyond his understanding. Specifically, it was evident that expert assistance in DNA analysis was needed to enable defense counsel to cross-examine the prosecution's expert witnesses in an effective fashion

In addition, the trial court, in denying defendant's motion for funds to hire expert witnesses, ignored the fact that defendant also needed to have an expert witness in the area of serology. After all, it was the evidence presented by the prosecution's experts in serology, Megan Clement and Marie Bard-Curtis, which linked defendant to the crime scene on the basis of the fact that she could have been a donor of the blood that was found on the sink next to the bar. Without her own expert witness in serology, however, defendant had no means to defend herself against the effect of such inculpatory evidence or to diminish its force by explaining that it constituted an anomalous test result.

The Court of Appeals in *People v Perez*, 255 Mich App 703 (2003) considered the so-called "missing witness" or "adverse inference" instruction. CJI 5.12 is an instruction that the jury may infer that the witness's testimony would have been unfavorable if the prosecution fails to produce the witness. The Court of Appeals held in this case that "we do not believe that CJI2d 5.12 remains a viable instruction." "...no obligation is imposed upon the prosecutor by MCL 767.40a beyond subpoenaing witnesses...the statute imposes no particular penalty on the prosecutor for a witness' failure to honor a subpoena. Accordingly, we see no justification for an instruction which states that a missing witness would have testified favorably to the defendant."

In *People v Ackerman*, \_\_Mich App\_\_ (No. 228526, 7-8-2003) the prosecution presented a clinical social worker/psychotherapist to testify to patters of adult sex offenders in desensitizing child victims. The Court of Appeals rejected a claim that this sort of evidence is only admissible with regard to victims but not defendants.

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