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CRIMINAL LAW UPDATE
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Table of Contents

I. Case Law

A. Fourth Amendment.

Administrative and Special Needs. *City of Ontario v Quon*, __ US __; 130 S Ct 2619; 177 L Ed 2d 216 (2010)**(june'10).** After a California political subdivision bought pagers for their SWAT team members to assist their work effort, persistent overages resulted in an audit of the messages. One officer's text messages were found to be primarily personal during the audit. He later brought suit. The Court, though finding an expectation of privacy in an employee's government-issued device (the pager here), determined that the audit/search was reasonable, as it was engaged to ascertain the appropriateness of the city's limitation on the volume of texting.

Exigent Circumstances, Warrantless Entry, Police Created Exigency. *Kentucky v King*, __ US __; 131 S Ct 1849 (2011)**(may'11).** A nearly unanimous court (Justice Ginsburg dissented), held that heavy banging on an apartment door while repeatedly yelling police, if followed by sounds of movement within (leading police to believe drug evidence was being destroyed), allows police to enter without a warrant. The "exigent circumstance" was not created by police activity of banging on the door "as loud as they could" as an objective test must be utilized, and police did not either violate the Fourth Amendment or threaten to do so before the "exigent circumstance" arose. In her lone dissent Justice Ginsburg opened by stating that the holding "arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases."

Investigatory Stop, Particularized Suspicion. *People v Steele*, __ Mich App __; __ NW2d __ (2011 WL 1432032, No. 299641, decided April 14, 2011)**(april'11)**. Defendant went to Meijer and purchased packages of Sudafed and one gallon of Coleman fuel, both of which are known precursors for methamphetamine. Police were alerted to Steele's purchases by a Meijer employee who was trained to identify the precursors for methamphetamine. After the tip, Steele was pulled over. He did not have a driver's license. Steele was asked out of the car and made to put his hands on the roof of the car, at which time the officer told Steele that he knew that there were narcotics in the vehicle. The officer asked Steele to confirm this, which he did, leading to his arrest. Steele was taken back to the police station and read his rights. Steele repeated the statements he had made during the roadside questioning approximately 45 minutes earlier. Defendant later moved to suppress both the evidence found in his vehicle and the statements made to police. There were three main issues. The first issue was whether the police had the requisite particularized suspicion necessary to conduct an investigatory stop. The second issue was whether Defendant was subjected to custodial interrogation at the location of the stop without first advising him of his *Miranda* rights. The final issue was whether Steele's statements made at the police station were inadmissible as the fruit of an illegal stop and illegal roadside interrogation. The trial court suppressed the evidence and defendant's statements. The court opined that "the purchase of only one package [a finding the COA later determined to be erroneous] of Sudafed and camping fuel is not enough to meet the standard of a particularized suspicion." The court also found that defendant was in custody for purposes of Miranda during the roadside interrogation and,

therefore, that his statements were illegally obtained. Lastly, the court found that defendant's statement at the police station was the fruit of an illegal roadside custodial interrogation. The Court of Appeals reversed all of these findings, holding that the purchases, combined with the reliability of the person providing the tip, gave the officer the requisite particularized suspicion to warrant an investigatory stop. The COA also held that Steele was not in custody ever after having been made to get out of his car, put his hands on the roof of the car, and told that the officer knew that there were drugs in the car. The court stated that typical traffic stops are such that there is little danger that a person questioned will be induced to speak where he would not otherwise do so freely. Finally, the COA found that the statements made at the station were also proper.

Search of Vehicle, Driver Secured, Good Faith. *People v Short*, __ Mich App __; __ NW2d __ (2010 WL 3389252, No. 292288, decided August 26, 2010)**(aug'10).** In this case the court decided a question left open in *People v Mungo*, 288 Mich App167; 792 NW2d 763 (2010). Holding that *Gant*, decided on the day the motion to suppress was heard in this case, was clearly retroactive, the court ruled the search of Defendant's vehicle after he was arrested and secured for driving without a license or insurance, was unconstitutional. However, the good faith exception was applied to affirm the trial court's denial of Defendant's motion to suppress firearms turned up in the search of the vehicle. The court based the good faith exception on the fact that at the time of the search *Belton* clearly allowed the search of Defendant's vehicle incident to his arrest. *Mungo* was distinguished because in that case it was a passenger who was arrested and secured before the vehicle was searched and, as the *Mungo* court noted, "the law in this state on this point was not established and clear." On October 29, 2010, the Michigan Supreme Court granted leave to appeal in *Short* on whether the good faith exception applies to warrantless vehicle searches conducted under the authority of *Belton* even if unconstitutional under the United States Supreme Court's decision in *Arizona v Gant*. On April 5, 2011, the Michigan Supreme Court held *Short* in abeyance, . 2011 WL 1294315, pending the United States Supreme Court's decision in *Davis v United States*. See Dave Moran's SCOTUS preview, section G of these materials.

Search, Terry Stop, Unnamed Informant. *People v Barbarich*, __ Mich App __; __ NW2d __ (2011 WL 309422, No. 290772, decided February 1, 2011)**(feb'11).** A state trooper, monitoring a bar on St. Patrick's Day, pulled out onto the highway from the bar and was signaled by a motorist going in the other direction. The motorist pointed at the vehicle in front of her and "mouthed" the words "almost hit me" to the trooper, who made a u-turn, followed the "offending" vehicle into the bar parking lot the trooper had just left, and ultimately arrested the driver for driving while intoxicated. The district court denied Mr. Barbarich's motion to suppress, but the circuit court granted it, stating that the trooper's "hunch" was insufficient to stop Barbarich. The court of appeals originally denied the prosecutor's leave app, but was later told to do so by the supreme court. On full review, the court of appeals majority (Kelly, joined by Zahra), with Judge Gleicher dissenting, reversed the grant of suppression. The majority held that even though the "informant" was unnamed, the trooper, had he "wished," could have copied her license plate number (there were no facts suggesting the trooper even saw the woman's license plate, and there was no discussion of the trooper's expertise in lip-

reading). Therefore, the majority held, the *Terry* stop was justified. Judge Gleicher found the seizure "premised on accusations utterly devoid of objective or specific facts."

B. Other Pretrial Matters.

Confession, Access to Lawyer. *People v Crockran*, __ Mich App __; __ NW2d __ (2011 WL 1272605, No. 294831, decided April 5, 2011)**(april'11)**. Twenty days after a gun battle outside a Flint club left one man dead, Mr. Crockran was arrested, about 10:30 a.m., on a first degree murder charge. Evidence developed at a hearing established that during those 20 days Crockran had been communicating extensively with the lawyer his family formally retained immediately after his arrest. The attorney immediately contacted "someone" at the police station several times to advise he was Crockran's attorney and that he wanted to speak to Crockran, but no one relayed the message to Crockran. At about 10:00 p.m., approximately 12 hours after his arrest, and about 10 hours after his attorney had begun trying to make contact with him, Crockran admitted to police that he shot the deceased, though he claimed self-defense. Separating the question of a valid waiver from the issue of whether police improperly withheld the fact that a lawyer was available to Crockran, the panel held that because the evidence of communication before and during arrest between Crockran and the lawyer demonstrated that Crockran was aware he had a lawyer, there was no error in failing to communicate the fact that his lawyer was trying to reach him and the police after his arrest. And, despite the fact that Crockran was repeatedly pleading for access to his lawyer as he was taken to the interrogation room, a plea ignored by police, the panel utilized the recent SCOTUS decision in *Montejo v Louisiana*, __ US __; 129 S Ct 2079 (2009), overruling *Michigan v Jackson*, 475 US 625 (1986), to hold that police can initiate interrogation even when they know a defendant is represented by counsel. Crockran asked police if they knew his lawyer and if he needed him, to which the police responded that it would be "a problem" if Crockran "lawyered up." Since Crockran admitted he received and understood his *Miranda* rights, his subsequent uncounseled statement was deemed admissible.

Confession, Custodial Interrogation. *People v Steele*, __ Mich App __; __ NW2d __ (2011 WL 1432032, No. 299641, decided April 14, 2011)**(april'11)**. Defendant went to Meijer and purchased packages of Sudafed and one gallon of Coleman fuel, both of which are known precursors for methamphetamine. Police were alerted to Steele's purchases by a Meijer employee who was trained to identify the precursors for methamphetamine. After the tip, Steele was pulled over. He did not have a driver's license. Steele was asked out of the car and made to put his hands on the roof of the car, at which time the officer told Steele that he knew that there were narcotics in the vehicle. The officer asked Steele to confirm this, which he did, leading to his arrest. Steele was taken back to the police station and read his rights. Steele repeated the statements he had made during the roadside questioning approximately 45 minutes earlier. Defendant later moved to suppress both the evidence found in his vehicle and the statements made to police. There were three main issues. The first issue was whether the police had the requisite particularized suspicion necessary to conduct an investigatory stop. The second issue was whether Defendant was subjected to custodial interrogation at the location of

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Confession, Defendant's Silence Through Most of Interrogation Does Not Invoke Right to Remain Silent. *Berghuis v Thompkins*, __ US __; 130 S Ct 2250; 176 L Ed 2d 1098 (2010)**(june'10).** Defendant was apprehended following a shooting that left one person dead. After reading him his *Miranda* rights, two police officers questioned him. The defendant never expressed that he did not want to talk to the police, and never asked for an attorney – he was silent during the three hour interrogation, except for answering affirmatively when asked if he prayed to be forgiven for the crime. Defendant later claimed that he invoked his Fifth Amendment right and that his statements were involuntary. The Supreme Court held that his silence during the interrogation did not invoke the right to remain silent, reasoning that a suspect's *Miranda* right to counsel must be invoked "unambiguously." *Davis v United States*, 512 US 452. The Court determined that there is no reason to apply different standards for determining when an accused has invoked the *Miranda* right to remain silent versus when the *Miranda* right to counsel is invoked. Any voluntary answers given to police, such as the "yes" given by the defendant here, may waive the *Miranda* Rights. The Court stated that a suspect must unambiguously indicate invocation of the right to remain silent in order to avoid complicating police procedures.

Confession, *Miranda*, Custody. *People v Vaughn*, __ Mich App __; __ NW2d __ (2010 WL 5350222, No. 292385, decided December 28, 2010)**(dec'10)**. Defendant was convicted of assault and firearm offenses after getting into a shootout with a retired police officer. Police traced a car left at the scene to Defendant and three officers entered his home, found him in the basement, and ordered him upstairs. The officers asked Defendant "where he had just come from" and he replied that "someone tried to steal his car and shot at him several times." The CA upheld the trial court ruling that no *Miranda* warnings were required as Defendant was not in custody when he was questioned.

CSC, Territorial Jurisdiction. *People v Aspy*, __ Mich App __; __ NW2d __ (2011 WL 321639, No. 294949, decided February 1, 2011)**(feb'11)**. Defendant was convicted of child sexually abusive activity, and using a computer to that offense. Defendant is a resident of Portland, Indiana. In an internet chat room, defendant began talking with Nancy Popham, an Ohio resident. Popham is a member of Perverted Justice, a group dedicated to identifying internet "predators." Popham was posing as a 14 year old girl from Michigan. After a series of sexually explicit communications, defendant arranged to meet "Popham" at a camp site near Grand Rapids, MI. After being provided a fictional address, defendant drove to Michigan to meet "Popham," where he was promptly arrested. Defendant asserted that the evidence of territorial jurisdiction is lacking because preparation using the internet is required. Defendant contends that since all of his computer activity took place in his home in Indiana, that police never recovered a laptop or smart phone from his vehicle in Michigan, and defendant engaged in no online discussions with "Popham" via the computer on the date he drove into Michigan, Michigan did not have territorial jurisdiction over him as it related to using the internet to commit child sexually abusive activity. The COA pointed out that under this statute, "A violation or attempted violation of this section occurs if the communication originates in this state, is intended to terminate in this state, or is intended to terminate with a person who is in this state." The court held that, while defendant's internet communication originated in Indiana, not Michigan, the communication was intended to terminate in Michigan. The court highlighted various facts that indicated that Defendant intended to commit the illegal acts in Michigan. Defendant viewed the profile information associated with the girl indicating that she was from Michigan, and had multiple online conversations which "Popham" during which she indicated that she was from Michigan. Defendant stocked his truck with alcohol and drove to Michigan where he then went to the Michigan address given for the purpose of picking up "Popham" to engage in prohibited acts in Michigan, the intended result of the internet communications.

Delay in Charging, OWI, Destruction of Evidence. *People v Reid*, __ Mich App __; __ NW2d __ (2011 WL 1775888, No. 286784, decided May 10, 2011)**(may'11)**. Defendant was arrested for Operating While Intoxicated in November of 2005 and his blood was drawn. He was not charged until August of 2007. The blood sample drawn in 2005 upon arrest was destroyed per MSP policy in February, 2008. Defendant's claim that he was denied due process by the nearly two year delay in charging him was turned back as he was unable to show prejudice – the court stated that Defendant had six months, from August of 2007 until February of 2008, to request an independent analysis of the blood sample and failed to do so. Other defense claims of delay by prosecution for tactical advantage were considered unproven.

Double Jeopardy, CSC, Retrial Prohibited after Erroneous Dismissal. *People v Szalma*, 487 Mich 708; 790 NW2d 662 (2010)**(aug'10).** In Macomb County the prosecutor erred by telling the trial judge that CSC 1 required a specific intent (sexual purpose). The trial judge directed a verdict of acquittal. Reversing the court of appeals, which had held that the trial court improperly assessed credibility and reinstated the charge, the supreme court held that the trial court did not assess credibility but found insufficient evidence on the specific intent element, and even though that element was not

part of the charged offense, *People v Nix*, 453 Mich 619; 556 NW2d 866 (1996) barred retrial. The prosecutor was estopped from arguing that *Nix* should be overruled due to its error at trial. The concurrence by Justice Cavanagh, joined by Justice Kelly, held that the double jeopardy clause bars retrial after a directed verdict for insufficiency irrespective of any error by the trial court.

Jurisdiction, Circuit Court over Misdemeanors. *People v Reid*, 288 Mich App 661; __ NW2d __ (2010)**(june'10).** Defendant was charged with felony drug possession and misdemeanor OWI. Prior to trial the drug possession charge was dismissed, depriving the circuit court of jurisdiction. The panel held that if Defendant had been convicted of only the misdemeanor after trial on both, the circuit court would have retained jurisdiction to sentence on the misdemeanor. However, since the felony charge allowing circuit court jurisdiction was dismissed prior to trial, the case should have been remanded to district court at that point. Defendant's conviction and sentence of 93 days in jail were reversed. **On October 27, 2010, the Michigan Supreme Court reversed and reinstated charges through an order, 488 Mich 917; 789 NW2d 492.**

Speedy Trial, 180 Day Rule. *People v Lown,* 488 Mich 242; 794 NW2d 9 (2011)**(jan'11).** Justice Corrigan, before her departure, wrote the majority opinion in this 4-2 decision with new Justice Mary Beth Kelly not participating. Mr. Lown was charged in Saginaw County with second degree home invasion in September of 2005. As soon as he was jailed the MDOC placed a parole hold. MDOC took over custody on May 4, 2006. The supreme court determined that the statutory 180-day period began on July 23, 2006 (date of receipt of notice sent by MDOC). Due to a variety of issues, paramount being docket congestion, delay occasioned by the defense, and the notion, accepted by the trial court and the supreme court, that the defendant's trial schedule took a back seat to prisoners awaiting trial in the county jail (as his sentence, given his parole violation status, would apparently run consecutive to an underlying sentence), Mr. Lown's trial still had not begun when he initiated this appeal in August of 2008. Because the prosecutor had taken *some* action in preparation to try the case within 180 days of the receipt of the notice and because there was no evidence that this initial action was followed by "inexcusable delay….and an evident intent not to bring the case to trial promptly," the statutory 180-day rule was not violated. Justice Kelly, joined in dissent by Justice Cavanagh, stated that the statute clearly requires trial to commence within 180 days of receipt of the notice.

Speedy Trial, Motion Periods Excepted. *United States v Tinklenberg,* __ US __; __ S Ct __ (2011 WL 2039366, No. 09-1498, decided May 26, 2011)**(may'11).** The federal speedy trial act requires trial to begin within 70 days after arraignment, but excepts several periods, including the time within which pretrial motions are pending. The Sixth Circuit, contrary to the holding in all other circuits, established a requirement that motion periods would not toll the time period unless they did not actually cause a delay or the expectation of delay. The Supreme Court reversed and voided this requirement.

Venue, MCL 762.8, Harmless Error. *People v Houthoofd,* 487 Mich 568;790_ NW2d 315 (2010)**(july'10).** The issue in this case was one of statutory construction and fact

determination: whether any of the acts of a solicitation to commit murder charge were committed in the county where the case was tried. The supreme court agreed on a strict construction and overruled the "effects" analysis of prior court of appeals decisions, which allowed trial in counties where the effects of the acts were felt. In this case, none of the acts were committed in Saginaw County, where the solicitation charge was tried. However, the error was held to be harmless. The court of appeals, which had reversed the solicitation to commit murder charge, was reversed, and the charge was reinstated. Corrigan filed a concurrence urging legislative action to bar appeal of venue issues altogether unless the appeal is interlocutory. Kelly and Cavanagh filed separate dissents.

C. Confrontation, Counsel, and Other Trial Issues.

Confrontation and Due Process; Witness Screen in Child CSC Case. *People v Rose*, __ Mich App __; __ NW2d __ (No. 290936, 2010 WL 2629721, decided July 1, 2010)**(july'10).** After taking testimony from the child complainant's therapist (child complainant was the younger sister of defendant's wife), over defense objection, the trial court permitted physical screening of defendant during complainant's testimony. The court of appeals, after examining SCOTUS precedent, held that even though MCL 600.2163a does not provide for physical screening, the practice here did not violate confrontation or due process rights. *Practice Note: The defense was specifically faulted for 1) not suggesting alternative measures under the statute and 2) failing to describe for the record the nature of the physical screening. Care should be given in appropriate cases to making a thorough record on these points.* **On February 2, 2011, the Michigan Supreme Court granted leave to appeal in this case, 488 Mich 1034; 793 NW2d 235.**

Confrontation, Dying Declaration. *Michigan v Bryant*, __ US __; 131 S Ct 1143 (2011)**(feb'11).** After being dispatched to a gas station, two Detroit police officers discovered Anthony Covington with a fatal gunshot wound. Covington, speaking with great difficulty, told the officers that he had been shot by Bryant. Covington claimed he was able to identify him based on Bryant's voice. The trial court allowed the officers to testify regarding Covington's statements. Bryant was convicted of 2nd degree murder. Later, the Michigan Supreme Court reversed his conviction, holding that the Sixth Amendment's Confrontation Clause, as explained in *Crawford* and *Davis*, rendered Covington's statements inadmissible testimonial hearsay. In a 6-2 decision authored by Justice Sotomayor, the Court held that the testimony by the Detroit police officers did not violate the defendant's rights under the Confrontation Clause using a "primary purpose" test. The Court held that, because the primary purpose of the victim's statements was to enable police to respond to an ongoing emergency (shooter on the loose), they were admissible. The Court explained that, in circumstances involving an ongoing emergency, a witness is less inclined to fabricate statements and the "Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." The Court applied a multi-factored test taking into account the perspectives of both the interrogators and the interrogated to determine the primary purpose. The Court explained that whether the emergency is "ongoing" even if the crime is completed turns mostly on the extent of

the continuing public danger – an assessment that could depend on the weapon used in the crime, the likelihood that the attacker would strike again, the condition of the victim, and other case-specific circumstances.

Confrontation, Language Conduit Rule. *People v Jackson,* __ Mich App __; __ NW2d __ (2011 WL 1878794, No. 285532, decided May 17, 2011)**(may'11)**. Defendant and two others were convicted of shooting two victims over a past drug debt. At trial, an officer testified regarding an interview of one of the victims who was unable to speak at the time due to the injuries incurred by the shooting. Sergeant Anderson communicated with the victim by asking "yes" or "no" questions, to which the victim would respond by either squeezing the hand of a nurse to indicate a "yes" response, or by not squeezing her hand to indicate a "no" response. At trial, the officer testified regarding the substance of the victim's responses, as reported by the nurse. Defendant argued on appeal that the nurse's reports were inadmissible hearsay and that the admission of her reports also violated his constitutional right of confrontation because she was not called as a witness at trial. The court held that the report was admissible under the "language conduit" rule, under which an interpreter is considered an agent of the declarant, not an additional declarant, and the interpreter's statements are regarded as the statements of the declarant, without creating an additional layer of hearsay. Similarly, the court held that a defendant does not have a constitutional right to confront a translator, because the statements of the translator are considered to be the statements of the declarant.

Confrontation, Non-Testifying Forensic Analysists. *People v Dendel,* 289 Mich App 445; 797 NW2d 645 (2010)**(aug'10).** After one reversal (later rescinded by the MSC) and trips up and down the appellate ladder, this case was remanded by MSC for review in light of the SCOTUS decision in *Melendez-Diaz v Massachusetts,* __ US __; 129 S Ct 2527; 174 L Ed 2d 314 (2009). Here, a toxicologist testified for the prosecution regarding cause of death issues, though he did not personally perform the testing (a number of people in the lab he ran performed the tests). In its original opinion on this point, the court of appeals held that the "statements" in the toxicology report were non-testimonial and therefore no error occurred. After analyzing state and federal confrontation clause law in the wake of *Crawford*, particularly *Melendez-Diaz,* the court reversed course and held that the autopsy report "statements" were indeed testimonial and, therefore, Dendel's confrontation clause rights were violated. Concluding that the importance of the toxicology findings at issue were undermined by the nature of the defense, the court held the constitutional error harmless using the *Neder* standard ("it is beyond a reasonable doubt that the jury would have convicted defendant on the basis of untainted evidence"). **On February 4, 2011, the Michigan Supreme Court held the leave application in this case in abeyance, 793 NW2d 240, pending the decision of the United States Supreme Court in *Michigan v Bryant,* which was decided on February 28, 2011 and is summarized in this update.**

Confrontation, Reports as Testimonial Evidence. *People v Dinardo,* __ Mich App __; __ NW2d __ (2010 WL 3984545, No. 294194, decided October 12, 2010)**(oct'10)**. Dinardo was arrested on suspicion of drunk driving and taken for alcohol testing using a Datamaster machine. Officer Lake administered the Datamaster test and recorded the test

results in a report, but did not print the original Datamaster ticket. The trial court held that the breath-test results report was hearsay and suppressed it. The prosecution applied for leave and the COA reversed, holding that the Datamaster ticket was neither "testimonial" in the constitutional sense nor "hearsay" under Michigan law. Note that the COA distinguished the report in this case from the report in *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009), because the reports at issue in *Melendez-Diaz* constituted testimonial hearsay because they were prepared by human analysts who recorded the results of various laboratory tests and set down their own conclusions. In contrast, the Datamaster ticket was generated entirely by a machine without the input of any human analyst.

Confrontation, Two-Way Interactive Video Technology. *People v Buie*, __ Mich App __; __ NW2d __ (2011 WL 93003, No. 278732, decided January 11, 2011)**(jan'11)**. Defendant was convicted of 1st degree CSC, victim under the age of 13, partly due to the testimony of two doctors who were allowed to testify by way of two-way, interactive video technology. Defendant argued that allowing this violated his constitutional right of confrontation. The COA first heard the case in August of 2009, when it held that a trial court may allow video-conferencing if it either makes case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation, or if the case meets the following three prong test: (1) the defendant is either present in the courtroom or has waived the right to be present, (2) there is a showing of good cause, and (3) the parties consent. The court remanded this case to the trial court to address these issues. At the evidentiary hearing it was stipulated that both witnesses would have testified in person if video-conferencing had not been available. The prosecution conceded that it "presented no specific state interest invoked for having [the doctors] testify via video rather than in person. Rather, it was done for convenience, but only after an agreement was reached with defense counsel..." The COA held that there was no public policy or state interest at issue in this case important enough to outweigh defendant's right of confrontation. The COA also held that the three elements listed above were not met. The court focused on the third element – consent. The COA held that a defense counsel may waive a defendant's right of confrontation, but may only do so if the waiver is a legitimate trial tactic or strategy **and the defendant does not object to the decision.** At the evidentiary hearing, defendant testified that defense counsel informed him of the video testimony immediately before it took place. Defendant told counsel that it "didn't feel right" to have witnesses testify from outside of the courtroom, and requested that she object. In response to his request, counsel made a statement regarding defendant questioning the veracity of the proceedings. Finally, the COA held that having allowed the video procedure cannot be deemed harmless error and vacated defendant's conviction. **The Michigan Supreme Court granted leave to appeal in this case on May 25, 2011, #142698.**

Counsel, Ineffective Assistance, C*ronic* versus *Strickland* Analysis. *People v Gioglio*, __ Mich App __; __ NW2d __ (2011 WL 1273182, No. 293629, decided April 5, 2011)**(april'11)**. The COA held that Gioglio was entitled to a new trial because his trial counsel was constitutionally ineffective. Counsel waived opening statement, failed to

cross-examine key witnesses, neglected to object to improper and/or inflammatory testimony, and admitted to the prosecutor that her client had confessed his guilt. Accordingly, the court concluded that prejudice must be presumed under *United States v Cronic*, 466 US 648 (1984). In *Cronic*, the United States Supreme Court recognized that that there were circumstances involving trial counsel's performance that were so likely "to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." The COA found that this was the circumstance in this case. The court held that the defendant's trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." The majority emphasized the word meaningful in the phrase, and noted that "the Supreme Court recognized that there might be extreme cases where, although the defendant's trial counsel took some actions on behalf of his or her client, the actions were so few and so ineffectual that it was tantamount to having no lawyer present at all." The COA reversed defendant's convictions and remanded the case for a new trial. Judge Kelly dissented, stating that the case should have been analyzed under *Strickland*, and not *Cronic*.

Counsel, Ineffective Assistance – Duty to Inform Client of Sex Offender Registration Consequence During Plea Stage. *People v Fonville*, __ Mich App __; __ NW2d __ (2011 WL 222127, No. 294554, decided January 25, 2011)**(jan'11).** Defendant Fonville was an admitted crack addict who had agreed to watch his girlfriend's two children, ages 8 and 10. Instead of returning them at the agreed upon time, he drove around through an entire night with a friend, with the children in the car, looking for and doing alcohol and drugs. The children were brought home the next day "tired, but unharmed." Mr. Fonville, on advice of counsel, subsequently pled guilty to one count of child enticement, a life offense, MCL 750.350 in return for dismissal of other child enticement and kidnapping counts. Mr. Fonville also negotiated a low guidelines sentence. He was unaware that he would have to register as a sex offender. When he discovered the registration requirement, Fonville tried, prior to sentence, to withdraw his plea, but this was denied. A direct appeal followed, but the ineffective assistance issue was not raised. After being denied all relief on direct appeal, Fonville filed a postconviction motion under MCR 6.500. The trial court denied relief but the court of appeals reversed. Finding the issue governed by the recent SCOTUS decision in *Padilla v Kentucky*, __ US __; 130 S Ct 1473 (2010), the panel held that, though the facts were sufficient to ground an enticement conviction, sex offender registration was a direct, not a collateral, consequence of Fonville's plea and failure to advise Fonville of this serious matter was ineffective assistance of counsel. Judge Jansen, concurring and dissenting, agreed and would also have held that under these facts a child enticement charge was not warranted.

Defenses, Emancipation of Minor, 'Void for Vagueness' Doctrine. *People v Roberts*, __ Mich App __; __ NW2d __ (2011 WL 1878387, No. 294212, decided May 10, 2011)**(may'11)**. Defendant advertised for "models," and the 17-year-old victim responded. Defendant was able to convince the victim and her father to sign a release allowing the victim to perform in X-rated films (though he claimed that this would not happen until she was 18). Defendant lured victim to his personal studio for a photo shoot, but proceeded to force her to perform a series of sex acts while secretly being filmed. Defendant argued that the child sexually abusive activity statute (MCL 750.145c)

he was convicted under was unconstitutionally vague where the affirmative defense written into the statute was unclear. MCL 750.145c states it is an affirmative defense to a prosecution under this section that the alleged child is a person who is emancipated by operation of law under MCL 722.4, as proven by a preponderance of the evidence. Emancipation by operation of law occurs when a minor is legally married, an individual reaches 18 years of age, if the minor is on active duty in the military, or for medical purposes when the minor is in the custody of law enforcement or a prisoner committed to the jurisdiction of the Michigan Department of Corrections. The court found this was clear, and that the "release" he had the victim sign did not fit into one of these categories.

Defenses, Self Defense, Felon in Possession. *People v Dupree*, 486 Mich 693; 788 NW2d 399 (2010)**(july'10).** Mr. Dupree was acquitted of several assaultive offense charges after witnesses gave varying descriptions of a fight, ending in gunshots, between Dupree and the complainant. Dupree's defenses to the charge of felon in possession, of which he was convicted, were self defense and duress on these facts. He claimed that he was forced to disarm the complainant, who had started the altercation and was armed. The trial court, over defense objection, gave an instruction, which required that Dupree intended to turn the gun over to police. The court of appeals, in *People v Dupree*, 283 Mich App 89, 771 NW2d 470 (2009), ruled that, to constitute a valid defense, the innocent possession must be both temporary and immediately necessary to protect against death or serious physical harm, and the defendant must not be negligent or reckless in placing himself in danger. However, there is no requirement that an intent to turn the weapon over to police must be shown. It is enough to show that defendant terminated possession at the earliest opportunity once the danger passed. Under these facts the unwarranted instruction requiring that Dupree show an intent to turn the gun over to police was in effect a directed verdict for the prosecution on the gun charge, and cannot be considered harmless. In separate opinions, Judge Gleicher concurred and Judge Murray dissented. The supreme court affirmed, though they held that since the defense of duress was not raised by defendant until he reached the court of appeals, that was not preserved. Cavanagh and Kelly concurred, noting that the duress defense was preserved at trial. *Note:* Contrast *People v Mardlin*, 487 Mich 609; 790 NW2d 607 (2010), where the court allowed the prosecutor to raise the prevailing issue, admissibility of highly prejudicial evidence under the "doctrine of chances," for the first time on appeal.

Evidence of Contributory Negligence, Driving Under Influence Causing Death. Controlled Substances. *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010)**(june'10).** Defendant was convicted of failure to stop at scene of an accident resulting in death, operating while intoxicated (OWI), and operating a motor vehicle with presence of schedule 1 controlled substance, causing death. On the night of the incident, Defendant was driving on a busy five-lane road. It was dark and raining extremely hard. The victim, whose BAC was a .29, was walking down the middle of the road with his back to oncoming traffic. The accident reconstructionists agreed that Defendant would have had to have been traveling 15 MPH under those conditions in order to avoid hitting the victim. After the court of appeals had affirmed the conviction, the supreme court reversed, holding that the trial court erred in not allowing Defendant to admit evidence showing that victim's own negligence was a contributing factor to the accident. In

reversing, the MSC ruled that, because proximate cause is an element that must be proven beyond a reasonable doubt, denying the defendant the opportunity to present evidence of the victim's intoxication undermined the reliability of the verdict. However, the Court insisted that, moving forward, the defense would still have to demonstrate a reliable theory that the victim engaged in gross negligence or intentional conduct in order to make the intoxication of the victim relevant. Here, with the victim walking down the middle of a busy roadway on a dark and stormy night when a sidewalk is nearby, it was arguable that the victim's conduct was grossly negligent. The court provided guidance on appropriate jury instructions on this point.

Evidence, Hearsay (Recorded Recollection). *People v Dinardo*, __ Mich App __; __ NW2d __ (2010 WL 3984545, No. 294194, decided October 12, 2010)**(oct'10)**. Dinardo was arrested on suspicion of drunk driving and tested with a Datamaster machine. Officer Lake administered the Datamaster test, and recorded test results in a report, but did not print the original Datamaster ticket. The trial court held that the breath-test results report was hearsay and suppressed it. The prosecution applied for leave and the COA reversed, holding that the Datamaster ticket was not "hearsay" under Michigan law as it constituted a recorded recollection under MRE 803(5).

Evidence, Hearsay - Tender Years Exception. *People v Gursky*, 486 Mich 596; 786 NW2d 579 (2010)**(july'10).** Defendant was convicted of four counts of first-degree criminal sexual conduct. The complainant, Defendant's girlfriend's daughter, testified that Defendant had abused her on two occasions when she was six and seven years old. The complainant testified at trial, and a friend of the complainant's mother also testified, claiming her trial testimony was consistent with what she had described shortly after the second incident. The issue was whether the evidence met the definition of "spontaneous" as the term is used in the "tender years" exception under MRE 803A. The adult friend asked the victim a series of leading questions based on suspicion that Defendant was abusing the young girl. The trial court allowed the hearsay under the tender years exception, and the COA affirmed holding that, taken as a whole, the victim's statements were "primarily spontaneous." The MSC disagreed, and vacated the COA's ruling and rejected its reasoning. The Court held that it is not enough for "tender years" evidence to have simply a few "spontaneous elements" as allowed by the appellate court below. Instead, the Court ruled MRE 803A admissibility requires that spontaneity be an "independent requirement." It must be established that the evidence was not prompted, implied or manufactured in any way by the overreaching actions or interrogations of an adult. However, the Court also found that the error in admitting the statements was harmless under the difficult standard for preserved non-constitutional error under *Lukity*, and affirmed Defendant's convictions. Justices Cavanagh and Kelly disagreed with the harmless error conclusion.

Evidence, Postconviction Access to DNA Testing. *Skinner v Switzer*, __ US __; 131 S Ct 1289 (2011)**(march'11).** Henry Skinner was convicted in Texas of murdering his girlfriend and her sons. In preparation for trial, the State had omitted DNA testing of several items of physical evidence. Postconviction, Skinner filed a claim under Section 1983, alleging that Texas violated his due process by refusing access to physical evidence

for DNA testing. The Court's ruling hinged on whether Skinner should have filed his case under Section1983 or habeas corpus. The Court ultimately held that, if a court's finding of a constitutional violation would directly lead to reversal and release from custody, then the person claiming the violation would need to have filed a habeas petition. However, if the finding of a constitutional violation would not directly lead to reversal, then Section 1983 is also a proper avenue. In this case, the release of the physical evidence would not directly undermine the conviction (testing may show that he did it), and therefore the Court held that the case was properly brought under Section 1983.

Evidence, 404(b), Doctrine of Chances. *People v Mardlin*, 487 Mich 609; 790 NW2d 607(2010)**(july'10).** Defendant was convicted of arson of a dwelling house and burning insured property. The court of appeals reversed and remanded, and the state appealed. To bolster the prosecution's position that this fire was intentionally set, the prosecution presented evidence of four other fires where property either owned or in the control of the defendant caught fire. However, each of these fires was accidental, and most caused financial hardship for the defendant. At trial, the prosecution attempted to admit these fires under every conceivable 404(b) exception, and the trial court allowed their admittance under a general theory that the legal trend was to allow 404(b) evidence in and figure out under what theory later. The COA disagreed, and reversed, holding that none of the 404(b) exceptions applied under the facts of this case. The prosecution never mentioned the doctrine of chances at trial, but made it their focal point in their application for leave to appeal in the MSC. The main issue concerning the doctrine of chances was whether the doctrine required a basic level of similarity between the prior fires and the charged fire. Though all of the case law, a unanimous court of appeals panel, and the three judges in the dissent agreed that it does, the four judges in the majority rejected the notion that similarity was always necessary, instead holding that it depended on the prosecution's theory of relevance (the majority felt the theory in this case was to prove absence of mistake, though Defendant never claimed that the fire was accidentally caused. Indeed, the fire had a specific electrical cause that Mr. Mardlin was not able to show at trial because the trial court denied him the appointment of an essential expert (an issue yet to be decided by the court of appeals).

Evidence, 404(b), MCL 768.27b. *People v Cameron*, __ Mich App __; __ NW2d __ (2011 WL 16794, No. 293119, approved for publication January 4, 2011)**(jan'11).** Cameron was convicted of domestic violence, third offense, MCL 750.81(4), after an incident with his ex-girlfriend. Cameron argued that evidence of alleged prior abusive behavior against previous girlfriends, and against the complainant in this case, admitted as 404(b) evidence, was improperly admitted. However, the COA found that, under MCL 768.27b, evidence of prior domestic violence can be used to show a defendant's character or propensity to commit the same act in cases of domestic violence under an expansive relevancy standard buttressed by an abuse of discretion review. The convictions were affirmed.

Evidence, 404(b), 768.27a. Note: The Michigan Supreme Court, on March 30, 2011, granted leave in companion cases to decide issues they backed off of after granting

leave in *People v Lincoln Anderson Watkins* pre-trial. See 277 Mich App 358 (2007). The leave grants, to consider whether the statute, in allowing all evidence that a defendant allegedly committed another listed offense against a minor with no judicial discretion, trumps the court rule. Due process and separation of powers issues are also to be considered. The two cases are, again, *People v Lincoln Anderson Watkins*, this time after conviction (# 142031) and, interlocutory, *People v Richard Kenneth Pullen* (#142751).

Hearsay, Language Conduit Rule. *People v Jackson,* __ Mich App __; __ NW2d __ (2011 WL 1878794, No. 285532, decided May 17, 2011)**(may'11)**. Defendant and two others were convicted of shooting two victims over a past drug debt. At trial, an officer testified regarding an interview of one of the victims who was unable to speak at the time due to the injuries incurred by the shooting. Sergeant Anderson communicated with the victim by asking "yes" or "no" questions, to which the victim would respond by either squeezing the hand of a nurse to indicate a "yes" response, or by not squeezing her hand to indicate a "no" response. At trial, the officer testified regarding the substance of the victim's responses, as reported by the nurse. Defendant argued on appeal that the nurse's reports were inadmissible hearsay and that the admission of her reports also violated his constitutional right of confrontation because she was not called as a witness at trial. The court held that the report was admissible under the "language conduit" rule, under which an interpreter is considered an agent of the declarant, not an additional declarant, and the interpreter's statements are regarded as the statements of the declarant, without creating an additional layer of hearsay. Similarly, the court held that a defendant does not have a constitutional right to confront a translator, because the statements of the translator are considered to be the statements of the declarant.

Jury Instructions, Preservation of Issue. *Black v United States,* __ US __; 130 S Ct 2963; 177 L Ed 2d 695 (2010)**(june'10).** In this corporate mail fraud case, the Court disagreed with the Seventh Circuit, which had held that Defendants forfeited their right to contest jury instructions on appeal since they had turned down the government's special verdict form offer. Defendant's timely objection to the trial court's "honest-services fraud" instruction was sufficient to preserve the issue.

Jury Selection, Pretrial Publicity. *Skilling v United States,* __ US __; 130 S Ct 1382; 176 L Ed 2d 249 (2010)**(june'10).** Defendant was charged with multiple financial crimes after the high publicity bankruptcy of one of the country's largest corporations. After taking great care to ensure a non-biased jury pool in the Houston, Texas area, the Defendant's venue change motion was denied. The Supreme Court held that Skilling failed to show sufficient bias to meet tests for change of venue in either the area of community partiality or actual bias of seated jurors.

Jury Selection, Venire, Systemic Exclusion. *People v Bryant,* 289 Mich App260; __ NW2d __ (No. 280073, decided July 20, 2010)**(july'10).** Defendant was convicted of first degree CSC by a Kent County jury in February of 2002. There was only one African-American in the jury venire of 42 people. The court of appeals earlier remanded for a hearing on this issue. The trial court made several findings on remand, including

that any Defendant failed to establish that any underrepresentation was unconstitutional and any underrepresentation was by chance. The trial court concluded that systemic exclusion had not been proven. On remand in this case evidence was offered on all three measurement tests discussed recently by the U.S. Supreme Court in *Berghuis v Smith*, __ US __; 130 S Ct 1382 (2010), the absolute disparity test, the comparative disparity test, and the standard deviation test. The absolute disparity test results were insufficient to show a denial of a fair cross-section, but were deemed an ineffective measure due to the low percentage of African-Americans eligible to vote in Kent County. The panel held that the comparative disparity test, which here registered 73.1, was the best measure of underrepresentation, even though it too suffered from a low percentage of African-Americans in the community. And 73.1 was a sufficient comparative disparity to conclude that the representation of African-Americans on Defendant's panel was unfair and unreasonable. Finally, documented computer problems with the Kent County selection system in 2001 and 2002, which resulted in selection of fewer jurors from areas of the county where African-Americans live, established systemic exclusion. The fact that the "computer glitch" that caused this problem for a period of 16 months after April of 2001 was not intentional was deemed irrelevant. Defendant's conviction was reversed and the case remanded for a new trial before an impartial jury drawn from a fair cross-section of the community. **The Michigan Supreme Court granted leave to appeal to the prosecutor on May 18, 2011 (#141741).**

D. Crimes and Offenses, Sufficiency

Child Sexually Abusive Material, Constructive Possession. *People v Flick & People v Lazarus*, 487 Mich 1; 790 NW2d 295 (2010)**(july'10).** In a 4-3 decision along party lines, before Weaver's departure, the court held that possession of child sexually abusive material, a four year felony under MCL 750.145c(4), is established through intentionally viewing web sites containing child pornography. The defense had contended, and the dissent urged, that defendants cannot knowingly possess prohibited images merely by intentionally accessing and purposely viewing those images on the Internet.

Child Sexually Abusive Material, Production. *People v Hill*, 486 Mich 658; 786 NW2d 601 (2010)**(july'10).** Defendant created thousands of child pornographic images by downloading the images from his computer and burning them to a CD-R. In a 4-3 decision (Markman joined the Dems, prior to Weaver's departure) the majority held that such conduct does not violate MCL 750.145c(2), making it a 20 year felony to arrange for, produce, make, or finance child sexually abusive material. The majority felt that there had to be a distinction between someone who makes copies off the internet for personal use and the person who actually produces the original material. The three dissenting justices felt that creating multiple CD's met the legislature's definition of making or producing child sexually abusive material.

Contributing to Delinquency of a Minor, MCL 750.145. *People v Tennyson*, 487 Mich 730; 790 NW2d 354 (2010)**(sep'10).** During execution of a search warrant at Defendant's home, police found heroin and firearms secreted in a bedroom. Defendant, charged with drug and firearm offenses, was also charged with contributing to the

delinquency of a minor under MCL 750.145 because his ten-year-old stepson was sitting on a couch in the living room. The supreme court, engaging in statutory interpretation and closely examining the wording of the statute at issue, held that that legislature did not contemplate momentary lapses in parental conduct to satisfy the elements of the offense, reversed the contribute to delinquency conviction. Conviction under this statute requires an overall assessment of the child and the child's circumstances, in conjunction with the actions of the defendant, and in this case there was insufficient record evidence to allow a jury to conclude that this Defendant's actions "tended to cause" the child to become delinquent. Nor was there sufficient evidence of neglect as there was no showing that the presence of the illegal items rendered the home unfit. There was no showing, for instance, that the house in question was a "drug house." Corrigan and Young issued separate dissents, each joining the other.

Driving Under Influence of Drugs, Causing Death, MCL 257.625(4) & (8), H-Carboxy-THC. *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010)**(june'10).** The supreme court overruled *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006), and held that 11-carboxy-THC was not a schedule 1 controlled substance as defined under the Public Health Code. A defendant cannot be prosecuted for operating with a schedule 1 controlled substance in their blood if the prosecution's only proof is the presence of 11-carboxy-THC in a sample of blood taken from the defendant. 11-carboxy-THC is a metabolite, not an active ingredient in marijuana that causes a euphoric effect.

Evidence Tampering, Attempt Obstruction. *People v Kissner*, __ Mich App __; __ NW2d __ (2011 WL 1820110, No. 296766, decided May 12, 2011)**(may'11)**. In August 2008, after having exhausted his other appellate rights, defendant filed a motion for relief from judgment concerning his burning real property conviction claiming that the judge should have disqualified himself based on personal bias against the defendant where the defendant was an ex-boyfriend to and possibly fathered a child by the judge's daughter. Defendant attached an affidavit to the motion to this effect. It turned out that none of that was true, and Kissner was subsequently charged with tampering with evidence and attempted obstruction of justice. Kissner claimed that the affidavit was not presented in an "official proceeding" as required by MCL 750.483a. The Court of Appeals held that evidence does not need to be presented when both parties are present in a courtroom to be considered an official proceeding. An official proceeding occurs when evidence is considered by a judicial official authorized to hear evidence under oath.

Federal Witness Tampering. *Fowler v United States*, __ US __; __ S Ct __ (2011 WL 2039370, No. 10-5443, decided May 26, 2011)**(may'11).** Defendant shot and killed a local police officer who was engaged in an effort to stop a group preparing to rob a Florida bank. The issue was whether Defendant's federal conviction for witness tampering was supported by sufficient evidence to show that he intended to prevent the local police officer from communicating to federal authorities. Without deciding whether the standard was met in this case, the Court remanded for the lower federal courts to assess whether the killing here, clearly done with an intent to prevent communication with law enforcement generally, was done, under a reasonable likelihood standard, with an intent to deter at least one relevant communication with a federal officer.

First Degree Murder, Aiding and Abetting. *People v Bennett & Benson*, __ Mich App __; __ NW2d __ (2010 WL 4320335, Nos. 286960 & 287768, decided November 2, 2010)**(nov'10).** Kyron Benson and Paula Bennett were living together in Bennett's apartment. Bennett's friend Stephanie sometimes stayed at the apartment. Benson began accusing Stephanie of stealing things and at one point accused her of killing their puppy. He became increasingly upset, obtained a gun, and threatened to kill Stephanie. Bennett directed Benson to Stephanie's residence after seeing Benson with a gun and hearing his threats "even though she took the threats seriously." The majority held this was sufficient to convict Bennett of aiding and abetting a first degree murder after Benson, acting alone, shot Stephanie, for which Bennett was sentenced to non-parolable life in prison. Judge Shapiro, in dissent, held that there was no evidence that Bennett wanted Stephanie to be harmed, let alone killed. He noted that the standard jury instruction on aiding and abetting failed to have the jury consider the fundamental issue in the case: whether Bennett subjectively knew/believed her boyfriend intended to kill at the time she provided assistance. Instead the instruction focused on an objective test: whether a reasonable person would or should have known about the boyfriend's intent. Judger Shapiro also suggested that the legislature modify aiding and abetting a first degree murder to allow a lesser sentence.

OUIL Causing Death, What is "Operation." *People v Lechleitner*, __ Mich App __; __ NW2d __ (2010 WL 4963010, No. 293577, decided December 7, 2010)(**dec'10**). Defendant was convicted of OUIL causing death after Lechleitner lost control of his truck on a slippery highway, hit both the left and right guardrails, and stopped in the middle of the highway. Defendant turned on his hazards. Another motorist swerved to miss the truck, then stopped on the shoulder out of concern for the accident. Then a third car, which also had two occupants, swerved to avoid defendant's truck and, in so doing, struck the vehicle that had stopped on the shoulder, killing that motorist. Defendant argued that the trial court applied an incorrect definition of "operate" in concluding that defendant was operating his vehicle at the time in question. The COA held that the trial court was correct in determining that Lechleitner's operation of his truck while intoxicated ultimately created the risk of death to the other drivers, and it did not matter that the truck was not in motion at the time of the injuries.

Possession of Burglary Tools, Statutory Interpretation, Vehicle as a Depository. *People v Osby, Jr.*, __ Mich App __; __ NW2d __ (2011 WL 252729, No. 295548, decided January 27, 2011)(**jan'11**). Defendant was convicted of possession of burglar's tools, receiving and concealing stolen property, possession of marihuana, and breaking and entering into a motor vehicle to steal property. Surveillance video eventually led police to Osby, who was carrying a "window punch." The main issue on appeal was the whether the burglar's tool statute applied to car thefts. The statute limits the list of tools to those which are used to open "a building, room, vault, safe, or other depository." MCL 750.116. The COA held that the term "depository" is a catch-all phrase that includes motor vehicles. The court used a series of dictionary definitions to define the term.

Unarmed Robbery. *People v Harverson,* __ Mich App __; __ NW2d __ (2010 WL 5350171, No. 293014, decided December 28, 2010)**(dec'10)**. Kenneth Conliffe accepted a UPS shipment of a cell phone intended for defendant's girlfriend. Conliffe proceeded to throw the phone into a stream in retaliation for a prior theft. Later, Conliffe was accosted by defendant (Harverson), and two others. Defendant accused Conliffe of stealing the cell phone and removed Conliffe's sunglasses at gunpoint before fleeing the scene with his compatriots. Defendant was subsequently tried on a charge of armed robbery, but convicted of unarmed robbery. In raising sufficiency, Harverson challenged only the intent element - in essence arguing that, because he walked away after taking the glasses and refused to steal any other items from Conliffe, the prosecution failed to establish that defendant intended to permanently deprive Conliffe of his property. The COA disagreed, holding that to permanently deprive in the context of unarmed robbery "does not require, in a literal sense that a thief have an intent to permanently deprive the owner of the property." *People v Jones*, 98 Mich App 421, 425–426; 296 NW2d 268 (1980). Rather, the intent to permanently deprive includes the retention of property without the purpose to return it within a reasonable time.

E. Sentencing.

Federal Firearm Offenses, Construction of 'Except' Clause. *Abbott v United States,* __ US __; 131 S Ct 18 (2010)**(nov'10).** In a pair of cases the Court considered the argument of the defendants that 18 U.S.C. § 924(c)'s "except" clause rendered their consecutive sentences for using, carrying or possessing a deadly weapon in connection with "any crime of violence or drug trafficking crime." The clause reads that § 924(c) requires a minimum five year consecutive sentence "except to the extent that a greater minimum sentence is otherwise provided by [§ 924(c) itself] or by any other provision of law. Defendants argued that since they received greater minimum sentences for other counts of conviction unrelated to § 924(c), sentencing under that section should not have been allowed. The Court disagreed, holding that the 'except' clause simply disqualifies the five year sentence if a defendant is being sentenced to enhanced levels for the § 924(c) violation (seven years for "brandishing" the weapon and ten years for discharging it).

Guidelines, Federal, Departure Below for Post-Sentencing Rehabilitation. *Pepper v United States,* __ US __; 131 S Ct 625 (2011)**(march'11).** Based on substantial assistance, Pepper was sentence to 24 months incarceration followed by 5 years of supervised release after pleading to drug charges. After *Booker* (543 US 220) required resentencing, the Eighth Circuit held that it was improper for the district court to consider, among other things, Pepper's impressive post-sentencing rehabilitation. The Supreme Court disagreed, holding that because judges should have the fullest information possible regarding defendant's conduct, character and background, and because post-sentencing rehabilitation is a solid predictor of whether a defendant will re-offend, a crucial sentencing concern, post-sentencing rehabilitation may be considered to support a downward variance from the now advisory guidelines range.

Guidelines, Inaccurate Information, Remand for Resentencing. *People v Jackson,* 487 Mich 783; 790 NW2d 340 (2010)**(sep'10).** Defendant's guidelines for an armed robbery sentence were calculated with concurrent convictions for felonious assault under PRV 7. The court of appeals vacated the felonious assault convictions, but refused to remand for resentencing under MCL 769.34(10) because the sentence remained within the appropriate guidelines range and defendant had not raised the issue below or in a "proper motion to remand." After hearing oral argument on whether to grant leave, the supreme court held that remand for resentencing was warranted here. The fact that the original sentence was based on inaccurate information trumped the fact that it was within the corrected guidelines range. Further, because the need for resentencing did not ripen until the court of appeals vacated the two felonious assault convictions, the fact that Defendant requested remand for resentencing in his brief on appeal was sufficient to meet the requirement that he request resentencing in a "proper motion to remand in the court of appeals."

OV 3, Co-Felon as Victim. *People v Laidler* __ Mich App __; __ NW2d __ (2010 WL 5381759, Nos. 294147 & 295111, decided December 28, 2010)**(dec'10)**. Defendant Laidler and Dante Holmes were breaking into an occupied residence when Holmes was shot and killed by the homeowner. The trial court, relying on *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003), assessed 100 points on the basis of death resulting to a victim in this non-homicide conviction (first degree home invasion). Distinguishing Albers, which did not result in death to a co-felon, the majority ruled that the only victim here was the homeowner, who was not physically injured. Therefore no points should have been assessed for OV 3, and resentencing was ordered. Judge O'Connell, in dissent, urged that OV 3 allows scoring of points for "any person harmed by the criminal actions of the charged party." **The Michigan Supreme Court scheduled orals on whether to grant leave to appeal on April 29, 2011 (#142442-3).**

OV 7, Aggravated physical abuse. *People v Hunt,* __ Mich App __; __ NW2d __ (2010 WL 4103689, No. 292639, decided October 19, 2010)**(oct'10)**. Hunt challenged the trial court's scoring of 50 points under OV 7 for aggravated physical abuse, determined by whether a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. The trial court scored OV 7 at 50 points because (1) the victims were moved from location to location, (2) a substantial beating was inflicted, designed to increase fear, and (3) one of the victims was beaten by multiple individuals. However, of these three factors, only the first applied to Hunt's role in the crime (others had beaten the victims). The record showed that Hunt's role in the crime was minimal. While Hunt was present and did have a gun at various points throughout the crime, at no time did he take part in a beating or fire a weapon. Cases upholding scores of 50 points for OV 7 are distinguishable, because they involve specific acts of sadism, torture, or excessively brutal acts **by the defendant.** The COA held that Hunt was entitled to resentencing.

OV 9, Multiple Victims. *People v Harverson,* __ Mich App __; __ NW2d __ (2010 WL 5350171, No. 293014, decided December 28, 2010)**(dec'10)**. Kenneth Conliffe accepted a UPS shipment of a cell phone intended for defendant's girlfriend. Conliffe proceeded

to throw the phone into a stream in retaliation for a prior theft. Later, Conliffe was accosted by defendant (Harverson), and two others. Defendant accused Conliffe of stealing the cell phone and removed Conliffe's sunglasses at gunpoint before fleeing the scene with his compatriots. Defendant was subsequently tried on a charge of armed robbery, but convicted of unarmed robbery. Defendant challenged the court's scoring of ten points for OV 9 for multiple victims. Evidence showed that defendant had robbed Conliffe at gunpoint in the presence of two other people. "[I]n a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life." *People v Sargent*, 481 Mich. 346, 350 n 2; 750 NW2d 161 (2008). The court held that pointing a gun at multiple individuals clearly places them in danger of injury or loss of life and therefore the score of ten points for OV 9 was appropriate.

OV 10, Vulnerable Victim. *People v Jamison,* __ Mich App __; __ NW2d __ (2011 WL 1565993, No. 297154, decided April 26, 2011)**(april'11)**. A sentencing court properly assesses 10 points for OV 10 when "the offender exploited a victim's physical disability, mental disability, youth or agedness, or a *domestic relationship,* or the offender abused his or her authority status." Here Ms. Jamison shot at, but missed, a former boyfriend. The issue was whether a prior romantic relationship (they dated briefly over a year before the incident) provided the requisite domestic relationship to justify a scoring of ten points for OV 10. The court concluded that not just any past or present "dating" relationship qualifies as a domestic relationship: There must be a familial or cohabitating relationship. Remanded for resentencing.

OV 12, Contemporaneous Felonious Criminal Act, Crimes Against a Person. *People v Wiggins,* __ Mich App __; __ NW2d __ (2010 WL 2016324, No. 290017, approved for publication July 6, 2010)**(july'10).** The issue in this case was whether the admitted contemporaneous acts should be scored at 25 points (for crimes against a person) or 10 points (other crimes). The crimes at issue, disseminating sexually explicit matter to a minor, MCL 722.675, were specifically categorized by the legislature as crimes against public order, and not as crimes against a person. Therefore, the trial court erred in concluding that since these crimes "involved" a person, it was free to score 25 points, irrespective of the legislative classification. Because the error changed the appropriate sentencing grid, resentencing was ordered.

OV 12, Contemporaneous Felonious Criminal Act, Subsumed Offenses. *People v Light,* __ Mich App __; __ NW2d __ (2010 WL 4751768, No. 293746, decided November 23, 2010)**(nov'10)**. Defendant Light pled to unarmed robbery after he pulled a knife in a grocery store, threatened the owner, and took $300.00. The trial court used CCW and either larceny from a person or larceny in a building as the two contemporaneous acts necessary to score 5 points for OV 12. The court held that neither of the larceny offenses could be used because both were subsumed in the conviction offense, unarmed robbery. Therefore, Defendant should have been assessed only one point for OV 12 for the CCW offense. Since this error changed the guidelines OV score

from level IV to level III, resulting in a different recommended sentence range, resentencing was required.

OV 13, Pattern of Felonious Criminal Activity, Conspiracy Offenses. *People v Thomas Lee Jackson,* __ Mich App __; __ NW2d __ (2011 WL 561775, No. 294964, decided February 17, 2011)**(feb'11)**. After discarding a *Blakely* claim by noting that the MSC, in 2006 in *Drohan* (475 Mich 140), held *Blakely* does not apply in Michigan, the panel tackled a question of first impression: whether defendant's conspiracy offense constitutes a separate crime against a person or property for purposes of scoring OV 13 (pattern of felonious criminal activity). The panel unanimously answered in the affirmative, so long as the underlying crime (home invasion here) constitutes a qualifying crime against persons or property.

OV 13, Pattern of Felonious Criminal Activity, Prior Juvenile Adjudications. *People v Harverson,* __ Mich App __; __ NW2d __ (2010 WL 5350171, No. 293014, decided December 28, 2010)**(dec'10)**. Defendant Harverson, convicted of unarmed robbery, claimed the trial court erroneously scored ten points for OV 13 (continuing pattern of criminal behavior) by including his juvenile adjudications. The court found that a juvenile adjudication clearly constitutes criminal activity because "it amounts to a violation of a criminal statute, even though that violation is not resolved in a "criminal proceeding." Citing *People v Luckett*, 485 Mich. 1072, 1073; 777 NW2d 163 (2010). Therefore, the court held that defendant's poor juvenile track record, rife with adjudications, properly supported the trial court's scoring of this variable.

OV 19, Interfering with Administration of Justice, Aggravating Conduct Post Sentencing Offense. *People v Smith*, 488 Mich 193; 793 NW2d 666 (2010)**(dec'10).** Defendant was convicted of manslaughter, reckless driving, and witness intimidation after his reckless driving caused a serious accident, killing the victim, who was driving another vehicle. The trial court assessed 15 points for interference with the administration of justice under OV 19, on the manslaughter conviction, after Defendant tried to silence a witness, who had been riding in Defendant's vehicle at the time of the crash, after this witness was released from the hospital. The court of appeals ordered resentencing relying on *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009). The supreme court, Cavanagh and Marilyn Kelly dissenting, reversed the court of appeals and held that scoring 15 points for interference with the administration of justice was appropriate here as "the circumstances described in OV 19 expressly include events occurring after the completion of the sentencing offense."

PRV 5. *People v Bulger*, __ Mich App __; __ NW2d __ (2010 WL 4861761, No. 288312, decided November 30, 2010)**(nov'10)**. Defendant Michael Bulger pleaded no contest to one count of operating a motor vehicle while intoxicated causing death, and one count of operating a motor vehicle while intoxicated, second offense. Bulger argued that his conviction for underage drinking and driving under the zero-tolerance provision did not constitute the type of prior conviction that may be counted against him in scoring the sentencing guidelines. While acknowledging that the prior conviction under the zero-tolerance provision did not require proof that Bulger was actually under the influence of

alcohol, or was impaired by alcohol, the COA concluded that the best reading of the sentencing statute and the zero-tolerance provision together reveals that the trial court properly considered Bulger's violation of the zero-tolerance provision in scoring two points for PRV 5.

F. Miscellaneous

Habeas, AEDPA Standard of Review, Batson. *Felkner v Jackson*, __ US __; 131 S Ct 1305 (2011)**(march'11).** Jackson was convicted of sexual offenses in California. At trial, Jackson raised a *Batson* challenge, which was denied. The California appellate courts rejected his challenge as well. Jackson then filed a petition for habeas corpus relief in federal district court, which was also denied. However, the Ninth Circuit reversed without discussing the reasoning of the prior courts that had considered the *Batson* issue. In this per curiam opinion, the Supreme Court reversed the Ninth Circuit, holding that that court ignored the standard of review established by the AEDPA, which permits the grant of a habeas petition only where the state court action "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Finding no basis for any conclusion of such an "unreasonable determination" the Court reversed.

Habeas, AEDPA Standard of Review, IAC. *Harrington v Richter*, __ US __; 131 S Ct 770 (2011)**(jan'11).** This case is a standard failure to investigate IAC case, with the exception of a novel threshold question as to whether AEDPA deference applies to state court summary decisions. Section 2254(d) requires deference to a state claim decided "on the merits." The issue was whether a California state opinion which simply stated "[p]etition for writ of habeas corpus is DENIED" should have been considered to have been decided on the merits. The Court, in an 8-0 decision, held that there is no requirement that a state articulate the reasons for denial. The Court stated that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." That presumption can be overcome where the habeas petitioner shows that "there is reason to think some other explanation for the state court's decision is more likely." Having decided that § 2254(d) applied, the Court then applied settled principles of AEDPA deference in the familiar context of the *Strickland* ineffective assistance claims. The Court found that trial counsel was not ineffective for failing to obtain blood spatter experts as the importance of the blood evidence did not become apparent until the beginning of trial, and counsel instead attempted to create reasonable doubt through cross-examination of the prosecution's experts. The Court further held that Richter failed to show that the defense experts would likely have changed the outcome.

Habeas, Evidentiary Hearings in Federal Court. *Cullen v Pinholster*, __ US __; 131 S Ct 1388 (2011)**(april'11).** On certiorari to the Ninth Circuit, the Court reversed grant of the writ, holding that when reviewing a claim under § 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act (assessing whether the state courts issued a decision that was contrary to or an unreasonable application of clearly established federal law), federal

courts are limited to the record that was before the state court that adjudicated the claim on the merits. Thus additional evidence submitted at a federal court evidentiary hearing for the first time presumably cannot be considered. The language in the various opinions, and the voting alignment with respect to the various sections of the lead opinion by Justice Thomas, who pulled only four votes for his entire opinion, promotes confusion for the precise nature of the holding with respect to habeas petitioners who diligently seek an evidentiary hearing in state court but are rejected.

Habeas, Federal Right. *Wilson v Corcoran,* __ US __; 131 S Ct 13 (2010)**(nov'10).** In this short Per Curiam opinion, the Court rebuked the Seventh Circuit for granting a habeas relief based on its opinion that an Indiana trial judge was not in compliance with state law when imposing a death sentence. The Court held that "it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts."

Habeas, IAC, Plea. *Premo v Moore,* __ US __; 131 S Ct 733 (2011)**(jan'11).** Moore pled no contest to felony murder. He had confessed to police and described the crime to two other people. Moore's lawyer did not attempt to suppress the confession to police before Moore entered into the plea. The Ninth Circuit ruled that the failure to suppress the confession constituted ineffective assistance of counsel, relying heavily on the SCOTUS decision in *Arizona v Fulminante,* discussing whether the introduction of a confession could be harmless error in a trial context. In an 8-0 Decision, the Supreme Court held that Moore did not meet either part of the *Strickland* analysis. In deciding the performance prong, the Court found that a reasonable state court could have accepted the explanation given by Moore's lawyer – that two other confessions were still on the record, rendering challenging the third inconsequential. As to the prejudice prong, the Court held that the proper question in plea cases is whether the defendant would have proceeded with a plea without the counsel's deficiency. The Court declined to apply the more liberal harmless error standard inquiry in *Fulminante* - which asks whether a defendant would have been found guilty beyond a reasonable doubt absent the error – to pleas. The Court felt there is no practical way to know whether a jury would have convicted a defendant who pled guilty. Note also that the Court quoted heavily from *Harrington v Richter* (also summarized in these materials) to explain that, in order to succeed on habeas corpus, a petitioner must show that a state court was unreasonable in its application of an already deferential *Strickland* standard.

Habeas, Independent State Ground, California's Timing Requirements. *Walker v Martin,* __ US __; 131 S Ct 1120 (2011)**(feb'11).** California does not have a precise time limit for collateral relief applications, employing a general reasonableness standard as to whether the filing is timely. Despite its imprecision, denial of relief based on delay was held to be consistently applied in California. Therefore the timing requirement qualifies as an independent state ground adequate to bar habeas corpus relief in federal court.

Habeas, Parole, Federal Right. *Swarthout v Cooke,* __ US __; 131 S Ct 859 (2011)**(jan'11).** In a Per Curiam opinion, the Supreme Court considered the practice of the Ninth Circuit and federal district courts in California in reviewing, through federal

habeas litigation, decisions of the parole board and the Governor regarding parole of state prisoners. Citing *Greenholtz* (442 US 1), the Court made it clear that the only protected federal right in the state parole process was procedure, and the California inmates whose cases were considered here had been given the process that was due. Federal habeas review should not concern itself with "whether the state court decided the case correctly." Assessing whether the constitutionally adequate procedures governing California's parole system are properly applied "is no part of the Ninth Circuit's business."

Habeas, Time Limit, Equitable Tolling. *Holland v Florida,* __ US __; 130 S Ct 2549; 177 L Ed 2d 130 (2010)**(june'10).** Defendant sent many letters to his appointed attorney in this death case, urging that the attorney file a timely habeas petition and reminding the attorney about the strict timing rules. Despite this due diligence on the part of Defendant, the federal district court and the Eleventh Circuit refused to allow equitable tolling for Defendant's five-week-late *pro se* habeas petition. The Supreme Court, with Scalia and Thomas dissenting, held that Defendant was indeed entitled to equitable tolling under the extraordinary circumstances set out here. The attorney's misconduct in this matter was beyond mere negligence.

Habeas, Time Limit, Tolling by Collateral Review. *Wall v Kholi,* __ US __; 131 S Ct 1278 (2011)**(march'11).** Under the AEDPA a habeas petition must be filed within one year of the end of direct review. A properly filed application for state post-conviction or other collateral review tolls that period. The issue in this case was whether a Rule 35 motion to reduce sentence under Rhode Island law is an application for "collateral review" triggering AEDPA's tolling provision. The court, reviewing dictionary definitions, held that it was and therefore Petitioner's habeas request was timely filed.

Habeas, Second or Successive. *Magwood v Patterson,* __ US __; 130 S Ct 2788; 177 L Ed 2d 592 (2010)**(june'10).** After winning sentencing relief in this Alabama death case, the state trial court sentenced Magwood to death a second time. Appealing that judgment of sentence, Magwood raised an issue that he did not have "fair warning" at the time of his offense that his conduct would permit a death sentence. The state argued that since he could have raised this issue in his initial appeal, it must be considered "second or successive" and thus barred. The Supreme Court held that "second or successive" is a term of art and should not be applied to the appeal of a completely new judgment of sentence.

Michigan Medical Marijuana Act (MMMA), "Enclosed, Locked Facility." *People v King*, __ Mich App __; __ NW2d __ (2011 WL 337365, No. 294682, decided February 3, 2011)**(feb'11)**. The prosecutor appealed the trial court's order which dismissed two counts against Defendant for the manufacture of a controlled substance (marijuana). Defendant was licensed to grow marijuana under the Michigan Medical Marijuana Act (MMMA). The issue on appeal was whether King was in compliance with a specific provision under the act which required the grower to keep the marijuana in an "enclosed, locked facility," which is defined by the MMMA to mean "a closet, room, or other enclosed area equipped with locks or other security devices." Defendant was storing the marijuana in a chain link fenced kennel that had 6 foot walls and no top. Defendant

covered the walls of the kennel with black shrink-wrap in an attempt to conceal the contents of the enclosure. Additionally, the kennel was equipped with a lock, and defendant maintained the key to the lock. The trial court had held that the officers should not have seized the marijuana because defendant complied with the requirements of the MMMA. Judge Fitzgerald, in his dissenting opinion agreed. The majority, however, held that an enclosed area must be limited to things of the same kind or character as a closet or room, as set out in the MMMA. They held that an open, moveable, chain-link kennel is not of the same kind or character as a closet or room. The court ultimately found that the trial court abused its discretion by dismissing the charges against Defendant. **On June 22, 2011, the Michigan Supreme Court granted leave to appeal to determine: (1) if defendant was immune from arrest with a valid registry card; (2) whether the police were able to show the arrest was valid because the defendant was not in compliance with the requirements of the MMA (particularly the enclosed, locked facility requirement); (3) if (2) is answered in the affirmative, whether defendant may then present a defense under sections 8; and (4) whether a defendant must have complied with section 4 requirements to have a valid section 8 defense 2011 WL 2506999.**

Michigan Medical Marijuana Act (MMMA), Retroactivity. *People v Campbell*, __ Mich App __; __ NW2d __ (2010 WL 2757023, No. 291345, decided July 13, 2010)**(july'10).** Defendant was charged with manufacture and possession with intent to deliver marijuana, and other related crimes. The trial court granted a motion to dismiss, holding that the Medical Marijuana Act, MCL 333.26421 *et seq.*, should be applied retroactively. Despite precedent in other states supporting such a ruling, our court of appeals disagreed and ruled that the MMMA is prospective only. Charges were reinstated. **Leave to appeal was denied by the Michigan Supreme Court on October 8, 2010, 788 NW2d 678**.

Michigan Medical Marijuana Act (MMMA), Timing of Physician Statement. *People v Kolanek*, __ Mich App __; __ NW2d __ (2011 WL 929966, No. 295125, decided January 11, 2011**(jan'11).** On April 6, 2009 Defendant was arrested for an "altercation" that resulted in a search of his vehicle. Eight marijuana cigarettes were seized from the trunk. After a physician statement, issued on June 9, 2009, establishing the need for Defendant to use marijuana to alleviate symptoms of his Lyme disease was considered, the district court denied a motion to dismiss, primarily because Defendant did not provide evidence that he had physician approval to use marijuana under the MMMA before his arrest. The circuit court reversed, holding that the MMMA merely requires the physician to "have stated" Defendant's eligibility, not necessarily before an arrest. Here the physician stated the eligibility during court proceedings. The CA reversed, holding that the MMMA, while not requiring possession of a valid registry card at the time of arrest (see *Redden & Clark*, below), does require the provision of a physician's supporting opinion under MCL 333.26428(a)(1) prior to a defendant's arrest for a marijuana offense. **On June 22, 2011, the Michigan Supreme Court granted leave to appeal to determine whether: (1) a defendant can assert a section 8 defense without first obtaining a registry card, (2) a defendant must have complied with section 4**

requirements to have a valid section 8 defense, and (3) a defendant may present a section 8 defense after a court has denied his motion to dismiss. 2011 WL 2506995.

Michigan Medical Marijuana Act (MMMA), Registry Card and Affirmative Defense. *People v Redden & Clark,* __ Mich App __; __ NW2d __ (2010 WL 3611716, No. 295809, decided September 14, 2010)**(sep'10).** A search warrant was executed and Defendants were arrested when police found 1.5 ounces and 21 plants (section 4 of the act specifies 2.5 ounces and 12 plants, though the court noted that this is not necessarily the "reasonable" amount specified in section 8. Section 4, which prohibits arrest and prosecution if one possesses a valid registry identification card, which these Defendants did not have (they were arrested several months after the act went into effect but before the cards were issued), is distinct from the affirmative defense provided in Section 8. In order to affirmatively defend under Section 8, certain conditions must be met, including a declaration by a licensed physician, but there is no need for a registry identification card. Nonetheless, the district court erred in dismissing charges as there were "triable issues" in the case, including whether the physician in question adequately developed a "bona fide physician-patient relationship," the amount of marijuana involved, its purposes, and the existence of serious or debilitating medical conditions. Judge O'Connell's concurrence is sharply critical of the MMMA and points out that those who qualify under the act, which he would very narrowly construe, "are violating the federal Controlled Substances Act and are still subject to arrest and punishment for doing so."

Motion for Relief from Judgment under MCR 6.500, Successive, Innocence. *People v Swain,* 288 Mich App 609; 794 NW2d 92 (2010)**(june'10).** This case was brought by the University of Michigan Law School Innocence Clinic. Defendant was convicted of four counts of CSC I for fellatio with her adopted son, acts which allegedly occurred when he was five or six years old. The complainant made the allegations years later only after he was caught engaging in inappropriate behavior with a cousin. He later recanted, and he and Defendant passed lie detector tests verifying Defendant's innocence. The trial court, Conrad Sindt in Calhoun County, after hearing testimony from crucial fact witnesses who did not testify at trial, granted Defendant's successive motion for relief from judgment, finding a significant possibility that Defendant was innocent. After the court of appeals denied the prosecutor's leave application, the supreme court sent the case back to be reviewed on leave granted with specific questions. A far more conservative panel than the one that originally denied the prosecutor's leave application then reversed the trial court's grant of relief. The new panel found that there were only two ways a successive motion under MCR 6.500 could be reviewed, retroactive change in law or newly discovered evidence, and neither applied here. Moreover, Defendant could not establish a "gateway" to overcome procedural default through actual innocence. Finally, trial defense counsel's failure to investigate was not ineffective assistance of counsel. **The Michigan Supreme Court, in a 4-3 decision along party lines, denied leave to appeal on December 16, 2010, 488 Mich 992; 791 NW2d 288.**

Municipal Immunity for *Brady* Violations. *Connick v Thompson,* __ US __; 131 S Ct 1350 (2011)**(march'11).** Justice Thomas authored this opinion which reversed a fourteen-million-dollar award in favor of Thompson, who served eighteen years in prison

for murder and armed robbery before his convictions were vacated after it was discovered that prosecutors failed to turn over exculpatory evidence. The Court held that the prosecutor's office could not be held liable under Section 1983 for failing to properly train its attorneys based on a single *Brady* violation. The main issue was how one can show deliberate indifference, a required element in Thompson's failure to train claim under Section 1983. The majority held that deliberate indifference is, almost exclusively, shown by proving a pattern of similar constitutional violations. However, Justice Ginsberg wrote, in a dissenting opinion joined by three other justices, that there are many ways to demonstrate deliberate indifference short of an established pattern of violations, and the evidence presented at trial was more than sufficient for the jury to find deliberate indifference.

Newly Discovered Evidence, Non Testifying Co-Defendant. *People v Terrell*,__ Mich App __; __ NW2d __ (2010 WL 3389313, No. 286834, decided August 26, 2010)**(aug'10).** Defendant was convicted of assault with intent to murder out of a confusing fact scenario with many actors on the streets of Detroit. A co-defendant was acquitted after taking the fifth at trial. After defendant was convicted a new trial was granted by the trial court (the actual motion for new trial was not in the trial court record), on the basis of the testimony of the co-defendant (another new witness was deemed by the trial court to be cumulative, a ruling that was not appealed). The trial court held that while the testimony was not newly discovered "it was not available to defendant at the time of trial." The court of appeals analyzed this as newly discovered and, finding that exculpatory evidence provided a now willing co-defendant was "newly available" as opposed to "newly discovered," concluded that the evidence did not meet the four-part test set out in *People v Cress*, 468 Mich 678, 691; 644 NW2d 174 (2003). The court expressed concern over the unreliability of exculpatory testimony after trial by an acquitted co-defendant who had exercised the fifth at trial. Charges were reinstated. *Practice Note: Judge Shapiro's concurrence provides an excellent checklist of procedural measures the defense could utilize to properly set up this issue.* **The Michigan Supreme Court denied leave to appeal on March 23, 2011, 2011 WL 1086021.**

Parole Revocation. *People v Glass*, 288 Mich App 399; 794 NW2d 49 (2010)**(may'10).** Defendant pled guilty to larceny and was sentenced to a two-year term of probation. Roughly one year and eight months after the probation period had ended, the trial court found Defendant guilty of violating the terms of his probation (violation proceedings did not even commence until about eight months after the probation period had expired), and imposed a term of imprisonment. The trial court relied on *People v Marks*, 340 Mich. 495, 498-502; 65 NW2d 698 (1954), which in turn relied on MCL 771.2(2). In *Marks* the court held that the probationary period for a felony could not exceed five years, and that a court could modify the probation anytime during the statutory five year probation period even if the specific probationary period ordered by the court had lapsed. In this case, the circuit court misplaced its reliance on *Marks* because the court did not merely alter or amend the terms contained in defendant's original order of probation, as contemplated in MCL 771.2(2) and *Marks*. Instead, the circuit court revoked defendant's probation. The COA held that "the circuit court lacked jurisdiction to revoke defendant's probation and

impose a prison sentence. The circuit court sentenced defendant to a two-year probation period that expired on June 23, 2006. The court did not sign the bench warrant for defendant's arrest for violating the terms of his probation until February 20, 2007, at the earliest, and the court clerk did not file the warrant until March 2, 2007. Because defendant's probation period had already expired well before any probation revocation proceedings had commenced, the circuit court did not possess jurisdiction to revoke defendant's probation and sentence him to imprisonment. Therefore, we vacate defendant's prison sentence and remand this case to the circuit court so that it may discharge defendant from his probationary sentence."

Pretextual Detention Policy, Qualified Immunity. *Ashcroft v Al-Kidd,* __ US __; __ S Ct __ (2011 WL 2119110, No. 10-98, decided May 31, 2011)**(may'11).** In the wake of 9/11 the Justice Department developed a policy to use the material-witness warrant process to arrest suspected terrorists when no probable cause existed. Despite the obviously pretextual nature of the policy (in Al-Kidd's case he, a native born American citizen, was never utilized as a witness, and there was no indication he was ever seriously considered as one before he was arrested, held for 16 days and very badly treated), the Court held that Ashcroft was shielded from a civil by qualified immunity because, at the time of the arrest here, "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional."

Prosecution Costs Improperly Imposed. *People v Dilworth*, __ Mich App __; __ NW2d __ (2011 WL 228872, No. 294785, decided January 25, 2011)(**jan'11**). Defendant challenged the trial court's authority to order him to pay $1,235 in prosecution costs. The trial court must have statutory authority to order a criminal defendant to pay costs associated with the trial. Neither of the statutes that Defendant was convicted of violating provide any such authority, but the Legislature has the "authority to enact a general cost provision." The COA held that, while trial courts may impose costs of prosecution, they "must bear some reasonable relation to the expenses actually incurred in the prosecution." Because there were no details of the expenses given by the prosecution, the COA remanded the case to the trial court for further proceedings.

Sexual Delinquency, Separate Juries. *People v Breidenbach*, __ Mich __; __ NW2d __ (2011 WL 1599549, No. 294319, decided April 28, 2011)**(april'11)**. In *People v Helzer*, 404 Mich 410; 273 NW2d 44 (1978), the MSC held that when a criminal defendant is charged with being a sexually delinquent person in relation to an underlying sexual offense, separate juries must determine a defendant's guilt of the sexual delinquency charge and the underlying charge. In this case, defendant was convicted by a single jury of "indecent exposure as a sexually delinquent person." The trial court granted defendant's motion for a new trial after the Court of Appeals vacated his conviction on the ground that the first trial violated his procedural rights under *Helzer*. The prosecutor appealed, arguing that *Helzer* was wrongly decided. The MSC agreed, and overruled *Helzer* in part, concluding that because the sexual delinquency statute, MCL 767.61a, neither explicitly nor implicitly requires that a separate jury determine the issue of sexual delinquency apart from the primary offense, the *Helzer* Court erred when it created a compulsory rule to that effect. The Court held that separate jury trials are discretionary,

not mandatory. The court added that determinations on whether separate juries are needed should be made on a case-by-case basis.

Sex Offender Registration, Continuing Jurisdiction. *People v Lee*, 288 Mich App 739; 794 NW2d 862 (2010)**(june'10).** A year after Defendant entered a nolo plea to third degree child abuse and was sentenced to five years probation (plus ten weekends in jail), the prosecutor brought a motion to require SORA registration. The defendant had flicked the complainant's penis in anger over the failure of the complainant to put his pajamas on. The panel approved the fact finding and the decision of the circuit court to place Defendant on the SORA registry, and made a determination that the circuit court has jurisdiction to entertain a request for SORA registration until a defendant completes any term of probation. **On November 24, 2010, the Michigan Supreme Court granted leave to appeal to determine whether the circuit court could order registration after the Defendant began serving his sentence and whether touching of genitals constitutes a sexual offense requiring registration on these facts, 488 Mich 953; 790 NW2d 823.**

Sex Offender Registration, Minors, Cruel and Unusual. *In re TD,* __ Mich App __; __ NW2d __ (2011 WL 2090903, No. 294716, decided May 26, 2011). Juvenile registration on public list is not cruel and unusual punishment. But see concurrence of Judge Amy Krause.

Sex Offender Registration, Homeless. In *People v Dowdy*, 287 Mich App 278; 787 NW2d 131 (2010), the court of appeals held that homeless people could not be prosecuted for failing to register, though the panel urged the legislature to fix the "problem." **The Michigan Supreme Court granted leave to appeal in this case on May 28, 2010, 486 Mich 935; 782 NW2d 200, and the case was argued on November 15, 2010 by Christine Pagac of the State Appellate Defender Office.** Four of the current justices have tipped their hand on this issue in an earlier order, 484 Mich 855; 769 NW2d 648.

Sex Offender Registration, Federal SORNA - Offender Cannot Be Penalized for Failure to Register that Occurred Before Act was Enacted. *Carr v United States*, __ US __; 130 S Ct 2229; 176 L Ed 2d 1152 (2010)**(june'10).** The Court held that the Sex Offender Registration and Notification Act (SORNA), enacted by Congress in 2006, did not intend to penalize an offender for failure to update their registration regarding interstate travel that took place before the Act's enactment. Defendant pled guilty to first-degree sex abuse and registered as an offender in Alabama in 2004. In 2005, he moved to Indiana but failed to register there. In 2007, he was charged with failing to register under SORNA. The Supreme Court reversed and remanded.

G. SCOTUS PREVIEW (Courtesy of Professor David A. Moran)

I. Search and Seizure

A. Administrative and "Special Needs" Searches

***Camreta v. Greene* & *Alford v. Greene* (argued March 1, 2011)**
Does the Fourth Amendment requires a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused?

***Florence v. Board of Freeholders* (to be argued Nov. 2011)**
Does the Fourth Amendment require that jail officials have reasonable suspicion to strip-search arrestees who have been arrested for civil infractions or minor crimes not involving contraband or weapons?

B. Exigencies

***Kentucky v. King* (argued January 12, 2011)**
If the police, engaged in lawful activity, create an "exigency," are the police thereby barred from using the exigency exception to the search warrant requirement?

C. Exclusionary Rule

***Davis v. United States* (argued March 21, 2011)**
If the police perform a search relying on precedent later overturned (in this case, *New York v. Belton*, overturned in *Arizona v. Gant*), should the evidence be admitted under the "good faith exception?"

II. Confessions

A. *Miranda* Issues-Custody

***J.D.B. v. North Carolina* (argued March 23, 2011)**
For purposes of the *Miranda* objective test to determine whether a suspect reasonably believes he/she is in custody, should the court take into account that the suspect is a child (13 years old in this case)?

***Howe v. Fields* (to be argued Oct. 2011)**
Is a prisoner in custody for purposes of *Miranda* if he is incarcerated for an offense unrelated to the subject of the questioning when he is taken to an isolated area of the prison facility and questioned about conduct occurring outside the prison?

III. Right to Counsel

A. Scope of the Right

***Turner v. Rogers* (argued March 23, 2011)**
Does a defendant have the right to counsel before being incarcerated for civil contempt (in this case, for failing to pay child support)?

B. Ineffective Assistance of Counsel

***Missouri v. Frye & Lafler v. Cooper* (to be argued Oct. 2011)**
Does the 6th Amendment provide a remedy for a defendant who rejected a plea as a result of deficient representation during plea bargaining and who was subsequently convicted and sentenced after a fair trial?

IV. Miscellaneous Trial Issues

A. Confrontation Rights—Testimonial Evidence

***Bullcoming v. New Mexico* (argued March 2, 2011)**
Is confrontation satisfied where a lab report is introduced when the lab analyst who performed a particular test is not available to testify but another analyst is available to testify about the testing procedures generally?

V. Post-Conviction Relief

A. AEDPA Standards of Review

***Greene v. Fisher* (to be argued Nov. 2011)**
If a new decision of the U.S. Supreme Court is issued after the last state court decision on the merits but before the conclusion of direct review (i.e., after the state court of appeals decision but before the state supreme court denies review), is that new U.S. Supreme Court decision "clearly established law" for purposes of federal habeas corpus review?

II. Legislation

The following are brief summaries of key legislation. These summaries were provided in part courtesy of Chari Grove, who compiles this material for the Criminal Defense Newsletter published by the State Appellate Defender Office. For a comprehensive review of all pertinent legislation in the criminal area, go to http://www.michiganprosecutor.org/ and download Tom Robertson's excellent compilations (select Prosecuting Attorneys Coordinating Council, click on downloads, then go to criminal law update for the year desired). Some of this legislation is extremely complex, and a full understanding demands that the public acts be read completely. Copies of the legislation can be obtained at http://www.michiganlegislature.org/.

Increased Penalties for Animal Cruelty

2008 PA 339 [HB 4552, eff. 1-1-09] amends MCL 750.50b. The animal cruelty statute is re-worded to include "committing a reckless act knowing or having reason to know that it would cause an animal to be killed, tortured, mutilated maimed or disfigured." The maximum fine is $5000.00 for a single animal, and $2500.00 for each additional animal involved in the violation, not to exceed $20,000.00. The Act also exempts veterinarians and specifies that the law does not apply to killing a dog pursuant to the Dog Law (which allows killing any dog pursuing or wounding livestock or attacking people.)

Out of State Violations May Enhance Drunk Driving Penalties

2008 PA 341 [HB 5160, eff. 1-1-09] amends MCL 257.625. This Act amends the vehicle code to revise the definition of "prior conviction" for which an enhanced penalty would apply to include convictions under "a law of the United States substantially corresponding to a law in this state."

DNA Testing Required for Certain Crimes

2008 PA 380 [HB 4092, eff. 7-1-09] amends MCL 750.520m. The penal code is amended to require a person to provide a DNA sample if he or she were arrested for a "violent felony," as defined in Section 36 of the Corrections Code, which deals with parole orders.

Adult Foster Care, Nursing Home, and Mental Health Facilities

2008 PA 442, 444 and 446 [SB 1578, HB 6627 and SB 1580, eff. 10-31-2010] amends MCL 333.20173a and MCL 333.1134a. PA 442 amends the Adult Foster Care Facility Licensing Act, PA 444 amends the Public Health Code, and PA 446 amends the Public Health Code and Mental Health Code to prohibit an adult foster care facility from employing an individual who has been convicted of a moving violation causing death within the previous five years.

Reckless Driving

2008 PA 466 and 467 [HB 6629 and 6630, eff. 10-31-2010] amends MCL 769.1f and MCL 777.12g, 777.16p. PA 466 will allow the court to order an individual convicted of either a moving violation causing death/serious injury or reckless driving causing death/serious injury to reimburse the state or local unit of government for expenses related to the incident. PA 467 includes the following offenses in the sentencing guidelines: reckless driving causing serous impairment, a Class E felony against a person with a maximum sentence of 5 years, and reckless driving causing death, a Class C felony against a person with a maximum sentence of 15 years in prison.

Theft of Catalytic Converter

2008 PA 475 and 476 [SB 1193 and HB 6022, eff. 5-1-09] amends MCL 750.356a. These Acts make theft of a catalytic converter a felony punishable by up to five years in prison and/or a maximum fine of $10,000. This law is in response to the recent trend of thefts of precious metals; catalytic converters contain small amounts of precious metal, usually platinum.

Derailment of a Streetcar

2008 PA 484 [HB 6625, eff.1-12-09] amends MCL 777.14m. PA 484 includes in the sentencing guidelines the offense of causing derailment of a streetcar or endangering the life of a person working or traveling by streetcar, a Class A felony against public safety with a maximum sentence of life in prison.

Restitution

2009 PA 27 and 28 [SB 145 and 146, eff. 7-1-09] amends MCL 769.1a. This Act amends the Code of Criminal Procedure (PA 28 amends the Crime Victim's Rights Act) to refer to the fair market value of damaged, lost, or destroyed property subject to a restitution order, and requires the replacement value of the property to used if the fair market value cannot be determined or ascertained. The Act applies only to crimes committed on or after July 1, 2009.

Special Alternative Incarceration Program (Boot Camp)

2009 PA 107 [HB 5311, eff. 10-1-2009] amends MCL 208.1515. This Act eliminates the “sunset” of September 30, 2009, on prisoner participation in the special alternative incarceration (SAI, or "boot camp") program. Prisoner participation in the "boot camp" program is allowed to continue. (According to the MDOC, the department is engaging in efforts to educate judges about the redesigned boot camp program, which is now less militaristic and more treatment and rehabilitation oriented.)

Search Warrant Expansion

2009 PA 10 and 11 [HB 4096 AND SB 188, eff. immediately] amend MCL 780.652 and MCL 780.651 and 780.654. These Acts amend Public Act 189 of 1966, which regulates the issuance of search warrants, to allow a warrant to be issued to search for and seize (in addition to property stolen or used in the commission of a crime) a *person* who is the subject of either of the following:

-- An arrest warrant for the apprehension of a person charged with a crime.
-- A bench warrant issued in a criminal case.

Personal Protection Order for Victim of Sexual Assault

PA 19 and PA 20 [HB 4222 and 4221, eff. 3-25-10] amends MCL 600.2950a and MCL 28.422. PA 19 allows a victim of sexual assault, or a victim threatened with sexual assault, to petition for a PPO. This would apply to situations in which the individual the PPO was against (respondent) had been convicted of sexually assaulting the petitioner or had been convicted of furnishing obscene material to a minor. The PPO would have to be granted if the court determined that the respondent had been convicted of sexually assaulting or furnishing obscene material to the petitioner. In addition, the bill would apply to a person who had been subjected to, threatened with, or placed in reasonable apprehension of sexual assault by another person. PA 20 revises reference to the personal protection order section of the CCW act to include the provision in PA 19.

Prohibition Against Re-Use of Medical Device

2010 PA 25 and PA 26 [SB 528 and SB 825, eff. 3-26-10] amends MCL 333.1101 to 333.25211 and MCL 777.13n. PA 25 amends the Public Health Code to prohibit a health care provider from knowingly reusing, recycling, refurbishing for reuse, or providing for reuse a single-use device, subject to certain exceptions. PA 26 amends the Code of Criminal Procedure to include reuse of a single-use medical device in the sentencing guidelines. The offense would be a Class D felony against public safety punishable by up to 10 years in prison.

Texting While Driving

2010 PA 58, 59, 60 [HB 4394, SB 468, HB 4370, eff. 7-1-2010] amends MCL 257.320a. PA 60 provides that a person may not read, manually type, or send a text message on a wireless two-way communication device, including a wireless phone, that is located in the person's hand or lap, while operating a moving motor vehicle on a street or highway in the State. "Wireless two-way communication device" does not include a global positioning or navigation system that is affixed to the vehicle. There are exceptions for emergencies, such as to report a traffic accident or road hazard and to report or avert a potential criminal act.

PA 59 provides that texting while driving is a civil infraction, subject to a mandatory civil fine of $100 for a first violation and $200 for a subsequent violation.

PA 58 prohibits points from being entered on a person's driving record for a violation of the prohibition in PA 60.

Repealed Laws

2010 PA 95, 96, 98, 99, 100 [HB 6137, 6136, SB 760-767, eff. 6-22-2010] amends MCL 750.171, MCL 750.442 - 752.447. These Acts repeal the following crimes and their respective sentences:

Engaging in or challenging to fight a duel with a deadly weapon. (PA 96, 95).

Engaging in a prize fight; training of any party to a prize fight; being present willfully at a prize fight; publishing notice or inviting any person to attend a prize fight. (PA 97, 98, 99).

Repeal of Law Prohibiting Forced Marriage

2010 PA 102 [SB 763, eff. 6-25-2010] amends MCL 750.11 and MCL 750.12. This Act repeals the statute making it a felony for a person to take any woman unlawfully and against her will, and by force, menace, or duress, compel her to marry him or any other person, or to be defiled. The offense was punishable by imprisonment for life or any term of years. Also repealed is the statute making it a felony, punishable by up to 10 years' imprisonment, for a person to take a woman unlawfully and against her will with intent to compel her by force, menace, or duress to marry him or another person, or to be defiled.

Installation of Tracking Devices

2010 PA 107 [SB 325, eff. 8/1/2010] amends MCL 750.1 - 750.568. PA 107 makes it a crime to install or place a tracking device on a person's vehicle without that person's knowledge and consent. It is a misdemeanor punishable by imprisonment for not more than one year and/or a fine of not more than $1,000. There are numerous exceptions (for police officers, to provide diagnostic services, by a parent or guardian of a child less than 18 years of age, and others). The rationale for this offense is that GPS and other electronic devices have been used by stalkers to locate their victims.

Energy Theft Made a Separate Crime

2010 PA 129 and 130 [SB 1311 and 1312, eff. 10-19-10], amends MCL 750.1 to 750.568; MCL 777.16o. PA 129 makes it a felony to sell or transfer, or attempt to sell or transfer, the product or service of an electric or natural gas provider to any other person, knowing or having reason to know that the product or service was obtained illegally. It was reported that energy theft has been on the rise due to the economic

downturn of the last several years. A first offense is punishable by imprisonment for not more than five years, a fine of not more than $5,000, or both. A second or subsequent offense is punishable by imprisonment for not more than five years, a fine of not more than $10,000, or both.

PA 130 amends the Code of Criminal Procedure to add this new felony offense to the sentencing guidelines as a Class E felony against property with a statutory maximum of five years.

Assaulting a Public Utility Employee

2010 PA 131 and 132 [SB 1313 and 1314, eff. 10-19-10], amends MCL 750.1 to 750.568; MCL 777.16d. PA 131 makes it a misdemeanor for a person to assault or batter a public utility employee or contractor while the employee or contractor was performing his/her duties or because of the individual's status as a public utility employee or contractor. This offense is punishable by imprisonment for not more than one year, a fine of not more than $1,000, or both.

If bodily injury requiring medical attention is involved, the offense is a felony punishable by imprisonment for not more than two years, and if serious impairment of a body function results, it is a five-year felony.

PA 132 amends the Code of Criminal Procedure to add the felony violations to the sentencing guidelines. An assault on a utility worker causing bodily injury requiring medical attention is a Class G felony against a person with a statutory maximum of two years. An assault on a utility worker causing serious impairment of a body function is a Class E felony against a person with a statutory maximum of five years.

Drunk Driving Enhancement

2010 PA 155 [SB 795, eff.: 1/1/2011] amends MCL 257.219 et al. This Act requires the secretary of state to issue a restricted license to a person whose license was suspended, restricted, revoked, or denied based on two or more convictions of driving while intoxicated or while impaired. In order for a restricted license to be issued, the person's license has to be suspended or revoked for 45 days, the driver must be admitted into a DWI/sobriety court, and an ignition interlock device must be installed on each of the driver's vehicles. A person who is issued a restricted license under the Act is prohibited from being considered for an unrestricted license until the court notifies the secretary of state that he or she has successfully completed the DWI/sobriety court program, or the minimum period of license sanction otherwise required has been completed, whichever is later.

2010 PA 154 [SB 5273, eff. 9-2-10] amends MCL 600 to 600.9946. PA 154 creates a three-year DWI/sobriety court interlock pilot project beginning on January 1, 2011, for individuals convicted of two or more violations of operating a vehicle while intoxicated or while impaired. A participating DWI/sobriety court judge will certify to

the secretary of state that a person seeking a restricted license has been admitted to a DWI/sobriety court and that an interlock device has been placed on each vehicle owned or operated by that person. The bill defines "DWI/sobriety courts" as the specialized court programs established within judicial circuits and districts throughout Michigan that are designed to reduce recidivism among alcohol offenders and that comply with the 10 guiding principles of DWI courts as promulgated by the National Center for DWI Courts.

New Additions to List of Schedule 1 Controlled Substances

2010 PA 169 and 171 [HB 6226 and 6038, eff. 10-1-10] amend MCL 333.7403, 333.7404, 333.7212, 333.7218.

PA 171 adds certain synthetic cannabinoids, certain Ecstasy-like stimulants commonly known as BZP, and other substances (MCPP, TFMPP, 2C-B-PZB) to the list of Schedule 1 controlled substances. It also includes Cathine in the list of Schedule 4 controlled substances, and adds the following to Schedule 1:

- Mephradone (4-methylmethcathinone), also known as 4-MMC, M-CAT, Meow Meow, Bounce, Bubbles, and Mad Cow.
- 4-methyl-alpha-pyrrolidinobutyrophenone, also known as MPBP.
- Catha Edulis (except for Cathinone and Cathine), also known as Khat or Qat.
- Cathinone.
- Salvia Divinorum.
- Salvinorin A.

PA 169 extends the penalties for possession and use of marihuana and other controlled substances to the possession and use of the substances listed in PA 169. (The penalties for possession of synthetics cannabinoids are the same as for marihuana, and the penalties for BZP, MCPP, TFMPP, 2C-B-PZB are the same as for possessing ecstasy or an analogue).

2010 PA 170 [SB 5920, eff. 10-1-10] amends MCL 777.13m. The Code of Criminal Procedure is amended to include the delivery or manufacture and the possession of N-Benzylpiperazine (an Ecstasy alternative, commonly known as "BZP") in the sentencing guidelines that currently apply to the delivery or manufacture and the possession of Ecstasy. (Delivery or manufacture of Ecstasy is a Class B controlled substance felony, punishable by up to 20 years' imprisonment. Possession of Ecstasy is a Class D controlled substance felony, punishable by up to 10 years' imprisonment).

PA 170 also adds a sentencing guidelines classification for unlawfully dispensing an out-of-State prescription. A violation constitutes a Class G controlled substance felony, punishable by up to two years' imprisonment.

Drug Court Requirement Changed

2010 PA 177 [SB 1354, eff. 9-30-10], amends MCL 600.1062 and 600.1068. This Act provides that the requirement to have a memorandum of understanding (MOU) in order to adopt or institute a drug treatment court applies only to a drug treatment court that includes in its program individuals who may be eligible for discharge and dismissal of an offense or delayed sentence, or individuals eligible for deviation from the sentencing guidelines.

Boot Camp Extended/Revised

2010 PA 194 [HB 4538, eff. 9-30-10], amends 791.234e. The Special Alternative Incarceration (Boot Camp) program was scheduled to sunset on 9/30/10 and the bill extends the sunset to 9/30/12. The bill also adds home invasion (MCL 750.110a) to breaking and entering as offenses requiring a minimum sentence of 24 months or less to be eligible for enrollment in SAI. For all other eligible crimes, the minimum sentence must be 36 months or less.

Parole to Deportation

2010 PA 223 [HB 4130, eff. 3-30-11], adds MCL 791.234b. The bill allows prisoners to be paroled after serving half of their minimum sentence if deportation will immediately follow. Those serving time for first or second degree murder or criminal sexual conduct, and habitual offenders, are not eligible.

Provision of Presentence Reports

2010 PA's 247 & 248 [HB 6389; SB 1491, eff. 12-14-10], amends MCL 791.229 & 771.14. Copies of presentence reports, which must be given to the defense, including to a defendant who is not represented, and to the prosecution at least two business days prior to sentencing, can now be retained by the defense and prosecution. Victim or witness phone numbers and addresses may not be included except in limited circumstances.

Guidelines for Gang Recruitment/Retaliation

2010 PA 278 [SB 713, eff. 12-16-10], adds MCL 777.16t. In 2008 the legislature added a crime for gang recruitment and for retaliation for withdrawal from a gang. The bill enacts guidelines for these felonies. Gang recruitment is a Class E felony against a person with a statutory maximum of five years. Retaliation for withdrawal is a Class B felony with a twenty-year maximum.

Identity Theft Package

2010 PA's 314-319 [HB 4325, SB's 223, 225, 226, 149, 150, eff. 4-1-11], adds MCL 445.74-445.74d, amends MCL 445.69, MCL 762.10c, MCL 777.14h, MCL 445.63, MCL 777.14h. The package provides for forfeiture of property used in committing identity theft and specify graduated penalties for second, third or subsequent violations of

the Act that are felonies, allowing up to 15 years incarceration. Guidelines sentences are provided for the expanded penalties. Other provisions in the package would allow identity theft crimes to be prosecuted in the jurisdiction in which the offense occurred, in which the information used to commit the violation was illegally used, or in which the victim lives. If more than one violation is charged and more than one jurisdiction is available, all violations can be prosecuted in any of the available jurisdictions. The package also prohibits and provides sentence guidelines for "Phishing," the practice of luring unsuspecting victims into linking to other websites and providing financial or personal identity information.

Controlled Substances, Parole and Penalty Package

2010 PA's 351-353 [HB's 4918-4920, eff. 12-22-10], amends MCL 771.2, MCL 333.7401, MCL 333.7403, MCL 791.234, MCL 769.10. The package extends the probation and sentencing reforms, effective March 1, 2003, in the area of controlled substance violations.

New "Doctor Shopping" Felony and Guidelines

2010 PA's 354 & 355 [HB's 6026 & 6027, eff. 12-22-10], amends MCL 333.7403a, MCL 777.13m. The bills add a four-year felony for fraudulently obtaining or attempting to obtain a controlled substance or a prescription for a controlled substance from a health care provider and provide sentencing guidelines.

Human Trafficking Package

2010 PA's 360-364 [HB's 5575-5579, eff. 4-1-11], amends MCL 750.462j, MCL 777.16w, MCL 750.159g, MCL 600.4701, MCL 780.766b. The package of bills creates a ten-year felony for obtaining the labor of another through force, fraud, or coercion, or recruiting, harboring, or transporting for involuntary servitude or debt bondage. Sentences would be increased to 20 years if the violation involved a minor, a commercial sex act or serious physical harm, and life if the violation resulted in a death. Guidelines are provided and the penal code is amended to make violations racketeering offenses. Property used in the offenses would be subject to seizure, and the Crime Victim's Rights Act was amended to require a court sentencing on trafficking offenses to order restitution for the full amount of loss suffered by a victim.

Charitable Organizations and Solicitations Act Revisions

2010 PA's 377 & 378 [SB's 1528 & 1577, eff. 3-30-11], amends MCL 400.272 et seq, MCL 777.14a. The bills make a plethora of revisions to the Charitable Organizations and Solicitations Act, requiring registration rather than licensing, increasing the exemption to $25,000 per year, making some violations of the Act a five-year felony, and allowing prosecution by county prosecutors. Guidelines are provided (Class E felony against the public trust).

Sex Offender Registration Revisions

2011 PA's 17-19 [SB's 188-189, 206, eff. 4-12-11 & 7-1-11], amends MCL 28.722, MCL 28.726, MCL 777.11b. The bills revise many of the reporting and record keeping requirements, changes mandated by the Federal Sex Offender Registration and Notification Act (SORNA). Offenses are categorized into three tiers, with Tier I offenders reporting for 15 years annually, Tier II for 25 years biannually, and Tier III for life, quarterly. Tier I offenders would be permitted to petition for discontinuing registration after ten years had elapsed from conviction or end of confinement. Reporting requirements are ended for some "Romeo and Juliet" offenders if the acts were consensual and the offender was not more than three or four years older than the victim.