CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

Advanced Criminal Defense Practice Conference

RECENT DEVELOPMENTS IN MICHIGAN CRIMINAL LAW

F. Martin Tieber

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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 (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.

Emergency Aid, Warrantless Entry. *Michigan v Fisher*, __ US __;130 S Ct 546 (2009)**(dec'09).**Two Michigan police offers responded to a disturbance complaint. The officers found a household in chaos: a pickup truck in the driveway with its front smashed, damaged fence posts, and three broken house windows, the glass still on the ground outside. They also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. Through a window, they could see the defendant inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door. The officers knocked, but the defendant refused to answer – they saw that he was bleeding from the hand and asked him whether he needed medical attention. The defendant continued to ignore them and told them to get a search warrant. One officer then entered the house and was met by the defendant pointing a gun at him. The defendant was charged with assault with a dangerous weapon and possession of a firearm during the commission of a felony. The US Supreme Court has previously held that searches and seizures inside a home without a warrant are presumptively unreasonable, but that presumption can be overcome. For example, "the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." *Mincey v Arizona*, 437 US 385, (1978) at 393. One such exigency is the need to help the seriously injured or individuals in danger of injuring themselves. *Brigham City v Stuart*, 547 US 398 (2006). Therefore, law enforcement officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Id.* This exigency requires only an objective reasonable basis that a person inside the house is in need of immediate aid. *Mincey* at 392. In this case, the officers responding to the situation had reason to believe the defendant or any unknown individuals in his house were in danger, accordingly, the Court held that officer's warrantless entry into defendant's residence was reasonable. Justices Stevens and Sotomayor dissented.

Investigative Subpoena, Michigan Campaign Finance Act. *In re Investigative Subpoenas,* 286 Mich App 201; __ NW2d __ (2009)**(nov'09).** The trial court refused to issue investigative subpoenas sought by the Grand Traverse prosecutor against Meijer Incorporated and Dickinson Wright in relation to an allegation that Meijer violated the MCFA in relation to township trustee recall elections, finding that the Secretary of State alone had the power to enforce the MCFA. Employing principles of statutory construction, the court held that the MCFA did not divest local prosecutors of the power of enforcement with respect to violations.

Search of Vehicle, Passenger Secured. *People v Mungo*, __ Mich App __; __ NW2d __ (2010 WL 1461620, No. 269250, April 13, 2010)**(april'10).** The prosecutor appealed the trial court's order granting defendant's motion to suppress evidence and quash the information. Previously, the COA reversed the circuit court's order, holding that "a police officer may search a car incident to a passenger's arrest where before the search there was no probable cause to believe that the car contained contraband or that the driver and owner of the car had engaged in any unlawful activity." Mungo appealed to our Supreme Court, which held the application for leave to appeal in abeyance pending release of the United States Supreme Court decision in *Arizona v. Gant*, 556 U.S. ----, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). In April of 2009, the United States Supreme Court issued an opinion in *Gant*, which held that **a vehicle may not be searched "incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle."** Id. at 1714. Consequently, the MSC vacated the COA decision in *Mungo* and remanded for reconsideration in light of *Gant*. On remand, the COA affirmed the circuit court's order suppressing evidence and quashing the Information.

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 *Mungo*, above. 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."

Search of Vehicle, Warrantless, Anonymous Tip, School Property. *People v Perreault,* 287 Mich App 168; 782 NW2d 526 (2010)**(jan'10).** A fairly vague (at least as to this defendant) anonymous tip came in from a purportedly reformed drug user indicating that a high school student was dealing drugs out of his truck at Traverse City Central High School. Without additional corroboration the assistant principal searched Defendant's vehicle on school grounds, without a warrant, and found a bag of marijuana. Judge Power refused to suppress the marijuana and Defendant was convicted. The court of appeals (Talbot joined with Davis in the majority opinion, with O'Connell dissenting),

after thoroughly examining the anonymous tip and events between receipt of the tip and the warrantless search, held that the totality of circumstances did not support a warrantless search of Defendant's vehicle. The dissent focused on the fact that the search was conducted by an assistant principal on school grounds and determined there was "reasonable suspicion" to support the search. On May 21, 2010, the Michigan Supreme Court, with Justices Cavanagh and Kelly dissenting, reversed pursuant to the reasoning in Judge O'Connell's dissenting opinion. Justice Markman added additional reasoning supporting the warrantless search. *People v Perreault*, 486 Mich 914; 781 NW2d 796 (2010)**(may'10).**

B. Other Pretrial Matters.

Confession, Break in "Miranda Custsody." *Maryland v Shatzer*, __ US __; 130 S Ct 1213 (2010)**(feb'10**). In 2003, the defendant was in prison for a prior charge when he was questioned by a detective about the molestation of his son. He invoked his *Miranda* right to counsel during interrogation and the interview was terminated. Three years later, another detective questioned the defendant, who was still in prison. This time he waived his *Miranda* rights and made incriminating statements. The trial court refused to suppress the statements, ruling that the bright-line rule from *Edwards v Arizona,* 451 US 477, which mandates that a suspect who has invoked his right to the presence of counsel during custodial interrogation is not subject to further interrogation until either counsel has been made available, or the suspect himself further initiates exchanges with the police, was not applicable in this case since the defendant had been released back into the prison population for 3 whole years between the two interrogations. The US Supreme Court agreed, finding that since the defendant had a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, the *Edwards* rule does not call for the suppression of his 2006 statements.

Confession, Defendant's Silence Through Most of Interrogation Does Not Invoke Right to Remain Silent. *Berghuis v Thompkins*, __ US __; 130 S Ct 2250 (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, Proper Reading of Miranda. *Florida v Powell*, __ US __; 130 S Ct 1195 (2010)**(feb'10**). While arresting the defendant, Tampa Police read him his *Miranda* rights, stating, "You have the right to talk to a lawyer before answering any of our questions" and "[y]ou have the right to use any of these rights at any time you want during this interview." Defendant then admitted that he, a convicted felon, was the owner of a handgun found when the police performed a search. He was charged with possession of a weapon by a convicted felon under Florida law. Defendant argued that the *Miranda* warnings he was read by the police did not properly convey to him that he had a right to an attorney during questioning. He also objected to the United State Supreme Court's jurisdiction over the case, contending that since the Florida Supreme Court relied on the Florida Constitution when making its decision the US Supreme Court could not interfere. The US Supreme Court held that it had jurisdiction to hear the case because although the Florida Supreme Court referenced the state constitution, as well as *Miranda*, in making its decision, it cannot be deemed from the face of that court's opinion that its decision rested on a "bona fide separate, adequate, and independent" state ground separate from *Miranda.* The US Supreme Court also found that the police officer's reading of *Miranda* was enough to alert the defendant to his right to a lawyer at any time, including during interrogation. The high Court has never laid out the exact words in which *Miranda* warnings must be conveyed, and as long as the essential information is reported to the listener, the semantics used may vary. *California v Prysock*, 453 US 355, at 359. To determine whether police warnings meet the standard courts should examine them to make sure they reasonably convey to a suspect his rights as required by *Miranda*. *Duckworth v Eagan*, 492 US 195 at 203.

Disqualification of Prosecutor Who Previously Represented Defendant. *People v Davenport,* 286 Mich App 191; __ NW2d __ (2009)**(nov'09).** After remanding for a second time (280 Mich App 464) to assess prejudice where Defendant's previous counsel moved to the prosecutor's office handling the case, the court found that the hearing provided sufficient evidence that the prosecutor's office implemented sufficient procedures to segregate former defense counsel from communications involving the case. Therefore, there was insufficient prejudice to Defendant to require reversal.

Double Jeopardy, CSC, Multiple Punishment for Single Penetration Okay. *People v Garland*, 286 Mich App 1; __ NW2d __ (2009) **(oct'09)**. Defendant challenged conviction of four counts of CSC based on two penetrations. Applying the *Blockburger* test, the court found that convictions of CSC 1 (during the commission of a felony) and CSC 3 (reason to know victim was physically helpless) for a single penetration was appropriate because each offense contains an element that the other does not.

Double Jeopardy, Multiple Counts of Home Invasion. *People v Baker*, __ Mich App __; __ NW2d __ (2010 WL 1875652, No. 286769, May 11, 2010)**(may'10).** Defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (during felony) and MCL 750.520b(1)(e) (weapon used), two counts of

first-degree home invasion, MCL 750.110(a)(2), and one count of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to 30-50 years on the CSC 1 counts, and 10-20 years on the home invasion counts. Defendant entered the victim's apartment, beat, and sexually assaulted her. When the victim managed to free her hands and uncover her eyes, defendant attacked her with a knife. The victim recognized defendant, because she had hired him to install cable television in her apartment a few days before. The victim escaped from defendant and fled into the hallway outside her apartment, where neighbors found her and called the police. Defendant fled, but was apprehended a few days later. Defendant only attacked the home invasion charges. He argued that his two convictions for first-degree home invasion arose from the same offense and, consequently, violated his constitutional protections against double jeopardy. The COA agreed, holding that, because "the home invasion was continuous, involving both sexual acts and committed with the intent to commit a larceny, while armed with a knife," his convictions for two separate counts of home invasion constitute a double jeopardy violation.

Double Jeopardy, CSC, Retrial Prohibited after Erroneous Dismissal. *People v Szalma,* __ Mich __; __ NW2d __ (2010 WL 3361723, No. 140021, decided August 26, 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.

Double Jeopardy, Retrial after Directed Verdict of Acquittal. *People v Evans*, __ Mich App __; __ NW2d __ (2010 WL 1925832, No. 290833, May 13, 2010)**(may'10).** Defendant was charged with burning of other real property under MCL 750.73. At the end of the prosecution's proofs, Defendant moved for a directed verdict which was granted by the trial court. The issue was whether the statute required that the property must not be a dwelling. The Defendant's position was that the crime charged pertained to the burning of property other than a dwelling house and argued the prosecution had not established that the building that burned was not a dwelling house. The trial court agreed. The court of appeals reversed and held that the statute does not require the property to be a non-dwelling house. Furthermore, the COA held that double jeopardy protections did not apply, as the trial court's directed verdict of acquittal was premised on an error of law. The trial court never discussed or resolved factual issues. Contrast the supreme court's decision in *People v Szalma*, above. The distinction between the two cases appears to be that in *Szalma*, the prosecutor was in accord with the trial court's legal error.

Double Jeopardy, Retrial after Hung Jury. *Renico v Lett,* __ US __; 130 S Ct 1855 (2010)(m**ay'10**). Defendant was charged with first-degree murder, and after deliberating less than nine hours the undecided jury approached the judge, who after questioning them, declared a mistrial. The judge scheduled a new trial, and after less than four hours, the jury found the defendant guilty of second-degree murder. Defendant argued that there was no manifest necessity present after the first mistrial and that the judge violated the Double Jeopardy Clause when she held a second trial. The Supreme Court held that the Michigan supreme court's ruling that retrial was not barred by the Double Jeopardy clause was reasonable because it succinctly applied SCOTUS precedent to the case. The Michigan supreme court correctly stated the manifest necessity standard for granting a mistrial, and noted that the jury seemed to go through intense deliberations from their notes, and answers to questioning from the judge. Because the Michigan supreme court did not make an "unreasonable application" of "clearly established federal law" under AEDPA, the Sixth Circuit incorrectly granted habeas relief.

Interlocutory Appeal off Motion to Suppress. *People v Richmond,* 486 Mich 29; 782 NW2d 187 (2010)**(april'10).** Defendant prevailed on a motion to suppress in a marijuana and firearm case in Wayne County under *People v Keller*, 270 Mich App 446; 716 NW2d 311 (2006) (insufficiency of affidavit in support of the warrant – trash pull uncovering minute evidence of marijuana). After noting that *Keller* had been reversed (479 Mich 467; 739 NW2d 505 (2007) the court of appeals, in an unpublished opinion in 2008, ordered the charges reinstated in *Richmond*. After initially denying leave, despite a protest from Justice Markman, the supreme court granted leave and held that because the Wayne County prosecutor voluntarily dismissed charges after the trial court granted the suppression motion there was no case in existence, and therefore no base from which to mount an interlocutory appeal. On June 28, 2010, the supreme court, on a prosecution rehearing motion, issued an order paving the way for reinstatement of charges by the prosecutor.

Jurisdiction, Circuit Court over Misdemeanors. *People v Reid,* __ Mich App __; __ NW2d __ (No. 286784, decided June 10, 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.

Speedy Trial, Federal Speedy Trial Act. *Bloate v US*, __ US __; 130 S Ct 1345 (2010)**(march'10**). Defendant was indicted on federal drug and firearm charges in Missouri. The indictment occurred on August 24, 2006, which commenced the 70 day clock of the Speedy Trial Act. On September 7, 2006 the court granted defendant's motion to extend the pretrial motion deadline, and on the new due date, September 25, defendant waived his right to file pretrial motions. That waiver was found voluntary and intelligent on October 4. Over the next 90 days the trial was delayed several times,

sometimes at defendant's request. After 179 days he moved to dismiss on speedy trial grounds. The District Court denied the motion, excluding the time from September 7-October 4 as pretrial motion preparation time. Defendant was convicted and sentenced to 360 months in prison. The Eighth Circuit Court of Appeals affirmed the District Court's decision. The Supreme Court reversed and remanded, holding that the Speedy Trial Act of 1974 requires a criminal defendant's trial to begin within 70 days of his indictment or initial appearance, 18 USC §3161(c)(1), and entitles him to dismissal of the charges if that deadline is not met, §3162(a)(2). The Act automatically excludes from the 70 day period "delay resulting from … proceedings concerning the defendant," 18 USC §3161(h)(1). The Eight Circuit Court of Appeals affirmed the District Court's ruling because it found that the District Court correctly counted the time between September 7 and October 4 as automatically excludable from the 70-day limit under subsection (h)(1). However, the United States Supreme Court disagreed, finding that time granted to a party to prepare pretrial motions is not automatically excludable from the Act's 70 day limit. Instead, this time may be excluded only if a court makes case-specific findings under subsection (h)(7), which requires that the judge first find that the ends of justice served by allowing the delay outweigh the interest to a speedy trial, and then records those findings. 18 USC §3161(h)(7). Justices Alito and Breyer dissented.

Speedy Trial, IAD, Prosecutor Interlocutory Appeal. *People v Waclawski,* 286 Mich App 634; __ NW2d __ (2009)**(dec'09).** After distinguishing between the 120 day period (when prosecutor seeks a defendant's return for prosecution) and the 180 day period (when defendant triggers the IAD), the court found that in this case the 120 day period applied. However, after analyzing time frames from Defendant's arrival in Michigan to his trial date, 120 days was not ascribed to the prosecution. The court refused to count a prosecutor interlocutory appeal against the prosecution, finding that its own earlier order for continuance was necessary, reasonable, and for good cause shown. Defendant, a lawyer and former prosecutor, also raised a standard speedy trial argument due to the 19 month delay between arrest and trial. The court applied the four part test set out in *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006), determining that Defendant's speedy trial rights were not violated.

Venue, MCL 762.8, Harmless Error. *People v Houthoofd,* __ Mich __; __ NW2d __ (2010 WL 3037768, Nos. 138959 & 138969, decided July 31, 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.*

Confrontation, Non-Testifying Forensic Analysists. *People v Dendel,* __ Mich App __; __ NW2d __ (No. 247391, 2010 WL 3385552, decided August 24, 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").

Confrontation, Statements to SANE Not Testimonial. *People v Garland*, 286 Mich App 1; __ NW2d __ (2009) **(oct'09)**. The court held that the complainant's statements to a SANE (sexual assault nurse examiner) were for the purpose of treatment, and therefore were spoken "to meet an ongoing emergency" and not to establish past events for a later prosecution. Because the statements were deemed not testimonial under this analysis, the confrontation clause did not prohibit their use at trial.

Counsel, Ineffective Assistance During Plea Negotiations. *People v McCauley*, 287 Mich App 158; __ NW2d __ (2010)**(jan'10).** At a *Ginther* hearing ordered by the court of appeals, Defendant insisted that he was not properly informed concerning the likelihood of being convicted of murder as an aider and abettor, even if he did not fire the fatal shot. Trial defense counsel admitted that aiding and abetting was not discussed before the defense rejected a plea to murder 2 with an 18 year minimum (Defendant was convicted at trial of murder 1). The trial court, and the court of appeals, found both

prongs of *Strickland* were met by trial defense counsel's failure to discuss aiding and abetting with his client on the facts of this case. The court of appeals ordered a tailored remedy designed to allow Defendant to reconsider the rejected plea offer with proper advice. The prosecutor would also be permitted to up the ante on the offer if they could prove there was no vindictive motive.

Counsel, Ineffective Assistance – Duty to Inform Client of Possible Deportation During Plea Stage. *Padilla v Kentucky*, __ US __; 130 S Ct 1473 (2010)(m**arch'10**). Defendant, a legal resident of the United States for over 40 years, faced deportation after pleading guilty to drug charges in Kentucky. He filed for postconviction relief, arguing that his trial counsel was ineffective for failing to warm him about the possibility of deportation as a consequence of a guilty plea. He claimed that he would have gone to trial if he had been properly informed of this fact. The Supreme Court found that trial counsel *was* deficient for failing to inform Padilla that immediate deportation was a possible result of his guilty plea, and that this deficiency was subject to *Strickland* ineffective assistance analysis for not only failing to inform of the possibility of deportation, but also for giving the erroneous advice that he did not need to worry about deportation because he had lived in the United States for so long. Concluding that Padilla's Sixth Amendment right was violated, the Court stated, "[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less." (pg. 11). Whether Padilla is entitled to relief is dependant on whether he can overcome the prejudice prong of *Strickland.*

Counsel, Ineffective Assistance, Failure to Investigate. *Wood v Allen,* __ US __; 130 S Ct 841 (2010)**(jan'10).** The dissent by Stevens and Kennedy in this Alabama death case is noteworthy as it discusses in detail the distinction between the strategic decision not to introduce evidence and the unprotected failure to investigate the evidence in the first instance. **See also,** and contrast, *Bobby v Van Hook,* __ US __; 130 S Ct 13 (2010)**(nov'09),** with *Porter v McCollum,* __ US __; 130 S Ct 447 (2010)**(nov'09).**

CSC, Other Acts Evidence, MCL 768.27a. *People v Mann*, __ Mich App __; __ NW2d __ (2010 WL 1404410, No. 288329, April 8, 2010) **(April'10).** Mann was convicted of 3 counts of CSC 1st and 1 count of CSC 2nd. Mann first argued that the trial court improperly allowed evidence of a prior abuse committed against a child. The COA, citing MCL 768.27a, held that the prior crime (attempted CSC 1 years earlier) "was admissible to be considered for its bearing on any matter to which it [was] relevant in this case. The challenged evidence was relevant because it tended to show that it was more probable than not that the two minors in this case were telling the truth when they indicated that Mann had committed CSC offenses against them. The challenged evidence also made the likelihood of Mann's behavior toward the minors at issue in this case more probable." The convictions were affirmed.

Defenses, Entrapment. *People v Fyda,* __ Mich App __; __ NW2d __ (2010 WL 1971961, No. 288421, May 18, 2010)**(may'10).** After a divorce, Defendant regularly

complained to a friend (Friederichs) about his ex-wife, and often spoke of his desire to kill her. Friederichs became concerned that Defendant might act on this desire after Defendant's ex-wife filed a motion seeking to recover $5,900 related to mortgage payments. Friederichs believed that Defendant might harm his ex-wife and contacted local law enforcement. Friederichs then worked with law enforcement to arrange a meeting between Defendant and an undercover officer who would be posing as a killer for hire. At this meeting, Defendant asked the officer to 'pop' his ex-wife, and provided the officer with the following items: a handgun that Defendant portrayed as not traceable, pictures of his ex-wife and her car, her work address, and a $200 down payment on a negotiated contract price of $700. Defendant was arrested at the conclusion of the meeting. Defendant was convicted of solicitation of murder and felony firearm. The trial court sentenced Defendant to 7-15 years in prison. On appeal, the Defendant argued that police exploited the long existing friendship between Defendant and Friederichs to manufacture a crime. However, the COA disagreed, holding that the police did not approach or utilize Friederichs because of his friendship with Defendant. Instead, Friederichs approached the police because of his concern that Defendant's threats against his ex-wife had been exacerbated by circumstances. "There is no indication that Friederichs appealed to any sense of sympathy Defendant might have had for him or that the police instigated procedures that would have likely escalated Defendant's culpability." Defendant also argued that he was offered an inducement that would make the commission of the crime unusually attractive because the police offered a low price of $700 to complete the murder. The Court held that the negotiated price cannot be said to be such an inducement for an otherwise law-abiding citizen to hire someone to commit a murder.

Defenses, Self Defense, Felon in Possession. *People v Dupree,* 486 Mich 693; __ NW2d __ (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,* __ Mich __; __ NW2d __ (2010 WL 3037770,

No. 139146, decided July 31, 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 - 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, 404(b), MCL 768.27b. *People v Railer*, __ Mich App __; __ NW2d __ (2010 WL 1558970, No. 291817, decided April 20, 2010)**(april'10).** Railer was convicted of unlawful imprisonment and assault after an incident with his ex-girlfriend. Allegedly, Railer threatened her, forced her to accompany him to an apartment, took her phone so she could not call for help, dragged her by her hair across a parking lot, punched her in the face, and strangled her until she was unconscious. Finally they ended up in a parking lot where Railer left her unattended. The complainant found help and Railer was arrested. Railer argued that evidence of prior abusive behavior against previous girlfriends, 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. The convictions were affirmed.

Evidence, 404(b), Character, Bad Acts. *People v Roper,* 286 Mich App 77; __ NW2d __ (2009)**(oct'09).** Defendant was on trial for the stabbing death of a friend during an argument. 404(b) evidence concerning other acts of violence by Defendant were prohibited in the prosecution's case in chief. Defendant testified, and claimed that "you know I'm not the person that you know would want to do anything like that." This statement was deemed sufficient to place Defendant's character for peacefulness in play, and allowed the prosecutor to cross examine Defendant about specific acts of violence. Although such evidence is generally limited to cross examination, the court held that Defendant's denial of claims he was extremely violent toward his girlfriend on several occasions allowed the prosecutor to call the girlfriend as a rebuttal witness so that she could testify concerning Defendant's repeated, extreme violence toward her.

Evidence, 404(b), Doctrine of Chances. *People v Mardlin,* ___ Mich ___; ___ NW2d ___ (2010 WL 3037770, No. 139146, July 31, 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) and 403. *People v Waclawski,* 286 Mich App 634; __ NW2d __ (2009)**(dec'09).** Defendant argued that evidence of online chats in other states was so dissimilar from the charged offenses (CSC 1 and 2 involving children and child sexually abusive activity) in Michigan that it should not have come in. The court disagreed, holding it was admissible as it demonstrated "intent and identity, as well as common scheme, plan, or system." The discussion leading to this ruling, as well as a footnote, indicating that the court declined to address alternative admissibility under MCL 768.27a, demonstrates the futility of challenging prior bad acts in criminal sexual conduct cases involving minors.

Evidence, Relevance, MRE 403. *People v Gipson,* 287 Mich App 261; __ NW2d __ (2010)**(jan'10).** Defendant, in this beating murder case, complained of the trial court's admission of evidence that, after the occurrence of the beating at issue, he "obtained a tattoo that read 'Murder 1' and depicted a chalk outline of a dead body underneath." The court upheld the trial court's exercise of discretion, noting that "[g]enerally, all relevant evidence is admissible. MRE 402." Despite the fact that the tattoo was subject to a variety of interpretations notwithstanding, the court found sufficient relevance to uphold the trial court. Defendant's claim that probative value was outweighed by prejudice was quickly dismissed.

Evidence, Relevance, Probative Value vs. Prejudice. *People v Schaw Jr.*, __ Mich App __; __ NW2d __ (2010 WL 1558973, No. 286410, April 20, 2010)**(april'10).** Defendant was convicted of assault with intent to do great bodily harm less than murder, torture and unlawful imprisonment after he allegedly choked and restrained his wife , held a knife to her neck, attempted to drug her, and threatened to kill her. At trial, the prosecution presented tape recordings of multiple conversations Defendant had with the victim while in jail in which he tried to coerce her into changing her testimony. During the course of one of these conversations the Defendant stated that he was a convicted felon and had spent time in prison to convince his wife not to testify against him. The Defendant argued that it was improper for the jury to hear about the prior convictions, and that the trial court should have granted a motion for mistrial. The COA disagreed: "The record makes clear that defendant was using his status as a previous prisoner in an attempt to convince [his wife] to lie during her anticipated testimony at the trial." The court further held that the statements where highly probative of guilt and therefore were not more prejudicial than probative under MRE 403.

Insanity, Great Weight of the Evidence. *People v LaCalamita,* 286 Mich App 467; __ NW2d __ (2009)**(dec'09).** The competing views of defense and prosecution expert psychological witnesses in this workplace shooting case led to the court's conclusion that the trial court's denial of a great weight motion (arguing that the evidence showed Defendant was legally insane when he shot the victims) was not an abuse of discretion.

Jury Instructions, Lesser Offenses, Home Invasion. *People v Wilder*, 485 Mich 35; 780 NW2d 265 (2010)**(march'10).** Wilder was charged with 1st degree home invasion, but convicted of 3rd degree (without being first charged with 3rd Degree). The COA held that 3rd degree home invasion is not a lesser-included offense because it did not share all of the elements of 1st degree (though it shared some), and reversed his convictions. The MSC granted leave to appeal, and reinstated the convictions. The MSC held that the COA erred in declaring that 3rd degree home invasion cannot be a necessarily included lesser offense of 1st degree because one or more of the *possible* alternative elements of 3rd degree are distinct from the elements of 1st degree. In doing so, it failed to confine its analysis to the elements at issue in this case. Accordingly, in order to determine whether the specific elements used to convict defendant of a lesser offense are present, one must examine the offense of first-degree home invasion *as charged* and determine whether the elements of third-degree home invasion as convicted are subsumed within the charged offense. The court held that they were subsumed.

Jury Instructions, Oral Penetration in Child Sex Case. *People v Waclawski,* 286 Mich App 634; __ NW2d __ (2009)**(dec'09).** After criticizing the holding in People v Reid, 233 Mich App 457, 480; 592 NW2d 767 (1999), regarding the need to show penetration (as opposed to mere oral contact), the court decided that a conflict panel was unnecessary because the photographic evidence in this case clearly depicted full fellatio, and the trial court did instruct at one point that fellatio required "entry into defendant's mouth by [the victim's penis." While the instructions were not perfect, they sufficiently protected defendant's rights in this case. Review standards for instructional issues are clearly laid out.

Jury Instructions, Preservation of Issue. *Black v United States,* __ US __; 130 S Ct 2963 (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 Instructions, Solicitation to Commit Murder. *People v Fyda,* __ Mich App __; __ NW2d __ (2010 WL 1979161, No. 288421, decided May 18, 2010)**(may'10).** After asking an undercover officer to 'pop' his ex-wife, Defendant provided the officer with the following items: a handgun that Defendant portrayed as not traceable, pictures of his ex-wife and her car, her work address, and a $200 down payment on a negotiated contract price of $700. Defendant was convicted of solicitation of murder and possession of a firearm during the commission of a felony (felony-firearm). The trial court sentenced Defendant to 7-15 years in prison. On appeal Defendant argued that counsel provided ineffective assistance by not objecting to the court's instruction on solicitation of murder. The jury instruction for solicitation to commit murder included elements of solicitation to inflict great bodily harm, or to act with wanton and willful disregard of the likelihood that one's behavior is to cause death or great bodily harm. The COA agreed with Defendant that the instruction was improper as a "defendant cannot be found guilty of solicitation to

commit murder without a finding of the necessary specific intent." While the court held that the defense attorney should have objected, it concluded that the error did not influence the outcome of the case and affirmed.

Jury Selection, Judge Only Present for Half of Voir Dire May Reject a Demeanor Based *Batson* Challenge. *Thaler v Haynes*, __ US __; 130 S Ct 1171 (2010)(f**eb'10**). In this case there were two judges presiding over the jury selection process – one for individual questioning of potential jury members and one for peremptory challenges. After defendant's attorney made a *Batson* objection, the state gave an explanation grounded in the juror's behavior during individual voir dire. The judge, who was not present during that stage of trial, ruled that the state's strike of the juror was "race neutral" and denied the objection. Reversing the Fifth Circuit Court of Appeals, the Supreme Court held that none of its previous case law, including *Batson v Kentucky*, 476 US 79, and *Snyder v Louisiana,* 552 US 472, clearly established that a judge, in ruling on an objection to a peremptory challenge, must reject a demeanor-based explanation unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based.

Jury Selection, Pretrial Publicity. *Skilling v United States,* __ US __; 130 S Ct 1382 (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, Right to Public Trial. *Presley v Georgia*, __ US __; 130 S Ct 721 (2009)**(jan'10)**. The defendant was convicted of a cocaine trafficking offense after a jury trial in Georgia state court. Defendant claimed his Sixth and Fourteenth Amendment right to a public trial were violated when the trial court excluded the public from jury selection. The Supreme Court of Georgia affirmed the trial court's decision. The problem arose when the defendant's uncle desired to sit in the gallery. The judge informed him that, because prospective jurors would fill all of the seats, he would have to wait until the start of the trial before he could be in the courtroom. After conviction, the defense made a motion for new trial because of the public's exclusion from voir dire. The defendant contended that 14 jurors could have fit in the jury box and the remaining 28 prospective jurors could have fit entirely on one side of the courtroom, leaving adequate room for the public. The trial court dismissed the motion, and the Georgia appellate courts affirmed this decision. The US Supreme Court has previously held that the right to a public trial rests within two provisions of the Bill of Rights – the Sixth Amendment right to a speedy and public trial, and the First Amendment right to free speech. Both are binding on the states via the Due Process Clause of the Fourteenth Amendment. The Court has held previously in *Press-Enterprise Co. v Superior Court of Cal. Riverside City*, that in the First Amendment context the public has a right to witness the voir dire of jurors in a criminal case. 464 US 501 (1984). Relying on the *Press-Enterprise* decision, the Court decided that the Sixth Amendment right to a public trial extends beyond actual trial

proofs, when it ruled that a pretrial suppression hearing must be open to the public in *Waller v Georgia*, 467 US 39 (1984). In *Waller* the Court stated, " There can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Id.* at 46. Additionally, *Waller* sets out standards for determining whether an extreme variable makes closure to the public necessary in a criminal trial, stating:

> "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48.

In the present case, the Court held that this right extends to the voir dire stages of the trial as well, and that the defendant's Sixth Amendment right to a public trial was violated when the trial court excluded the public from the voir dire of prospective jurors. The Court reasoned that trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Quoting *Press-Enterprise*, the Court pointed out that there are certain circumstances when a judge could conclude that voir dire needs to be closed, whether it be because of threats of improper communications or safety issues, stating, "[I]n those cases, the particular interest, and threat to that interest, must 'be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Press-Enterprise* at 510. Justice Thomas filed dissenting opinion, which Justice Scalia joined.

Jury Selection, 6th Amendment Right to an Impartial Jury Pool. *Berghuis v Smith*, __ US __; 130 S Ct1382 (2010)**(march'10)**. Defendant was convicted of second-degree murder and felony firearm in a Michigan state court. He alleged that his jury pool, which consisted of only three African Americans out of a panel of 60-100 people, did not fairly reflect an accurate cross section of the community. In the county (Kent) where he was convicted, African-Americans constituted 7.28% of the vounty's jury-eligible population, and 6% of the potential jury pool. The Sixth Amendment gives defendants the right to trial by an impartial jury drawn from a fair cross section of the community. *Taylor v Louisiana,* 419 US 522. *Duren v Missouri* lays out what a defendant must show to establish a violation of the fair cross section requirement: (1) a group qualifying as "distinctive" (2) is not fairly and reasonably represented in jury venires, and (3) "systematic exclusion" in the jury-selection process accounts for the underrepresentation. 429 US 357 at 364. Reversing the Sixth Circuit's decision that the defendant met the requirements laid out in *Duren*, the US Supreme Court agreed with the Michigan supreme court's finding that *Duren* required the defendant to show that underrepresentation complained of was due to systematic exclusion, and that he failed to do so. The Court pointed out that the exemptions defendant claims occurred (siphoning – the district court first approach, the excusal of jurors with hardship argument, lack of police enforcement of jury service) do not amount to a violation of his Sixth Amendment Rights in this case. The Court abstained from laying out a clear standard to determine whether a minority group has been excluded from the opportunity to serve on jury duty, and left broad discretion to the states in making that determination.

Jury Selection, Venire, Systemic Exclusion. *People v Bryant,* __ Mich App __; __ 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.

Prosecutorial Misconduct. *People v Ericksen*, __ Mich App __; __ NW2d __ (2010 WL 1507631, No. 288496, decided April 15, 2010)**(april'10).** The complainant in this case was involved in an altercation and Defendant allegedly stabbed the complainant multiple times. Defendant was charged and convicted of assault with intent to murder, and sentenced as a 4th habitual offender to life. Defendant asserted that the convictions should be reversed based on multiple incidents of prosecutorial misconduct. For example, Defendant claimed the prosecutor improperly highlighted the victim's injuries, injected his personal beliefs into the case when he hypothesized the intent of Defendant when he confronted the victim, and prompted a witness to provide testimony commenting on the credibility of another witness. The COA held that Defendant failed to show misconduct. The Court held that the prosecutor's statements where all rooted in trial testimony, or were merely presenting anticipated testimony. The court also said that any impropriety was not prejudicial and easily overcome when the court instructed the jury to consider only the evidence and clarified that the attorneys' statements were not evidence.

Prosecutorial Misconduct, Comment on Defendant's Failure to Testify. *People v Mann*, __ Mich App __; __ NW2d __ (2010 WL 1404410, No. 288329, decided April 8, 2010)**(april'10).** Munn was convicted of 3 counts of CSC 1st and 1 count of CSC 2nd. Mann argued on appeal that the prosecutor, during closing, improperly commented on Mann's failure to testify. The COA found that "although the prosecutor's comment about Mann not testifying could be read as implicating a potential violation of Mann's right to

remain silent, the impropriety did not rise to the level of a due process violation." The convictions were affirmed.

D. Crimes and Offenses, Sufficiency

Armed Robbery, Need for Completed Larceny. *People v Williams*, __ Mich App __; __ NW2d __ (2010 WL 1404415, No. 284585, decided April 8, 2010)**(april'10).** Williams was charged with two separate armed robberies. Appellant pled guilty to both. The issue was whether there was a sufficient factual basis for Defendant's plea to one of the robberies. Williams argued that his plea was deficient because there was no demonstration or showing that defendant actually took any property from the store. The trial court denied defendant's motion to withdraw his plea. Williams appealed to the COA, and argued that larceny was "an integral and necessary element of armed robbery," and absent evidence of a completed larceny, the circuit court erred by accepting his guilty plea. The COA rejected that argument and held that the Legislature's 2004 amendment of the robbery statute "specifically considers and incorporates acts taken in an attempt to commit a larceny, regardless of whether the act is completed." The crime of armed robbery now includes attempts to commit that offense.

Assault with Intent to Commit Murder. *People v Ericksen*, __ Mich App __; __ NW2d __ (2010 WL 1507361, No. 288496, decided April 15, 2010)**(april'10).** The victim in this case was involved in an altercation and ultimately stabbed the victim multiple times. Defendant was charged and convicted of assault with intent to murder, and sentenced as a 4th habitual offender to life. Defendant claimed that his conviction was not supported by the evidence. Specifically, Defendant argued that, because the prosecution's case rested extensively on circumstantial evidence, he could only be convicted if that evidence proved the prosecution's theory of guilt with "impelling certainty." The COA held that that was a "misstatement of the law. Circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its constitutionally based burden of proof beyond a reasonable doubt."

Child Sexually Abusive Material, Constructive Possession. *People v Flick & People v Lazarus,* __ Mich __; __ NW2d __ (2010 WL 2925096, Nos. 138258, 138261, decided July 27, 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; __ NW2d __ (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.

Criminal Sexual Conduct, Force or Coercion. *People v Phelps*, __ Mich App __; __ NW2d __ (2010 WL 1461600, No. 288999, decided April 13, 2010)**(april'10).** Phelps was convicted of CSC 1st and CSC 3rd stemming from an incident with a 16-year-old complainant. Phelps argued that the complainant consented, but the COA found that complainant's testimony that she did not give Phelps permission to have penile/vaginal intercourse, was engaged in a different consensual act with him, and was surprised when he inserted his penis into her vagina, was sufficient to sustain a conviction of CSC I.

Contributing to Delinquency of a Minor, MCL 750.145. *People v Tennyson,* __ Mich __; __ NW2d __ (2010 WL 3488992, No. 137755, decided September 7, 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.

Delivery of Narcotics. *People v Plunkett,* 485 Mich 50, 780 NW2d 280 (2010)**(march'10)**. This appeal involved the sufficiency of evidence to bind the defendant over for trial on criminal charges of delivery of heroin and delivery of heroin causing death. Defendant, an attorney, did not directly give the heroin to the decedent. In a 4-3 decision, the MSC peremptorily reversed the Court of Appeals' decision to vacate the district court's bindover, and remanded the case for trial. The Supreme Court held that it was sufficient for bindover at preliminary examination that the Defendant had transported a third party, a prostitute named Tracy Corson, to purchase the heroin, supplied the money to buy it, and intended that a purchase occur. After these events, Corson gave some heroin to a childhood friend, Tiffany Gregory, after inviting her over to Defendant's apartment. Gregory died from an accidental overdose. In the majority opinion, Justice Young agreed with the prosecution's position that actual physical

transfer of the heroin from the Defendant to Corson was not required to prove "delivery" of heroin. The Court concluded that probable cause existed to demonstrate that the defendant aided and abetted delivery of heroin from the drug dealer to Corson, enough to show guilt of delivering heroin. Chief Justice Kelly's dissent, in which Justices Cavanagh and Hathaway joined, did not agree that merely driving Corson to purchase heroin and paying for the heroin was enough to aid and abet its delivery.

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.

Financial Transaction Device, Stealing or Retaining without Consent, MCL 750.157n(1). *People v Malone*, __ Mich App __; __ NW2d __ (No. 286958, decided March 30, 2010)**(march'10).** Reported identity theft as to the credit cards of several Wayne County employees was traced back to Defendant, who worked in the county management and budget office and sometimes dealt with payroll. A search of Defendant's home turned up post-it notes with personal information of four Wayne County employees. Defendant was not authorized to have this information at her home. In ruling against Defendant on a sufficiency challenge, the court held that it was not necessary that Defendant possess physical cards on which the personal information appeared (social security card, driver's license, etc.), and further that complainants did not need to "suffer an actual loss." A simple decision to copy personal identification numbers without authorization is sufficient. A constitutional challenge to the statute at issue on vagueness and overbreadth was also turned back.

Larceny from a Motor Vehicle, MCL 750.356a. *People v Miller*, __ Mich App __; __ NW2d __ (2010 WL 1507826, No. 294566, April 15, 2010)**(april'10).** Defendant was charged with stealing a cell phone from a parked car under MCL 750.356a(1). The trial court held that the statute did not apply to cell phones because they are not permanently attached to the vehicle. The statute reads: "A person who commits larceny by stealing or unlawfully removing or taking any wheel, tire, air bag, catalytic converter, radio, stereo, clock, telephone, computer, or other electronic device in or on any motor vehicle, house trailer, trailer, or semitrailer is guilty…" The prosecutor appealed, and the COA reversed holding that nothing in the language of the statute expresses the legislative intent to limit the application to items that are permanently attached to the vehicle.

Murder 2, Malice, Sufficiency. *People v Roper,* 286 Mich App 77; __ NW2d __ (2009)**(oct'09).** Defendant's admission that he had grabbed a knife and stabbed his friend during an argument, along with other circumstances, was sufficient to establish the requisite malice for second degree murder.

Torture, MCL 750.85, Severe Mental Pain or Suffering. *People v Schaw Jr.*, __ Mich App __; __ NW2d __ (2010 WL 1558973, No. 286410, decided April 20, 2010)**(april'10).** There was sufficient evidence that Defendant husband's attack of his wife caused mental injuries to the degree necessary to sustain a separate torture conviction, notwithstanding his wife's preexisting mental problems. Defendant argued that the victim did not sustain severe mental pain or suffering required by the torture statute (MCL 750.85) (when no great bodily injury was inflicted). The statute defines severe mental pain as "a mental injury that result[ed] in a substantial alteration of mental functioning that [was] manifested in a visibly demonstrable manner...." MCL 750.85(2)(d). The COA held that, "while there was evidence that the jury could have credited to conclude that all of the [victim's] mental issues resulted solely from her preexisting conditions, there was also evidence that the jury could have credited, and evidently did credit, to conclude that defendant's attack caused some of her mental injuries. That [the victim] experienced hallucinations and had to resume her medication after the attack was evidence of a substantial altering of mental functioning and evidence of a visibly demonstrable mental injury. As noted in *People v Alter*, 255 Mich App 194, 204-205; 659 NW2d 667 (2003), when a defendant causes an injury, the special susceptibility of a victim towards a particular injury does not constitute an independent cause of the injury such that a defendant is exonerated as a cause. Reversal is unwarranted."

Unlawful Imprisonment. *People v Railer*, __ Mich App __; __ NW2d __ (2010 WL 1558970, No. 291817, April 20, 2010)**(april'10).** Railer was convicted of unlawful imprisonment after an incident with his ex-girlfriend, Amy Nichols. Allegedly, Railer threatened her, forced her to accompany him to an apartment, took her phone so she could not call for help, dragged her by her hair across a parking lot, punched her in the face, and strangled her until she was unconscious. Finally they ended up in a parking lot where Railer left her unattended. Nichols found help and Railer was arrested. Railer argued the evidence was insufficient to support an unlawful imprisonment charge. However the COA disagreed: "First, it is clear Nichols was forcibly confined against her will where she was sitting in the apartment parking lot and defendant dragged Nichols by her hair to force her into the car. Twice after leaving the apartment-once at Meijer and once before arriving-the car was parked. However, Nichols dared not leave while in defendant's presence since before arriving at Meijer, defendant struck her face and choked her until she lost consciousness in response to Nichols voicing her displeasure with the situation." The convictions were affirmed.

Weapon, Dangerous, Carrying with Unlawful Intent. *People v Parker,* __ Mich App __; __ NW2d __ (No. 289357, decided May 20, 2010)**(may'10).** Defendant got into a fracas in a bar, and displayed an open knife. He was convicted after jury trial of felonious assault and carrying a dangerous weapon with unlawful intent, MCL 750.226. The latter offense, when it involves a knife, requires that the blade be at least three inches in length. Contrasting the concealed weapons statute, MCL 750.227, the court held that the carrying a dangerous weapon with unlawful intent statute required, as to knives, proof that the length of the blade was at least three inches. The complete lack of proofs on this point doomed that particular conviction. The prosecution's suggestion that the length of

the blade was of no consequence was rejected. Double jeopardy principles demanded entry of a verdict of acquittal.

E. Sentencing.

***Apprendi/Blakely*, Mandatory Minimums and the Sixth Amendment, Use of an AK-47 Must be Presented to Jury.** *United States v O'Brien and Burgess,* __ US __; 130 S Ct 2169 (2010)**(may'10**). The defendant's use of a semiautomatic AK-47 during a crime IS an element that the court must present to a jury, and prove beyond a reasonable doubt. The sixfold increase in the mandatory minimum should NOT be a factor in the trial judge's sentencing of the crime, even though the mandatory minimum does not increase the statutory maximum.

CSC Repeat Offender Statute, Sentencing Guidelines. *People v Wilcox,* 486 Mich 60; 781 NW2d 784 (2010)**(may'10).** Defendant was convicted of 1st degree CSC, and sentenced as a repeat CSC offender to 10-40 years. At issue was whether the legislative sentencing guidelines (which in this case were scored at 27-56 months) apply to defendant's 10-year minimum sentence imposed under MCL 750.520f, the repeat criminal sexual conduct (CSC) offender statute. In a 4-3 decision, The MSC held that a 10-year minimum sentence imposed under MCR 750.520f represents a departure from the legislative sentencing guidelines, and thus had to be reversed based on the trial court's failure to state substantial and compelling reasons for the departure. The key issue in the case is whether MCL 750.520f(1) mandates a five-year sentence, or any minimum sentence of five years or more. The Court of Appeals concluded that the mandate was five years or more. The statute states: "If a person is convicted of a second or subsequent offense under [MCL 750.520b, 750.520c, or 750.520d], the sentence imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of at least 5 years." The majority agreed with the defendant that a five-year minimum is the only sentence that is mandatory, and that any sentence above five years is permissive, thus triggering the need for a sentencing court explanation for any departure which is over the guidelines range and over 5 years. The dissenters (Young, Corrigan, Weaver) argued that since the statute allowed a "mandatory" minimum of any sentence of anything over 5 years, whatever the court imposed was in fact a mandatory minimum not subject to the guidelines.

Guidelines, OV 4, 9, 10, & 12 in Child Sex Case. *People v Waclawski,* 286 Mich App 634; __ NW2d __ (2009)**(dec'09).** Detailed discussion on these points, all resulting in resolution in favor of the prosecution, with clear outline of review standards.

Guidelines, Departure, "Location Departure." *People v Lucey,* 287 Mich App 267; __ NW2d __ (2010)**(feb'10).** Roscommon Circuit Judge Michael Baumgartner followed the advice of his probation officer and issued a "location departure" due to the inconvenience of bringing Defendant back to the county jail to serve his intermediate sanction sentence after completion of the sentence for which he was serving parole at the time he

committed the instant attempted third-degree fleeing and eluding. The court of appeals made it very clear that there is no such thing as a "location departure," and remanded for resentencing.

Guidelines, Inaccurate Information, Remand for Resentencing. *People v Jackson,* __ Mich __; __ NW2d __ (2010 WL 3488989, No. 138988, decided September 7, 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 4. Serious Psychological Injury Requiring Professional Treatment. *People v Davenport,* 286 Mich App 191; __ NW2d __ (2009)**(nov'09).** Minimal evidence (prosecutor submitted receipt for counseling services and informed court that two days prior to sentencing victim "began another series of counselings") is sufficient to score 10 points for OV 4.

OV9. Number of Victims. *People v Brian Mann,* 287 Mich App 283; __ NW2d __ (2010)**(feb'10).** In this plea to armed robbery, the trial court scored 10 points for 2-9 victims. Although there was only one victim of the robbery itself, Defendant commandeered a car for his getaway and the driver of that vehicle became the second victim. The court ruled, after examination of the relevant statutes, that "the course of an armed robbery includes the robber's conduct in fleeing the scene of the crime."

OV9, OV10. Number of Victims and Victim Vulnerability. *People v Phelps*, __ Mich App __; __ NW2d __ (2010 WL 1461600, No. 288999, decided April 13, 2010)**(april'10).** Phelps was convicted of CSC 1st and CSC 3rd stemming from an incident with a 16-year-old complainant. Phelps argued that the complainant consented, but the COA found that complainant's testimony that she did not give Phelps permission to have penile/vaginal intercourse, was engaged in a different consensual act with him, and was surprised when he inserted his penis into her vagina, was sufficient to sustain a conviction of CSC I. The COA did remand for resentencing holding that the trial court abused its discretion in scoring OV 9 at 10 points. "MCL 777.39 governs the scoring of OV 9 and provides in relevant part that the trial court assess 10 points when, "2 to 9 victims were placed in danger of physical injury or death, or 4 to 19 victims ... were placed in danger of property loss. The statute defines "victim" as "each person who was placed in danger of physical injury or loss of life or property...." Here, there is no evidence on the record to support the conclusion that two people in this case were in

danger of physical injury or loss of life, or that four people were in danger of loss of property when Phelps committed criminal sexual conduct crimes against one victim only." The court approved 10 points under OV 10, as the 24-year-old Defendant "was aware that the complainant was only 16 or 17 years old, and he acknowledged that he had previous "trouble" with young girls."

OV 12, Contemporaneous Felonious Criminal Act, Crimes Against a Person. *People v Wiggins,* __ Mich App __; __ NW2d __ (No. 290017, approved for publication July 6, 2010)**(july'10).** The issue in this case was whether the admitted contemporaneous acts should b 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 and OV 13 Interaction. *People v Bemer,* 286 Mich App 26; __ NW2d __ (2009)**(oct'09).** If eligible for scoring under OV 12 (contemporaneous felonious criminal act), a particular act must be scored under that variable prior to the scoring of OV 13 (continuing pattern of criminal behavior). Here the trial court held a prior act out under OV 12 so it could be used to obtain a higher point total under OV 13 (ordinarily acts scored under OV 12 cannot be used to score OV 13). After analyzing the legislative guidelines structure, the court held that trial courts do not have the discretion to avoid scoring acts under OV 12 before turning to OV 13.

Juvenile, Ban on Non-Parolable Life for Non-Homicide Crimes. *Graham v Florida,* __ US __; 130 S Ct 2011 (2010)**(may'10**). 16 year-old defendant pled to charges of armed burglary, and while on probation attempted to commit armed robbery. His probation was revoked, and he was sentenced to life in prison – under Florida law he would never be eligible for parole. The Supreme Court held that this sentence violated his Eight Amendment right against cruel and unusual punishment, and that no juvenile can be given non-parolable life sentences for non-homicide crimes. **See also,** *Sullivan v Florida,* __ US __; 130 S Ct 2059 (2010)**(may'10**). A 13 year-old defendant was charged with sexual assault and given a life sentence without parole. The Writ of Certiorari was dismissed by the Court as improvidently granted, given its earlier decision in *Graham v Florida*.

Restitution, Civil Judgment Setoff. *People v Dimoski,* 286 Mich App 474; __ NW2d __ (2009)**(dec'09).** Construing statutory provisions, the court held that the trial court erred in reducing a large restitution award by the amount of a *potential* civil action recovery. Though the victim has no right to "double recovery," there is more potential for recovery through the criminal restitution provision and it should have been left in place.

F. Miscellaneous

Appeal, Plain Error Application, Ex Post Facto Clause. *United States v Marcus,* __ US __; 130 S Ct 2159 (2010)(m**ay'10**). Defendant was indicted and convicted of forced labor and sex trafficking in 2001 under the Trafficking Victims Protection Act of 2000 (TVPA). The TVPA was enacted in October 2000, and the defendant's conduct that began in 1998 and ended in 2001. The defendant contended, for the first time on appeal, that the jury should have been instructed that his conduct before the TVPA's October 2001 enactment was not unlawful, and the fact that this was not done violated the Ex Post Facto Clause. The Second Circuit vacated his conviction, finding that under "plain error" analysis of Federal Rule of Criminal Procedure 52(b), the Ex Post Facto Clause had been violated. The Supreme Court reversed this decision, ruling that the Second Circuit's plain-error standard of review for ex post facto violations was not consistent with Federal Rule of Criminal Procedure 52(b). The Court found that the Second Circuit failed because not all four conditions required for the appellate courts to overturn a decision based on an issue that was not raised at trial were present here. The four conditions are: 1. there must be an error; 2. the error must be clear or obvious, rather than subject to reasonable dispute, 3. the error must affect the appellant's substantial rights, typically by affecting the outcome at trial, and 4. it must seriously affect the fairness, integrity or public reputation of judicial proceedings. The final two points were found to be deficient by the Supreme Court.

Child Support, Failure to Pay, Due Process. *People v Likine*, __ Mich App __; __ NW2d __ (2010 WL 1568450, No. 290218, decided April 20, 2010)**(april'10).** Selesa Likine was ordered to pay child support for her three minor children pursuant to her divorce proceedings. The criminal case against Likine charged that she fell behind on the support payments from 2005 through 2008, creating arrears in the amount of nearly fifty thousand dollars. Likine attempted to assert the defense of an "inability to pay" the support ordered by the family court. She claimed that she was unemployed due to a lengthy hospitalization at the beginning of the charging period, and provided evidence she suffered from Schizoaffective Disorder and Major Depressive Disorder. She further claimed that her support was erroneously calculated, as it was based on a "phantom" income of $5000 per month; a wage she claims she never earned in her entire life (she did purchase a house then valued at $500,000, and a new car). Likine relied on a Michigan Supreme Court decision from 1889 which held that statutes cannot criminalize conduct which, through no fault of the defendant, is impossible to avoid. Such a criminal law lacks the requisite, "voluntary actus reus" (bad act). The COA held that Likine's argument is actually an impermissible collateral attack on the underlying support order in family court. "Defendant was a party to several civil proceedings involving the modification of her child support obligation which afforded her ample opportunity to present evidence of her ability or inability to pay an increased amount of child support." The court added that her home and car purchases provided evidence that it was not impossible for her to pay the support. The judgment was affirmed

Civil Commitment, Use of Necessary/Proper Clause. *United States v Comstock,* __ US __; 130 S Ct 1949 (2010)**(may'10**)The Court found that under the Necessary and

Proper Clause Congress has the authority to allow civil commitment of mentally ill, sexually dangerous federal prisoners past their sentence term. The Court laid out five reasons explaining its holding: 1) the Necessary and Proper Clause grants Congress broad authority to enact laws; 2) Congress has an interest in protecting the public; 3) the statute efficiently meets state interests; 4) Congress has been involved in the mental healthcare of prisoners for a long time already, and this statute just adds on to that history; and, 5) the scope is narrow, which is appropriate.

Habeas – Application of *Cone v Bell* – Discovery, Evidentiary Hearing. *Wellons v Hall*, __ US __; 130 S Ct 727 (2009)**(jan'10)**. Defendant was sentenced to death in a Georgia state court after being convicted of malice murder and rape. During trial, inappropriate exchanges were going on between the jury, judge, and bailiff that were unknown to the defense at the time, including planning of a reunion between judge, bailiff and jurors, and provision of presents of a sexual nature. When trying to decipher what had exactly occurred, Defendant found himself lost in a procedural maze. He raised the issue on direct appeal but was constrained by the nonexistent record. He then sought state habeas relief and moved to develop evidence, but the court held that the matter had already been decided on appeal and was barred. He tried to raise the issue again in his federal habeas petition but the District Court held that he was procedurally barred from doing so. The Eleventh Circuit affirmed, finding that he was procedurally barred from bringing up the misconduct in federal habeas because of the state court's ruling that declined to review the misconduct claim stating that it had already done so. Additionally, the Eleventh Circuit decided that the defendant was not entitled to habeas relief on the merits. The US Supreme Court decision recognized that the Eleventh Circuit committed the same procedural error that it had previously corrected in *Cone* v. *Bell,* 556 U. S. ___, ___ (2009), and stated that perhaps the Eleventh Circuit would have ruled differently if it had the benefit of the Court's decision in that case. The *Cone* decision states, "When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Id.* The Eleventh Circuit did not address the defendant's appeal of the denial of his motions for discovery and an evidentiary hearing at all, stating that "[e]ven if we assume that Wellons' misconduct claims are not procedurally barred, they do not entitle Wellons to habeas relief." *Id*. at 936. In its opinion the Supreme Court pointed out that this only addresses whether Defendant was entitled to a new trial, not whether the allegations, combined with the facts defendant had learned, entitled him to the discovery and evidentiary hearing that he sought. The Court also noted that although the Eleventh Circuit denied habeas on the merits, which according to the dissenting opinions of Justices Scalia and Alito makes the *Cone* errors irrelevant, this is in fact untrue because the Eleventh Circuit may have been blinded by the procedural bar it incorrectly found, and failed to address, or give any weight to whether the defendant was entitled to an evidentiary hearing. The Supreme Court held that under *Cone*, Defendant's claims of judge, juror, and bailiff misconduct were not procedurally barred, and that grant of certiorari, vacatur of judgment below, and remand was warranted. Justice Scalia filed a dissenting opinion in which Justice Thomas joined, and Justice Alito filed a dissenting opinion in which Chief Justice Roberts joined.

Habeas - Discretionary State Procedural Rules as an Adequate Ground to Bar Federal Habeas Review. *Beard v Kindler*, __ US __; 130 S Ct 612 (2009)**(dec'09).** The defendant was convicted of capital murder in Pennsylvania state court, and the jury recommended a death sentence. He filed post verdict motions challenging his conviction and sentence, but before the trial court could consider the motions or the death recommendation, the defendant escaped and fled to Canada. The state trial court then dismissed the post verdict motions because of the escape. Defendant later sought to reinstate his post verdict motions, but the trial court denied relief, holding that the judge who had dismissed the motions had not abused his discretion under Pennsylvania's fugitive forfeiture law. On direct appeal the defendant argued that the court erred in declining to address the merits of his post verdict motions, but the Pennsylvania Supreme Court affirmed. Then, after being rejected for state habeas relief, the defendant sought federal habeas relief. Under the *adequate state ground doctrine*, a federal habeas court will not review a claim rejected by a state court "if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v Thompson*, 501 US 722. Regardless, the District Court granted defendant's petition, determining that the state fugitive forfeiture rule did not provide an adequate basis to bar federal review of his habeas claims. The Third Circuit affirmed. The US Supreme Court has determined that the question of whether a state procedural ruling is adequate is a question of federal law. *Lee v Kemna*, 534 US 362. The adequacy inquiry hinges on whether the state rule was established and regularly followed. *Id.* at 376. The Court held that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review, and remanded for further review.

Habeas, Time Limit, Equitable Tolling. *Holland v Florida,* __ US __; 130 S Ct 2549 (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, Second or Successive. *Magwood v Patterson,* __ US __; 130 S Ct 2788 (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.

Habeas – Sufficiency of the Evidence, Application of *Jackson v Virginia*. *McDaniel v Brown*, __ US __; 130 S Ct 665 (2010)**(jan'10).** Defendant was convicted of sexual

assault of a child under age 14 in a Nevada state court. After exhausting his state postconviction remedies, the defendant sought federal habeas relief. The United States District Court for the District of Nevada granted the petition, and allowed the defense to present new evidence 11 years after the original trial – a new report from a DNA expert, which pointed out that a statistical error known as the "prosecutor's fallacy" (the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample) had been made by the prosecution when presenting the DNA evidence. The District Court then dismissed the previous DNA evidence and ordered a retrial. The state appealed. The Court of Appeals for the Ninth Circuit then affirmed. The US Supreme Court granted cert to consider two questions: The proper standard of review for a *Jackson* claim on federal habeas, and whether such a claim may rely upon evidence outside the trial record that goes to the reliability of trial evidence. In *Jackson v Virginia*, 443 US 307 (1979), the US Supreme Court held that a state prisoner is entitled to habeas corpus relief if a federal judge finds that "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324. In this case the petitioner (warden) argued that under the *Jackson* standard the District Court erred in supplementing the record with the new DNA report. The US Supreme Court agreed, holding that both lower federal courts misapplied *Jackson* because the lower court trial record included both the contested DNA evidence and other convincing evidence of guilt. The court remanded for consideration of the defense claims of ineffective assistance.

Lifetime Electronic Monitoring. *People v Kern,* __ Mich App __; __ NW2d __ (No. 289478, decided May 25, 2010)**(may'10).** Although the language of 750.520c(2d degree CSC) and 750.520b (1st degree CSC) mandate lifetime electronic monitoring for defendants 17 or over when the complainant is under 13, the provisions mandating this punishment link to other statutory sections which clearly indicate that the lifetime monitoring program is limited to those released from prison or parole, or both. Because Defendant here was sentenced to jail and probation and not to prison or parole, he was not subject to lifetime electronic monitoring. The court acknowledged the merit of some of the prosecution's arguments, but urged that they be made to the legislature.

Medical Marijuana Statute, 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 MMA is prospective only. Charges were reinstated.

Medical Marijuana Statute, 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,* __ Mich App __; __ NW2d __ (No. 293350; decided June 8, 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.

Newly Discovered Evidence, Non Testifying Co-Defendant. *People v Terrell,* __ Mich App __; __ NW2d __ (No. 286834, 2010 WL 3389313, 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.*

Parole Revocation. *People v Glass*, __ Mich App __; __ NW2d __ (2010 WL 1926279, No. 290278, decided May 13, 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."

Prisoner's Rights, Mistreatment of a Prisoner. *Wilkins v Gaddy*, __ US __; 130 S Ct 1175 (2010)**(feb'10**) Defendant brought an action against a corrections officer in a North Carolina prison alleging that his Eight Amendment rights were violated when the guard used excessive force against him. The US Supreme Court found that the crucial question when a prisoner alleges mistreatment is not whether a certain level of injury occurred, but instead whether the force was applied maliciously or in a good faith effort to maintain order.

Sex Offender Registration, Continuing Jurisdiction. *People v Lee,* __ Mich App __; __ NW2d __ (No. 283778, decided June 17, 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.

Sex Offender Registration, Holmes Youthful Trainee Act, Romeo-Juliet Offenses. *People v Dipiazza,* 286 Mich App 137; __ NW2d __ (2009)**(nov'09).** Defendant was treated under the Holmes Youthful Trainee Act, MCL 762.11 *et seq.,* for attempt 3d degree CSC when he was 18, after having consensual sex with his then almost 15 year old girlfriend, who years later became his wife. After examining the interplay between the SORA and HYTA, the court held that it is incongruous that the law requires a teen who engaged in consensual sex and is assigned to HYTA status before 10/1/04 must register, while those in similar circumstances but assigned prior to that date need not comply with SORA. After examining the impact of registration on defendant's life, the court concluded that registration, even for the shorter ten year period ordered by the trial court, constituted cruel and unusual punishment. The case was remanded to the trial court so that defendant could be removed from the list.

Sex Offender Registration, Homeless. *People v Dowdy,* 287 Mich App 278; __ NW2d __ (2010)**(feb'10).** After utilizing dictionary definitions and the wording of the legislation at issue to define the terms "residence" and "domicile," the court held that a homeless person simply has no residence or domicile to register under SORA. The trial court's dismissal of pending failure to register charges against Defendant was upheld. The court invited a legislative "fix."

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 (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)

A. Search and Seizure

Kentucky v. King **(to be argued Jan. 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?

B. Ineffective Assistance of Counsel

Harrington v. Richter **(argued October 12, 2010)**
Is trial counsel ineffective for failing to obtain exculpatory forensic evidence when counsel instead attempted to create reasonable doubt through cross-examination?

C. Confrontation Rights – Testimonial Evidence

Michigan v. Bryant **(argued October 5, 2010)**
Is a statement from a wounded victim identifying his perpetrator to police officers on the scene "testimonial" within the meaning of *Crawford v. Washington* so as to bar admission absent an opportunity to cross-examine the declarant?

Bullcoming v. New Mexico **(to be argued January 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?

D. Post-Conviction Access to Evidence

Skinner v. Switzer **(argued October 13, 2010)**
Does a death row prisoner have a Due Process right to access and test potentially exculpatory DNA evidence and, if so, may he bring a § 1983 action or must he proceed in habeas corpus?

E. AEDPA Statute of Limitations and Tolling

Wall v. Kholi **(to be argued November 29, 2010)**
Does a motion for discretionary sentence reduction filed in the state trial court toll the time for filing a federal habeas petition?

F. AEDPA Standards of Review

Harrington v. Richter **(argued October 12, 2010)**
Is a state decision summarily rejecting an ineffective assistance claim entitled to AEDPA deference?

Premo v. Moore **(argued October 12, 2010)**
When a defendant who entered a guilty plea argues ineffective assistance of counsel on collateral review because his attorney failed to move to suppress the defendant's involuntary confession, should the federal court apply the *Fulminante* rule that the admission of an involuntary confession is never harmless error?

II. Legislation

The following are brief summaries of key legislation. These summaries were provided 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/.

Causing Death or Injury to Person in Work Zone

2008 PA 296 [HB 4468, eff. 10-8-08] amends MCL 257.601b. This Act amends the Michigan Vehicle Code to refer to "another person in the work zone" instead of "a person working in the work zone" in provisions prescribing criminal penalties for moving violations that cause injury or death to a person working in a work zone. It also deletes the requirement for signs notifying drivers of the increased penalties.

2008 PA 297 [HB 4469, eff. 10-8-08] amends MCL 777.12e. PA 297 is tie-barred to PA 296 and adds the language of the latter to the sentencing guidelines.

2008 PA 298 [HB 5351, eff. 10-8-08] amends MCL 257.1 to 257.9323. The Michigan Vehicle Code is amended to allow an owner or employee of a construction or maintenance entity to direct traffic within a work zone if properly trained, equipped, and attired. Failure to comply with the traffic directions will be a civil infraction.

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.)

Unauthorized Practice of an Occupation

2008 PA 340 [HB 4938, eff. 12-23-08] amends MCL 777.13p. The unauthorized practice of an occupation or unauthorized operation of a school teaching an occupation by an unlicensed person causing injury or death is designated in the sentencing guidelines as a Class F felony against the public trust, with a maximum sentence of four years in prison.

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."

Recording of Order Setting Aside Forged Deed

2008 PA 378 [HB 5534, eff. 12-23-08] amends MCL 750.248 and 249. The circuit court is required by this Act to enter and have recorded an order indicating that a document is invalid if a person convicted of forgery or uttering and publishing forged a deed, discharge of mortgage, or other real estate document.

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.

Sentence for Filing False Affidavit of Fraudulent Financing Statement

2008 PA 382 [HB 5935, eff. 12-29-08] amends MCL 777.14g. This Act specifies that filing a false affidavit of fraudulent financing statement is a Class E felony against the public trust with a maximum term of imprisonment of 5 years.

Sentencing Guidelines for Returning Nonreturnable Containers

2008 PA 386 [SB 1392, eff. 12-29-08] amends MCL 777.14h. New felony violations regarding improper redemption of nonreturnable bottles are added to the sentencing guidelines as follows:

- Improper return of 10,000 or more nonreturnable containers is a Class H felony with a five-year maximum sentence.
- Improper acceptance or delivery of 10,000 or more nonreturnable containers by a distributor or dealer is a Class H felony with a five-year maximum sentence.
- Altering a reverse vending machine is a Class G felony with a two-year maximum sentence.

Provision for Payment of Crime Victim Services

2008 PA 390 and 391 [HB 6602 and SB 1629, eff. 12-29-08] amend MCL 18.351 to 368, 382. These Public Acts allow health care providers to directly apply to the Crime Victim Services Commission for compensation for costs related to a sexual assault medical forensic examination and prohibit health care providers from billing the victim.

Distribution of Crime Victims Rights Funds

2008 PA 396 [HB 5355, eff. 12-29-08] amends MCL 780.901. PA 396 will allow the Crime Victims Rights Services Act to allow, until October 1, 2010, any excess revenue from the Crime Victims Rights Fund not used for victim compensation to be used for the following: the amber alert missing child program, treatment services for rape victims, polygraph tests, expert witness testimony, and enhancement of the sex offender registry.

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.)

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.

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.