CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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RECENT DEVELOPMENTS IN MICHIGAN CRIMINAL LAW

F. Martin Tieber

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I. Case Law

A. Fourth Amendment.

Administrative Search, Warrantless; Tobacco Products. *People v Beydoun,* 283 Mich App 314; 770 NW2d 54 (2009)**(April'09).** State police conducted an "administrative" search of defendant's place of business pursuant to regular inspection activity under the Tobacco Products Tax Act (TPTA, MCL 205.428(3)), and in this case due to an anonymous tip concerning illegal tobacco products. Defendant moved to quash in the circuit court, arguing that the administrative search was a subterfuge and this was actually a warrantless criminal search. The circuit court agreed and suppressed the seized tobacco products. The court of appeals reversed, holding that the search came under the pervasively regulated industry exception to the warrant requirement, citing *Tallman v Dep't of Natural Resources,* 421 Mich 585; 365 NW2d 724 (2009)**.** A seven factor analysis was employed at some length to arrive at the conclusion that the state's interest in performing warrantless searches under the TPTA outweighs the privacy expectations of those engaged in tobacco transactions. A subsequent search of defendant's home was authorized through consent.

Inevitable Discovery. *People v Hyde*, __ Mich App __; __ NW2d __ (No. 282782, September 1, 2009)**(sep'09).** In this drunk driving case, the trial court and the court of appeals agreed that police had probable cause to obtain a warrant even though their error in advising Defendant, a diabetic, of his rights under the implied consent law, was erroneous. However, the court of appeals refused to apply inevitable discovery in this circumstance, concluding that to do so would eliminate the warrant requirement whenever probable cause existed. Using the test set out by some federal circuits ((1)police had high level of probable cause to obtain a warrant, (2) the police were in the process of obtaining a warrant, and (3) the same evidence would have been obtained through the warrant), the court concluded that while 1 and 3 were met, the police here were clearly not in the process of obtaining a warrant. This preserved constitutional error was not harmless and Defendant's OWI conviction was vacated.

Investigative Subpoena, Conflict with Psychologist-Patient Privilege. *In re Petition for Subpoenas,* 282 Mich App 585; 766 NW2d 675 (2009)**(march'09).** The attorney general, acting on behalf of the Michigan Department of Community Health, sought full disclosure of ten patient files in order to investigate "possible billing fraud" on the part of a licensed psychologist. The trial court originally approved the subpoenas but later quashed them on motion of respondent psychologist. Analyzing the psychologist-patient privilege statute (MCL 333.18237) in conjunction with the investigative subpoena

provision (MCL 333.16235(1)), the court upheld the trial court's quash of the subpoenas in this case. The court concluded that there was no ambiguity in the psychologist-patient privilege statute, no exceptions applied here, and reading the provisions together, it is clear the legislature plainly intended to exempt a licensed psychologist's disclosure of patient records from the investigative subpoena power.

Investigatory Stop. *People v Horton*, 283 Mich App 105; 767 NW2d 672 (2009)**(mar'09).** Police received a "man with a gun" tip from an unidentified citizen face to face. Following up on information provided (make and color of car being driven by man waving gun plus location) police effectuated a stop, ordering defendant out of his car to check identification. Police noticed a weapon on the car seat vacated by the defendant pursuant to their order. The trial court suppressed and dismissed due to police failure to obtain identifying information from the tipster. Citing People v Tooks, 403 Mich 568; 271 NW2d 503 (1978), and distinguishing Florida v J L, 529 US 266; 120 S Ct 1375; 146 L Ed 2d 254 (2000) on the basis that a tip received face to face from a citizen is qualitatively different from an anonymous phone tip, the court of appeals found sufficient indicia of reliability under a three-prong test to justify the investigatory stop here.

PBT Testing of Minors, Warrantless, Special Needs Exception. *People of the City of Troy v Chowdhury,* __ Mich App __; __ NW2d __ (No. 288696, September 10, 2009)**(sep'09).** First, the court held that police action requiring those under 21 years of age to take a preliminary breath test is a search. And while the special needs, or regulatory, exception to the warrant requirement dispenses with the need to show probable cause, unlike other exceptions to the warrant requirement, the government cannot show special needs in this circumstance. A statute or ordinance that allows searches and seizures in order to ferret out crime, absent the condition of a warrant or an excuse for proceeding without one, is unconstitutional on its face. The court also negated the city's arguments that consent or exigent circumstances could save the search here.

Search Incident to Arrest; Good Faith. *People v Richard Reese,* 281 Mich App 290; 761 NW2d 405 (2009)**(oct'08).** The court of appeals reversed the trial court's grant of a defense motion to suppress. Police were patrolling an apartment complex known for narcotics trafficking. A clearly illegal arrest of defendant on loitering charges led to obtaining defendant's identification, which in turn led to discovery of a pre-existing warrant. 120 grams of cocaine were found during an inventory search pursuant to arrest on the warrant. The trial court's suppression of the cocaine was reversed by the court of appeals based on the warrant, which the court concluded was an intervening, untainted justification for the search of Reese's car. The fact that the LEIN information disclosing the warrant was inaccurate did not help defendant Reese's cause – the officers were protected by the "good faith" exception. Although the time between an illegal arrest and discovery of an underlying warrant is one of three factors to consider, it is not controlling and the other two factors are key: 1) Whether initial illegality (stop and arrest here) was manifestation of flagrant police misconduct and; 2) Presence of intervening circumstances; or otherwise stated, what evidence was obtained prior to discovery of the outstanding arrest warrant. If, as here, the only thing police discovered was defendant's

name, and there was no flagrant misconduct, items seized at arrest on outstanding warrant will not be suppressed.

Search and Seizure, Good Faith. *Herring v United States*, __ US__; 129 S Ct 695 (2009)**(jan'09).** The exclusionary rule does not require the suppression of evidence obtained as a result of a search that was conducted on a good faith mistake that the defendant had an outstanding warrant for his arrest – even when the police themselves are the ones to make the mistake. When the mistakes made by the state that lead to an unlawful search are the result of one instance of negligence, rather than reckless disregard for constitutional requirements or continuous error, the evidence resulting from that search is admissible.

Search and Seizure, Terry Searches. *Arizona v Johnson*, __ US__; 129 S Ct 781 (2009)**(jan'09).** An officer can pat down a passenger in a vehicle stopped for a minor traffic infraction based on reasonable suspicion that the passenger is armed and dangerous, even when lacking reasonable suspicion that the passenger is committing or has committed any offenses. Defendant was a passenger in a vehicle, which was stopped for an infraction warranting a citation in an area with high gang activity. The police officer, after observing Defendant's suspicious behavior and learning Defendant had been in prison, ordered him out of the car so she could question him about his gang affiliation away from the driver. For her safety, she proceeded to pat him down and felt the butt of a gun. In *Muehler v Mena,* 544 US 93, the Court held that a lawful roadside stop begins when a vehicle is pulled over for a traffic violation. The seizure of everyone in the vehicle continues for the duration of the stop. The stop ends when the police, no longer needing to control the scene, allow the driver and passengers to leave. An officer's questions regarding matters not related to the traffic stop does not remove the encounter from the realm of a lawful seizure, so long as the inquiries do not measurably extend the stop's duration. Here, the officer, after observing suspicious behavior, asked the defendant to exit the vehicle during a legal traffic stop so she could question him further. All of these actions were valid during this traffic stop, and therefore the officer had the right to pat the defendant down to protect herself without violating the Fourth Amendment.

Search and Seizure, Vehicular Search Incident to Arrest. *Arizona v Gant*, __ US__; 129 S Ct 1710 (2009)**(april'09).** The Fourth Amendment requires law enforcement officers to demonstrate a threat to their safety, or a need to preserve evidence related to the crime, in order to justify a warrantless vehicular search under *Belton,* incident to arrest, conducted after the vehicle's recent occupants have been arrested and secured. Here, unlike in *Belton,* where one police officer was faced with four unsecured arrestees, five officers handcuffed the defendant and the two other suspects in separate patrol cars before the search began. Defendant clearly could not have accessed his car at the time of the search, and an evidentiary basis for the search was also lacking. The search in this case does not fall under any exceptions, and was unreasonable.

Strip Searches, School Setting. *Unified School District #1 Et Al v Redding,* __ US__; 129 S Ct 2633 (2009)**(june'09).** Petitioner alleged that a strip search of her 13 year-old

daughter by school personnel, during school hours, violated the girl's Fourth Amendment rights. The Court found that the search of the girl's underwear violated the Fourth Amendment, and that for school searches, "the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause," citing its decision in *New Jersey v TLO*, 469 US 325. School searches, "will be permissible . . . when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id*. at 342. Here, the principal had sufficient cause to search the girl's backpack and outer clothing but not to extend the search to the point of making her pull out her underwear. The content of the suspicion failed to match the degree of intrusion. The fact that the school personnel that searched her claimed to have seen nothing when she pulled out her underwear does not make it an acceptable search, but still a strip search, and its Fourth Amendment consequences are not defined by who was looking and how much was seen.

Warrant, Sufficiency of Affidavit. *People v Mullen*, 282 Mich App 14; 762 NW2d 170 (2008)**(dec'08).** Even though the circuit court did not clearly err in striking a number of items from a police officer's affidavit in support of a warrant for a blood draw in a drunk driving case based on "reckless disregard for the truth," including results of an improperly performed horizontal gaze nystagmus test, the non-stricken items adequately supported the warrant. Therefore, the circuit court erred in suppressing the BAC results.

B. Other Pretrial Matters.

Confessions, Counsel, Invocation of. *Montejo v Louisiana*, __ US__; 129 S Ct 2079; (2009)**(may'09).** *Michigan v Jackson*, 475 US 625, which forbids police to initiate interrogation of a criminal defendant once he has invoked his right to counsel at an arraignment or similar proceeding, is no longer good law. *Jackson* is unnecessary because without it defendants would still be thoroughly protected from their coerced admissions being admitted at trial because the Court has taken substantial other measures to exclude them. Under *Miranda*, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present. Under *Edwards*, interrogation must cease once such a defendant invokes his rights, and under *Minnick v Mississippi*, 498 US 146, no further interrogation may take place until counsel is present. Applying *Jackson's* rule also has the negative effect of allowing crimes to go unsolved and criminals unpunished when un-coerced confessions are excluded, and when officers are deterred from even trying to obtain confessions. Because of other case law, the protection *Jackson* offers defendants is no longer necessary, and not worth the negative effects it can have on crime solving.

Confessions, Counsel Violation, Use of Statement for Impeachment. *Kansas v Ventris*, __ US__; 129 S Ct 1841 (2009)**(april'09).** A statement obtained from a represented defendant, without a waiver in violation of the Sixth Amendment right to counsel, is admissible as impeachment evidence. The interests safeguarded by excluding tainted evidence for impeachment purposes are "outweighed by the need to prevent perjury and to assure the integrity of the trial process." Also see *Stone v Powell*, 428 US 465 and *Harris v New York*, 401 US 222.

Confessions, McNabb-Mallory Rule. *Corley v United States*, __ US__; 129 S Ct 1558 (2009)**(april'09).** When the police failed to promptly present an arrested defendant before a magistrate, and instead obtained an incriminating but voluntary statement from the defendant, the statement must be suppressed in federal court because of the *McNabb-Mallory* rule. Without this rule, the government would be free to question suspects for unlimited amounts of time before bringing them out in the open, which isolates and pressures the individual, inducing false confessions.

Double Jeopardy. *Yeager v. United States*, __ US__: 129 S Ct 2360 (2009)**(june'09).** Defendant was charged with securities and wire fraud, conspiracy, insider trading, and money laundering. The jury acquitted him on the fraud charges, but was hung on the insider trading charges. The Supreme Court held that collateral estoppel bars retrial if reasonable doubt existed for the jury regarding elements that the acquitted charges and hung charges shared.

Double Jeopardy, Defining Mental Retardation under *Atkins*. *Bobby v Bies*, __ US__; 129 S Ct 2145 (2009)**(june'09).** Defendant was convicted in Ohio of the aggravated murder, kidnapping, and attempted rape of a ten-year-old boy. Instructed at the sentencing stage to weigh mitigating circumstances (including evidence of his mild to borderline mental retardation) against aggravating factors, the jury recommended a death sentence, which the trial court imposed. The state court of appeals and supreme court both affirmed the conviction and the defendant petitioned for relief, asserting that the Eight Amendment prohibits execution of a mentally retarded defendant. Soon after that *Atkins v Virginia*, 536 US 304, which held that the Eight Amendment does bar the execution of mentally retarded offenders, was decided. *Atkins* leaves the task of finding appropriate ways to determine when an offender claiming mental retardation would be removed from the veil of execution to the states. The District Court then stayed defendant's federal habeas proceedings so that he could present an *Atkins* claim to the state postconviction court. The state court denied his motion for summary judgment and ordered a full hearing on the Atkins claim – deciding not to go ahead with that hearing, the defendant returned to federal court with the argument that the Double Jeopardy Clause barred the state from relitigating the mental retardation issue.

The Supreme Court held that the Double Jeopardy Clause does not bar the Ohio courts from conducting a full hearing on defendant's mental capacity. The jury voted to impose the death penalty and the issue here is whether that sentence should be vacated or not – it is not an effort by the state to retry him or increase his punishment. At the time of his sentencing and direct appeal, *Atkins* was not the guiding decision, and the issue was whether the mitigating factors were outweighed by the aggravating circumstances beyond a reasonable doubt. . The Sixth Circuit erred in relying on *Ashe v Swenson* here because this case does not involve the kind of "ultimate fact" addressed in *Ashe*. There, the state was precluded from trying Ashe for robbing a poker player because he had already been acquitted of robbing a different player in the same game based on a determination that he was not a participant in the poker game robbery. Here, the defendant was not acquitted, and determinations of his mental capacity were not necessary to the ultimate imposition

of the death penalty. The Court also stated that the federal courts' intervention in this case derailed the state court proceeding, and that recourse first to Ohio's courts is what should have occurred under the idea that the issue of applying A*tkins* is the states' responsibility.

Double Jeopardy, Re-trial after Prosecutorial Misconduct. *People v Aceval,* 282 Mich App 379; 764 NW2d 285 (2009)**(feb'09).** In this drug case both the trial court and the prosecutor allowed perjury without notice to the defense in relation to the CI, and were themselves later charged. A new trial was granted to the defendant, who subsequently pled guilty prior to new trial proceedings. Defendant argued on appeal that retrial should have been barred under a due process theory due to the seriousness of the prosecutor's and trial court's misconduct, which the court agreed was "disgraceful." Noting that it is the "misconduct's effect on the trial, not the blame-worthiness of the prosecutor" that is critical, the court held that the remedy of retrial was sufficient, and a bar to further proceedings was not required by due process. In a footnote, the court left open the possibility that prosecutorial misconduct designed to avoid or prevent an acquittal might bar a retrial.

Defenses, Statue of Limitations. *People v Seals,* __ Mich App __; __ NW2d __ (Nos. 282215 & 282216, July 14, 2009)**(july'09).** Defendant was charged with felony murder after the statute of limitations had run on the underlying felonies. Stating that there is no statute of limitations on murder, the court rejected defendant's argument that the necessity of a "conviction" on the underlying felony prohibits felony murder charges under these circumstances.

Guilty Plea; Failure to Place Defendant under Oath. *People v Plumaj,* __ Mich App __; __ NW2d __ (2009)**(june'09).** Defendant pled to various offenses in two cases, including second degree murder. Several months after he was sentenced to 25 ½ years to 38 ¼ years on the murder charge, Defendant moved to withdraw his plea on several grounds, including ineffective assistance of counsel and various failures in the plea taking process. The trial court granted withdrawal solely on the basis that Defendant had not been placed under oath during the plea procedure as required by MCR 6.302(A). After noting that automatic rules of reversal are to be discouraged, the court of appeals sent the matter back to the trial court for a determination of whether the plea was accurate, understanding, and voluntary.

Joinder and Severance. *People v Williams,* 483 Mich 226; 769 NW2d 605 (2009)**(july'09).** Holding that MCR 6.120(A) and (B) permit joinder in a greater range of circumstances than did the decision in *People v Tobey*, 401 Mich 141 (1977), the court overruled *Tobey,* and allowed joinder of two separate sets of drug charges arising out of warrants executed at a motel room registered to Defendant and at a residence where Defendant was present. The execution of these warrants was separated by several months. The majority found the offenses could be joined for trial because they were "related." Justices Cavanagh and Hathaway joined Justice Kelly's dissent.

Speedy Trial, 180 Day Rule. *People v Davis,* 283 Mich App 737; 769 NW2d 278 (2009)**(may'09).** Pursuant to MCL 780.131 and 780.133, the prosecution must merely

"commence the action," and need not begin trial, within 180 days of receiving the required notice from the MDOC. The trial court thus erred in dismissing charges against defendant due to violation of the 180 day rule.

Speedy Trial, Defense Delays. *Vermont v Brillon*, __ US__; 129 S Ct 1283 (2009)**(march'09).** Delays requested by assigned defense counsel, over the objection of a jailed defendant, do not count against the government for purposes of deciding whether the defendant received a speedy trial, even if those delays were arguably attributable to a "breakdown" in the public defense system. Here, the state supreme court incorrectly labeled assigned counsel essentially as state actors in the criminal justice system. Assigned counsel should be treated the same way as retained counsel, and delays sought by counsel are ordinarily attributable to the defendants they represent.

Speedy Trial, IAD. *People v Swafford*, 483 Mich 1; 762 NW2d 902 (2009)**(mar'09).** The Wayne County prosecutor lodged a detainer against a prisoner on a murder charge while the prisoner was serving federal time. Subsequently the prisoner sent a written request for final disposition under the IAD to the prosecutor. The prosecutor's failure to initiate trial within 180 days of the prisoner's request was fatal. After noting that it was improper to try and convict the defendant on the murder charge after the court of appeals had reversed the trial court's IAD dismissal of charges, because a supreme court application was pending, the court unanimously reversed defendant's conviction and sentence. The supreme court disagreed with the court of appeals' rationale for reversing the trial court's dismissal of charges – that the detainer was lodged before defendant began serving a term of imprisonment (between arrest and conviction on the federal charge). Because the detainer continues and because defendant filed his request for final disposition of the Wayne County murder charge while he was serving a term of imprisonment, the IAD applies. Neither did the fact that the Wayne prosecutor filed the detainer with the U.S. Marshal rather than the federal Bureau of Prisons defeat defendant's IAD claim.

Speedy Trial, IAD, Failure to Notify. *People v Patton*, __ Mich App __; __ NW2d __ (No. 283921, July 30, 2009)**(july'09).** Failure to notify Defendant that a detainer was entered against him, a violation of Article III(C) of the Interstate Agreement on Detainers, does not entitle Defendant to vacation and dismissal. Although dismissal is required if "trial does not occur within the required 180 days" after a prisoner "has made the required request," there is apparently no remedy if prison authorities never tell a prisoner that a detainer was lodged against him.

Territorial Jurisdiction, Offense near State Line. *People v Gayheart*, __ Mich App __; __ NW2d __ (No. 282690, July 30, 2009)**(july'09).** The body of the deceased, a Michigan resident, was found 100 feet into Indiana. Defendant argued Michigan did not have territorial jurisdiction to try him for murder. Stating that MCL 762.2, passed by the Michigan legislature in 2002, expanded common law territorial jurisdiction, the court of appeals disagreed with Defendant and affirmed his conviction. Michigan now has jurisdiction over "any crime where any act constituting an element of the crime is committed within Michigan" irrespective of whether Defendant intended to cause

"detrimental effects" in this state. Jurisdiction may be proved by circumstantial evidence. Here the facts supported the determination that elements of both premeditated and felony murder were committed in Michigan.

C. Confrontation, Counsel, and Other Trial Issues.

Confrontation, Forensic Examiner's Report. *Melendez-Diaz v Massachusetts*, __ US__; 129 S Ct 2527 (2009)**(june'09).** A Massachusetts state court allowed the admission of certificates stating that material seized by police was a certain amount of cocaine. The certificates were of state laboratory analysis confirming the substance and amount of cocaine, and were accepted as prima facie evidence of what they asserted. Defendant argued that the admission of the certificates without the analyst's in-person testimony violated his Sixth Amendment rights within the meaning of *Crawford v Washington*. The Court found for the defendant reasoning that, applying *Crawford*, the certificates, which were affidavits, fall within the core class of testimonial statements covered by the Confrontation Clause. Not only were the certificates made, as *Crawford* required for testimonial statements, "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," id. at 52, but under the relevant Massachusetts law their sole purpose was to provide prima facie evidence of the substance's composition, quality, and net weight. Petitioner was entitled to "be confronted with" the persons giving this testimony at trial. The Court rejected the claim that because the witnesses were not accusatory, they were not subject to confrontation, pointing out that the absence of interrogation is irrelevant; a witness who volunteers his testimony is no less a witness for Sixth Amendment purposes.

Confrontation, Interrogation of Victim by Police, Testimonial. *People v Bryant,* 483 Mich 132; 768 NW2d 65 (2009)**(jun'09).** As the victim in a shooting lay dying, police questioned him about what had occurred. His statement implicated Defendant, and Defendant was later convicted of murder. The court of appeals affirmed, holding that the victim's statements constituted admissible non-testimonial hearsay (excited utterance exception). The supreme court, in a 4-3 decision (Corrigan, Young and Weaver dissenting), reversed, holding that under *Crawford, Davis, and Hammon* the interrogation elicited statements whose primary purpose was to prove past events potentially relevant to later criminal prosecution, as opposed to meeting an ongoing emergency. Because the statements at issue were testimonial, it was not relevant that they might have met the excited utterance exception to the hearsay rule in light of *Crawford's* sweeping revision of Confrontation Clause jurisprudence. Although *Crawford* left the door open for dying declarations, the prosecution in this case abandoned that issue by failing to attempt to lay a foundation below.

Confrontation, Limitation on Cross Examination. *People v Hill,* 282 Mich App 538; 766 NW2d 17 (2009)**(march'09).** In this carjacking case defendant was cut short on cross examination of the complainant (as to her general drug use) and a police witness (as to the defense theory that the complainant traded the jacked car to someone else for drugs). The court turned aside Confrontation Clause challenges to both restrictions, stating that there is no right to confront a witness on general credibility issues, and the

defense theory regard to trading the car for drugs was too remote and speculative. The court held that "the Confrontation Clause does not confer a right to impeach the general credibility of a witness. *Boggs v Collins*, 226 F3d 728, 737-738 (CA 6, 2000)." But see *Vasquez v Jones*, 486 F3d 135, 144-146 (CA 6, 2007), discrediting *Boggs* on this point, which our court of appeals failed to acknowledge.

Confrontation, Nontestifying Experts. *People v Payne*, __ Mich App __; __ NW2d __ (No. 280260, July 28, 2009)**(july'09).** Citing *People v McDaniel*, 469 Mich 409; 670 NW2d 659 (2003), the court held that lab reports prepared by nontestifying analysts constitute inadmissible hearsay and were not harmless as to two of four CSC counts. But see the MSC leave grant in *People v Horton*, 480 Mich 987 (2007). The court of appeals also ruled that admission of these reports denied Confrontation Clause rights under the recent decision in *Melendez-Diaz v Massachusetts*, 557 US __; 129 S Ct 2527; __ L Ed 2d __ (2009).

Confrontation; Right to at Probation Revocation Hearing. *People v Breeding*, 284 Mich App 471; __ NW2d __ (2009)**(june'09).** Defendant was violated after the trial court found he was in the company of children under 16, a violation of a probation condition after a CSC 2 conviction. The primary evidence against him was in the form of out of court statements by nontestifying witnesses. After invitation from the supreme court, the court of appeals held that the right to confrontation does not apply to probation revocation hearings. Probation revocation proceedings are not a stage of a criminal prosecution to which the full panoply of rights need be applied. Defendant's due process challenge to being revoked and sent to prison on the basis of unconfronted evidence was turned back because his attorney failed to request cross examination and failed to object to the unconfronted evidence.

Confrontation; Statements to SANE. *People v Spangler*, __ Mich App __; __ NW2d __ (No. 288632, July 21, 2009)**(july'09).** The trial court, in this Ingham County case, granted a defense motion in limine to exclude the four-year-old complainant's statements to a Sexual Assault Nurse Examiner (SANE) implicating Defendant in a sexual assault. The trial court found the statements to be a classic example of testimonial statements under *Crawford*. The court of appeals vacated the trial court's order, and sent the case back for an expanded hearing, finding that insufficient evidence was present on this record to establish whether "the circumstances would lead an objective witness to reasonably believe that the statements would be available for use in a later prosecution or objectively indicated that the primary purpose of [the SANE questioning] was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." The court reviewed cases around the country on this point, and set out 13 factors that various courts have looked to in making this determination.

Confrontation, Two-Way Interactive Video Technology. *People v Buie*, __ Mich App __; __ NW2d __ (No. 278732, August 25, 2009)**(aug'09).** In this CSC case, DNA and medical experts were permitted to testify via two-way interactive video technology. Defendant failed to object so the matter was reviewed, as an unpreserved, nonstructural constitutional claim, for plain error. After reviewing case law on two-way interactive

technology, the court concluded that the technology is not yet sufficient to conclude that confrontation rights, which include the truth-finding effect of a face-to-face appearance, are adequately protected through this process. The matter was remanded for a determination by the trial court as to whether, in this particular case, the procedure was "necessary to further a public policy or state interest important enough to outweigh defendant's confrontation rights."

Counsel, Effective Assistance. *People v Chapo*, 283 Mich App 360; 770 NW2d 68 (2009)**(april'09).** Initially the court noted that it was limiting review to the record, despite defendant's unsuccessful attempt to conduct a *Ginther* hearing, as defendant failed to "demonstrate[d] any issue for which further factual development would advance his claim." Trial counsel was not ineffective for failing to challenge lawfulness of a police officer's conduct during a traffic stop as the court had previously determined the conduct was appropriate. Nor was trial counsel ineffective for failure to object to prosecution comments during closing argument, or for failure to develop, and request jury instructions on, a duress defense.

Counsel, Effective Assistance. *People v Payne*, __ Mich App __; __ NW2d __ (No. 280260, July 28, 2009)**(july'09).** In this Kent County case, trial defense counsel failed to meet with his client between exam and trial, waived arraignment and had no hearings between exam and trial, thereby shutting Defendant off from any appearance in court prior to his entry at trial unkempt and in shackles, failed to object to Defendant's inability to groom himself, and to his appearance, for no reason, in shackles, failed to retain experts to review the prosecution DNA evidence, waived opening statement, and improperly cross-examined two of the complainants. After noting that Defendant's request for a *Ginther* hearing was denied, the court of appeals nonetheless rejected several of Defendant's arguments claiming Defendant failed to prove prejudice. The rest of the failures were deemed acceptable strategy. The court did not indicate whether trial defense counsel made any investigatory effort to explore presentation of expert witnesses.

Counsel, Federal Counsel Appointment for State Proceedings. *Harbison v Bell*, __ US__; 129 S Ct 1481 (2009)**(april'09).** A certificate of appealability pursuant to 28 U. S. C. 2253(c)(1)(A) is not required to appeal an order denying a request for federally appointed counsel under 18 USC §3599 because §2253(c)(1)(A) governs only final orders that dispose of a habeas corpus proceeding's merits. §3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings, and entitles them to compensation for that representation. The government's argument that Congress meant for §3599 to apply only to federal defendants contradicts legislative history.

Counsel, Right to Counsel of Choice. *People v Aceval*, 282 Mich App 379; 764 NW2d 285 (2009)**(feb'09).** In this drug case both the trial court and the prosecutor allowed perjury without notice to the defense in relation to the CI, and were themselves later charged. A new trial was granted to the defendant, who subsequently pled guilty. Before pleading, however, the new trial judge, Vera Massey Jones, denied original trial counsel's request to withdraw, and would not allow another attorney permission to participate in the case. The Court first held that, despite the denials, failure to plead conditionally left

the issue unpreserved, but went on to review the counsel issue pursuant to supreme court order. Analyzing the U.S. Supreme Court's relatively recent decision in *United States v Gonzalez-Lopez*, 548 US 140 (2006), the court held that docket efficiency considerations, and the failure of defendant to object to continuation by the original "counsel of his choice," doomed the issue.

Counsel, Right to on Appeal after Plea, Waiver as Plea Condition. *People v Billings*, 283 Mich App 538; 770 NW2d 893 (2009)**(april'09).** Defendants pled in Saginaw County after the United States Supreme Court's decision in *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005), which required appointment of counsel for the poor after a felony conviction by plea. The court here held that Saginaw County's practice of requiring a waiver of the right to appointed counsel on appeal as part of the plea bargain was unconstitutional.

Counsel, Self Representation. *People v Hill*, 282 Mich App 538; 766 NW2d 17 (2009)**(march'09).** Judge Jansen, in dissent, decried the trial court's summary denial of defendant's request to represent himself "without ever inquiring into his reasons or attempting to establish whether his expressed desire for self-representation was unequivocal, knowing, intelligent, and voluntary." The majority affirmed despite this failure, claiming that the request for self-representation was made "solely through counsel." The majority also argued that the record did not provide a basis for concluding that the request was knowing and intelligent, the very reason the dissent insisted reversal was required.

CSC – Other Acts Evidence. *People v Smith*, 282 Mich App 191; __ NW2d __ (2009)**(jan'09).** Defendant was convicted of two counts of CSC 1 and one count of CSC 2 for sexual assaults (intercourse and touching) of his then ten or eleven-year-old daughter. The court held that testimony of the victim's stepsister, that defendant exposed himself to her three times when she was between the ages of eleven and fifteen, was admissible under 404(b) as a "similar act." Per direction of the supreme court, the court of appeals analyzed the admissibility of the three acts of indecent exposure under recent revisions to MCL 768.27a, which substantially expanded the prosecutor's ability to introduce prior acts. The court of appeals, after a confusing discussion of the statutory language dealing with indecent exposure and listed offenses, determined that two of the three prior acts were not admissible under 768.27a. However, the court held that 768.27a was not a rule of exclusion and, since 404(b) allowed all three prior acts, defendant's conviction was affirmed.

Defendant's Appearance, Shackling, Grooming. *People v Payne*, __ Mich App __; __ NW2d __ (No. 280260, July 28, 2009)**(july'09).** Although the trial court had no cause to shackle Defendant at trial in this Kent County CSC case, the defense table was skirted with paper, and Defendant did not come or go when the jury was present. As a result, the court of appeals found no prejudice. The failure to allow Defendant to shave for eight months did not require a new trial as the trial court ordered grooming supplies after an objection was made on the second day of trial.

Defenses, Momentary Innocent Possession, Felon in Possession. *People v Dupree*, 283 Mich App 89, 771 NW2d 470 (2009)**(May'09).** 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 defense to the charge of felon in possession, of which he was convicted, was momentary innocent possession, an offshoot of 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 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.

Defenses, Self Defense, Statutory Construction. *People v Conyer*, 281 Mich App 526; 762 NW2d 198 (2008)**(nov'08).** Defendant was convicted of assault with intent to do great bodily harm and felony firearm for injuring a person attending a party when his group was attacked by the complainant and others. The issue was whether the self defense act (SDA), MCL 780.971, effective 10/1/06, applied retroactively to cover the shooting in this case, which occurred on 1/29/06. The SDA revised the duty to retreat doctrine, allowing someone who is not committing a crime and is in a location where they have a legal right to be, to stand their ground and use deadly force if they honestly and reasonably believe it is necessary to prevent death or great bodily harm to themselves or others. This change "affects substantial rights" and therefore, under settled rules of statutory construction, the SDA is not retroactive. Therefore, the trial court did not err in refusing to instruct the jury consistent with the SDA.

Evidence, 404(b) and 403. *People v Murphy (on Remand)*, 282 Mich App 571, 766 NW2d 303 (2009)**(march'09).** In this procedurally complex case (a new trial had been originally granted by the court of appeals due to lack of counsel for defendant during prosecution initiated interlocutory appellate proceedings related to the evidence at issue; the new trial relief was later vacated by the supreme court in favor of a new appeal), the defense argued that circumstantial evidence of defendant's connection to a sawed off shotgun was barred by 404(b) and 403. Citing *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989), the court found no error in the admission of tangentially connected other acts evidence. There is good language for the defense when offering remotely relevant evidence, including a quote from *People v McKinney*, 410 Mich 413; 301 NW2d 824 (1982) to the effect that "legal technicalities" should not control over logic and common sense when determining what evidence to admit. The court also turned back defendant's 403 argument, stating that "[a]lthough the carjacking-related evidence involved a serious and entirely separate crime, the risk of unfair prejudice did not substantially outweigh the

probative force of the evidence, which connected defendant to the Dodge Ram and the shotgun."

Evidence, Hearsay, 804(b)(3). *People v Taylor*, 482 Mich 368; 759 NW2d 361 (2008)**(dec'08).** A codefendant (Scarber) made statements to a friend (Ervin) implicating himself and others (Taylor and King) in a murder/kidnap. The trial court allowed the statements under 804(b)(3), statements against penal interest. After announcing that *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), which interpreted *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), which in turn was overturned, as to the Confrontation Clause, by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) and *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), was no longer good law, the majority conducted a *Poole* analysis and affirmed the decision of the trial court and the court of appeals that the statements of Scarber, introduced through Ervin, were admissible as statements against penal interest. The majority held that the statements were not covered by the Confrontation Clause, as they were not testimonial. The dissenting justices, Cavanagh and Kelly, noted that the *Poole* determination that non self inculpatory statements, which in fact inculpated someone else, were admissible as long as they were part of a broader narrative that could be considered to be "as a whole against the declarant's penal interest," and the commentary to the federal rules on which it was based, were discredited by the decision in *Williamson v United States*, 512 US 594, 600-601; 114 S Ct 2431; 129 L Ed 2d 476 (1994). The dissent excoriated the majority for dismissing *Williamson's* destruction of *Poole's* foundation in a footnote, and urged the grant of leave to take up the issue.

Evidence, Hearsay, 803(3); Statement of Identification, 801(d)(1); Bad Acts, 404(b); Flight. *People v Smelley*, __ Mich App __; __ NW2d __ (No. 274033, published August 13, 2009, issued May 26, 2009)**(aug'09).** A series of erroneous evidentiary rulings, causing prejudice where scant remaining evidence implicated Defendant, led the court to reverse Defendant's second-degree murder conviction. The trial court first erred in admitting substantial hearsay in the form of alleged statements of the deceased expressing fear of Defendant and describing altercations between the two. Criticizing *People v Fishe*r, 449 Mich 441; 537 NW2d 577 (1995) and *People v Ortiz*, 249 Mich App 297; 642 NW2d 417 (2001) for their failure to set forth relevant background facts in conducting the complex MRE 803(3) analysis, the panel pointed to the lack of critical relevance with respect to the deceased's state of mind, as there was no defense of accident, suicide, or self defense here. In addition, the prosecutor improperly introduced highly prejudicial "identification" testimony, claiming it was not hearsay under 801(d)(1), when the declarant later testified he did not see the shooting. The prosecutor further prejudiced Defendant by improperly introducing a series of irrelevant "bad acts" weapons offenses. Finally, the trial court erroneously admitted evidence that defendant was arrested by a DEA agent in Georgia two weeks after the homicide as evidence of flight.

Evidence, Other Acts, 404(b). *People v Steele*, 283 Mich App 472; 769 NW2d 256 (2009)**(april'09).** Defendant was convicted of multiple CSC 1 and 2 counts for alleged sexual activity with the then under thirteen-year-old grandchildren of his common law

wife or girlfriend. The prosecutor admitted, over objection, other acts evidence relating to the three complainants, and their mother, and her sister. The court held that the "other acts evidence had a concurrence of common features so that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design." A high degree of similarity or distinctive or unusual features are not required.

Evidence, Right to Present Defense, Collateral Matter. *People v Steele*, 283 Mich App 472; 769 NW2d 256 (2009)**(april'09).** The court rejected the prosecutor's argument that the disallowed evidence of Defendant's sister, to the effect that the mother of the complainants in this CSC case was motivated to foment false testimony by her children because the complainants' grandmother was squandering her estate on the Defendant, was collateral. However, the court held the error was harmless, even if considered a constitutional denial, because there was "strong evidence" that defendant repeatedly raped the victims.

Evidence, Right to Present Defense, Psychological Expert in Sex Case. *People v Steele***,** 283 Mich App 472; 769 NW2d 256 (2009)**(april'09).** Defendant was rebuffed by the trial court when he tried to present Dr. Andrew Barclay who "would have testified that he tested defendant and that defendant did not fit the profile, or display the characteristics, of having a personality consistent with pedophilia or being a sexual predator." Citing *People v Dobek*, 274 Mich App 58; 732 NW2d 546 (2007), where the court rejected the testimony of Dr. Barclay for lack of scientific reliability under *Daubert*, the court found that the same result is required here.

Evidence, Right to State's for DNA Testing. *District Attorney's Office for the Third Judicial District Et Al v Osborne*, __ US__; 129 S Ct 2308 (2009)**(june'09).** Defendant was convicted of sexual assault and other crimes in state court. Years later, he filed this suit under 42 U. S. C. §1983, arguing he had a due process right to access the evidence used against him in order to subject it to DNA testing at his own expense. The Federal District Court dismissed his claim, holding that he must proceed in habeas because he sought to set the stage for an attack on his conviction. The Ninth Circuit reversed, stating that §1983 was the proper vehicle for the claims. The district court then granted defendant summary judgment, concluding that he had a constitutional right to the new testing, and the Ninth Circuit affirmed, relying on the prosecutorial duty to disclose exculpatory evidence under *Brady v. Maryland.*

The Supreme Court held that defendant has no constitutional right to post conviction access to the state's evidence for DNA testing, assuming that his claims can be pursued using §1983, stressing that "[t]he availability of new DNA testing technologies, cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The task of establishing rules to harness DNA's power to prove innocence without unnecessarily overthrowing the established criminal justice system belongs primarily to the legislature." See *Washington v Glucksberg*, 521 US 702, 719. The Court also disagreed with the Ninth's Circuit's *Brady* argument, pointing out that *Brady* is a pretrial right and should not be extended to postconviction. Federal courts may upset a state's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights

provided. Here, there is nothing inadequate about Alaska's postconviction relief procedures, or its methods for applying those procedures to persons seeking access to evidence for DNA testing. The Court rejected defendant's invitation to recognize a substantive due process right to DNA evidence, stating that the Court is "reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v Harker Heights*, 503 US 115, 125.

Evidence, Silence in the Wake of Miranda Warnings. *People v Borgne,* 483 Mich 178; 768 NW2d 290 (2009) & *People v Shafier,* 483 Mich 205; __ NW2d __ (2009)**(july'09).** These two separately reported cases, both authored by Justice Cavanagh, and both generally unanimous decisions, focus on *Bobo-Doyle* error. The court agreed that in both cases constitutional error was present when the prosecutor focused on the Defendants' post-arrest, post-warnings silence to argue their guilt. In both cases, however, the claims of error were unpreserved, and were reviewed for plain error under *Carines*. In the *Borgne* case, unpublished, the court of appeals, over a dissent, reversed the Defendant's convictions. The supreme court reversed the court of appeals and reinstated Defendant's convictions, holding that the prejudice prong of the plain error test, which places the burden on the defendant to prove prejudice, was not met. In *People v Shafier*, 277 Mich App 137 (2007), the court of appeals, again over a dissent, affirmed Defendant's convictions. The supreme court again reversed the court of appeals and ordered a new trial, holding that the prejudice prong of *Carines* had been met in that case. The assessment in both cases focused on the extent of the prosecutorial *Bobo-Doyle* misconduct and the strength of the untainted convicting evidence. In both cases, though agreeing that *Carines* is good law in Michigan for now, Justices Kelly and Cavanagh expressed their continuing opinion that this type of constitutional error should be assessed under the harmless error standard, which places the burden of proving lack of harm on the prosecution.

Evidence, Spousal Privilege, Unavailability, Confrontation. *People v Garrett,* unpublished opinion per curiam of the Court of Appeals, issued August 25, 2009 (Docket No. 279546)**(aug'09).** Defendant was not married to the witness at the time of trial. Therefore the witness was not unavailable due to the spousal privilege. Use of the witness's preliminary exam testimony, without a finding of a good faith effort on the part of the prosecution to obtain her presence, requires reversal.

Evidence, Voice Identification. *People v Murphy (on Remand)*, 282 Mich App 571, 766 NW2d 303 (2009)**(march'09).** In permitting a voice identification where the complainant heard defendant only once in the course of an alleged armed robbery, the court signals that there are virtually no restrictions to such evidence.

Judge, Disqualification for Bias. *People v Wade*, 283 Mich App 462; 771 NW2d 447 (2009)**(april'09).** Employing the eight point assessment in MCR 2.003(B), and citing to *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001), the court held that the trial court's derogatory comments regarding security guards did not sufficiently show bias to allow disqualification in this case where a security guard was on

trial for murder in relation to a shooting that occurred while he was on duty. Generalized hostility or bias does not demand disqualification.

Juror, Disqualification for Felony Conviction. *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008)**(dec'08).** Defendant, convicted of a sex charge, discovered that one of his jurors had been twice convicted of sex felonies and had lied about it during voir dire. The trial judge denied a motion for new trial, stating that he had "fairly equal confidence" that a defense attorney would have wanted a felon convicted of the same type of crime as defendant on the jury. The court of appeals reversed and ordered a new trial. The supreme court, with Justices Kelly and Cavanagh dissenting, reversed the court of appeals and reinstated defendant's conviction, overruling precedent.

Jury Instructions, Felony Murder, Intent. *People v Garrett*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2009 (Docket No. 279546)**(aug'09).** The trial court erred in instructing the jury that intent [to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm…] was not a necessary element of felony murder. Defense counsel was ineffective for failing to object.

Jury Instructions, Lesser Offenses; Involuntary Manslaughter. *People v McMullan*, 284 Mich App 149; 771 NW2d 810 (2009)**(june'09).** The majority opinion (Saad) and the dissent (Bandstra) agreed that involuntary manslaughter is a necessarily included lesser offense of murder, and where, as here, a defendant is charged with murder, the trial court should instruct on common law involuntary manslaughter if a rational view of the evidence supports it. However, there was disagreement on the facts. The majority held that no rational jury could conclude that McMullan acted without malice where he cocked the gun and shot the decedent at close range. Judge Bandstra pointed to the long association between McMullan and the decedent, and McMullan's drug usage on the day of the shooting, to conclude that McMullan's claim that the gun "just went off," and he had no malicious intent, was sufficiently supported by the facts to require the requested instruction.

Jury Instructions, RICO "Enterprise." *Boyle v United States*, __ US__; 129 S Ct 2237 (2009)**(june'09).** During defendant's RICO prosecution the district court denied his request for a jury instruction requiring the government to prove that the enterprise had "an ascertainable structural hierarchy distinct from the charged predicate acts." Instead the court instructed the jury that to establish a RICO "enterprise," the government must prove an ongoing organization with a framework, and that association members functioned as a continuing unit to achieve a common purpose. The Second Circuit affirmed the district court's holding. The Supreme Court found that an association-in-fact enterprise under RICO must have a "structure," but the pertinent jury instruction need not be framed in the precise language the defendant proposed. By explicitly telling jurors they could not convict on the RICO charges unless they found that the government had proved the existence of an enterprise, the instructions made clear that this was a separate element from the pattern of racketeering activity. The jurors also were adequately told that the enterprise needed the structural attributes that may be inferred from the statutory language. See *United States v Turkette*, 452 US 576.

Jury Instructions, Verdict Form. *People v Wade,* 283 Mich App 462; 771 NW2d 447 (2009)**(april'09).** Defendant was convicted of involuntary manslaughter and felony firearm after shooting a retreating thief while acting as a security guard at a Detroit Police Department impound lot. Defendant repeatedly objected to the trial court's verdict form, which set out a verdict of not guilty as to the primary count of premeditated murder, but did not allow for a general verdict of not guilty. The court cited an unpublished opinion, *People v Garcia,* unpublished opinion per curiam of the Court of Appeals, issued October 19, 1988 (Docket No. 94233) and noted endorsement of this decision in *People v Garcia,* 448 Mich 442; 531 NW2d 683 (1995).

Jury Selection. *Rivera v Illinois,* __ US__; 129 S Ct 1446 (2009)**(march'09).** A trial court's erroneous decision upholding a "reverse-*Batson*" challenge to a defendant's attempt to exercise a peremptory strike is harmless error so long as any reasonable juror would have found the defendant guilty. Further, the Due Process Clause does not require automatic reversal of a conviction because of the trial court's good-faith error in denying the defendant's peremptory challenge to a juror. A good-faith misapplication of *Batson* does not violate due process, and to hold that it does would discourage trial courts and prosecutors from policing a defendant's discriminatory use of peremptory challenges. If there are no federal constitutional violations, states are free to decide, as a matter of state law, if a trial court's improper denial of a peremptory challenge is reversible error.

Jury Trial, Waiver. *People v Cook,* __ Mich App __; __ NW2d __ (No. 280600, August 27, 2009)**(aug'09).** Defendant did not sign a jury waiver (it was signed by defense counsel), and when the trial court announced the waiver before conducting a bench trial, Defendant objected on the record. The court of appeals held that under these facts Defendant was denied his right to jury trial, a structural error not reviewable for harmless error.

Prosecutorial Misconduct, Acquiescence in Perjury, Bar to Re-trial. *People v Aceval,* 282 Mich App 379; 764 NW2d 285 (2009)**(feb'09).** In this drug case both the trial court and the prosecutor allowed perjury without notice to the defense in relation to the CI, and were themselves later charged. A new trial was granted to the defendant, who subsequently pled guilty prior to new trial proceedings. Defendant argued on appeal that retrial should have been barred under a due process theory due to the seriousness of the prosecutor's and trial court's misconduct, which the court agreed was "disgraceful." Noting that it is the "misconduct's effect on the trial, not the blame-worthiness of the prosecutor" that is critical, the court held that the remedy of retrial was sufficient, and a bar to further proceedings was not required by due process. In a footnote, the court left open the possibility that prosecutorial misconduct designed to avoid or prevent an acquittal might bar a retrial.

Statements by Defendant Pursuant to Investigative Subpoena, Use at Trial. *People v Seals,* __ Mich App __; __ NW2d __ (Nos. 282215 & 282216, July 14, 2009)**(july'09).** Defendant was convicted of first degree felony murder. At trial Defendant's investigative subpoena testimony was used to impeach him, despite the fact that he failed to testify at trial. The court held that it was proper for the prosecutor to "offer as

circumstantial evidence of guilt evidence that exculpatory statements are false." Defendant's arguments that his right to due process and to be free from compulsory self-incrimination were violated by the investigative subpoena procedure were turned back based on the court's determination that Defendant could have challenged the prosecutor's request for a statement under MCL 767A.6 or could have exercised his Fifth Amendment right not to incriminate himself. The court held that accomplice and police testimony rendered Defendant's investigative subpoena testimony "inconsequential to the ultimate resolution of the case," and any error was therefore harmless.

D. Crimes and Offenses, Sufficiency

ACCA, Failing to Report is not a "Violent Crime." *Chambers v United States*, __ US__; 129 S Ct 687 (2009)**(jan'09).** The Armed Career Criminal Act imposes a fifteen-year mandatory prison term on a felon unlawfully in possession of a firearm who has three prior convictions for committing certain drug crimes or a violent felony. The crime of failure to report for penal confinement falls outside the scope of ACCA's "violent felony" definition. Failure to report for confinement is different from escaping a penal institution and results from different underlying behavior, therefore, it does not fall in the "violent felony" category even though escaping does.

Animal Cruelty, Torture, Sufficiency of Evidence to Bind Over. *People v Henderson and Mercier,* 282 Mich App 307; 765 NW2d 619 (2009)**(feb'09).** Defendant Henderson owned a ranch and most of the 69 horses found in deplorable condition. Defendant Mercier was the primary caretaker of the horses. Interpreting *People v Fennell,* 260 Mich App 261 (2004), the court held that it was error for the trial court to quash felony counts against Henderson based on an "innocent owner" theory. Bindover on the torture charge requires only that defendant acted with conscious disregard of known risks and that was sufficiently established on this record. The defense argument that bindover required proof that defendant intended to harm the animals was rejected.

Controlled Substances, Delivery, Sufficiency of Evidence. *People v Plunkett,* 281 Mich App 721; 760 NW2d 850 (2008)**(nov'08).** Defendant was consorting with a former prostitute (Corson) and funding her crack cocaine and heroin habit. After Corson had introduced a friend (Gregory) to heroin, Gregory used heroin defendant and Corson had purchased using defendant's money. In part because she had consumed a substantial amount of alcohol before using heroin with Corson, Gregory died. Defendant was charged with delivery causing death (MCL 750.317a), and delivery of heroin under 50 (MCL 333.7401(2)(a)(iv)). The district court rejected defendant's sufficiency argument and bound over on both charges, but the circuit court found no evidence of delivery and granted defendant's motion to quash as to both (the court allowed bindover on one count of delivery of less than 50 grams of cocaine (MCL 333.7401(2)(a)(iv)), and maintaining a drug house (MCL 333.7405(1)(d)). The court of appeals agreed with the circuit court, finding that since defendant did not actually or constructively deliver heroin to Corson, the charges could not be brought. Nor could defendant be charged under an aiding or

abetting theory as he did nothing to assist the drug dealer. Schuette, J., in dissent, would support a charge on the aiding and abetting theory.

Counterfeit; Improper Use of Computer. *People v Harrison*, 283 Mich App 374; 768 NW2d 98 (2009)**(april'09).** Defendant used a computer, scanner and printer to produce counterfeit U.S. currency. He first argued the evidence was insufficient to convict because MCL 750.255, prohibiting use of tools to produce counterfeit currency, could not apply to use of a computer. The court held that the 1846 statute's use of the terms "tools, instruments or implements" covered the modern use of computer technology to forge currency. The evidence was also sufficient to convict under MCL 750.254 as the prosecutor adequately proved that defendant intended to utter, pass, or render forged bills he knowingly possessed.

CSA §843(b), Misdemeanor Drug Buyer is not "Facilitating." *Abuelhawa v United States*, __ US__; 129 S Ct 2102 (2009)**(may'09).** Using a telephone to make a misdemeanor drug purchase does not facilitate felony drug distribution in violation of §843(b) of the CSA, which makes it a felony "to use any communication facility in . . . facilitating" felony distribution and other drug crimes. Likening "facilitate" to "aid, abet, and assist" the Court pointed out, "that where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the legislature's punishment calibration."

Drunk Driving, Prior OUIL Convictions Used to Enhance, Ex Post Facto, Equal Protection and Due Process Challenges. *People v Sadows & Gale*, 283 Mich App 65; 768 NW2d 93 (2009)**(mar'09).** In January of 2007, the Michigan legislature amended the OUIL statute to allow previous convictions occurring at any time to upgrade the charge from a misdemeanor to a felony for a third OUIL offense (Heidi's Law). Previously, only convictions going back ten years could be used to enhance. Citing *People v Perkins*, 280 Mich App 244; 760 NW2d 669 (2008) the court of appeals again turned back an ex post facto challenge to Heidi's Law. The court also rejected equal protection and due process challenges, noting that the amendment, by targeting repeat OUIL offenders, is rationally related to a legitimate governmental interest and defendants had constructive notice that their prior OUIL convictions would subject them to felony prosecution for a new violation.

Felony Firearm, Discharge Enhancement. *Dean v United States*, __ US__; 129 S Ct 1849 (2009)**(april'09).** 18 USC §924(c)(1)(A)(ii), (iii) increases the mandatory minimum for using or carrying a firearm during any violent or drug trafficking crime, or possessing a firearm in furtherance of such a crime, from 5 years to 7 years if the firearm is brandished and 10 years if it is discharged. Defendant was sentenced to a 10 year mandatory minimum after being convicted of conspiring to commit bank robbery and discharging a firearm during an armed robbery. He contended that the enhancement requires that the discharge of the firearm be intentional, and therefore he cannot be charged because his discharge was accidental. The Court held that §924(c)(1)(A)(iii) requires no separate proof of intent, and that the 10 year mandatory minimum applies if a

gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident.

Felon in Possession, Misdemeanor DV as Predicate Offense. *United States v Hayes*, __ US__; 129 S Ct 1079 (2009)**(feb'09).** The federal Gun Control Act prohibits possession of a firearm by convicted felons, which includes those convicted of a misdemeanor crime of domestic violence under 18 USC §922(g)(9). Here, defendant appealed his possession charge, arguing that his misdemeanor conviction for domestic violence did not qualify as a predicate offense under §922(g)(9), because although he hit his then-wife, the generic battery law he was convicted under did not designate a domestic relationship between aggressor and the victim as one of its elements. The Court found that a domestic relationship has to be established beyond a reasonable doubt in a §922(g)(9) possession prosecution, but does not have to be an element of the predicate offense.

Fleeing and Eluding, Sufficiency. *People v Chapo*, 283 Mich App 360; 770 NW2d 68 (2009)**(april'09).** Defendant ran over a fire hose in use and a police officer, who knew defendant, attempted to ticket him. Things got out of hand and defendant ended up driving off when the officer attempted to taser him. Defendant was convicted of fourth degree fleeing and eluding, MCL 257.602a(2), and argued on appeal that the evidence was insufficient. The court of appeals disagreed, holding that defendant received adequate notice of the charges against him, and that there was sufficient evidence the officer was acting in the lawful performance of his duties when defendant drove off.

Harmful Chemical Substances, Unlawful Use, Sufficiency. *People v Blunt*, 282 Mich App 81; 761 NW2d 427 (2009)**(jan'09).** Defendant heated cooking oil and threw it on his neighbor, causing severe burns. Defendant was convicted of assault with intent to do great bodily harm, and sentenced to 6 ½ to 10 years on that charge. He also conditionally pled to unlawful use of a harmful chemical substance, MCL 750.200i(1)(b), and received a sentence of 20-40 years on that charge. Reasoning that the victim did not sustain injury through the chemical or physical properties of cooking oil, the court held that defendant's conviction and sentence on that charge must be vacated. The court also remanded for resentencing on the assault with intent to do great bodily harm charge as the circuit court improperly scored OV 1 (victim subjected to a harmful chemical substance) and OV 2 (offender used a harmful chemical substance).

Identity Crime, Enhancement. *Flores-Figueroa v United States*, __ US__; 129 S Ct 1886 (2009)**(may'09).** A federal statute forbidding "aggravated identity theft" imposes a mandatory consecutive two year prison term on an individual convicted of certain predicate crimes if, during the commission of those other crimes, the offender, "knowingly . . . uses, without lawful authority, a means of identification of another person." 18 U. S. C. §1028A(a)(1). The statute requires that the government show the defendant **knew** that the means of identification at issue belonged to another person.

Murder, Failure to Define. *People v Mesick*, __ Mich App __; __ NW2d __ (No. 282088, September 10, 2009)**(sep'09).** The failure of Michigan legislation to define

"murder" does not render MCL 750.316 unconstitutional. The court held that "[w]e find nothing vague about what conduct is prohibited by the statute." The distinguishing element of murder, manslaughter, is adequately defined in case law and in the dictionary.

E. Sentencing.

Apprendi/Blakely, Facts Allowing Consecutive Sentence. *Oregon v Ice*, __ US__; 129 S Ct 711 (2009)**(jan'09).** The Sixth Amendment, as construed in *Apprendi v New Jersey* and *Blakely v Washington*, does not inhibit states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses. The Supreme Court believed that historical practice and respect for state sovereignty are strong reasons to not extend the *Apprendi* and *Blakely* line of decisions to the imposition of sentences for discrete crimes, but rather keep them within the offense-specific context that supplied the historic grounding for the decisions.

Controlled Substance Repeat Offenders, Doubling Minimum Sentence. *People v Lowe,* 484 Mich 718; __ NW2d __ (2009)**(aug'09).** Justice Hathaway again joined the conservative majority in a sentencing decision (see *People v Idziak*, below). MCL 333.7413(2) allows a repeat controlled substance offender to be sentenced to a term "not more than twice the term otherwise authorized." In this case Defendant's statutory maximum was ten years, and his computed guidelines range was 10 to 23 months. The trial court doubled both, sentencing Defendant to 46 months to 20 years. The five justice majority approved, using statutory interpretation. Justices Cavanagh and Kelly dissented, stating that, absent a departure, the minimum sentence should not be altered, as the repeat enhancement provision applies only to the part of the sentence "within the controlled substances act" – the maximum.

Corrections Department Notices to Court, Alteration of Sentence. *People v Holder,* 483 Mich 168; 767 NW2d 423 (2009)**(june'09).** In a rare unanimous ruling for the defense, the supreme court reversed a sentencing judge's compliance with a request by the MDOC to make previously imposed sentences consecutive to an underlying sentence on which Defendant had been discharged from parole prior to conviction on the crimes at issue. The MDOC had belatedly "cancelled" Defendant's parole discharge by sending Defendant a notice to that effect, and the trial court complied with the MDOC request to change the sentence on the subsequent convictions without notice to the parties and without holding a hearing. There is no statutory authority allowing the MDOC to revoke a discharge from parole once it is issued, and it cannot be recalled. The MDOC has no inherent authority, and any authority to revoke a parole discharge once granted must be supplied by the legislature. Lower courts were instructed that MDOC notices regarding sentencing "errors" are informational only, and any corrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules. This did not occur here as the trial court violated MCL 769.27 by altering the sentence without notice to the parties or a hearing upon objection.

Credit for Jail Time Served; Defendant on Parole. *People v Johnson,* 283 Mich App 303; 769 NW2d 905 (2009)**(april'09).** Defendant pled no contest to two property crimes, and sought credit for jail time served prior to sentencing. The court held that since defendant was on parole when he committed the property crimes, credit could only be applied on "the prior sentence on the offense for which he enjoyed parole."

Credit for Jail Time Served; Defendant on Parole. *People v Idziak,* 484 Mich 549; __ NW2d __ (2009)**(july'09).** After a complex analysis, which led to three different opinions in the case, the four justice majority ruled that a criminal defendant who commits a new crime while on parole is not entitled to credit for time served prior to being sentenced for the new offense. This is so, according to the majority, because a defendant upon arrest for a new crime immediately begins serving time for the offense for which he had been paroled and is therefore not being denied liberty due to inability to post bond on the new offense. Justice Markman, in dissent, complained that such a ruling will subject different defendants to disparate treatment based on factors such as the diligence of the prosecution or the schedule of the court. Justices Kelly and Cavanagh, concurring and dissenting, would allow the time between arrest and sentencing on the new offense to be credited in the computation of a new minimum, to arrive at a new parole eligibility date, by the MDOC.

Costs and Fines; Assessment of Ability to Pay. *People v Wallace,* 284 Mich App 467; __ NW2d __ (2009)**(june'09).** The trial court's imposition of court fees pursuant to MCL 769.1k(1), without assessing Mr. Wallace's ability to pay, was appropriate. Noting the supreme court's grant of leave in *People v Jackson*, 483 Mich 884; 759 NW2d 401 (2009), to determine whether *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), finding the imposition of reimbursement of attorney fees improper without assessment of the ability to repay, was correctly decided, the court separated that issue from the one at issue in the instant case. Here, the only question was imposition of fines and costs, and the legislature neglected to require an assessment of the ability to pay them. The court refused to read such a requirement into MCL 769.1k(1). There was no discussion of the need to assess ability to pay before an indigent defendant can be incarcerated for failure to pay court fees.

Costs and Fines; Assessment for FFA Violation. *People v Lloyd,* __ Mich App __; __ NW2d __ (No. 280373, July 9, 2009)**(july'09).** Although there is no provision in the felony firearm statute covering imposition of costs, the legislature has expressly provided for imposition of costs in all cases after a finding of guilt in MCL 769.1k, effective January 1, 2006. MCL 769.34(6), addressing the duties of the court at sentencing, also provides a general authority for imposition of costs.

Federal Sentencing Guidelines, Crack-to-Powder Ratio. *Spears v United States*, __ US__; 129 S Ct 840 (2009)**(jan'09)**(per curiam). District courts are entitled to decline to follow the crack-cocaine Guidelines. See *Kimbrough v United States*, 552 US ___ (2007), where the Supreme Court held that, under *Booker*, the cocaine guidelines, like all other guidelines, are advisory only. In this case, the district court's choice to lower the crack-to-powder ratio to 20:1 when determining defendant's sentence, rather than the

recommended 100:1, was based upon two reliable decisions by other courts, and was appropriate.

Federal Sentencing Guidelines, Presumption of Reasonableness. *Nelson,aka Zikee v United States*, __ US__; 129 S Ct 890 (2009)**(jan'09)** (per curiam). Relying on Fourth Circuit precedent that "the guidelines are considered presumptively reasonable," the district court sentenced defendant to 360 months in prison for conspiracy to distribute and to possess with intent to distribute more than 50 grams of cocaine base – the bottom of the guideline range. Defendant argued that the district court's reliance on that presumption was error, and that it incorrectly applied a presumption of reasonableness to his range. Citing *Rita v United States*, 551 US 338 (2007), the Supreme Court agreed that its precedent does not allow a sentencing court to presume that a sentence within the applicable guidelines range is reasonable. The Federal Sentencing Guidelines are not mandatory on sentencing courts, and they are also not to be presumed reasonable.

Guidelines Scoring Issues under PRV 4, PRV 6, OV 9, & OV 12. *People v Billings*, 283 Mich App 538; 770 NW2d 893 (2009)**(april'09).** Guidelines scoring issues are discussed in this case which deals primarily with *Halbert* counsel rights.

Invalid Sentence, Okay to Impose Longer Minimum on Correction. *People v Parish*, 282 Mich App 106; 761 NW2d 441 (2009)**(jan'09).** Defendant was originally sentenced to 126 months to life, an invalid sentence under MCL 769.9(2). Because the original sentence is wholly invalid, resentencing is *de novo*, allowing an increased minimum (defendant was later sentenced to 210 to 360 months). The presumption of vindictiveness was also avoided because a different judge imposed the new sentence.

OV 9 – Number of Victims. *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009)**(july'09).** OV 9 allows ten points to be scored if a defendant places more than one person in danger during commission of the offense. In *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008) the court recently ruled that OV 9 cannot be scored based on uncharged acts that did not occur during the "same criminal transaction" as the sentencing offense. In *McGraw*, a 4-3 ruling, the court refused to score ten points for OV 9 for conduct that occurred after completion of the offense for which Defendant McGraw was being sentenced. In this case, the court of appeals had ruled that because Defendant had placed several people in danger during his flight from the scene of a breaking and entering, it was permissible to score the ten points, which revised the guidelines upward. The majority held that a defendant's conduct after the sentencing offense is completed does not relate back for scoring offense variables "unless a variable specifically instructs otherwise." Justices Weaver and Young joined Justice Corrigan's dissent.

OV 10 – Vulnerable Victim. *People v Russell (on remand)*, 281 Mich App 610; 760 NW2d 841 (2008)**(dec'08).** To score 15 points under OV 10, predatory conduct must be directed toward an actual victim. Under the Michigan Supreme Court decision in *People v Cannon*, 481 Mich 152 (2008), defendant's subjective intent (here, defendant thought he was setting up a sexual encounter with a 14-year-old girl over the internet but was instead communicating with an adult male special agent) is irrelevant to OV 10 scoring

even though it is sufficient to establish the elements of the crimes defendant was convicted of (child sexually abusive activity; use of internet).

OV's 8, 10 and 19. *People v Steele*, 283 Mich App 472; 769 NW2d 256 (2009)**(april'09).** The court, in this CSC case, upheld scoring under OV 8 (asportation to a place of greater danger, OV 10 (exploitation of victim vulnerability, with predatory conduct), and OV 19 (interference with administration of justice – here, defendant allegedly telling his victims that they should not disclose his acts or he would go to jail).

Presentence Report; Challenge to Accuracy. *People v Lloyd*, __ Mich App __; __ NW2d __ (No. 280373, July 9, 2009)**(july'09).** Noting the importance of accurate information in the report, the court remanded to the trial court for consideration of Defendant's challenge to an assertion in the report that charges were pending against him. The trial court had declined to review the matter as no objection had been made at sentencing. Noting that MCR 6.249(C) had been amended to allow a challenge to information relied upon in determining a sentence "at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals," the appellate panel found that Defendant's post-sentence motion to correct the presentence report was sufficient compliance to allow review of his claim.

F. Miscellaneous

Arrest Records, Destruction after Deferral. *People v Benjamin*, 283 Mich App 526; 769 NW2d 748 (2009)**(april'09).** Defendant successfully completed a drug deferral program under MCL 333.7411(1) and requested destruction of arrest and fingerprint records by the state police. The trial court agreed. Citing *McElroy v Michigan State Police Criminal Justice Information Center*, 274 Mich App 32; 731 NW2d 138 (2007), which interpreted a similar deferral program, the court held that the trial court erred in ordering destruction of the records. The statutory deferral program demands that a non-public record be kept in order to ensure that the program is accessed only once by an individual, and deferral under the program is not a finding of "not guilty" required by MCL 28.243(8) for destruction of the arrest and fingerprint records.

Counsel on Appeal, Guilty Pleas, *Halbert* Retroactivity. *People v Maxson*, 482 Mich 385; 759 NW2d 817 (2008)**(dec'08).** Defendant pled guilty in 2001 to two felonies and failed to request appointed counsel on appeal, as Michigan had unconstitutionally eliminated that right. On June 23, 2005, the United States Supreme Court decided *Halbert v Michigan*, 545 US 605, clearly indicating Michigan had acted unconstitutionally in denying counsel to guilty pleaders in conjunction with their first, direct appeal, despite the fact that the appeal was discretionary. The supreme court held that *Halbert* is not retroactive under either federal or state law. Justice Cavanagh, joined by Justice Kelly, accused the majority of swerving and dodging the decisions of the United States Supreme Court to deny indigent defendants access to justice.

Death Penalty, Non-Homicide Crimes. *Kennedy v Louisiana*, __ US__; 129 S Ct 1 (2008)**(oct'08).** Defendant was charged with aggravated rape of his 8 year-old stepdaughter. He was convicted and sentenced to death under a Louisiana state statute authorizing capital punishment for the rape of a child under 12. The state supreme court rejected defendant's reliance on *Coker v Georgia*, 433 US 584, which barred the use of the death penalty as punishment for the rape of an adult woman, declaring that children were in a special class, and that the rape of a child is a crime deserving of death. *Coker* left open the question of whether any other non-homicide crimes can be punished by death consistent with the Eighth Amendment. The US Supreme Court elaborated on its earlier *Coker* decision, and determined that the Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death.

Expungement, Statutory Construction. *People v Droog*, 282 Mich App 68; 761 NW2d 822 (2008)**(dec'08).** Defendant attempted to set aside a 2001 conviction for obtaining a controlled substance by fraud using the code of criminal procedure. MCL 780.621. However, the offense was reportable to the secretary of state, MCL 257.732(4)(i), and the vehicle code dictates that courts "shall not order expunction" of such violations. Looking at the two provisions, the court, employing statutory construction rules, including the need to avoid absurd results, held that the limiting provision of the vehicle code did not prohibit setting aside convictions under the code of criminal procedure and remanded, directing that a set aside order be entered.

Fees for Court Appointed Counsel, Recoupment Procedures. *People v Jackson,* 483 Mich 271; 769 NW2d 630 (2009)**(july'09).** The court granted leave to examine the decision of the court of appeals in *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), which required an examination of a defendant's ability to pay before a trial court could order reimbursement of attorney fees at sentencing. After analyzing United States Supreme Court decisions in the area, the court held that the *Dunbar* requirement that the ability to pay be analyzed prior to the imposition of the obligation to repay attorney fees was not constitutionally mandated. However, an assessment of ability to pay is in fact required at the time "imposition is enforced." In other words, an indigent defendant cannot be punished for failure to reimburse attorney fees if his failure is due to his poverty.

Habeas, Federal, AEDPA Standards. *Knowles v Mirzayance*, __ US__; 129 S Ct 1411 (2009)**(march'09).** The Ninth Circuit applied an improper standard of review, and did not defer sufficiently to the conclusions of the state court that trial counsel was not ineffective for failing to advance an insanity defense. The state court's decision correctly applied *Strickland's* standard for ineffective assistance claims, where a defendant must show both deficient performance by counsel and prejudice. The fact that the Ninth Circuit disagreed with the state court's decision does not make it erroneous if it was reasonable under the general standard required by *Strickland*. The question "is not whether a federal court believes the state court's determination" under *Strickland* "was incorrect but whether it was unreasonable—a substantially higher threshold." *Schriro v Landrigan,* 550 US 465, 473.

Habeas, Federal, AEDPA Standards. *Washington v Sarausad*, __ US__; 129 S Ct 823 (2009)**(jan'09).** A federal court must defer to a state court's conclusion that jury instructions were accurate, unambiguous, and did not reduce the prosecution's burden of proof as long as it was not unreasonable. Here, because the state courts' conclusion that the jury instructions were proper was not objectively unreasonable, the Ninth Circuit should have ended its §2254(d)(1) inquiry. Furthermore, even if the instructions were ambiguous, the Ninth Circuit still erred in finding it so ambiguous as to cause a federal constitutional violation requiring reversal under AEDPA. The state courts reasonably applied Supreme Court precedent when they determined that there was no rational way that the prosecutor's closing argument led the jury to apply the jury instructions in a manner where the state was relieved of its burden to prove every element of the crime beyond a reasonable doubt.

Habeas, Federal, Alternative Theories of Guilt Instruction, Structural Error and "Clearly Established." *Hedgpeth v Pulido*, __ US__; 129 S Ct 530 (2008)**(dec'08)**(per curiam). If the jury is instructed on two alternative theories of guilt, and may have relied on an invalid one, the error is not a structural one that would automatically reverse the defendant's conviction. A reviewing court finding such error should ask whether the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict." See *Brecht v Abrahamson*, 507 US 619.

Habeas, Federal, Postconviction Relief, Procedural Default. *Cone v Bell*, __ US__; 129 S Ct 1769 (2009)**(april'09).** A constitutional claim is not procedurally defaulted, and therefore is reviewable on federal habeas, when a state court erroneously applied its rules in refusing to hear the merits of the claim. Defendant's claim that the state of Tennessee had violated his rights under *Brady v Maryland*, 373 US 83 by suppressing documents, was rejected under the premise that the claim was decided by the state supreme court on direct review and that defendant had waived it by never properly raising it in state court. Neither of these premises provides an independent and adequate state ground for denying defendant's federal claim. Even though it is highly unlikely that the suppressed evidence would have affected the jury's verdict, there is a chance that the evidence may have influenced the jury's sentencing recommendation, and for that reason a full review of the evidence is necessary.

Habeas, Statute of Limitations. *Jimenez v. Quarterman*, __ US __: 129 S Ct 681 (2009)**(jan'09).** Defendant was charged with felony burglary, exhausted his state postconviction remedies, and applied for habeas relief. The district court dismissed the petition as untimely under AEDPA and the Fifth Circuit affirmed. The Supreme Court held that a state appellate court's decision to reinstate a defendant's erroneously dismissed direct appeal reset the AEDPA habeas clock to zero until the end of that state direct appeal.

Immunity, Prosecutorial under 42 U. S. C. §1983. *Van De Kamp et Al v Goldstein*, __ US__; 129 S Ct 855 (2009)**(jan'09).** Defendant was released from prison after a successful federal habeas petition alleging that his murder conviction resulted from false

testimony by a jailhouse informant, who had received reduced sentences for his testimony in past cases. He alleged that prosecutors knew, yet failed to tell defendant's attorney, valuable impeachment information, which led to his mistaken conviction. Defendant filed suit under 42 U. S. C. §1983, against the prosecution, declaring that they breached a constitutional duty to communicate this information, resulting from supervisory prosecutors' inability to train or supervise, or to establish an information system containing impeachment material about informants. The petitioners claimed absolute immunity. The Supreme Court found for petitioners, asserting that they are entitled to absolute immunity from liability in §1983 suits brought against prosecutorial actions that are "intimately associated with the judicial phase of the criminal process." See *Imbler v Pachtman*, 424 US 409. Although defendant here challenged administrative procedures, they are still procedures that are directly linked with the trial's conduct and are therefore protected.

Immunity, Qualified, *Saucier* Analysis not Mandatory. *Pearson v. Callahan*, __ US__; 129 S Ct 808 (2009)**(jan'09).** The consent-once-removed doctrine permits a warrantless police entry into a home when consent to enter has already been granted to an undercover officer who has observed contraband in plain view. Here, when respondent's conviction of possession and distribution of drugs was vacated by state courts, he brought an action against petitioner police officers in federal court asserting that they violated the Fourth Amendment by unlawfully entering his house without a warrant. Petitioners argued that they were entitled to qualified immunity because they, in good faith, believed their actions to fall under the consent-once-removed doctrine. Ruling that the *Saucier v Katz*, 533 US 194, two prong analysis was not strictly required for every qualified immunity case, the US Supreme Court held that the officers are entitled to qualified immunity because it was not clearly established at the time of the search that their conduct was unconstitutional. When the entry occurred, two state supreme courts and three federal courts of appeals had accepted the consent-once-removed doctrine. The officers were entitled to rely on these cases, even though their own federal Circuit had not yet ruled on consent-once-removed entries.

Juvenile Diversion, Notice under CVRA. *In re Lee*, 282 Mich App 90; 761 NW2d 432 (2009)**(jan'09).** MCL 780.786(b)(1) demands notice to prosecutor, who in turn must inform victim, who has right to appear and address court, before a juvenile charge alleging commission of a CVRA crime (punishable by more than one year or designated a felony if committed by an adult, MCL 780.781(1)(f)), can be "removed from the adjudicative process." While there were technical violations in two cases under consideration with respect to the family court's compliance with these requirements, the court of appeals found the violations harmless in one case and found substantial compliance in the other.

Parole, Discharge, Lack of Authority to Revoke. *People v Holder*, 483 Mich 168; 767 NW2d 423 (2009)**(june'09).** In a rare unanimous ruling for the defense, the supreme court reversed a sentencing judge's compliance with a request by the MDOC to make previously imposed sentences consecutive to an underlying sentence on which Defendant had been discharged from parole prior to conviction on the crimes at issue. The MDOC

had belatedly "cancelled" Defendant's parole discharge by sending Defendant a notice to that effect, and the trial court complied with the MDOC request to change the sentence on the subsequent convictions without notice or a hearing. There is no statutory authority allowing the MDOC to revoke a discharge from parole once it is issued, and it cannot be recalled. The MDOC has no inherent authority, and any authority to revoke a parole discharge once granted must be supplied by the legislature. Lower courts were instructed that MDOC notices regarding sentencing "errors" are informational only, and any corrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules. This did not occur here as the trial court violated MCL 769.27 by altering the sentence without notice to the parties or a hearing upon objection.

Plea Agreements, Breach of by Government. *Puckett v United States*, __ US__; 129 S Ct 1423 (2009)**(march'09).** In exchange for defendant's guilty plea the government agreed to request a three level reduction in his offense level, and a sentence at the low end of the guideline range. After the guilty plea was accepted, but before his sentencing, defendant committed another crime, and the government opposed reduction if his offense level. Defendant appealed, raising for the first time the argument that the government had broken the plea agreement. The Fifth Circuit held that defendant forfeited his claim by failing to raise it at the trial level, applied FRCP 52(b)'s plain-error standard for unpreserved claims of error, and found the error harmless. The Supreme Court agreed with the Fifth Circuit, finding that FRCP 52(b)'s plain-error test applied to defendant's forfeited claim, and applied in the usual fashion. The government's breach of the plea agreement does not retroactively cause the defendant's guilty plea to have been unknowing or involuntary.

Sex Offender Registration, Catchall Provision, Aggravated Assault. *People v Anderson*, 284 Mich App 11; __ NW2d __ (2009)**(may'09).** Defendant was convicted of aggravated assault, and complained that the trial court erred in examining underlying facts of the offense to require him to register as a sex offender for this non-listed offense. The court of appeals disagreed, holding that because the conviction was a state law violation, the victim was under 18, and an examination of the underlying facts (Defendant touched the complainant "underneath her underwear on at least nine occasions") revealed that the offense "by its nature" constituted a sexual offense, it was appropriate to require Defendant to register as a sex offender.

Sex Offender Registration, Validity of Modification Allowing Defendant to Reside in a Student Safety Zone. *People v Zujko*, 282 Mich App 520; 765 NW2d 897 (2009)**(feb'09).** Defendant pled to one count of use of a computer to commit a crime after being charged with 6 counts, including 3 of possession of child sexually abusive material. At sentencing, defendant was required to register as a sex offender under MCL 28.735. Later the trial court granted defendant's request to modify terms of his probation and permitted him to remain in his residence, despite the fact that the residence was in a "student safety zone" as defined by the SORA. The prosecutor appealed the modification and the court of appeals upheld it, holding that the plain language of the SORA exempts individuals who were living in a student safety zone prior to January 1, 2006, unless they subsequently initiate contact with a minor within that zone.

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

A. *Miranda* Violations

Maryland v. Shatzer **(argued October 5, 2009)**
If a defendant invokes his *Miranda* right to counsel, does *Edwards v. Arizona* prevent the police from initiating custodial interrogation even after a very long period of time (more than two years, in this case) has passed?

Florida v. Powell **(to be argued December 2009)**
Is a version of the *Miranda* warnings fatally defective if it fails to clearly state that the arrestee has the right to have counsel with him *during* questioning?

Berghuis v. Thompkins **(to be argued December 2009)**
Does *Miranda* allow an officer to continue attempts to interrogate a prisoner who has neither waived his *Miranda* rights nor invoked them but has simply maintained his silence (in this case, for nearly three hours)?

B. Ex Post Facto

Carr v. United States **(to be argued December 2009)**
May a defendant be convicted for violating a sex offender registration act by failing to register and traveling in violation of the act when the failure to register and the travel both occurred before the law was enacted?

C. Ineffective Assistance of Counsel

Padilla v. Kentucky **(argued October 13, 2009)**
Is counsel who fails to advise a non-citizen client that pleading guilty to a particular offense will trigger automatic deportation ineffective so that the client may set aside the guilty plea?

D. Jury Selection

Berghuis v. Smith **(to be argued December 2009)**
Is it clearly established for habeas corpus purposes that a state court evaluating a Sixth Amendment fair cross-section claim must apply the comparative disparity test instead of the absolute disparity test?

E. Confrontation Clause—Testimonial Statements and Forfeiture

***Briscoe v. Virginia* (to be argued December 2009)**
Is the Confrontation Clause satisfied by a scheme that allows the prosecution to introduce the lab report from an analyst while the defendant retains the right to call the analyst as his own witness?

F. Mandatory Minimums and the Sixth Amendment

***United States v. O'Brien and Burgess* (to be argued Dec 2009)**
Does a "sentencing enhancement" statute that results in a 30-year mandatory minimum for use of a machine gun create sentencing factor that may be found by the judge by a preponderance or an element of the offense that must be proved to the jury beyond a reasonable doubt?

G. Juvenile Sentencing and the Eighth Amendment

***Graham v. Florida* & *Sullivan v. Florida* (to be argued November 9, 2009)**
Does the 8th Amendment bar the imposition of life sentences on juveniles for crimes other than murder?

H. Civil Commitment

***United States v. Comstock* (to be argued December 2009)**
May Congress constitutionally provide for the indefinite civil commitment of sexually dangerous federal prisoners after their federal correctional sentences expire?

I. Procedural Default

***Beard v. Kindler* (argued November 2, 2009)**
Is a state rule of procedural default (in this case, the fugitive forfeiture rule) not "firmly established" if the state courts have discretion as to whether to apply the rule to bar review on the merits?

J. AEDPA Standards of Review

***McDaniel v. Brown* (argued October 13, 2009)**
What is the proper standard of review on federal habeas for an insufficiency of the evidence claim that was rejected by the state courts?

II. Legislation

The following are brief summaries of key legislation. Much of this was provided courtesy of Brian R. Laxton, who compiled the material for a recent presentation to the Ingham County Bar Association's Criminal Law Section. 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/.

2008 PA's 296-298 (HB's 4468-4469, 5351), eff. 10/8/08. Causing Death or Injury to Person in Work Zone. Eliminates requirement that death or injury be to a worker for enhanced penalties – can be any person in a work zone. Eliminates need to post warning signs.

2008 PA 339 (HB 4552) eff. 1/1/09. Increases penalties for animal cruelty.

2008 PA 340 (HB 4938) eff. 12/23/08. Unauthorized practice of an occupation causing injury or death = class F felony (4 year max).

2008 PA 341 (HB 5160) eff. 1/1/09. Enhances drunk driving penalties for out of state violations.

2008 PA's 466-467 (HB's 6629-6630) eff. 10/31/2010. Provides for payment to state or local government for costs related to certain reckless driving convictions.

2008 PA's 475-476 (HB 6022, SB 1193) eff. 5/1/09. Theft of catalytic converter = five year felony.

2008 PA 484 (HB 6625) eff. 1/12/09. Derailing streetcar or endangering life of passenger or worker on streetcar = class A felony with life imprisonment possible.

2008 PA's 411-412 (HB's 6092-6093) eff. 1/6/09. False statement in petition for DNA testing = 5 year felony with consecutive sentence. **2008 PA 410 (HB 5089) eff. 1/6/09,** extended the DNA testing statute through January 1, 2012.

2008 PA's 413-414 (HB's 5361-5362) eff. 3/1/09. Stealing utility property = five year felony.

2008 PA's 430-431 (SB 1571, SB 1114) eff. 4/1/09. Buying or selling stolen metal = five year felony.

2008 PA 508 (HB 4260) eff. 1/13/09. Allows for removal of data from system after acquittal or other elimination of conviction.

2008 PA 538 (HB 4612) eff. 3/1/09. False statement on CCW application = four year felony.

2008 PA's 543, 547 (HB 5055, SB 1616) eff. 4/1/09. Increases minimum costs for juvenile and adult criminal offenders.

2009 PA's 10-11 (HB 4096, SB 188) eff. 4/9/09. Allows search warrants for a person who is the subject of an arrest or bench warrant.

2009 PA's 27-28 (SB's 145-156) eff. 7/1/09. Allows recovery in restitution for replacement value if fair market value is difficult to determine.

Courtesy of Brian R. Laxton:

Public Acts 564 and 565 of 2008
Gangs!!
MCL 750.411u and MCL 777.16t
If a person who was an associate or a member of a gang committed or attempted to commit a felony, and his or her association or membership in the gang provided the motive, means, or opportunity to commit the felony, the person would be guilty of a Class B felony punishable by imprisonment for up to 20 years.
A sentence imposed under the bill would be in addition to the sentence imposed for the conviction of the underlying felony, or the attempt to commit the underlying felony, and could be served consecutively to and preceding any term of imprisonment imposed for the underlying felony or attempt.
"Gang" would mean an ongoing organization, association, or group of at least five people, other than a nonprofit organization, that identifies itself by all of the following:
1. A unifying mark, manner, protocol, or method of expressing membership, including a common name, sign or symbol, means of recognition, geographical or territorial sites, or boundary or location.
2. An established leadership or command structure.
3. Defined membership criteria.
"Gang member" or "member of a gang" would mean a person who belongs to a gang.
Effective on April 1, 2009.

Public Acts 380, 533, 534 and 535 of 2008
Establishes DNA gathering before conviction upon being charged with certain crimes rather than after a conviction.
MCL 750.520m
Katie's Law

Effective July 1, 2009

Testimony given before the House Judiciary Committee illustrated how important collecting DNA samples from arrestees can be. Jayann Sepich from New Mexico told of how her daughter, Katie, was brutally raped, murdered, and set on fire in August of 2003. DNA evidence was collected from under her fingernails. Even though investigators ran the DNA profile through a law enforcement database weekly, no matches were made. However, just three months after Katie was murdered, a man was arrested on aggravated burglary charges for breaking into the home of two women with, according to Ms. Sepich, intent to rape and murder them. The women fled to a bathroom, locked the door, and called police on a cell phone. Gabriel Avilla was arrested at the scene and in March of 2004, convicted of that crime. He was released on bond prior to sentencing and, before a DNA sample was collected, fled to Mexico. Mr. Avilla wasn't rearrested until August of 2005, two years after Katie's death. When a DNA sample was finally taken, it matched the evidence collected in Katie's case. Mr. Avilla confessed to Katie's murder when confronted with the DNA evidence linking him to the crime. He was formally charged with her murder on December 26, 2006, more than three years after Katie's death, on what would have been her 26th birthday.

Katie's Law, which requires DNA for most felony arrests to be included in CODIS, the DNA database operated by the FBI (and in which states can elect to share DNA profiles), took effect in New Mexico in January 1, 2007. Reportedly, states which have adopted similar laws have been able to solve more cold cases. According to Katie's mother, within the first 11 months after the law went into effect in New Mexico, investigators were able to solve two homicides, two sexual assaults, and five property crimes by matching DNA profiles of arrestees with evidence collected at previous crime scenes. Had such a law been in effect in New Mexico at the time Katie's murderer was arrested on the subsequent burglary charge, Gabriel Avilla would have been linked to Katie's murder much earlier and would not have been released on bond prior to sentencing on the burglary charge. In addition, many law enforcement dollars spent on investigating the crime and bringing him to justice could have been saved. Moreover, it is not known what crimes he may have committed while eluding authorities.

Recently, several other states have expanded their laws regarding DNA collection and retention to include certain arrestees. Citing a need for increased public safety, many believed that Michigan should adopt a similar law.

Public Act 380

Amended the Michigan Penal Code (MCL 750.520m) to require an individual arrested for a violent felony, as defined in the Corrections Code, to provide samples for chemical testing for DNA identification profiling or a determination of the sample's genetic markers. Currently, the county sheriff or the investigating law enforcement agency is required to collect and transmit the samples as required under the DNA Identification Profiling System Act. The bill adds that a sample taken from persons arrested for a violent felony may be transmitted to MSP upon collection.

"Violent felony" is defined in the Corrections Code to mean the following crimes: felonious assault/armed; assault with intent to commit murder; assault with intent to do great bodily harm less than murder; assault with intent to maim; assault with intent to commit felony not otherwise specified; assault with intent to rob and steal (unarmed); assault with intent to rob and steal (armed); first degree murder; second degree murder;

manslaughter; kidnapping; prisoner taking a hostage; leading, taking away, enticing child under 14; mayhem (with intent to maim, disfigure, or cut out facial features, limb, or organ); criminal sexual conduct (CSC) 1st, 2nd, 3rd, and 4th degree; assault with intent to commit CSC 1st, 2nd, or 3rd degree; armed, aggravated assault; carjacking; use of force or violence to commit a larceny of money or property.

Public Act 553

Amended the DNA Identification Profiling System Act (MCL 28.173a). Currently, if the investigating law enforcement agency or the Department of State Police already has a DNA sample from an individual, then another sample does not have to be collected upon conviction. Under the act, if the DNA sample was inadequate for purposes of analysis, the individual will have to provide another DNA sample that is adequate for analysis.

Public Act 535

Unlawful conduct relating to DNA samples and information. Dissemination of DNA profiles is restricted under the act to criminal justice purposes, court proceedings, and limited research purposes. The act prohibits an individual from disseminating, receiving, or otherwise using or attempting to use information in the DNA identification profile record knowing that such conduct is for a purpose not authorized by law. Further, an individual could not willfully remove, destroy, tamper with, or attempt to tamper with a DNA sample, record, or other DNA information obtained or retained under the act without lawful authority. A violation of either prohibition is a misdemeanor punishable by imprisonment for not more than one year and/or a fine of not more than $1,000.

Retention of DNA samples and profiles. Currently, the law provides for permanent retention of a DNA identification profile by the Department of State Police of adults and juveniles who were convicted of, or found responsible for, a felony or specified misdemeanors. All other DNA identification profiles obtained by the department could only be retained as long as the profile is needed for a criminal investigation or criminal prosecution.

In addition to the current requirements, the act requires the State Police Forensic Laboratory to dispose of a DNA sample or a DNA identification profile, or both, if (1) it receives a written request for disposal from the investigating police agency or prosecutor indicating that the sample or profile was no longer necessary for a criminal investigation or criminal prosecution; or (2) it receives a written request for disposal and a certified copy of a final court order establishing that the charge for which the sample had been obtained has been dismissed or resulted in an acquittal or that no charge was filed within the applicable limitations period.

The above provision would not apply if the department determined that the individual from whom the sample had been taken had otherwise become obligated to submit a sample (e.g., the person was arrested for or convicted of a different crime for which DNA collection is authorized) or if subsection 16 of the bill applied. Subsection 16 specifies that notwithstanding any other provision of the act, the department is not required to dispose of physical evidence or data obtained from a sample if evidence relating to an individual other than the person from whom the sample had been taken would be destroyed and the evidence or data relating to the other individual would otherwise be retained under Section 6.

Further, under the act, an identification, warrant, detention, probable cause to arrest, arrest, or conviction based upon a DNA match or DNA information is not invalidated if it is later determined that one or more of the following errors occurred in good faith:
A DNA sample was erroneously obtained; A DNA identification profile was erroneously retained; A DNA sample was not disposed of or there was a delay in disposing of the sample; A DNA identification profile was not disposed of or there was a delay in disposing of the profile.

Public Act 534

Added a new section to the same act (MCL 28.175a) to restrict the use of DNA profiles of lawfully obtained DNA samples by the Department of State Police to only one or more of the following purposes:

Law enforcement identification purposes.
Assisting in the recovery or identification of human remains or missing persons.
Academic, research, statistical analysis, or protocol development purposes only if personal identifiers were removed.
Further, DNA samples provided under the act could not be analyzed for identification of any medical or genetic disorder.

Public Acts 461 and 462 of 2008

Super Drunk Driving - MCL 257.625k et seq.

These acts add a criminal penalty for operating a vehicle with a BAC of 0.17 or more. In essence, it increases the penalties from a 93-day misdemeanor to a 180-day misdemeanor. It also mandates participation and successful completion of a treatment program for at least one year.
If the person has no prior convictions, the Secretary of State shall suspend the person's license for one year. After 45 days, the Secretary of State may issue the person a restricted license. The restricted license also requires that an ignition interlock device be placed in the offender's vehicle.
Additionally, if a hearing officer issues a restricted license requiring an ignition interlock device based upon multiple drunk driving convictions, the ignition interlock device must not be for less than one year. The interlock device cannot be removed without the Secretary of State issuing an order for its removal. This law takes effect on October 31, 2010.

Public Acts 463, 468, 442, 446 and 465 of 2008

Establishes penalties for moving violations that seriously injure or kill another person as follows:

A moving violation that causes serious impairment of a body function of another person is a misdemeanor punishable by up to 93 days imprisonment, a fine of $500 or both.
A moving violation that causes the death of another person is a misdemeanor punishable by imprisonment of up to one year or a maximum fine of up to $2,000 or both.
Reckless driving that causes serious impairment of a body function of another person is a felony punishable by imprisonment for up to five years or a fine of between $1,000 and $5,000 or both, and vehicle immobilization.

Reckless driving that causes the death of another person is a felony punishable by imprisonment for up to 15 years or a fine of $2,500 to $10,000, or both and vehicle immobilization.
The law requires the Secretary of State to assign six points to a person's driving record for any of the above offenses, and four points for a moving violation resulting in an at-fault collision as well as revoke a drivers license for a conviction of a reckless driving causing either serious injury or death. A moving violation that results in serious injury or death will result in a one year license suspension. A person convicted of any of the above offenses is required to pay $1,000 driver responsibility fees each year for two consecutive years.
The law eliminates the offenses of felonious driving and negligent homicide.
The law takes effect on October 31, 2010.

PA 192 of 2008;
GPS Tracking Domestic Violence Cases - MCL 765.6b
The Public Act allows a judge or district court magistrate to order a defendant charged with a crime involving domestic violence, to carry or wear a global positioning system (GPS) device as a condition of bond. If the judge or magistrate makes GPS monitor a condition of bond, the defendant is only allowed to be released if he or she agrees to pay the GPS costs or perform community service in lieu of payment.
It also allows the court, with the victim's informed consent, to order the defendant to give the victim a device to receive information from the defendant's GPS device. The victim may give the court a list of areas from which he or she wanted the defendant excluded and requires the court to consider the request. The victim may request that the court terminate his or her participation in the GPS monitoring of the defendant at any time.
It requires the court to instruct GPS monitoring system to notify the proper authorities if the defendant violates the bond conditions. It also requires that the court impose a condition of bond that the defendant not purchase or possess any firearm.
Effective July 10, 2008

Public Acts 519, 520, 521 and 577 of 2008
Child Abuse and Unattended Child in Car
MCL 750.136b; 777.16g and 750.135a
Took effect on April 1, 2009
Rationale:
Incidents in which children were left in a car on a hot day brought to light a problem with the application of Michigan's child abuse laws. First- and second-degree child abuse involve knowing or intentional acts, omissions, or reckless acts that cause or are likely to cause serious physical harm or, in some cases, serious mental harm to a child. Third-degree child abuse involves a person's knowingly or intentionally causing physical harm, and fourth-degree child abuse involves a person's omission or reckless act that causes physical harm. ("Physical harm", "serious physical harm", and "serious mental harm" are defined terms in the Michigan Penal Code.) The child abuse prohibitions do not address situations in which a person knowingly and intentionally places a child in a situation that is likely to cause physical harm to a child. As a result, such a person cannot be convicted

of third- or fourth-degree child abuse unless the child suffered actual physical harm, and cannot be convicted of first- or second-degree child abuse unless the incident involved serious harm. If, for instance, a child is found in a car on a very hot or very cold day before he or she suffers physical harm, the person who exposed the child to the likely harm might not be held criminally liable for his or her actions. Some people suggested that child abuse prohibitions and penalties should apply in situations in which a person knowingly and intentionally does something that poses an unreasonable risk of harm or injury to a child, and that the Penal Code should include specific prohibitions and penalties for leaving young children unattended in a vehicle when that action poses an unreasonable risk of harm or injury to a child.

Public Act 577 amends the Michigan Penal Code to do all of the following:

-- Include in the factors that constitute third- and fourth-degree child abuse a person's knowing or intentional act that, under the circumstances, poses an unreasonable risk of harm or injury to a child.

-- Designate third-degree child abuse as a felony rather than a misdemeanor.

-- Include in the factors that constitute second-degree child abuse a person's reckless act that causes serious mental harm to a child.

-- Provide that conduct that is a reasonable response to domestic violence is an affirmative defense to a prosecution for child abuse.

Fourth-Degree Child Abuse

Currently, a person is guilty of fourth-degree child abuse, a misdemeanor punishable by up to one year's imprisonment, if his or her omission or reckless act causes physical harm to a child (an unemancipated person under 18 years old). Under the act, a person also is guilty of fourth-degree child abuse if he or she knowingly or intentionally commits an act that, under the circumstances, poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results.

Third-Degree Child Abuse

Currently, a person is guilty of third-degree child abuse if he or she knowingly or intentionally causes physical harm to a child. Under the act, a person also is guilty of third-degree child abuse if he or she knowingly or intentionally commits an act that, under the circumstances, poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child.

Third-degree child abuse previously was a high court misdemeanor punishable by up to two years' imprisonment. Under the act, the offense is a felony subject to the same penalty.

Second-Degree Child Abuse

Under the Penal Code, a person is guilty of second-degree child abuse, a felony punishable by up to four years' imprisonment, if any of the following apply:

-- The person's omission causes serious physical harm or serious mental harm to a child.

-- The person's reckless act causes serious physical harm to a child.

-- The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child, regardless of whether harm results.

-- The person knowingly or intentionally commits an act that is cruel to a child, regardless of whether harm results.

Under the act, a person also is guilty of second-degree child abuse if his or her reckless act causes serious mental harm to a child.

"Physical harm" means an injury to a child's physical condition.
"Serious physical harm" means any physical injury to a child that seriously impairs the child's health or physical well-being, including brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.
"Serious mental harm" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.
Affirmative Defense
The act specifies that it is an affirmative defense to a prosecution for child abuse that the defendant's conduct involving the child was a reasonable response to an act of domestic violence in light of all the facts and circumstances known to the defendant at that time. The defendant has the burden of establishing the affirmative defense by a preponderance of the evidence. As used in this provision, "domestic violence" means that term as defined in the domestic violence prevention and treatment Act (MCL 400.1501), i.e., the occurrence of any of the following acts by a person that is not an act of self-defense:
-- Causing or attempting to cause physical or mental harm to a family or household member.
-- Placing a family or household member in fear of physical or mental harm.
-- Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
-- Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
Public Acts 519 and 521
These acts prohibit a person who is responsible for the care or welfare of a child under six years old from leaving that child unattended in a vehicle for a period of time that poses, or under circumstances that pose, an unreasonable risk of harm to the child. A violation is punishable as shown below:
Result of Violation Offense Level Max. Imprisonment and/or Max. Fine
No physical harm Misdemeanor 93 days; $500
Physical harm other than serious physical harm Misdemeanor 1 year; $1,000
Serious physical harm D Class (Person) Felony 10 years; $5,000
Death B Class (Person) Felony 15 years; $10,000
The bill defines "unattended" as alone or without the supervision of an individual who is at least 13 and is not legally incapacitated.