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# CRIMINAL LAW UPDATE
## *OCTOBER 2010THRUOUGH OCTOBER 2011*

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# Table of Contents

# I. Case Law

## A. Fourth Amendment.

**Community Caretaking Exception, Warrantless Entry by Firefighter.** *People v Slaughter*, 489 Mich 302; __ NW2d __ (2011)**(july'11).** A firefighter entered Defendant's townhouse in his absence after a neighbor reported running water, spotted marijuana plants and assorted grow material, and contacted police. After Defendant was charged he moved to suppress. The circuit court granted suppression, holding that firefighters could not avail themselves of the community caretaking exception. The court of appeals in a 2-1 unpublished opinion, ruled that the community caretaker exception can apply to firefighters but here they were too quick to enter. The dissenting judge thought the firefighters acted reasonably here. The supreme court reversed, holding that the search was reasonable, fitting within the community caretaker exception to the warrant requirement. "We conclude that the community caretaking exception to the warrant requirement applies when a firefighter, responding to an emergency call involving a threat to life or property, reasonably enters a private residence in order to abate what is reasonably believed to be an imminent threat of fire inside."

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

**Expectation of Privacy in a Condemned Home, Search and Seizure.** *People v Antwine*, __ Mich App __; __ NW2d __ (2011 WL 2554204, No. 297287, decided June 28, 2011)**(june'11).** The trial court found that police violated Antwine's 4th Amendment rights when they conducted a warrantless search of the condemned home Defendant was occupying, and dismissed the drug charges against him. The prosecution appealed. Police arrived at the condemned home after receiving a call that someone was unlawfully residing there. Antwine allowed them into the home, where drugs where eventually found. The trial court found that, even with a condemned home, the occupier has a right to possess it, and the police search exceeded the scope of their reason for visiting. The COA reversed, holding that the Antwine had no reasonable expectation of privacy. The court held that defendant's wrongful presence outweighed any property right (and any expectation of privacy associated with that right). The COA also noted a governmental interest in controlling condemned buildings.

**Investigatory Stop, Particularized Suspicion.** *People v Steele*, __ Mich App __; __ NW2d __ (2011 WL 1432032, No. 299641, decided April 14, 2011)**(april'11)**. Defendant went to Meijer and purchased packages of Sudafed and one gallon of Coleman fuel, both of which are known precursors for methamphetamine. Police were alerted to Steele's purchases by a Meijer employee who was trained to identify the precursors for methamphetamine. After the tip, Steele was pulled over. He did not have a driver's license. Steele was asked out of the car and made to put his hands on the roof of the car, at which time the officer told Steele that he knew that there were narcotics in the vehicle. The officer asked Steele to confirm this, which he did, leading to his arrest. Steele was taken back to the police station and read his rights. Steele repeated the statements he had made during the roadside questioning approximately 45 minutes earlier. Defendant later moved to suppress both the evidence found in his vehicle and the statements made to police. There were three main issues. The first issue was whether the police had the requisite particularized suspicion necessary to conduct an investigatory stop. The second issue was whether Defendant was subjected to custodial interrogation at the location of the stop without first advising him of his *Miranda* rights. The final issue was whether Steele's statements made at the police station were inadmissible as the fruit of an illegal stop and illegal roadside interrogation. The trial court suppressed the evidence and defendant's statements. The court opined that "the purchase of only one package [a finding the COA later determined to be erroneous] of Sudafed and camping fuel is not enough to meet the standard of a particularized suspicion." The court also found that defendant was in custody for purposes of Miranda during the roadside interrogation and, therefore, that his statements were illegally obtained. Lastly, the court found that defendant's statement at the police station was the fruit of an illegal roadside custodial interrogation. The Court of Appeals reversed all of these findings, holding that the purchases, combined with the reliability of the person providing the tip, gave the officer the requisite particularized suspicion to warrant an investigatory stop. The COA also held that Steele was not in custody ever after having been made to get out of his car, put his hands on the roof of the car, and told that the officer knew that there were drugs in the car. The court stated that typical traffic stops are such that there is little danger that a person questioned will be induced to speak where he would not otherwise do so freely. Finally, the COA found that the statements made at the station were also proper.

**Vehicle Search after Arrest, Good Faith.** *Davis v United States,* __ US __; 131 S Ct 2419 (2011)**(june'11).** Defendant was a passenger in a vehicle and was arrested for giving police a false name. After he was cuffed and secured, police searched the vehicle and found his gun. Defendant was then indicted on the gun charge. Defendant agreed that this search complied with then existing 11th Circuit precedent interpreting *New York v Belton*, 453 US 454 (1981), but raised the issue to preserve it on appeal. While the appeal was pending SCOTUS decided *Arizona v Gant*, 556 US __, 129 S Ct 1710 (2009), which required law enforcement officers to demonstrate a threat to their safety, or a need to preserve evidence related to the crime of arrest, in order to justify a warrantless vehicle search under *Belton* after the occupants of the vehicle have been secured. Clearly the police conduct here violated the pronouncement in *Gant*, and since Defendant's case was pending on appeal when *Gant* was decided, the Court held *Gant* must be retroactively applied. However, as to relief, the good faith reliance of the officers on *Belton* and

existing 11th Circuit precedent interpreting that case precludes suppression of the evidence.

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

## B. Other Pretrial Matters.

**Arrest, Probable Cause.** *People v Cohen*, __ Mich App __; __ NW2d __ (2011 WL 2859823, No. 2998076, decided July 19,2011)**(july'11).** Defendant, a passenger in a vehicle, was arrested when police spotted cocaine paraphernalia resting near him on a car seat. Later, at the police station, Defendant unsuccessfully attempted to discard a large rock of crack and was charged with possession of residue coating the paraphernalia and the rock. The district court bound Defendant over on the rock, but dismissed charges pertaining to the residue on the paraphernalia as it was convinced this likely belonged to the driver of the car. The circuit court later granted a motion to quash as to the rock charge finding that in the absence of probable cause to bind Defendant over on the paraphernalia residue charge, the police lacked probable cause for his arrest. The court of appeals reversed, ordering the case to trial, and detailing the differences in the probable cause standard for arrest as opposed to bindover. The probable cause determination at bindover "is an entirely separate legal proceeding distinct from the probable cause judgment to arrest made by the police officer in the field." Close proximity of Defendant to the "contraband" was enough to meet the lesser probable cause standard for arrest.

**Confession, Access to Lawyer.** *People v Crockran*, __ Mich App __; __ NW2d __ (2011 WL 1272605, No. 294831, decided April 5, 2011)**(april'11)**. Twenty days after a gun battle outside a Flint club left one man dead, Mr. Crockran was arrested, about 10:30 a.m., on a first degree murder charge. Evidence developed at a hearing established that

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

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

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

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

**Confession, *Miranda,* Custody.** *J.D.B. v North Carolina*, __ US __; 131 S Ct 2394 (2011)**(june'11).** Defendant, a 13-year-old 7th grader, was suspected of two home break-ins. A police investigator went to Defendant's school and a uniformed officer assigned to the school took Defendant to a closed-door conference room where police and school officials questioned him for 30 minutes. Defendant was not given *Miranda* warnings until he confessed. After two juvenile petitions were filed Defendant moved to suppress his statements, claiming he had been interrogated in a custodial setting without proper warnings. The trial court denied the motion and the North Carolina appellate courts affirmed. The North Carolina Supreme Court found age irrelevant to the determination of whether Defendant was in police custody. The US Supreme Court, in a 5-4 decision with Justice Sotomayor delivering the opinion, disagreed, holding that a child's age must be considered when assessing whether an interrogation was custodial. The Court noted that custodial police interrogations are pressure-packed situations that can induce a "frighteningly high percentage" of people to confess. Children are universally unique in their lack of capacity to exercise judgment and age generates conclusions regarding perception and behavior that should be taken into account in determining whether an interrogation setting is "custodial" within the meaning of *Miranda*. The case was remanded to the state courts for a custody determination taking all relevant information, including Defendant's age, into account.

**CSC, Territorial Jurisdiction.** *People v Aspy*, __ Mich App __; __ NW2d __ (2011 WL 321639, No. 294949, decided February 1, 2011)**(feb'11)**. Defendant was convicted of child sexually abusive activity, and using a computer to that offense. Defendant is a resident of Portland, Indiana. In an internet chat room, defendant began talking with Nancy Popham, an Ohio resident. Popham is a member of Perverted Justice, a group dedicated to identifying internet "predators." Popham was posing as a 14 year old girl from Michigan. After a series of sexually explicit communications, defendant arranged to meet "Popham" at a camp site near Grand Rapids, MI. After being provided a fictional

address, defendant drove to Michigan to meet "Popham," where he was promptly arrested. Defendant asserted that the evidence of territorial jurisdiction is lacking because preparation using the internet is required. Defendant contends that since all of his computer activity took place in his home in Indiana, that police never recovered a laptop or smart phone from his vehicle in Michigan, and defendant engaged in no online discussions with "Popham" via the computer on the date he drove into Michigan, Michigan did not have territorial jurisdiction over him as it related to using the internet to commit child sexually abusive activity. The COA pointed out that under this statute, "A violation or attempted violation of this section occurs if the communication originates in this state, is intended to terminate in this state, or is intended to terminate with a person who is in this state." The court held that, while defendant's internet communication originated in Indiana, not Michigan, the communication was intended to terminate in Michigan. The court highlighted various facts that indicated that Defendant intended to commit the illegal acts in Michigan. Defendant viewed the profile information associated with the girl indicating that she was from Michigan, and had multiple online conversations which "Popham" during which she indicated that she was from Michigan. Defendant stocked his truck with alcohol and drove to Michigan where he then went to the Michigan address given for the purpose of picking up "Popham" to engage in prohibited acts in Michigan, the intended result of the internet communications.

**Defense, Right to Present, Psychiatric Evidence; Social Network Site Evidence.** *People v Orlewicz*, __ Mich App __; __ NW2d __ (2011 WL 2342390, No. 285672, decided June 14, 2011)**(june'11).** This notorious "thrill kill beheading" case was overturned by the Wayne County Circuit Court on a motion for new trial after superb appellate work by Liz Jacobs, based on the failure of the trial judge (a motion to disqualify the original trial judge from hearing the motion for new trial was successful) to allow psychiatric testimony purportedly discussing Defendant's mental state in relation to his defense of self-defense (the court of appeals did not detail the nature of this testimony). The court of appeals reversed the grant of a new trial, holding that while psychiatric testimony might be relevant in this context, it was not relevant here as the case turned on which of two factual scenarios occurred and Defendant's mental state had no bearing on that issue. The court of appeals did find that the trial court erred in rejecting evidence of the victim's MySpace page as this was allowable character evidence ("in the nature of a semi-permanent yet fluid autobiography presented to the world") on the self-defense claim (to prove the victim was the probable aggressor). Given other evidence presented, however, the court of appeals found the trial court's error in excluding this evidence harmless.

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

of the blood sample and failed to do so. Other defense claims of delay by prosecution for tactical advantage were considered unproven.

**Public Trial, Right to.** *People v Orlewicz,* __ Mich App __; __ NW2d __ (2011 WL 2342390, No. 285672, decided June 14, 2011)**(june'11).** The trial court erred in clearing the courtroom of all spectators (including Defendant's family and supporters) during jury voir dire due to the large number of potential jurors. Trial defense counsel did ask the judge if the family could stay and was denied. The court of appeals stated that they would have agreed that Defendant was denied the right to a public trial "[h]ad defendant properly raised this as a constitutional issue." ***Practice Note: If a trial judge clears the courtroom for voir dire be sure to raise this as a denial of the federal constitutional right to a public trial, citing Presley v Georgia, __ US __; 130 S Ct 721 (2010).***

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

**Speedy Trial, Motion Periods Excepted.** *United States v Tinklenberg,* __ US __; 131 S Ct 2007 (2011)**(may'11).** The federal speedy trial act requires trial to begin within 70 days after arraignment, but excepts several periods, including the time within which pretrial motions are pending. The Sixth Circuit, contrary to the holding in all other circuits, established a requirement that motion periods would not toll the time period unless they did not actually cause a delay or the expectation of delay. The Supreme Court reversed and voided this requirement.

## C. Confrontation, Counsel, and Other Trial Issues.

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

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

**Confrontation, Non-Testifying Psychiatrist.** *People v Fackelman,* 489 Mich 515; __ NW2d __ (2011)**(july'11).** Defendant's son was killed by the road rage driving of the

complainant. The complainant got six months in jail, while treating Defendant and his family rudely. Defendant experienced severe psychological difficulties, and at one point drove to complainant's residence where he displayed a gun and made threats. Defendant was subsequently hospitalized, where he was seen by a psychiatrist, Dr. Shahid, who diagnosed him as having severe depression, without psychosis. Defendant was tried on several charges, including home invasion, convicted, and sentenced to prison. His defense was not guilty by reason of insanity. Two doctors, neither being Dr. Shahid, testified, one for the prosecution and one for the defense, giving predictably opposing opinions on whether Defendant was psychotic/criminally responsible. The prosecutor, without calling Dr. Shahid as a witness, extensively utilized his diagnosis of no psychosis as the "neutral tie-breaker." After the trial court and the court of appeals affirmed the conviction, the supreme court granted leave and, in a 5-2 opinion written by Justice Markman (with Young and Zahra dissenting), reversed, holding that despite the lack of objection, Defendant's constitutional Confrontation Clause rights were violated by the use of Dr. Shahid's diagnosis without his appearance as a witness against Defendant. Superb appellate work by CDAM past president John Minock resulted in a majority opinion that provides a primer on the dictates of the Confrontation Clause, and excoriates the dissent for its indefensible claims that Defendant waived his confrontation rights by not himself calling this clearly adverse witness, and that this outcome determinative, tie-breaking diagnosis was not substantive evidence but was mere impeachment. The failure to admit the facts and data in Dr. Shahid's report, expressly relied upon by the prosecution and defense experts, in contravention of MRE 703, constituted independent, prejudicial error requiring reversal.

**Confrontation, Prior Sexual Experience, Rape-Shield.** *People v Benton*, __ Mich App __; __ NW2d __ (2011 WL 4424318, No. 296721, decided September 22, 2011)**(sep'11)**. Defendant was an elementary school teacher until she was convicted of having sex with a 12-year-old former student and sentenced to 25-38 years in prison. Complainant admitted during a forensic interview that he had prior sexual experiences with a 13-year-old girl and a 14-year-old girl. Because Defendant suggested Defendant placed his penis in her vagina because he did not know how, Defendant argued that the confrontation clause demanded introduction of his prior sexual experience to counter his claim of inexperience, despite the fact that he was introducing it for reasons not enumerated as exceptions in the rape-shield statute. The court disagreed, primarily because whether Defendant was experienced or not was not sufficiently relevant, since his age and the fact of penetration alone determined that this was first degree CSC.

**Confrontation, Reports as Testimonial Evidence.** *People v Dinardo*, 290 Mich App 280; 801 NW2d 73 (2010)**(oct'10)**. Dinardo was arrested on suspicion of drunk driving and taken for alcohol testing using a Datamaster machine. Officer Lake administered the Datamaster test and recorded the test results in a report, but did not print the original Datamaster ticket. The trial court held that the breath-test results report was hearsay and suppressed it. The prosecution applied for leave and the COA reversed, holding that the Datamaster ticket was neither "testimonial" in the constitutional sense nor "hearsay" under Michigan law. Note that the COA distinguished the report in this case from the report in *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009), because the reports at

issue in *Melendez-Diaz* constituted testimonial hearsay because they were prepared by human analysts who recorded the results of various laboratory tests and set down their own conclusions. In contrast, the Datamaster ticket was generated entirely by a machine without the input of any human analyst.

**Confrontation, Report Containing Testimonial Certification.** *Bullcoming v New Mexico*, __ US __; 131 S Ct 2705 (2011)**(june'11).** In this drunk driving case, Defendant's blood was tested by an analyst at the Scientific Laboratory Division (SLD) of the New Mexico Department of Health. This analyst completed, signed, and certified the report. For unstated reasons he was placed on unpaid leave, and another analyst was called, over objection on confrontation grounds, to validate the report, even though the second analyst did not participate in or observe the testing done by the first analyst. The Court, in yet another 5-4 ruling (with Justices Scalia and Thomas joining the majority and Justices Breyer and Kennedy in the dissent), written for the most part by Justice Ginsburg, held that since the analysis was more than a "machine generated number," and involved human activity of significance by the first analyst (receiving the sample intact with seal unbroken, checking to be sure numbers matched, performing a particular test, adhering to protocol, and noting that nothing interfered with the integrity of the test), the Defendant had a right to confront this witness unless the analyst was unavailable at trial and Defendant had an opportunity to confront the analyst pre-trial.

**Confrontation, Testimony from Non-Examining Physician, and Non-Testifying Physician's Notes as Testimonial Evidence, Plain Error.** *People v McDonald*, __ Mich App __; __ NW2d __ (2011 WL 2694430, No. 301113, decided July 12, 2011)**(july'11).** McDonald was convicted of CSC 1, kidnapping, and armed robbery. At trial, the emergency room physician who saw the victim, but who did not himself administer the sexual assault examination, was allowed to testify regarding the specifics of that examination. Notes of the examining physician were admitted. The court ruled that, even if this was error, there was a waiver as to the notes, and no objection to the testimony of the non-examining physician. Under the *Carines* test for non-preserved constitutional error, this did not rise to plain error because testimony elicited from the physician was helpful to Defendant, and police, through other evidence, where led to Defendant, and the victim identified Defendant as the rapist.

**Confrontation, Two-Way Interactive Video Technology.** *People v Buie*, __ Mich App __; __ NW2d __ (2011 WL 93003, No. 278732, decided January 11, 2011)**(jan'11)**. Defendant was convicted of 1st degree CSC, victim under the age of 13, partly due to the testimony of two doctors who were allowed to testify by way of two-way, interactive video technology. Defendant argued that allowing this violated his constitutional right of confrontation. The COA first heard the case in August of 2009, when it held that a trial court may allow video-conferencing if it either makes case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation, or if the case meets the following three prong test: (1) the defendant is either present in the courtroom or has waived the right to be present, (2) there is a showing of good cause, and (3) the parties consent. The court remanded this case to the trial court to address these issues. At the

evidentiary hearing it was stipulated that both witnesses would have testified in person if video-conferencing had not been available. The prosecution conceded that it "presented no specific state interest invoked for having [the doctors] testify via video rather than in person. Rather, it was done for convenience, but only after an agreement was reached with defense counsel..." The COA held that there was no public policy or state interest at issue in this case important enough to outweigh defendant's right of confrontation. The COA also held that the three elements listed above were not met. The court focused on the third element – consent. The COA held that a defense counsel may waive a defendant's right of confrontation, but may only do so if the waiver is a legitimate trial tactic or strategy **and the defendant does not object to the decision.** At the evidentiary hearing, defendant testified that defense counsel informed him of the video testimony immediately before it took place. Defendant told counsel that it "didn't feel right" to have witnesses testify from outside of the courtroom, and requested that she object. In response to his request, counsel made a statement regarding defendant questioning the veracity of the proceedings. Finally, the COA held that having allowed the video procedure cannot be deemed harmless error and vacated defendant's conviction. **The Michigan Supreme Court granted leave to appeal in this case on May 25, 2011, # 142698.**

**Counsel, Ineffective Assistance, C*ronic* versus *Strickland* Analysis.** *People v Gioglio,* __ Mich App __; __ NW2d __ (2011 WL 1273182, No. 293629, decided April 5, 2011)**(april'11)**. The COA held that Gioglio was entitled to a new trial because his trial counsel was constitutionally ineffective. Counsel waived opening statement, failed to cross-examine key witnesses, neglected to object to improper and/or inflammatory testimony, and admitted to the prosecutor that her client had confessed his guilt. Accordingly, the court concluded that prejudice must be presumed under *United States v Cronic*, 466 US 648 (1984). In *Cronic*, the United States Supreme Court recognized that that there were circumstances involving trial counsel's performance that were so likely "to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." The COA found that this was the circumstance in this case. The court held that the defendant's trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." The majority emphasized the word meaningful in the phrase, and noted that "the Supreme Court recognized that there might be extreme cases where, although the defendant's trial counsel took some actions on behalf of his or her client, the actions were so few and so ineffectual that it was tantamount to having no lawyer present at all." The COA reversed defendant's convictions and remanded the case for a new trial. Judge Kelly dissented, stating that the case should have been analyzed under *Strickland*, and not *Cronic*. **On September 21, 2011, the Michigan Supreme Court reversed the judgment of the COA for the reasons stated by Judge Kelly in dissent and remanded the case for consideration under *Strickland*.** *People v Gioglio,* __ Mich __; __ NW2d __ (No. 143136, 2011 WL 4398542).

**Counsel, Ineffective Assistance – Duty to Inform Client of Sex Offender Registration Consequence During Plea Stage.** *People v Fonville,* __ Mich App __; __ NW2d __ (2011 WL 222127, No. 294554, decided January 25, 2011)**(jan'11).** Defendant Fonville

was an admitted crack addict who had agreed to watch his girlfriend's two children, ages 8 and 10. Instead of returning them at the agreed upon time, he drove around through an entire night with a friend, with the children in the car, looking for and doing alcohol and drugs. The children were brought home the next day "tired, but unharmed." Mr. Fonville, on advice of counsel, subsequently pled guilty to one count of child enticement, a life offense, MCL 750.350 in return for dismissal of other child enticement and kidnapping counts. Mr. Fonville also negotiated a low guidelines sentence. He was unaware that he would have to register as a sex offender. When he discovered the registration requirement, Fonville tried, prior to sentence, to withdraw his plea, but this was denied. A direct appeal followed, but the ineffective assistance issue was not raised. After being denied all relief on direct appeal, Fonville filed a postconviction motion under MCR 6.500. The trial court denied relief but the court of appeals reversed. Finding the issue governed by the recent SCOTUS decision in *Padilla v Kentucky*, __ US __; 130 S Ct 1473 (2010), the panel held that, though the facts were sufficient to ground an enticement conviction, sex offender registration was a direct, not a collateral, consequence of Fonville's plea and failure to advise Fonville of this serious matter was ineffective assistance of counsel. Judge Jansen, concurring and dissenting, agreed and would also have held that under these facts a child enticement charge was not warranted.

**Counsel, Right to in Civil Proceedings.** *Turner v Rogers*, __ US __; 131 S Ct 2507; 180 L Ed 2d 452 (2011)**(june'11).** At issue in this case was whether or not an indigent, non-custodial parent has a right to appointed counsel during a civil contempt proceeding where the non-custodial parent is facing imprisonment. Turner was indigent, and could not afford an attorney for his contempt hearing. No attorney was appointed, and he was placed in jail for failure to pay child support. He appealed to his state supreme court, which held that he had no right to counsel because this was a civil proceeding, and not a criminal one. The United States Supreme Court granted Turner's cert petition. Justice Breyer, writing for the majority of 5, pointed out that "the Sixth Amendment does not govern civil cases. Civil contempt differs from criminal contempt in that it seeks only to coerce the defendant to do "what a court had previously ordered him to do." He added that "the Court has made clear (in a case not involving the right to counsel) that, where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case." As such, the Court held that Due process does not *require* a state to provide counsel at civil contempt hearings, even when incarceration is possible. In this case, however, the Court held that petitioner's imprisonment violated due process because, not only was he denied counsel at the hearing, he was also denied the benefit of alternative procedural safeguards that would reduce the risk of an erroneous deprivation of liberty.

**Counsel, Right to New Counsel.** *People v Strickland*, __ Mich App __; __ NW2d __ (2011 WL 3208155, No. 298707, decided July 28, 2011)**(july'11).** Defendant requested appointment of new counsel on the first day of trial, proffering a grievance he had filed. Because Defendant's complaints were general, and merely indicated he did not have confidence in his attorney, they did not constitute good cause to require appointment of new counsel. Defendant's complaints "did not involve a difference of opinion with regard to a fundamental trial tactic."

**Counsel, Self-Representation.** *People v Brooks,* __ Mich App __; __ NW2d __ (2011 WL 3587382, No. 298299, decided August 16, 2011)**(aug'11).** In a detailed and thorough opinion written by Judge Gleicher, the court overturned Defendant's conviction for entering without breaking with intent to commit larceny, and remanded for a new trial, because the trial court denied self-representation without conducting a meaningful inquiry. The trial court also erred in relying on "constitutionally impermissible criteria" – specifically, that the Defendant did not have demonstrable knowledge of the rules of criminal procedure and the rules of evidence. The trial court also erred in basing a refusal to allow self-representation on the fact that Defendant made confusing statements and complained that jail personnel were refusing to give him his medications as the trial court failed to conduct an appropriate examination of Defendant's competence.

**Defenses, CSA, Vitiating Proportion.** *People v Hartuniewicz,* __ Mich App __; __ NW2d __ (2011 WL 4501554, No. 298163, decided September 29, 2011)**(sep'11).** Defendant was convicted of possession of ketamine, an anesthetic and a schedule III controlled substance, pursuant to MCL 333.7216(1)(h). Defendant moved for a directed verdict, then sought a special jury instruction, arguing that MCL 333.7227(1) allows an exception or exclusion as the drug was "in a proportion or concentration to vitiate the potential for abuse." The court held, however, that the prosecution merely had to prove knowing or intentional possession of ketamine. MCL 333.7227(1) is an affirmative defense and a defendant bears the burden of proving that the drug was in a proportion or concentration which vitiated the potential for abuse. Since Defendant did not carry his burden here, it was not error to deny the motion for directed verdict and refuse a special jury instruction.

**Defenses, Emancipation of Minor, 'Void for Vagueness' Doctrine.** *People v Roberts,* __ Mich App __; __ NW2d __ (2011 WL 1878387, No. 294212, decided May 10, 2011)**(may'11)**. Defendant advertised for "models," and the 17-year-old victim responded. Defendant was able to convince the victim and her father to sign a release allowing the victim to perform in X-rated films (though he claimed that this would not happen until she was 18). Defendant lured victim to his personal studio for a photo shoot, but proceeded to force her to perform a series of sex acts while secretly being filmed. Defendant argued that the child sexually abusive activity statute (MCL 750.145c) he was convicted under was unconstitutionally vague where the affirmative defense written into the statute was unclear. MCL 750.145c states it is an affirmative defense to a prosecution under this section that the alleged child is a person who is emancipated by operation of law under MCL 722.4, as proven by a preponderance of the evidence. Emancipation by operation of law occurs when a minor is legally married, an individual reaches 18 years of age, if the minor is on active duty in the military, or for medical purposes when the minor is in the custody of law enforcement or a prisoner committed to the jurisdiction of the Michigan Department of Corrections. The court found this was clear, and that the "release" he had the victim sign did not fit into one of these categories.

**Defenses, Self Defense, Duty to Retreat, Jury Instruction.** *People v Richardson,* 490 Mich 115; __ NW2d __ (2011)**(july'11).** Defendant asserted a theory of self defense at

trial after being charged with numerous assault charges, including two counts of assault with intent to commit murder. At the close of trial, the court read a standard self defense jury instruction explaining that a person may only use deadly force when necessary. The instruction also included a clause explaining a person's duty to retreat, but added that there is never a duty to retreat in one's own home. After a day of deliberations, the jury asked the judge to define "home." The court explained that an individual had no duty to retreat before using deadly force if in his own home. Two days later, the jurors notified the court that they could not reach a decision. The court reinstructed them on self-defense, explaining that people "can actually be in their home, their dwelling and not be subject to self-defense unless those circumstances them self [sic] justify that." Defendant argued that the instructions where improper. Defendant argued that the instructions were unclear, and they should have explained that the Defendant did not have a duty to retreat in this case because the evidence was clear he was in his home. The MSC agreed that the instructions could have been clearer, however held that any error did not prejudice Richardson. The Court stated that it was apparent that the jury concluded that deadly force was not necessary, and that the facts supported that conclusion. Furthermore, the jury was informed that a person attacked in his or her home had no duty to retreat.

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

**Evidence, Hearsay (Recorded Recollection).** *People v Dinardo,* 290 Mich App 280; 801 NW2d 73 (2010)**(oct'10)**. Dinardo was arrested on suspicion of drunk driving and tested with a Datamaster machine. Officer Lake administered the Datamaster test, and recorded test results in a report, but did not print the original Datamaster ticket. The trial court held that the breath-test results report was hearsay and suppressed it. The prosecution applied for leave and the COA reversed, holding that the Datamaster ticket was not "hearsay" under Michigan law as it constituted a recorded recollection under MRE 803(5).

**Evidence, Postconviction Access to DNA Testing.** *Skinner v Switzer*, __ US __; 131 S Ct 1289 (2011)**(march'11).** Henry Skinner was convicted in Texas of murdering his girlfriend and her sons. In preparation for trial, the State had omitted DNA testing of several items of physical evidence. Postconviction, Skinner filed a claim under Section 1983, alleging that Texas violated his due process by refusing access to physical evidence for DNA testing. The Court's ruling hinged on whether Skinner should have filed his case under Section1983 or habeas corpus. The Court ultimately held that, if a court's finding of a constitutional violation would directly lead to reversal and release from custody, then the person claiming the violation would need to have filed a habeas petition. However, if the finding of a constitutional violation would not directly lead to reversal, then Section 1983 is also a proper avenue. In this case, the release of the physical evidence would not directly undermine the conviction (testing may show that he did it), and therefore the Court held that the case was properly brought under Section 1983.

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

**Evidence, 404(b), 768.27a. Note: The Michigan Supreme Court, on March 30, 2011, granted leave in companion cases to decide issues they backed off of after granting leave in *People v Lincoln Anderson Watkins* pre-trial. See 277 Mich App 358 (2007). The leave grants, to consider whether the statute, in allowing all evidence that a defendant allegedly committed another listed offense against a minor with no judicial discretion, trumps the court rule. Due process and separation of powers issues are also to be considered. The two cases are, again, *People v Lincoln Anderson Watkins*, this time after conviction (# 142031) and, interlocutory, *People v Richard Kenneth Pullen* (#142751).**

**Jury, Due Process Denial of Transcript Request.** *People v McDonald*, __ Mich App __; __ NW2d __ (2011 WL 2694430, No. 301113, decided July 12, 2011)**(july'11).** McDonald argued that the trial court deprived him of due process, and violated MCR 6.414(J), when it asked the jury to rely on its collective memory instead of granting its request to review transcripts of certain testimony. In forming their opinion, the COA highlighted the fact that the trial court did not tell the jury that transcripts would not be available for weeks or months, or not at all. The COA held that, because the trial court did not foreclose the possibility of the jury obtaining transcripts in the future, it did not violate MCR 6.414(J).

**Jury Instructions, Accosting a Minor for Immoral Purposes.** *People v Kowalski*, 489 Mich 488; __ NW2d __ (2011)**(july'11).** Defendant, 51 years old, engaged in a sexually charged internet chat with a male police officer who had successfully disguised himself as "keyanagurl," a 15-year-old female. Defendant's convictions of accosting a minor for immoral purposes or encouraging a minor to commit an immoral act, MCL 750.145a, and using a computer or the Internet to accomplish same, MCL 750.145d, were overturned by the court of appeals due to faulty jury instructions. The supreme court held that the accosting offense had two prongs. The first prong requires a defendant to commit acts of accosting enticing or soliciting with the specific intent to induce or force the child to commit proscribed acts. The second is a general intent crime and requires only that a defendant intend to encourage a child to engage in acts of depravity. The supreme court agreed with the court of appeals that the jury instruction was faulty since it omitted the *actus reus* element of the first prong of the statute. However, the error was waived (not just forfeited as the dissent claims) by defense counsel's repeated approval of the instruction. And, subjecting the error to review under the plain error standard of *Carines*, no relief is warranted here as the court determined it was clear from the transcripts of the Internet chat between Defendant and the male police officer that Defendant was guilty. The Internet chat transcripts also doom claims of ineffective assistance of counsel and insufficiency of the evidence.

**Jury, Substitution after Deliberations Begun.** *People v Mahone*, __ Mich App __; __ NW2d __ (2011 WL 4467641, No. 299056, decided September 27, 2011)**(sep'11).** Defendant was convicted of CSC I and Unarmed Robbery. After the jury began to deliberate, one of the jurors sent a note indicating that her stress level would not allow her to continue to deliberate (the juror was pregnant and indicated that she feared the stress would cause early labor). The court held that, even though the record could have been better, there was sufficient information on the record to conclude that the trial court had acted properly in dismissing the juror and in bringing back an alternate to conclude the deliberations. While no one asked the juror during examination of her alone after she had sent the note, there was no indication she was experiencing stress because she held a minority viewpoint. Indeed, the record made suggested this was not the cause of the juror's problem.

## D. Crimes and Offenses, Sufficiency

**Anti Drug Abuse Act, Statutory Interpretation.** *Depierre v United States*, __ US __; 131 S Ct 2225 (2011)**(june'11).** Congress enacted the Anti Drug Abuse Act (ADAA) in 1986. The statute provides a mandatory 10 year minimum sentence for certain drug offenses involving varying amounts of cocaine. Petitioner was convicted of distribution of 50 grams or more of "cocaine base." The issue was what the term "cocaine base" meant. Depierre argued that "cocaine base" referred exclusively to what is commonly known as crack cocaine. The Court disagreed, and affirmed the lower courts' holdings

that the term "cocaine base" in the ADAA refers to cocaine in its chemically basic form, not just crack cocaine.

**Criminal Sexual Conduct, First Degree, Blood or Affinity.** *People v Zajaczkowski*, __ Mich App __ (2011 WL 3111957, No. 295240, decided July 26, 2011)**(july'11).** Defendant pled to first degree CSC conditioned on his ability to raise the issue of whether he was related to the 15-year-old complainant to the fourth degree by blood or affinity. If answered negatively he could only be convicted of third degree CSC. At the time the facts underpinning the conviction arose, Defendant was 30 and the complainant was 15. They had a common father but genetic testing proved that this man was not the natural father of Defendant, and this man and Defendant's mother were divorced two years after Defendant was born. Employing statutory construction the court held that despite these facts, Defendant and the complainant had a common father through marriage, were related through blood and affinity to the fourth degree due to presumptions and, irrespective of that, Defendant had no standing to challenge paternity, or the "presumption of legitimacy."

**Disrupting University Employee, Constitutionality of Ordinance.** *People v Rapp*, __ Mich App __; __ NW2d __ (2011 WL 1778643, Nos. 294630 & 295834, decided May 10, 2011)**(may'11).** Defendant protested a parking ticket on the MSU campus by "aggressively" approaching an MSU parking enforcement officer who was in the area. The officer got in his vehicle and waited for police while Defendant took pictures of the employee with his cell phone. Defendant was charged with violation of MSU Ordinance 15.05, which prohibits, *inter alia*, disrupting the normal activity of any person carrying out a service for the university. After conviction the Ingham County Circuit Court reversed and dismissed, finding the ordinance unconstitutionally overbroad on its face. Leave to appeal by the prosecution was granted, and the court of appeals reversed the circuit court, holding that this case was distinguishable from *City of Houston v Hill*, 482 US 451 (1987), upon which the circuit court based its determination, because in *Hill* the ordinance prohibited interruption of police officers who had arrest powers, and because there was a difference between "interruption" and the "disruption" prohibited here. Finally, "disruption" is not focused solely on speech, as were the actions prohibited in *Hill* (oppose, molest, abuse, or interrupt). The circuit court's assessment of costs against the prosecution was deemed to be inappropriate, as such relief is provided for only in civil cases. An application for leave to appeal was filed in the MSC on 7/5/11.

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

evidence does not need to be presented when both parties are present in a courtroom to be considered an official proceeding. An official proceeding occurs when evidence is considered by a judicial official authorized to hear evidence under oath.

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

**Felony Firearm, Drug Raid, Sufficiency.** *People v Johnson,* __ Mich App __; __ NW2d __ (2011 WL 2557481, No. 295664, decided June 14, 2011)**(june'11).** Police raided a house in Detroit and found Defendant on a couch in the front room with about a gram of marijuana in front of him. Two long guns were somewhere in the room. Due to the size of the weapons, the court concluded that Defendant Johnson was in constructive possession of them.

**Felony Firearm, Felon in Possession.** *People v Strickland,* __ Mich App __; __ NW2d __ (2011 WL 3208155, No. 298707, decided July 28, 2011)**(july'11).** Defendant attacked complainant in complainant's home and attempted to wrest a gun from complainant, who had armed himself during the break-in. During the altercation the complainant was shot in the hand. The court held that there was sufficient evidence of joint possession of the gun during the struggle to uphold the felony firearm and felon in possession convictions.

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

Shapiro also suggested that the legislature modify aiding and abetting a first degree murder to allow a lesser sentence.

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

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

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

## E. Sentencing.

**Federal, Armed Career Criminal Act (ACCA), Mandatory Minimum.** *Sykes v United States,*__ US __; 131 S Ct 2267 (2011)**(june'11).** Federal law mandates a 15-year minimum sentence under the ACCA if an armed defendant has three prior "violent felony" convictions. The Court held that, as defined by Indiana law, a conviction in that state for "vehicle flight" qualified as a prior violent felony for ACCA purposes. Justice Kagan, in dissent, would hold that because Indiana distinguishes several forms of vehicular flight crimes, the "simple" form Sykes was convicted of should not qualify as a violent offense under ACCA.

**Federal Armed Career Criminal Act, Enhanced Sentence.** *McNeill v United States,* __ US __; 131 S Ct 2218 (2011)**(june'11).** Under the Armed Career Criminal Act (ACCA), a felon unlawfully in possession of a firearm is subject to a 15 year minimum prison sentence if he has three prior convictions for a "violent felony" or "serious drug offense." McNeil pleaded guilty to a firearm charge, and the district court found he qualified for sentence enhancement under the ACCA. McNeil conceded two violent felony charges, but argued that his drug convictions were not "serious" because those crimes had had their maximum term of imprisonment reduced since he was sentenced. The Court held that the "maximum term of imprisonment" for a defendant's prior state drug offense was the maximum sentence applicable to his offense *at the time he was convicted* of it.

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

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

sentencing rehabilitation is a solid predictor of whether a defendant will re-offend, a crucial sentencing concern, post-sentencing rehabilitation may be considered to support a downward variance from the now advisory guidelines range.

**Federal Sentence Reduction after Guidelines Amendment.** *Freeman v United States*, __ US __; 131 S Ct 2685 (2011)**(june'11).** Defendant entered into a plea agreement under 11(C)(1)(c) for crimes which included possession with intent to distribute cocaine base. Three years later the US Sentencing Commission amended the guidelines to remedy the disparity between penalties for cocaine base and powder cocaine. Since 18 USC §3582(c)(2) allows for a motion to reduce the sentence in cases where the applicable guidelines range has been lowered by retroactive amendment, Defendant so moved. The Sixth Circuit held that because Defendant's sentence was arrived at through a plea agreement he was not eligible for a reduction. In a 5-4 plurality opinion, written by Justice Kennedy, with Justice Sotomayor concurring in the decision, the Supreme Court reversed the Sixth Circuit, holding that since the guidelines must instruct a sentence, even when it is reached pursuant to agreement, §3582 permits sentence reduction where the sentence is based on a range later subject to retroactive amendment.

**Federal Sentencing Reform Act, Sentence Increase for Rehabilitation.** *Tapia v United States*, __ US __; 131 S Ct 2382 (2011)**(june'11).** Tapia was sentenced to 51 months in federal prison for bringing an illegal immigrant into the United States for financial gain. The District Court imposed the 51 month prison sentence in order for Tapia to qualify for, and complete, the Bureau of Prisons' Residential Drug Abuse Program (RDAP). The issue was whether the Sentencing Reform Act (SRA, 18 USC 3582(a)) allowed the imposition of an increased sentence in order to promote rehabilitation. The SRA instructs sentencing courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." The Ninth Circuit held that a sentencing court cannot impose a prison term to assist a defendant's rehabilitation, but once imprisonment is chosen, the court may consider the defendant's rehabilitation needs in setting the sentence's length. The United States Supreme Court reversed, holding the text, context, and history of the SRA precluded this type of sentence increase, and remanded for further proceedings.

**Guidelines, Enhanced Drug Sentence.** *People v Peltola*, 489 Mich 174; __ NW2d __ (2011)**(june'11).** The issue in this case was whether a trial court should score an offender's PRVs when the sentence may be enhanced pursuant to MCL 333.7413. Peltola, who had been previously convicted of a controlled substance offense, was convicted of several new drug charges. The trial court scored Peltola's PRVs under the guidelines, and then doubled both the minimum and maximum under MCL 333.7413(2). Peltola argued that a prior decision (*People v Lowe*, 484 Mich 718; 773 NW2d 1 (2009)) precluded the scoring of PRVs when a sentence is to be enhanced. Despite recognizing that its holding in this case was contrary to statements made in *Lowe*, the MSC held that a court should score the offender's PRVs even when the sentence may be enhanced by MCL 333.7413(2).

**Guidelines, Disproportionate Departure.** *People v Brooks*, __ Mich App __; __ NW2d __ (2011 WL 3587382, No. 298299, decided August 16, 2011)**(aug'11).** The court of appeals (the panel included Michael Talbot) held that a "career criminal" convicted of entering without breaking (an offense "that otherwise warranted a minimum sentence of less than four years" and which "essentially amounted to trespassing") should not have been sentenced to life imprisonment. The departure was disproportionate to the offense and the offender.

**Mandatory Minimum in CSC I, Cruel and/or Unusual.** *People v Benton*, __ Mich App __; __ NW2d __ (2011 WL 4424318, No. 296721, decided September 22, 2011)**(sep'11)**. Defendant was an elementary school teacher, with no prior record, until she was convicted of first degree CSC for having sex with a 12-year-old former student and sentenced to 25-38 years in prison. Complainant admitted during a forensic interview that he had prior sexual experiences with a 13-year-old girl and a 14-year-old girl. Defendant challenged the 25 year minimum sentence for offenders over 16 who have sex with pre-teens as cruel and/or unusual under the state and federal constitutions. The court disagreed, focusing primarily on the gravity of the offense and the resultant psychological and social disruption.

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

**OV 7, Aggravated physical abuse.** *People v Hunt*, 290 Mich App 317; __ NW2d __ (2010 WL 4103689, No. 292639, decided October 19, 2010)**(oct'10)**. Hunt challenged the trial court's scoring of 50 points under OV 7 for aggravated physical abuse, determined by whether a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. The trial court scored OV 7 at 50 points because (1) the victims were moved from location to location, (2) a substantial beating was inflicted, designed to increase fear, and (3) one of the victims was beaten by multiple individuals. However, of these three factors, only the first applied to Hunt's role in the crime (others had beaten the victims). The record showed that Hunt's role in the crime was minimal. While Hunt was present and did have a gun at various points throughout the crime, at no time did he take part in a beating or fire a weapon. Cases upholding scores of 50 points for OV 7 are distinguishable, because they involve specific acts of sadism, torture, or excessively brutal acts **by the defendant.** The COA held that Hunt was entitled to resentencing.

**OV 9, Multiple Victims.** *People v Harverson*, __ Mich App __; __ NW2d __ (2010 WL 5350171, No. 293014, decided December 28, 2010)**(dec'10)**. Kenneth Conliffe accepted a UPS shipment of a cell phone intended for defendant's girlfriend. Conliffe proceeded to throw the phone into a stream in retaliation for a prior theft. Later, Conliffe was accosted by defendant (Harverson), and two others. Defendant accused Conliffe of stealing the cell phone and removed Conliffe's sunglasses at gunpoint before fleeing the scene with his compatriots. Defendant was subsequently tried on a charge of armed robbery, but convicted of unarmed robbery. Defendant challenged the court's scoring of ten points for OV 9 for multiple victims. Evidence showed that defendant had robbed Conliffe at gunpoint in the presence of two other people. "[I]n a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life." *People v Sargent*, 481 Mich. 346, 350 n 2; 750 NW2d 161 (2008). The court held that pointing a gun at multiple individuals clearly places them in danger of injury or loss of life and therefore the score of ten points for OV 9 was appropriate.

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

**OV 10, Vulnerable Victim, Predatory Conduct.** *People v Huston*, 489 Mich 451; __ NW2d __ (2011)**(july'11).** Holding that a defendant's predatory conduct can itself create a vulnerable victim, a four-justice majority ruled that OV 10 can be scored when a defendant's predatory conduct can make the community as a whole vulnerable. This Defendant's act of lying in wait for a lone victim qualified, irrespective of any indicia of vulnerability on the part of the individual complainant.

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

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

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

**OV 13, Pattern of Felonious Criminal Activity, Crimes Against Public Safety.** *People v Bonilla-Machado*, 489 Mich 412; __ NW2d __ (2011)**(july'11).** Defendant was convicted of two counts of assaulting a prison employee, a crime designated under the statutory guidelines as a crime against public safety. The trial court scored 10 points for OV 13, and the Defendant complained on appeal that this was error as Defendant had only two previous convictions for crimes against a person (unarmed robbery and attempted carjacking). The court of appeals increased the OV 13 score to 25 points, concluding that although his convictions of two counts of assaulting a prison employee were not categorized as crimes against a person, they can be considered as such for purposes of OV 13 since "a prison employee is a person." The supreme court reversed, and remanded for resentencing, holding that under a strict reading of the statutory language crimes against public safety do not qualify under OV 13, and therefore 0 points should have been scored for this OV. Young and Zahra dissented.

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

appropriate here as "the circumstances described in OV 19 expressly include events occurring after the completion of the sentencing offense."

**PRV 2.** *People v Meeks*, __ Mich App __; __ NW2d __ (2011 WL 2421038, No. 297030, decided June 16, 2011)**(june'11).** At issue is the scoring of PRV 2, which takes into account earlier low-severity felonies. Meeks had been convicted in Indiana for purchasing a stolen gun. The crime in this case fit the description of both a misdemeanor and felony under Michigan statutory language. Defendant argued that his one-year jail sentence in Indiana showed it should have been classified as a misdemeanor. The COA used the canon of statutory construction, whereby the more specific statutory construction should govern, to uphold the trial court's decision to classify the weapons conviction as a felony.

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

## F. Miscellaneous

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

**Habeas, AEDPA Standard of Review, IAC.** *Harrington v Richter*, __ US __; 131 S Ct 770 (2011)**(jan'11).** This case is a standard failure to investigate IAC case, with the

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

**Habeas, Evidentiary Hearings in Federal Court.** *Cullen v Pinholster,* __ US __; 131 S Ct 1388 (2011)**(april'11).** On certiorari to the Ninth Circuit, the Court reversed grant of the writ, holding that when reviewing a claim under § 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act (assessing whether the state courts issued a decision that was contrary to or an unreasonable application of clearly established federal law), federal courts are limited to the record that was before the state court that adjudicated the claim on the merits. Thus additional evidence submitted at a federal court evidentiary hearing for the first time presumably cannot be considered. The language in the various opinions, and the voting alignment with respect to the various sections of the lead opinion by Justice Thomas, who pulled only four votes for his entire opinion, promotes confusion for the precise nature of the holding with respect to habeas petitioners who diligently seek an evidentiary hearing in state court but are rejected.

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

**Habeas, IAC, Plea.** *Premo v Moore,* __ US __; 131 S Ct 733 (2011)**(jan'11).** Moore pled no contest to felony murder. He had confessed to police and described the crime to two other people. Moore's lawyer did not attempt to suppress the confession to police before Moore entered into the plea. The Ninth Circuit ruled that the failure to suppress the confession constituted ineffective assistance of counsel, relying heavily on the SCOTUS decision in *Arizona v Fulminante,* discussing whether the introduction of a confession could be harmless error in a trial context. In an 8-0 Decision, the Supreme

Court held that Moore did not meet either part of the *Strickland* analysis. In deciding the performance prong, the Court found that a reasonable state court could have accepted the explanation given by Moore's lawyer – that two other confessions were still on the record, rendering challenging the third inconsequential. As to the prejudice prong, the Court held that the proper question in plea cases is whether the defendant would have proceeded with a plea without the counsel's deficiency. The Court declined to apply the more liberal harmless error standard inquiry in *Fulminante* - which asks whether a defendant would have been found guilty beyond a reasonable doubt absent the error – to pleas. The Court felt there is no practical way to know whether a jury would have convicted a defendant who pled guilty. Note also that the Court quoted heavily from *Harrington v Richter* (also summarized in these materials) to explain that, in order to succeed on habeas corpus, a petitioner must show that a state court was unreasonable in its application of an already deferential *Strickland* standard.

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

**Habeas, Parole, Federal Right.** *Swarthout v Cooke,* __ US __; 131 S Ct 859 (2011)**(jan'11).** In a Per Curiam opinion, the Supreme Court considered the practice of the Ninth Circuit and federal district courts in California in reviewing, through federal habeas litigation, decisions of the parole board and the Governor regarding parole of state prisoners. Citing *Greenholtz* (442 US 1), the Court made it clear that the only protected federal right in the state parole process was procedure, and the California inmates whose cases were considered here had been given the process that was due. Federal habeas review should not concern itself with "whether the state court decided the case correctly." Assessing whether the constitutionally adequate procedures governing California's parole system are properly applied "is no part of the Ninth Circuit's business."

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

**International Law, Vienna Convention, Death Penalty.** *Garcia v Texas,* 564 US __; 131 S Ct 2866 (2011)**(july'11).** In this 5-4 Per Curiam decision, breaking along party lines, a Mexican national, whose execution was carried out in July of 2011 despite pleas from President Obama to Texas Governor Rick Perry and the Supreme Court on grounds that executing Garcia would substantially harm American interests abroad, argued that the failure of Texas officials to inform him of his rights under the Vienna Convention (to

contact his consulate) demanded a stay. The majority disagreed, holding that Congress had not codified the international agreement, see *Medillin v Texas*, 552 US 491 (2008), and noting that it was unlikely Garcia could prove prejudice in any event.

**Michigan Medical Marijuana Act (MMMA), "Enclosed, Locked Facility."** *People v King*, __ Mich App __; __ NW2d __ (2011 WL 337365, No. 294682, decided February 3, 2011)**(feb'11)**. The prosecutor appealed the trial court's order which dismissed two counts against Defendant for the manufacture of a controlled substance (marijuana). Defendant was licensed to grow marijuana under the Medical Marijuana Act (MMA). The issue on appeal was whether King was in compliance with a specific provision under the act which required the grower to keep the marijuana in an "enclosed, locked facility," which is defined by the MMA to mean "a closet, room, or other enclosed area equipped with locks or other security devices." Defendant was storing the marijuana in a chain link fenced kennel that had 6 foot walls and no top. Defendant covered the walls of the kennel with black shrink-wrap in an attempt to conceal the contents of the enclosure. Additionally, the kennel was equipped with a lock, and defendant maintained the key to the lock. The trial court had held that the officers should not have seized the marijuana because defendant complied with the requirements of the MMA. Judge Fitzgerald, in his dissenting opinion agreed. The majority, however, held that an enclosed area must be limited to things of the same kind or character as a closet or room, as set out in the MMA. They held that an open, moveable, chain-link kennel is not of the same kind or character as a closet or room. The court ultimately found that the trial court abused its discretion by dismissing the charges against Defendant.

**Michigan Medical Marijuana Act (MMMA), Separate "Enclosed Locked Facility" Requirement.** *People v Bylsma*, __ Mich App __; __ NW2d __ (2011 WL 4467638, No. 301762, decided September 27, 2011)**(sep'11).** Defendant and his brother were registered primary caregivers. Defendant rented an enclosed, locked facility, and was growing marijuana for two patients for whom he had been approved as a primary caregiver. His brother and other registered caregivers were utilizing the same space, and Defendant's tutelage, to grow marijuana for patients for whom they had been approved as caregivers. Despite this, the Grand Rapids police, using a warrant, seized 88 marijuana plants from Defendant's locked facility, and he was charged with manufacturing marijuana, and subjected to an enhanced sentence under MCL 333.7413(2)(a). His motion to dismiss was denied because each set of 12 plants permitted under the MMMA to meet the needs of a single patient must be kept in a separate closed, locked facility, accessible by only one individual. The court of appeals agreed with the denial, and held that since Defendant himself was only connected to two qualifying patients through registration as a primary caregiver, he was only allowed to possess 24 plants, and his access to the plants of other patients, connected to other primary caregivers, was a violation of the controlled substance act with no immunity and no affirmative defense available to Defendant under §'s 4(b) or 8 of the MMMA.

**Michigan Medical Marijuana Act (MMMA), Dispensary, Patient to Patient Sales.** *State v McQueen*, __ Mich App __; __ NW2d __ (2011 WL 3685642, No. 301951, decided August 203, 2011)**(aug'11).** The issue in this case was whether the MMMA

permits the operation of a private club that facilitated the sale of marijuana from one patient to another. The dispensary retained at least 20 percent of the sale price. The trial court found the dispensary operated within the MMMA. The Court of Appeals reversed. The specific issue was whether the "transfer" and "delivery" language in the MMA contemplated sales. The COA held that "the 'delivery' or 'transfer' of marihuana is only one component of the 'sale' of marihuana - the 'sale' of marihuana consists of the 'delivery' or 'transfer' *plus* the receipt of compensation. The 'medical use' of marihuana, as defined by the MMMA, allows for the 'delivery' and 'transfer' of marihuana, but not the 'sale' of marihuana."

**Michigan Medical Marijuana Act (MMMA), Required Use of Expert Testimony.** *People v Anderson,* __ Mich App __; __ NW2d __ (2011 WL 2202553, No. 300641, decided June 7, 2011)**(june'11).** Defendant possessed more plants than allowed under the MMMA. In support of an affirmative defense, Defendant and his physician testified that the amount of plants was reasonable to treat Defendant's condition. The trial court found both to be unpersuasive for different reasons. The trial court then stated that, in the absence of relevant expert testimony and any other credible testimony supporting the defense, Anderson failed to establish a defense. Defendant argued that this language constituted a requirement of expert testimony in order to establish a defense. The COA disagreed, holding that there was no such requirement. The trial court merely analyzed the other evidence presented by defendant, i.e., his testimony and that of his physician and, after rejecting that evidence, as well recognizing a lack of expert testimony, denied defendant's motion. As such, defendant's assertion that the trial court required him to produce an expert was incorrect. **On September 26, 2011, the Michigan Supreme Court held the leave application in this case in abeyance, 2011 WL 4466610, pending decision of the cases of *People v Kolanek* and *People v King.***

**Michigan Medical Marijuana Act (MMMA), Timing of Physician Statement**. *People v Kolanek,* __ Mich App __; __ NW2d __ (2011 WL 92996, No. 295125, decided January 11, 2011)**(jan'11).** On April 6, 2009 Defendant was arrested for an "altercation" that resulted in a search of his vehicle. Eight marijuana cigarettes were seized from the trunk. After a physician statement, issued on June 9, 2009, establishing the need for Defendant to use marijuana to alleviate symptoms of his Lyme disease was considered, the district court denied a motion to dismiss, primarily because Defendant did not provide evidence that he had physician approval to use marijuana under the MMMA before his arrest. The circuit court reversed, holding that the MMMA merely requires the physician to "have stated" Defendant's eligibility, not necessarily before an arrest. Here the physician stated the eligibility during court proceedings. The CA reversed, holding that the MMMA, while not requiring possession of a valid registry card at the time of arrest (see *Redden & Clark,* below), does require the provision of a physician's supporting opinion under MCL 333.26428(a)(1) prior to a defendant's arrest for a marijuana offense. **Leave to appeal was granted by the Michigan supreme court on June 22, 2011, 489 Mich 956; 798 NW2d 509 (2011).**

**Michigan Medical Marijuana Act (MMMA), Timing of Physician Statement**. *People v Reed,* __ Mich App __; __ NW2d __ (2011 WL 3820071, No. 296686, decided August

30, 2011)**(aug'11).** Defendant suffers from chronic back pain as a result of degenerative disk disease (he underwent surgery a decade ago) and, upon passage of the MMMA, he began exploring medical marijuana to relieve his pain. He was rejected by the clinic he had been attending for treatment because they received federal funding. He was continuing his search for a place to receive certification when an aerial surveillance conducted by the Huron Undercover Narcotics Team (HUNT) spotted six marijuana plants growing at Defendant's residence. Approximately three weeks after the aerial surveillance spotted the six plants, Defendant obtained a certification to use medical marijuana from a doctor, and ten days after he received his registry identification card from MDCH he was arrested. The court extended the time frame for requiring possession of a valid registry card, and for obtaining a physician's statement, set in *Kolanek*, above, at the point of arrest, to "before commission of the purported offense." Judges Meter, Owens and O'Connell held that Defendant, since he grew six marijuana plants prior to obtaining his physician's statement and registry identification card, was "not immune from arrest, prosecution, or penalty."

**Municipal Immunity for *Brady* Violations.** *Connick v Thompson*, __ US __; 131 S Ct 1350 (2011)**(march'11).** Justice Thomas authored this opinion which reversed a fourteen-million-dollar award in favor of Thompson, who served eighteen years in prison for murder and armed robbery before his convictions were vacated after it was discovered that prosecutors failed to turn over exculpatory evidence. The Court held that the prosecutor's office could not be held liable under Section 1983 for failing to properly train its attorneys based on a single *Brady* violation. The main issue was how one can show deliberate indifference, a required element in Thompson's failure to train claim under Section 1983. The majority held that deliberate indifference is, almost exclusively, shown by proving a pattern of similar constitutional violations. However, Justice Ginsberg wrote, in a dissenting opinion joined by three other justices, that there are many ways to demonstrate deliberate indifference short of an established pattern of violations, and the evidence presented at trial was more than sufficient for the jury to find deliberate indifference.

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

**Prosecution Costs Improperly Imposed.** *People v Dilworth*, __ Mich App __; __ NW2d __ (2011 WL 228872, No. 294785, decided January 25, 2011)(**jan'11**). Defendant challenged the trial court's authority to order him to pay $1,235 in prosecution costs. The trial court must have statutory authority to order a criminal defendant to pay

costs associated with the trial. Neither of the statutes that Defendant was convicted of violating provide any such authority, but the Legislature has the "authority to enact a general cost provision." The COA held that, while trial courts may impose costs of prosecution, they "must bear some reasonable relation to the expenses actually incurred in the prosecution." Because there were no details of the expenses given by the prosecution, the COA remanded the case to the trial court for further proceedings.

**Sexual Delinquency, Separate Juries.** *People v Breidenbach*, __ Mich __; __ NW2d __ (2011 WL 1599549, No. 294319, decided April 28, 2011)**(april'11)**. In *People v Helzer*, 404 Mich 410; 273 NW2d 44 (1978), the MSC held that when a criminal defendant is charged with being a sexually delinquent person in relation to an underlying sexual offense, separate juries must determine a defendant's guilt of the sexual delinquency charge and the underlying charge. In this case, defendant was convicted by a single jury of "indecent exposure as a sexually delinquent person." The trial court granted defendant's motion for a new trial after the Court of Appeals vacated his conviction on the ground that the first trial violated his procedural rights under *Helzer*. The prosecutor appealed, arguing that *Helzer* was wrongly decided. The MSC agreed, and overruled *Helzer* in part, concluding that because the sexual delinquency statute, MCL 767.61a, neither explicitly nor implicitly requires that a separate jury determine the issue of sexual delinquency apart from the primary offense, the *Helzer* Court erred when it created a compulsory rule to that effect. The Court held that separate jury trials are discretionary, not mandatory. The court added that determinations on whether separate juries are needed should be made on a case-by-case basis.

**Sex Offender Registration, Delay in Registration Requirement.** *People v Lee*, 489 Mich 289; __ NW2d __ (2011)**(june'11).** Lee pleaded nolo contendere to third-degree child abuse as a second-offense habitual offender. At sentencing, the prosecution requested that Lee be required to register as a sex offender. The trial court held that the assault did not constitute a sex act, but retained jurisdiction to allow the prosecution to set a hearing to further develop their argument. Some 20 months later (and after the presiding judge had retired), the prosecution renewed their request to require Lee to register. The request was granted. The successor judge held that there was no procedural bar to granting the prosecution's motion because the original judge had reserved a decision on the SORA issue. The COA, after being ordered to hear the case by the MSC, affirmed. The MSC granted leave, reversed the COA, and vacated the trial court's order requiring Lee to register. The court held that the trial court's decision mandating registration was erroneous because the court failed to comply with multiple statutory requirements. More specifically the MSC found that the trial court had not required registration before sentencing, failed to give the registration form to the defendant and inform him of his duties under SORA, failed to ensure the registration was forwarded to the state police *before* imposing sentence, and when entering the judgment of sentence, failed to determine that the crime was a listed offense requiring registration.

**Sex Offender Registration, Homeless Sex Offenders.** *People v Dowdy*, 489 Mich 373; __ NW2d __ (2011)**(july'11).** Due to a prior conviction, Defendant was required to register as a sex offender. As such, he was required to appear in-person at a law

enforcement agency and provide information regarding his residence or domicile. He was also required to notify law enforcement officials within 10 days of a change in his residence or domicile. Dowdy was homeless. He initially listed a shelter as his address, but once the shelter became aware of his sex offender status he was no longer allowed to sleep there. When police realized Dowdy was not staying at the shelter, he was found and arrested for violating SORA. The trial court and COA held that, because he was homeless, he did not have the ability to report his residence or domicile as required. The MSC disagreed, holding that a residence, for purposes of SORA, is a place where an offender habitually sleeps and establishes regular lodging. It is not necessary that the residence is a home, a street address, or even a physical structure. Instead, the residence only has to be a "place." Under this definition, presumably an offender could register his or her residence as a park, or even a street corner. The court noted that the Michigan State Police allow homeless to register under the address 123 homeless. The COA opinion was reversed and the case was remanded for trial. Justice Marilyn Kelly, in a dissenting opinion joined by Justices Cavanagh and Hathaway, vehemently disagreed. The dissenters noted that while a "park bench, highway underpass, or steam grate" may describe where a homeless offender sleeps from time to time, it is not a regular place of lodging. Additionally, the dissent explained that an individual must establish a residence before he or she can establish domicile. Lastly, the dissenters noted that the use of the fictitious address "123 Homeless" by the Michigan State Police contravenes the purposes of SORA because it does not allow police or the public to locate offenders, or guard against future sex crimes.

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

**State Sovereignty, 10th Amendment, Individual Standing.** *Bond v United States*, __ US __; 131 S Ct 2355 (2011)**(june'11).** Bond, who was alleged to have placed harmful chemicals on items a friend would be likely to touch after the friend was impregnated by Bond's husband, was indicted for stealing mail and for violating a 1998 statute derived from an international chemical weapons treaty, ratified by Congress in 1997. She argued that charging her under the statute violated the Tenth Amendment, and intruded on powers reserved to the states. The Court of Appeals for the Third Circuit found Bond lacked standing to make a Tenth Amendment claim. The United States Supreme Court unanimously held that *individuals*, and not just states, have standing to challenge federal laws as violations of state sovereignty under the 10th Amendment. Justice Anthony Kennedy wrote that "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." The Court expressed no view on the merits of Bond's 10th Amendment claim.

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

### I. Search and Seizure

#### A. What Constitutes a "Search"?

***United States v. Jones*** **(to be argued November 8, 2011)**
**Did the government violate the defendant's Fourth Amendment rights by installing a tracking device on his car without a warrant and using the device to monitor his movements on public streets?**

#### B. Administrative and "Special Needs" Searches

***Florence v. Board of Freeholders*** **(argued Oct. 12, 2011)**
**Does the Fourth Amendment require that jail officials have reasonable suspicion to strip-search arrestees who have been arrested for civil infractions or minor crimes not involving contraband or weapons?**

### II. Eyewitness Identification – Due Process Violations

***Perry v. New Hampshire*** **(argued November 2, 2011)**
**Could the admission of a suggestive identification procedure violate due process even when the police did not orchestrate the identification?**

### III. Confessions – *Miranda* Issues

***Howes v. Fields*** **(argued October 4, 2011)**
**Is a prisoner in custody for purposes of *Miranda* if he is incarcerated for an offense unrelated to the subject of the questioning when he is taken to an isolated area of the prison facility and questioned about conduct occurring outside the prison?**

### IV. Right to Counsel

#### A. Scope of the Right

***Martinez v. Ryan*** **(argued October 4, 2011)**
**If a state prohibits a defendant from raising a claim of ineffective assistance of trial counsel on direct appeal, does the defendant have the right to the effective assistance**

**of post-conviction counsel when post-conviction counsel raises a claim of ineffective assistance of trial counsel in a state post-conviction proceeding?**

### B. Ineffective Assistance of Counsel

***Missouri v. Frye & Lafler v. Cooper* (argued October 31, 2011)**
**Does the 6th Amendment provide a remedy for a defendant who rejected a plea as a result of deficient representation during plea bargaining and who was subsequently convicted and sentenced after a fair trial?**

## V. Miscellaneous Trial Issues

### A. Confrontation Rights—Testimonial Evidence

***Williams v. Illinois* (to be argued December, 2011)**
**Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.**

### B. Prosecutorial Misconduct—Brady Violations

***Smith v. Cain* (to be argued November 8, 2011)**
**Was the defendant denied a fair trial by the cumulative effect of numerous pieces of exculpatory evidence withheld by the police and prosecutors?**

## VI. Post-Conviction Relief

### A. AEDPA Standards of Review

***Greene v. Fisher* (argued October 11, 2011)**
**If a new decision of the U.S. Supreme Court is issued after the last state court decision on the merits but before the conclusion of direct review (i.e., after the state court of appeals decision but before the state supreme court denies review), is that new U.S. Supreme Court decision "clearly established law" for purposes of federal habeas corpus review?**

### B. AEDPA Statute of Limitations and Tolling

***Gonzalez v. Thaler*** **(argued November 2, 2011)**
**When does the time for taking further direct review expire and, therefore the time for filing a federal habeas petition begin to run in a case in which the defendant does not pursue an appeal to the state's highest court?**

### C. Procedural Default

***Maples v. Thomas*** **(argued October 4, 2011)**
**Was there "cause" to excuse petitioner's procedural default in failing to timely file an appeal to the state's highest court after the intermediate appellate court mailed the decision to his lawyers' firm, which erroneously returned the mail to the appeals court without opening it or notifying petitioner?**

# II. Legislation

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

*Search Warrant Expansion*

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

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

*Personal Protection Order for Victim of Sexual Assault*

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

*Prohibition Against Re-Use of Medical Device*

**2010 PA 25 and PA 26 [SB 528 and SB 825, eff. 3-26-10] amends MCL 333.1101 to 333.25211 and MCL 777.13n**. PA 25 amends the Public Health Code to

prohibit a health care provider from knowingly reusing, recycling, refurbishing for reuse, or providing for reuse a single-use device, subject to certain exceptions. PA 26 amends the Code of Criminal Procedure to include reuse of a single-use medical device in the sentencing guidelines. The offense would be a Class D felony against public safety punishable by up to 10 years in prison.

*Texting While Driving*

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

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

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

*Repealed Laws*

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

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

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

*Repeal of Law Prohibiting Forced Marriage*

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

*Installation of Tracking Devices*

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

*Energy Theft Made a Separate Crime*

**2010 PA 129 and 130 [SB 1311 and 1312, eff. 10-19-10], amends MCL 750.1 to 750.568; MCL 777.16o.** PA 129 makes it a felony to sell or transfer, or attempt to sell or transfer, the product or service of an electric or natural gas provider to any other person, knowing or having reason to know that the product or service was obtained illegally. It was reported that energy theft has been on the rise due to the economic downturn of the last several years. A first offense is punishable by imprisonment for not more than five years, a fine of not more than $5,000, or both. A second or subsequent offense is punishable by imprisonment for not more than five years, a fine of not more than $10,000, or both.

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

*Assaulting a Public Utility Employee*

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

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

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

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

**2010 PA 154 [SB 5273, eff. 9-2-10] amends MCL 600 to 600.9946.** PA 154 creates a three-year DWI/sobriety court interlock pilot project beginning on January 1, 2011, for individuals convicted of two or more violations of operating a vehicle while intoxicated or while impaired. A participating DWI/sobriety court judge will certify to the secretary of state that a person seeking a restricted license has been admitted to a DWI/sobriety court and that an interlock device has been placed on each vehicle owned or operated by that person. The bill defines "DWI/sobriety courts" as the specialized court programs established within judicial circuits and districts throughout Michigan that are designed to reduce recidivism among alcohol offenders and that comply with the 10 guiding principles of DWI courts as promulgated by the National Center for DWI Courts.

*New Additions to List of Schedule 1 Controlled Substances*

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

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

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

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

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

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

*Drug Court Requirement Changed*

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

*Boot Camp Extended/Revised*

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

*Parole to Deportation*

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

*Provision of Presentence Reports*

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

*Guidelines for Gang Recruitment/Retaliation*

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

*Identity Theft Package*

**2010 PA's 314-319 [HB 4325, SB's 223, 225, 226, 149, 150, eff. 4-1-11]**, adds MCL 445.74-445.74d, amends MCL 445.69, MCL 762.10c, MCL 777.14h, MCL 445.63, MCL 777.14h. The package provides for forfeiture of property used in committing identity theft and specify graduated penalties for second, third or subsequent violations of the Act that are felonies, allowing up to 15 years incarceration. Guidelines sentences are provided for the expanded penalties. Other provisions in the package would allow identity theft crimes to be prosecuted in the jurisdiction in which the offense occurred, in which the information used to commit the violation was illegally used, or in which the victim lives. If more than one violation is charged and more than one jurisdiction is available, all violations can be prosecuted in any of the available jurisdictions. The package also prohibits and provides sentence guidelines for "Phishing," the practice of luring unsuspecting victims into linking to other websites and providing financial or personal identity information.

*Controlled Substances, Parole and Penalty Package*

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

*New "Doctor Shopping" Felony and Guidelines*

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

*Human Trafficking Package*

**2010 PA's 360-364 [HB's 5575-5579, eff. 4-1-11]**, amends MCL 750.462j, MCL 777.16w, MCL 750.159g, MCL 600.4701, MCL 780.766b. The package of bills creates a ten-year felony for obtaining the labor of another through force, fraud, or coercion, or recruiting, harboring, or transporting for involuntary servitude or debt bondage. Sentences would be increased to 20 years if the violation involved a minor, a commercial

sex act or serious physical harm, and life if the violation resulted in a death. Guidelines are provided and the penal code is amended to make violations racketeering offenses. Property used in the offenses would be subject to seizure, and the Crime Victim's Rights Act was amended to require a court sentencing on trafficking offenses to order restitution for the full amount of loss suffered by a victim.

*Charitable Organizations and Solicitations Act Revisions*

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

*Sex Offender Registration Revisions*

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

*Moving Violation in a School Bus Zone*

**2011 PA's 59 & 60 [HB's 4167 & 4168, eff. 7/1/11]** amends MCL 777.12e & 257.601b to add misdemeanor and felony penalties (up to 15 years for a moving violation for which at least three points would be assigned causing death) for traffic violations committed in a "school bus zone" – the area within 20 feet of a school bus that has stopped.

*Expunction Revisions*

**2011 PA 64 [SB 159, eff. 6/23/11]** amends MCL 780.621. Prior to enactment of 2011 PA 64 a criminal conviction could be expunged only if it were the only offense of record for an individual. Now one qualifies for expunction of a more serious conviction even if convicted of two "minor" offenses (misdemeanor or ordinance violation for which the maximum penalty is 90 days or less) before the age of 21. The bill also prohibits expunction of life offenses, criminal sexual conduct offenses (except fourth degree), child sexually abusive activity, and certain crimes involving use of the internet or a computer.

*Ephedrine and Pseudoephedrine Sale Restrictions*

**2011 PA's 84-87 [SB's 333 & 350; HB's 4749- 4750, eff. 7/15/11]** amends MCL 333.17766c et seq., 777.13n; adds MCL 333.7340a. PA 84 significantly beefs up reporting and electronic tracking of sales of products containing ephedrine or pseudoephedrine. PA 85 prohibits the use of a fake ID to purchase products containing ephedrine or pseudoephedrine. PA's 86 and 87 set new rules for limiting sales of these products and amend a statutory citation in the sentencing guidelines.

*Add Substances to Schedule 1*

**2011 PA 88 [HB 4565, eff. 8/1/11]** amends MCL 333.7212. PA 88 adds various substances, including bath salts, to the list of Schedule 1 controlled substances.

*Revise Collection of DNA from Prisoners*

**2011 PA 127 [SB 346, eff. 7/21/11]** amends MCL 791.233d. Currently DNA is collected upon conviction of a crime or arrest for a violent felony. In addition all prisoners must submit a sample upon release on parole, placement in a community facility or discharge. PA 127 requires all prisoners serving time on June 1, 2011 to provide samples no later than January 1, 2012. For those whose sentence begins after June 1, 2011, samples must be taken within 90 days of com