

Criminal Defense Newsletter



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Why the Greenfield Opinion is a “Brown Field” for DUI Defendants

Until recently it had been relatively easy for attorneys representing Michigan’s drunk driving accused to obtain the videotape of the motorist’s breath testing. This may have all changed based on the recent Court of Appeals decision [People v Greenfield](#), On Reconsideration, ___ Mich App ___ (#264879, June 29, 2006) that appears to indicate that the Michigan rules of evidence do not require the police to produce these tapes. This opinion is unfortunate because the terms “due process” and “meaningful defense” in a drunk driving breath case are synonymous with obtaining and reviewing this police videotape. [Editor’s Note: Responding to the prosecution’s motion for reconsideration, the panel added language to footnote 6 “reiterating” for the bench and bar in its amended opinion that MCR 6.201 does not apply to misdemeanor cases.]

In ruling that the breath test videotape was not subject to Michigan’s rules of discovery, the [Greenfield](#) opinion indicated: “[F]urther, it is pure conjecture to assume that anything on the tape would have been favorable to defendant and defendant, who is in the best position to do so, fails to assert any facts to suggest that the officer failed to properly conduct the tests.” This analysis suggests that the appeals court possesses a rather unsophisticated understanding of the issues that were presented, and that the defense attorneys presenting the case did not sufficiently disabuse them of this limited understanding. Breath testing is a relatively complicated scientific procedure, and the only way to understand when and why things may go wrong is to have both a thorough understanding of the proper administration of a breath tests, as well as an equally thorough understanding of the science of infrared breath alcohol measurement.

When a videotape is reviewed by someone with a trained eye many examples of police misconduct are easily observed. Many of these examples can lead to unreliable or inaccurate test results, and might include for example where it is obvious that the cops are using their police radios while the test is being conducted (absolutely prohibited according to the state police training manual); where it is obvious from the discussion taking place and the mannerisms of the defendant that he or she was actively experiencing gastric reflux while the test was being administered; where it was obvious the client's chemical test rights were not read; where it was obvious the client was talked out of a second test and/or independent test; where a viewing of the tape shows that a breath test ticket from an aborted test is destroyed (tossed in the garbage) prior to the successful test being administered, which essentially amounts to destruction of evidence, and where it is obvious no 15-minute observation was conducted.

To impute such a high level of sophisticated knowledge to a typical motorist is both unfair and unrealistic. Only a well-trained defense attorney or his or her expert could possibly make such a "good cause" determination and this conclusion could only occur after viewing the tape. Of course the Greenfield opinion also ignores the fact the person to whom this knowledge is imputed is accused of an alcohol-related crime and alcohol does have a tendency to affect one's memory, a fact that only further demonstrates the fallacy of placing a "good cause" requirement on the drunk driving accused.

Additionally, the government already has what amounts to ironclad control over the breath test evidence because it is the arresting police department that is in charge of maintaining the equipment and administering the breath test. In fact, only police officers are allowed any access to the equipment. As a result, defense requests to inspect the equipment and subpoenas to produce the equipment for inspection at trial are routinely and resolutely denied by the courts. Thus, the only objective and unbiased evidence that can be used by the defense in an effort to determine if the breath test was properly administered is the booking room video tape itself. Even in the best case scenario demonstrating "good cause," without first viewing the tape, will nearly always be "conjectural," and the Greenfield Court suggests that conjecture will not be sufficient. By requiring a showing of "good cause," what the Court of Appeals has done is to ensure that such requests always be based on nothing short of conjecture because the only way to go from conjecture to good cause is to view the very tape they are precluding from discovery! Thus, what was complete secrecy has now become absolute secrecy.

By placing a completely unrealistic and nearly insurmountable "good cause" requirement on the accused, the end result of this opinion will almost surely be a further reduction in the constitutional due process rights of accused citizens. It may also be argued that, for the reason just stated, the Greenfield case violates the very recent case of Holmes v South Carolina, ___ US ___, 126 SCt 1727 (2006), where the United State Supreme Court examined a related issue in the context of a murder case. In an opinion written by Justice Alito the Court found that while state and federal rule makers did have "broad latitude" to establish rules excluding evidence from criminal trials, they may not do so where such limitations preclude a defendant from the meaningful opportunity to present a defense. The Holmes Court summarized that the Constitution does prohibit rules of exclusion that serve no "legitimate purpose" or that allow such exclusion where same is "disproportionate to the ends that they are asserted to promote," but stated also that it is permissible for such rules to allow the exclusion of evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or where such evidence has the potential to mislead the jury, is repetitive, only marginally relevant, or possesses an undue risk of harassment or prejudice.

It appears that in some ways the Michigan Court of Appeals suggested a similar analysis because in footnote 4 of the Greenfield decision, the Court indicates that the Constitution is involved (and therefore the tapes might still be subject to discovery) when the issue of exculpatory evidence is in play. In practice however, and contrary to Holmes, where Michigan's law enforcement is allowed to maintain and use breath testing equipment in what amounts to absolute secrecy, then effectively the defendant is nearly always precluded from the ability to provide a meaningful defense in any drunk driving case. The result of course will be to significantly increase the odds of conviction for all motorists accused of drunk driving.

The Greenfield decision also seems to further the trend in Michigan drunk driving case law that appellate judges seem to no longer see themselves as members of a branch of government that is separate from the executive, or as a "check and balance" on the executive power. Instead it seems that many judges see their role as being to assist the state in gaining its conviction. This appears to be true at all levels of the judiciary, from the trial court judges to the Supreme Court justices. In reading cases as they are being decided one is often left to wonder if three branches of government persist in America.

Having drawn these conclusions, it's difficult to estimate what the actual significance of the Greenfield

decision will be in the long run because it's hard to know for sure if, or perhaps more importantly exactly how, the trial court judges will apply this ruling. If the result of the ruling is that videotapes are no longer provided, then the ruling will have a significantly deleterious effect on the constitutional rights of the accused. There is no question however that without the opportunity to review the booking room videotape, the defendant's "due process vision" is considerably "blinded," and that certainly is not justice!

by Patrick T. Barone

Mr. Barone is the principal and founding member of The Barone Defense Firm, located in Birmingham, a practice devoted exclusively to defending drinking drivers. He also is the author of two respected books, "Defending Drinking Drivers," and "The DUI Book, a Citizens' Guide to Understanding DUI-DWI Litigation in America," available at <http://www.jamespublishing.com/books/ddd.htm>.

Greenfield: Preserving this Brady Issue for Federal Habeas Corpus Review

The Greenfield decision specifically notes that there is no general constitutional right to discovery in criminal cases. People v Greenfield, On Reconsideration, ___ Mich App ___ (#264879, June 29, 2006); Slip op. at p. 3, n. 4 citing People v Elston, 462 Mich 751, 765 (2000). But as the author of this piece recommends, it is incumbent upon trial counsel to adequately protect his client's due process rights where there is a possibility of obtaining discoverable information. Counsel must make timely demands for disclosure of such videotape evidence. Assuming the tapes exist, there is an inference that they contain information favorable to the defense when they are not immediately distributed to counsel by the police or prosecution.

A formal demand for discovery of exculpatory evidence which is ignored amounts to a constitutional violation under Brady v Maryland, 373 US 83 (1963). Though the Greenfield decision suggests that videotaped evidence is not discoverable, the responsible defense attorney will demand a much broader interpretation of MCR 6.201. This due process argument must be raised with an eye toward federal court, in an effort to lay the groundwork for potential habeas corpus proceedings.

The most crucial step for preserving this or any federal habeas corpus issue is to identify the constitutional right and United States Supreme Court precedent that has been violated. Where counsel has a good faith basis for alleging a Brady violation, he should move for an evidentiary hearing on the matter to fully develop a factual record on both the prosecutor's conduct and the undisclosed evidence.

Even in the absence of a request by the defendant, due process requires the prosecution to disclose evidence that has obvious substantial value to the defense. United States v Agurs, 427 US 97 (1976). Brady applies to evidence that is known only to the police and not to the prosecutor; the prosecutor has a duty to learn of favorable evidence known to others who are acting on behalf of the government in the case. Kyles v Whitley, 514 US 419 (1995).

Evidence is favorable to the accused under Brady if it is exculpatory or if it impeaches the credibility of a government witness. United States v Bagley, 473 US 667 (1985), on remand 798 F2d 1297 (9th Cir. 1986) [fair trial denied by suppression of fact two key witnesses were paid to investigate defendant.] Evidence is material under Brady where there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. Strickler v Greene, 527 US 263 (1999).

For a comprehensive compilation of successful and instructive exculpatory evidence claims, please refer to the Capital Defense Network's website, http://www.capdefnet.org/hat/contents/constitutional_issues/exculpatory_evi/exculpatory_evi.htm with relevant case law organized by Court.

by Marla McCowan
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Ms. McCowan is co-author of the Defender Habeas Book, published by the Criminal Defense Resource Center, www.sado.org.

CDAM Launches Task Force on Fees

At its meeting on March 16, 2006, the Board of the Criminal Defense Attorneys of Michigan (CDAM) created a Task Force on Fees, chaired by Frank Eaman and Dawn Van Hoek, charging it with support of

CDAM members who accept assignments throughout the state. The Task Force will focus on fees paid to assigned counsel and access to experts and investigators in criminal cases, with a view to whether

fees are adequate and experts and investigators are provided to ensure competent representation and a fair trial or appeal. CDAM members will have access to pleadings and other tools to assist them in seeking the state-guaranteed "reasonable fee" and also to assist in obtaining experts and investigators. CDAM members who wish to contest fees, withdraw from cases because of inadequate fees, or challenge the system of payment also will be able to consult with experienced Task Force volunteers.

Another purpose of the Task Force is to allow CDAM members to provide stories of their cases, where attempts to collect reasonable fees or to obtain the appointment of experts have been denied. These anecdotes will be collected and made available for legislative and litigation support.

An educational and intake web site for the Task Force will reside at www.cdam.net/, with pleadings hosted by the Criminal Defense Resource Center (CDRC) in a searchable database at www.sado.org/.

Attorneys taking assigned cases at both trial and appellate levels receive widely different fees, depending on the jurisdiction. The CDRC recently published its 2006 survey, revealing a range in hourly rates from \$45 to \$88 for trial work, and a low of \$25 an hour for appellate work. See: www.sado.org/public_defense/. Adequacy of fees and access to experts and investigators are under review by the Michigan Public Defense Task Force, which has drafted reform legislation to address the problems caused by Michigan's uncoordinated method of providing defense services. See: www.mipublicdefense.org.

From Our Readers: Davis and Crawford; A Cloud in the Silver Lining

In June, the United States Supreme Court issued its much anticipated decision in [Davis v Washington](#), and the companion case of [Hammon v Indiana](#), ___ U.S. ___ 126 S.Ct. 2266; ___ LEd2d ___ (2006). The decision generated comments from the defense bar which were generally favorable regarding both (1) the Court's determination two years ago in [Crawford v Washington](#), 541 U.S. 36 (2004), that the confrontation clause absolutely prohibits use of testimonial statements where there was no opportunity for cross examination, regardless of whether the statements were "reliable," and (2) the [Davis/Hammon](#) development of the definition of "testimonial" [a call to a 911 operator describing contemporaneous events is not testimonial, but statements to police during a domestic violence investigation at a home are testimonial and cannot be introduced at trial].

Lost in all of these comments, however, is the emerging problem, outlined in the first paragraph of section II of Justice Scalia's opinion, with non-testimonial, but nonetheless highly unreliable and prejudicial, hearsay. In that first paragraph, on p. 6 of the opinion in [Davis/Hammon](#), Scalia says "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."

In other words, if you've got a "confession" from a non-testifying co-defendant to an acquaintance in a bar, which just happens to be the key evidence against your client resulting in a murder 1 conviction, and the confession is highly unreliable, the state courts, which serve as the general source of "traditional limitations

upon hearsay evidence," may have the last word. We appear to be heading toward no Confrontation Clause protections, and thus no habeas jurisdiction for the federal courts, with respect to any statements not deemed testimonial.

In the wake of [Crawford](#), the circuits had been leaning toward keeping the [Ohio v Roberts](#), 448 US 56 (1980) test as a continuing Confrontation Clause protection in cases where nontestimonial statements do not fall within a firmly-rooted hearsay exception and do not carry particularized guarantees of trustworthiness. According to several post-[Crawford](#) decisions of the lower federal courts, these unreliable hearsay statements are still subject to exclusion under federal constitutional Confrontation Clause principles, even if they are not testimonial. See [United States v Gibson](#), 409 F.3d 325, 338-339 (6th Cir. 2005). See also [United States v Holmes](#), 406 F.3d 337, 348 & n. 14 (5th Cir. 2005); [United States v Saget](#), 377 F.3d 223, 227 (2d Cir. 2004). This is obviously an idea with which Justice Scalia does not agree.

While the elimination of all Confrontation Clause protections for hearsay statements not deemed testimonial appears to be dicta in the [Davis/Hammon](#) case, there is little doubt it is coming as a holding in the foreseeable future. One could always try to argue under a general due process theory that the right to a fair trial was denied by improper state court evidentiary rulings which are so severe that they clearly rendered the trial fundamentally flawed. U.S. Const., Ams. V, XIV; [Estelle v McGuire](#), 502 U.S. 62 (1991); [Crane v Kentucky](#), 476 U.S. 683 (1986); [Walker v. Engle](#), 703 F.2d 959, 962-963 (6th Cir.1983). While the

issue should be preserved in the appropriate case, general due process arguments, especially where the federal courts appear to be backing off protection by a more specific and formerly applicable constitutional provision, are very difficult to make.

To be sure, this is not to suggest that Crawford is a step in the wrong direction from a criminal defense perspective. Certainly many courts, especially our pro-prosecution appellate courts here in Michigan, were skirting the Confrontation Clause protections with suspect determinations of trustworthiness. However, it should be kept in mind that there are cases out there that would have had a good chance of winning in federal habeas under the Roberts test that will not have

a prayer now that the contest has moved from whether a statement is trustworthy to whether it is testimonial.

**by F. Martin Tieber
Lansing, Michigan**

Mr. Tieber is co-chair of CDAM's Rules & Laws Committee.

Tired of talking to yourself? Talk to other readers or the Editor by sending a letter to the Criminal Defense Resource Center, for publication in the Criminal Defense Newsletter. Address letters to the Editor, Criminal Defense Newsletter, 3300 Penobscot Building, 645 Griswold, Detroit, MI 48226.

Practice Note: Authority for Use of Demonstration Evidence

PowerPoint presentations (the most commonly used demonstration software) have been used in court in a variety of situations. Among other things, PowerPoint has been used for giving advice of rights, to highlight opening statements, as demonstrative evidence, as substantive evidence, as closings statements and for jury instructions.

The Michigan Rules of Evidence do not specifically address the use of PowerPoint demonstrations. The evidentiary standard that applies depends on the intended use of the PowerPoint presentation. Material presented in an attorney's opening statement and closing arguments is not strictly regarded as "evidence." Trial counsel is generally permitted to put anything into a visual aid that would be permitted orally in argument. Charts and drawings that could be used in opening statement or closing argument can generally be put into PowerPoint. However, as will be discussed below under attorney work product, care should be taken in the selection of the visuals.

The rules applicable to PowerPoint presentations are the same ones governing demonstrative evidence generally. If PowerPoint is used as demonstrative evidence, at a minimum, to be admissible, it must be relevant to some fact of consequence to the case (Rule 401) and its probative value must not be substantially outweighed by any risk of unfair prejudice, confusion of the issues, or be misleading to the jury (Rule 403).

The controlling rule for admission of demonstrative evidence was established by the Michigan Supreme Court in Smith v Grange Mutual Fire Ins Co of Michigan, 234 Mich 119; 208 NW2d 145 (1926). According to Smith, supra at 126, demonstrative evidence is admissible when the testing conditions are substantially similar to the conditions in existence at the time of the event in question. The conditions need only be reasonably similar and that

"the lack of exact identity affects only the weight and not the competency of the evidence . . ." The substantial similarity test focuses on the conditions under which the "test observations" were made and not on what those observations revealed. Smith, supra at 125. The Smith "substantial similarity" test was affirmed in Lopez v General Motors Corp, 224 Mich App 618; 569 NW2d 861 (1997) [videotapes of test crashes were properly admitted into evidence because the out-of-court testing conditions were substantially similar to the conditions in existence at the time of the plaintiff's accident].

It should be noted that the test for demonstrative evidence differs from the test for admission of "re-creation evidence." When a party attempts to present "re-creation evidence," it has the burden of establishing "that the evidence reasonably and faithfully reproduces the conditions that existed at the time in question." Lopez v General Motors Corp, 224 Mich App 618, 628, n13; 569 NW2d 861 (1997). The standard for "re-creation evidence" essentially mandates a "virtual identity" between the proffered evidence and the incident it purports to re-create. *Id.* The test for admitting re-creation evidence is more stringent than the requirements for the admission of demonstrative evidence. This distinction has been reiterated in Sumner v General Motors (On Remand), 245 Mich App 653, 657; 633 NW2d 1 (2001).

A trial court does have discretion to exclude demonstrative evidence. To be admissible, demonstrative evidence must satisfy traditional requirements for relevance and probative value. Although the demonstrative evidence may be relevant to a material issue in the trial, and therefore admissible under MRE 402, demonstrative evidence does not escape scrutiny under MRE 403. When it would be confusing and un-beneficial to the jury, so as to substantially outweigh its

probative value because the jury would be unable to distinguish such evidence as purely demonstrative, its exclusion may be proper. [People v Castillo](#), 230 Mich App 442, 444-447; 584 NW2d 606 (1998)

In a case of first impression, the Court of Appeals addressed demonstrative evidence in the context of closing arguments in [People v Mundy](#), 63 Mich App 606, 608; 234 NW2d 663 (1975). The Court held that historically, all materials admitted into evidence compose an integral and absolutely necessary part of the case, and both the prosecution and the defendant have an absolute right to use any and all such evidence in final arguments. This is basic to trial procedure. Defendant did argue, however, that films are in a category apart from other types of demonstrative evidence because they have a certain testimonial quality not present in other types of exhibits. This difference, defendant contended, renders improper the use of films during closing argument. The panel disagreed and adopted the rationale of the New Mexico Court of Appeals in [State v Orzen](#), 83 NM 458; 493 P2d 768 (1972).

[People v Bulmer](#), 256 Mich App 33; 662 NW2d 117 (2003) specifically dealt with a PowerPoint presentation as demonstrative evidence during the testimony of an expert witness. The prosecutor moved to admit into evidence a computer-animated, slideshow simulation of the shaken-baby syndrome. The prosecutor offered the slideshow simulation solely as demonstrative evidence pursuant to [MRE 702](#) and [703](#) to explain what happens to the baby's brain during a shaken-baby episode. The prosecutor stated that the simulation served as a basis for the expert witness opinion and that it was not intended to be an exhibit that would be introduced into evidence at trial. At trial, the defendant objected, on the grounds that the prosecution had violated the mutual discovery rules of [MCR 6.201\(A\)\(2\)](#) and (3). He argued that he should have received the slideshow well before trial. He had just reviewed the slideshow before trial and did not have time to have other medical experts review it. The trial court found [MCR 6.201\(A\)\(2\)](#) and (3) did not apply. On appeal, the defense claimed that the PowerPoint was not supported by a proper foundation and served to inflame and prejudice the jury.

The Court of Appeals avoided the mutual discovery issue by holding that it was not properly preserved because of the different grounds for the objection raised in the Court of Appeals. The appellate panel held that demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case. [People v Castillo](#), 230 Mich App 442, 444; 584 NW2d 606 (1998). The demonstrative evidence must be relevant and probative. Further, when evidence is offered, not in an effort

to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event. [Lopez v General Motors Corp.](#), 224 Mich App 618, 628 n. 13; 569 NW2d 861 (1997). After reviewing the slideshow, the Court of Appeals concluded that it simply demonstrated what the expert witness described in her testimony, and affirmed the defendant's conviction of second-degree murder.

[U.S. v Burns](#), 298 F3d 523 (CA6, 2002) is a Sixth Circuit case that also dealt with a PowerPoint presentation. The defendants argued that the district court erred in permitting the government, over defense objection, to use a PowerPoint slide presentation in opening statement. Prior to trial, the government had advised the defendants of its intention to use this presentation during its opening statement and provided them with copies of each slide. After viewing the presentation, the district court ruled that as long as there would be evidence about each image that appeared with the text, the presentation was permissible. While the U.S. Attorney spoke, various drawings, photographs, icons, and text appeared on a screen. Some of the images depicted items that were not intended to become evidence in the case, most notably photographs of a large amount of crack cocaine and fistfuls of money. The jury was instructed by the court before the opening statements and in its final instructions that the attorney's statements were not evidence. The circuit court of appeals held that an opening statement is designed to allow each party to present an objective overview of the evidence intended to be introduced at trial. It is not appropriate for a prosecutor to "use the opening statement to poison the jury's mind against the defendant or to recite items of highly questionable evidence." [United States v Brockington](#), 849 F2d 872, 875 (4th Cir. 1988). Even if the district court erred in allowing the PowerPoint presentation, reversal would be warranted only if the presentation's effect on the defendants was prejudicial. FedRCrimP 52(a). Although the photographs of large amounts of crack cocaine and the fistfuls of money might have confused the jury as to the actual amounts of drugs or money at issue, the court presumed that the district court's instructions against viewing the opening statements as evidence cured any harm. In [Burns](#), the potential prejudicial effect of the slides was not so great as to overwhelm the jury's ability to follow the court's instructions not to consider the opening statements as evidence.

Conclusion

The general, although not universal, rule that seems to emerge from the appellate case law is that visual presentation, including PowerPoint, should be provided to the opposition well before trial. The

exception is that anything considered attorney work product need not be disclosed, nor should the court require disclosure. A trial lawyer should not have to disclose to the other side his or her anticipated opening or closing arguments and PowerPoint visuals. While conflicts might arise between discovery rules that require disclosure of all visual aids to be used at trial and the work product doctrine, in camera review by the trial court in accordance with [People v Stanaway](#), 446 Mich 643, 649-650; 521 NW2d 557 (1994) and [People v Laws](#), 218 Mich App 447, 452; 554 NW2d 586 (1996) is available to resolve such conflicts.

However, even in the area of attorney work product, care must be taken in the selection of the visuals. For example, in the unreported case of [State v Robinson](#), 110 Wash App 1040 (2002) 2002 WL 258038, the appellate court strongly criticized the prosecution's use of a PowerPoint slide in closing argument for showing images of flaming curtains. The court explicitly said:

The trial court should not have permitted the display and the prosecutor should have known better than to have used it. The picture of flaming curtains was not in evidence, added nothing to the evidence, and was not probative of anything at issue in this case. The only purpose served by this irrelevant material was to distract or to prejudice. Its use was dangerous, unnecessary, and in error. It is not at all difficult to imagine an arson case in which this display would be deemed prejudicial sufficient to warrant reversal. For example, this display could have caused great mischief if the fact of the fire was at issue rather than the intent of the accused.

As PowerPoint presentations become more commonly used in criminal cases by both the prosecution and the defense, it is likely that a body of case law will develop to further guide the bench and practicing bar.

**by William Schooley
CDRC Research Attorney**

New and Interesting in the Online Brief Bank

Attorneys with online access to the SADO Brief Bank may be interested in the following issues recently filed by SADO attorneys. This is just a sampling of the hundreds of pleadings now available to registered criminal defense attorneys through SADO's Web site, www.sado.org. Attorneys also may use the brief bank at SADO's Detroit office, 3300 Penobscot Building, 645 Griswold, Detroit, during normal business hours.

Prosecutor Comment

The prosecutor committed misconduct in closing argument by improperly expressing his personal opinion that a key defense witness had lied to the jury. [BB 10262](#).

Connection to Drugs and Gun

The evidence was insufficient to prove that the defendant possessed the drugs and gun found in the heat vent. [BB 10246](#).

Sufficiency of Drug Possession Evidence

The evidence was insufficient to prove that the defendant possessed the drugs found in the home, or that she maintained that home as a drug house. [BB 10267](#).

Blakely Error at Sentencing

The trial court violated the appellant's due process rights at sentencing by scoring offense variables and increasing the statutory sentencing guideline range

based on disputed facts which the prosecutor did not charge and prove beyond a reasonable doubt at a trial or have appellant admit as part of the plea. [BB 10257](#).

Correction of Presentence Report

The appellant is entitled to correction of the presentence investigation report where the trial court agreed not to consider disputed alleged incidents involving other family members. [BB 10257](#).

False Confession

Defense counsel at trial was constitutionally ineffective in failing to move to suppress appellant's coerced confession where appellant suffered from claustrophobia and counsel had argued at trial that appellant falsely confessed. [BB 10256](#).

Plea Withdrawal

The defendant must be permitted to withdraw his no contest plea because the so-called plea "bargain" held no benefit for him. His plea was involuntary, unknowing, and unintelligent, in violation of the state and federal due process clauses, where it was premised on this illusory bargain and where he was given inadequate time and inadequate assistance from counsel in considering it. [BB 10255](#).

Restitution

The court should grant resentencing where it violated the United States and Michigan Constitutions by imposing its sentence for a felony rather than a

misdemeanor based purely on this indigent defendant's inability to pay five thousand dollars in restitution before the date of the sentencing hearing. [BB 10259](#).

Payment of Attorney Fees

The trial court committed reversible error by ordering payment of attorney fees based on inaccurate and incomplete information and without proper authority and must grant relief by vacating that portion of the judgment of sentence in order to comply with federal and state constitutional requirements. [BB 10259](#).

CCW Exception

Due process requires vacating appellant's conviction because the prosecutor failed to prove beyond a reasonable doubt that the "place of business" exception for carrying a dangerous weapon did not apply, where there was substantial evidence that appellant had clothing and a bed in the truck cab where the officer found the knife. [BB 10247](#).

Opinion Evidence

The defendant's due process right to a fair trial was violated by the admission of improper opinion testimony that embraced ultimate issues of law and fact, and improperly bolstered the prosecution's case. [BB 10265](#).

Advice on Plea Consequences

Due process requires plea withdrawal where the court did not inform defendant at the time of the plea to first-degree murder that defendant would never be eligible for parole. [BB 10264](#).

Confrontation

The trial court violated the defendant's constitutional right to confront his accuser by admitting the accuser's out-of-court verbal and written statements that were testimonial in nature. [BB 10260](#).

Court Costs

The assessments of \$457 court costs and \$60 minimum state costs must be vacated because there was no statutory authority for them with a prison sentence for breaking and entering with intent. [BB 10251](#).

Assessment of Attorney Fees

The trial court erred in assessing attorney fees as part of the judgment of sentence. Further, the assessment of attorney fees is improper because defendant is indigent. This Court should remand for correction of the judgment of sentence and for further proceedings consistent with the requirements of People v Dunbar, 264 Mich App 240 (2004). [BB 10251](#).

Technical Tips: Reordering Paragraphs in Microsoft Word Documents

As with most computer functions, there are multiple ways to accomplish the same task, and reordering paragraphs is no different. There are at least three ways to move paragraphs within documents. The one most often used is the *cut*, *copy* and *paste*. Another way is to highlight the paragraph and then drag the highlighted text with the cursor to a new location within the document. Finally, perhaps a simpler, less-known approach is to place the cursor

within the paragraph, hold down the Shift-Alt keys, and move the paragraph up or down using the arrow keys. Each use of the arrow key moves the selected paragraph either above or below the adjacent paragraph.

**by John Powell,
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Public Defense Updates

As activity continues to mount on reform of Michigan's public defense system, we will continue to provide updates to our readers. These updates will include those addressing attorney fees.

Maryland Begins Holistic Defense Pilot Project

The Maryland Public Defender Office is starting two holistic defender projects - one in Montgomery

County and one in Baltimore County. In these offices, defenders will help clients address not only their criminal cases, but also subsidiary issues such as housing, addiction problems, and access to public benefits. The aim of the projects is to reduce the number of repeat offenders by addressing some of the causes of criminal behavior. "We owe it to the communities not just to close the file once they're sentenced . . .," Public Defender Nancy S. Forster said.

"We really do want them to pick up their lives and not be in the recidivism trap."

The initial pilot project started in Montgomery County last year. The office will be fully operational this month. The second project office in Baltimore is expected to open soon. If successful, the projects will be expanded statewide.

NYSACDL Proposes Statewide Public Defense System

On May 1, 2006, the New York State Association of Criminal Defense Lawyers released proposed legislation aimed at creating a statewide public defense system in New York. The 26-page legislation calls for the creation of a state Office of Defender General and several regional offices, to be governed by an independent indigent defense commission. All current county-based and private providers would come under the umbrella of the state system and would be required to adhere to standards set by the commission.

The notion of a unified indigent defense system appears to be gaining increased traction in New York. Earlier this spring, Chief Judge Judith Kaye of the New York Court of Appeals announced that the Commission on the Future of Indigent Defense Services had unanimously decided to recommend a statewide system in New York. The commission's full recommendations will be detailed in its final report, due out in June.

Currently, New York's 62 counties are responsible for indigent defense, leading to a patchwork of different systems.

Items on Maryland and New York developments reprinted with permission, The Champion, June, 2006, Publication of the National Association of Criminal Defense Lawyers, authored by Malia Brink, NACDL's Indigent Defense Counsel.

Michigan Legislature Adopts SCR 39

Both chambers of the Michigan Legislature have now adopted Senate Concurrent Resolution 39, calling on the National Legal Aid & Defender Association and the State Bar of Michigan to collect data on our state's public defense system. As approved on June 8, 2006 by the House, SCR 39 provides:

- o A concurrent resolution to request the State Bar of Michigan and the National Legal Aid and Defender Association to issue a joint report to the Legislature on the number and types of cases and the costs resulting from court-

- o appointed attorneys for indigent criminal cases in Michigan.
- o Whereas, The Michigan Constitution of 1963, in Article I, Section 20, provides that an accused person is ". . . to have the assistance of counsel for his or her defense" and ". . . to have such reason-able assistance as may be necessary to perfect and prosecute an appeal"; and
- o Whereas, The people of Michigan expect the government to administer a system of justice that is just, swift, accountable, and frugal; and
- o Whereas, Michigan has no accounting for the total number of misdemeanor, felony, juvenile, mental health, and appellate cases requiring the appointment of counsel; and
- o Whereas, Michigan has incomplete accounting for expenditures dedicated to public defense services; and
- o Whereas, The Michigan Supreme Court and the State Court Administrative Office have demonstrated a commendable commitment to the collection of complete data on court assignment of counsel; and
- o Whereas, The National Legal Aid and Defender Association is a national, nonprofit association that has a research division with a discrete national capacity for public defense data collection, research, standards-based evaluation, and technical assistance to help state and local government policymakers determine the most efficient and effective manner to deliver the constitutional right to counsel; and
- o Whereas, A mission of the State Bar of Michigan is to "aid in promoting improvements in the administration of justice"; and
- o Whereas, Both the State Bar of Michigan and the National Legal Aid and Defender Association have independent funding and the capacity to provide data collection services at no cost to the taxpayers of Michigan; now, therefore, be it
- o Resolved by the Senate (the House of Representatives concurring), That we respectfully request the State Bar of

- o Michigan and the National Legal Aid and Defender Association to collect information in cooperation with the State Court Administrative Office and issue a joint report to the Michigan Legislature on the costs of indigent criminal cases, the number of criminal cases assigned to court-appointed attorneys, and the types of criminal cases that receive court appointed attorneys in Michigan. We urge that the report be provided to the
- o chairpersons of the Judiciary Committees of the House and Senate and the chairpersons of the appropriate subcommittees of the House and Senate Appropriations Committees; and be it further:
- o Resolved, That copies of this resolution be transmitted to the Michigan Supreme Court, the State Bar of Michigan and the National Legal Aid and Defender Association.

Legislative Update

We offer on a continuing basis summaries of recently passed state and important proposed legislation, as a supplement to our annual survey. Summaries are prepared by Chari Grove.

Human Trafficking

2006 PA 162 [HB 5747, eff. 8-24-06] adds **MCL 750.462a-462i**. This Act adds human trafficking to the penal code. The Act prohibits a person from knowingly subjecting another person to forced labor or services by: 1) causing or threatening physical harm to the person; 2) physically restraining the person; 3) abusing the legal process; 4) destroying a passport or immigration document of the person; or 5) using blackmail against the person. Penalties range from 10 years to life in prison. PA 162 also states that "A person shall not knowingly recruit, entice, harbor, transport, provide, or obtain by any means, or attempt to recruit, entice, harbor, provide, or obtain by any means, a minor knowing that the minor will be used for child sexually abusive activity."

2006 PA 156 [HB 5748, eff. 8-24-06] amends **MCL 777.16w**. PA 156 adds the human trafficking violations to the sentencing guidelines:

Human trafficking

Class D felony against a person
Maximum sentence of 10 years;

Human trafficking causing injury

Class C felony against a person
Maximum sentence of 15 years;

Human trafficking causing death

Class A felony against a person
Maximum sentence of life in prison;

Recruiting a minor for child sexually abusive activity.

Class B felony against a person
Maximum sentence of 20 years.

Harsher Penalties for Criminal Sexual Conduct

2006 PA 169 [HB 5421, eff. 8-28-06] amends **MCL 750.520b**. This Act establishes new punishments for criminal sexual conduct. First-degree CSC involving a victim under 13 and an offender 17 or older now carries a mandatory minimum sentence of 25 years; and if the offender has been previously convicted of CSC, the Act requires a sentence of life imprisonment without parole. PA 169 also allows a court to order a consecutive sentence for first-degree CSC and any other crime arising from the same transaction. In addition to any other penalty, the Act requires the court to sentence a defendant convicted of first-degree CSC to lifetime electronic monitoring.

2006 PA 165, 166 [SB 709, SB 717, eff. 8-28-06] amends **MCL 750.520b** and **MCL 777.16y**. PA 165 provides for a penalty of life in prison without the possibility of parole for a conviction of first-degree criminal sexual conduct involving a victim under 13 and an offender 17 or older if the offender has been previously convicted of CSC. PA 166 adds the sentence to the sentencing guidelines.

2006 PA 167 [SB 718, eff. 8-28-06] amends **MCL 791.234**. PA 167 adds first-degree CSC involving a victim under 13 and an offender 17 or older if the offender has been previously convicted of CSC to the list of life offenses for which parole is not possible.

2006 PA 168 [SB 1122, eff. 8-28-06] amends **MCL 791.236**. This Act specifies that if a person convicted of first or second-degree CSC, other than an offender subject to lifetime electronic monitoring, is paroled, the parole board could require that the parolee be subject to electronic monitoring.

2006 PA 170 [HB 5422, eff. 8-28-06] amends **MCL 791.242**. This Act provides that parole shall only be granted for life for a prisoner sentenced for first-degree CSC with a victim younger than 13 while armed or with use of force or coercion.

2006 PA 171 [HB 5531, eff. 8-28-06] amends **MCL 750.520a and 750.520c**. **PA 171** requires a sentence of lifetime electronic monitoring for a defendant convicted of second-degree CSC when the victim is under 13 and the offender is at least 17. It also provides that intentionally removing the tether is a felony punishable by up to 2 years, which may run consecutively to a sentence for another offense arising from the same transaction.

2006 PA 172 [HB 5532, eff. 8-28-06] amends **MCL 791.204 and 791.206**. This Act establishes the lifetime electronic monitoring program in the Department of Corrections and establishes requirements for the program. The offender would have to reimburse the DOC for the cost of monitoring.

Disorderly Conduct at Funerals

These bills were prompted by disturbances created by the Rev. Fred Phelps and members of his Westboro Baptist Church in Topeka, Kansas, who have protested at military funerals with chants and signs, saying deaths of soldiers in Iraq are God's vengeance

for acceptance of homosexuality, adultery and promiscuity in the United States.

2006 PA 148 [HB 5887, eff. 8-22-06] amends **MCL 750.1 to 750.568**. This bill will amend the penal code to make it a felony to be a disorderly person within 500 feet of a funeral or memorial service. The following behavior is prohibited: making loud noises and continuing to do so after being asked to stop; making a statement or gesture that would make a reasonable person feel intimidated or harassed; engaging in other conduct the person should know would disrupt the funeral.

2006 PA 150 [SB 1171, eff. 8-22-06] amends **MCL 750.168**. Under SB 1171, a first offense would be punishable by a maximum of two years in prison, or four years for a repeat offender.

2006 PA 149, 151 [HB 5888, SB 1229, eff. 8-22-06] amend **MCL 777.16i**. These bills would add the offense to the sentencing guidelines; **HB 5888** applies to first offenses and **SB 1229** applies to both first and subsequent offenses.

From Other States

Tennessee: Housing Project Checkpoint Unconstitutional

The Tennessee Supreme Court found that a police checkpoint program designed to improve the safety of a housing authority apartment complex by stopping motorists and pedestrians for "resident identification" violated the Fourth Amendment. Applying the balancing test to determine whether the program was reasonable and limited police discretion, the court emphasized that the prosecutors had provided no statistics, media reports, or other evidence establishing a connection between harm to the residents and unauthorized visitors. The Court concluded that the officers were using the suspicionless stops to engage in general crime control investigations. State v Hayes, 188 SW3d 505 (Tenn, 2006); <http://pub.bna.com/cl/0302338.pdf>.

Ninth Circuit: Lawyer's Remark to Juror Was Improper Extraneous Influence

A lawyer's statement to a friend, who was sitting on a jury, that she must follow the judge's instructions or risk getting in trouble was extraneous information that tended to improperly coerce the juror's decision, according to the Ninth Circuit Court of Appeals. The juror called the attorney because she was feeling frustrated about the instructions. The Ninth Circuit considered the communication tantamount to a substantive legal discussion, and stated that jurors

cannot fairly determine the outcome of a case if they believe they will face "trouble" for a conclusion they reach as jurors. United States v Rosenthal, 445 F3d 1239 (CA9, 2006); <http://pub.bna.com/cl/0310307.pdf>.

Ninth Circuit: Juveniles Deserve Credit for Prior Custody

The Ninth Circuit Court of Appeals struck down a policy used by the Federal Bureau of Prisons (BOP) to deny juveniles credit for time spent in custody prior to the commencement of their sentences. Although Congress did not specifically mention presentence custody credits in the revised credit statute, the Court found that that did not mean Congress intended to exclude such credit. The Court found support for its position in the federal international transfer statute, and in the legislative history of the statute. Moreover, the Court observed, it is highly unlikely that Congress meant to treat juveniles more harshly than adult offenders. Jonah R. v Carmona, 446 F3d 1000 (CA9, 2006); <http://pub.bna.com/cl/0516391.pdf>.

Pennsylvania: Computer-Generated Animation Admissible

Computer-generated animation to demonstrate an expert witness's version of the offense may be admissible at trial, subject to the same limitations as other demonstrative evidence, held the Pennsylvania Supreme Court. The Court noted that the practice of

law becomes more sophisticated with each technological advancement, and that the courts need to “shed any technophobia” and be willing to embrace those advancements. However, the trial court must ensure that jurors are not unduly swayed by the nature of the animation and must instruct the jury regarding the limited use they are to make of the animation, the Supreme Court cautioned. The Court further concluded that animation is an illustration rather than scientific evidence, and need not pass the Frye test (Frye v United States, 293 F 1013 (CA DC, 1923). Commonwealth v Serge, 896 A2d 1170 (Pa, 2006); <http://pub.bna.com/cl/150map2004.pdf>.

Ninth Circuit: Law Prohibiting “Possessing” “Using or Carrying” is Only One Crime

The Ninth Circuit Court of Appeals held that the federal statute proscribing “possessing” a firearm in furtherance of a drug trafficking or violent crime, as well as “using or carrying” a firearm during such a crime creates different ways of committing one offense rather than different offenses. The Court concluded that, while the statute proscribes two distinct acts, it is not clear from the statutory language that each act is a separate offense. The Court further observed that the two types of conduct are difficult to distinguish conceptually. United States v Arreola, 446 F3d 926 (CA9, 2006); full text at <http://pub.bna.com/cl/0410504.pdf>.

Ninth Circuit: Prosecution Has Duty to Investigate Perjury

The Ninth Circuit Court of Appeals held that the prosecution has a duty to investigate allegations of perjury as part of its constitutional obligation to reveal perjury by one of its witnesses. The Court emphasized that a prosecutor may not remain “willfully ignorant of the facts” when perjury is suspected. However, rejecting an automatic reversal rule, the Court decided that the defendant was required to demonstrate that correcting the falsehood would have supported his claim of innocence. The Court also held that the written opinion of a prosecutor that one of the state's

witnesses committed perjury constitutes “work product” that the prosecution is not obligated to disclose to the defense. Morris v Ylst, 447 F3d 735 (CA9, 2006); full text at <http://pub.bna.com/cl/0599002.pdf>.

Georgia: Ban on Disruption of Meetings Violates First Amendment

The Georgia Supreme Court ruled that a state statute making it a crime to “recklessly or knowingly commit any act which may reasonably be expected to prevent or disrupt a lawful meeting” was unconstitutionally overbroad. The Court rejected the vagueness challenge, and recognized that the state has a legitimate concern in preventing individuals’ “unruly assertion” of their right of free expression from impeding other citizens’ rights of free association. However, the statute significantly impacted constitutionally-protected conduct without the requisite narrow specificity, and failed to reasonably balance the conflicting constitutional rights, the Court concluded. State v Fielden, 629 SE2d 252 (Ga, 2006); full text at <http://pub.bna.com/cl/s06a0282.pdf>.

Minnesota: Decision Not to Present a Defense Not Malpractice

A defense attorney who made a strategic decision not to present a particular defense after telling his client that he would be shielded from liability for malpractice as a matter of law, the Minnesota Court of Appeals held. The attorney decided that raising the defense of self-defense was too risky, and raised, instead, the defense that the prosecution could not prove that the defendant fired a weapon at the victims. According to the Court, an attorney is not liable for “mistakes” made in the “honest exercise of professional judgment.” The Court observed that the ABA standards do not require an attorney to pursue a particular strategy, and, moreover, the standards are not intended to create substantive or legal rights. Noske v Friedberg, 713 NW2d 866 (Minn Ct App, 2006); full text at <http://pub.bna.com/cl/a51160.pdf>.

Circuit Court Opinion of the Month: Evidence Insufficient to Survive Corpus Delicti Rule

Kent County Circuit Court Judge Dennis C. Kolenda was recently faced with a motion to dismiss a second-degree criminal sexual conduct charge against a man who confessed in church that changing his baby boy's diapers sexually aroused him. The judge treated the motion as a request to suppress the accused's confession based on the corpus delicti rule. Even under

Michigan's limited rule, Judge Kolenda found the evidence lacking.

According to Judge Kolenda's analysis, more is required than a showing of consistency with unlawfulness; the corpus delicti rule requires that criminality in some form be independently established “by a preponderance of direct or circumstantial

evidence." *People v Burns*, 250 Mich App 436 (2002). In this case, the evidence established only that the defendant's behavior was not inconsistent with criminality. As the circuit judge emphasized, a father touching his infant son's "intimate parts" while changing his diapers, which is all anyone ever saw the defendant do, was not even suggestive of criminality. Nor was the baby's subsequent behavior (objecting to having his diaper changed) adequate independent

proof of a crime, and his mother's opinion on the subject was incompetent.

Judge Kolenda ruled that defendant's confession was inadmissible. While not dismissing the case, the Judge noted that, excluding the confession, there was not enough evidence to withstand a motion for directed verdict. *People v Gareth Mitchell* (Case no. 05-12396-FH, 6-8-06).

Training Events

The **Northwestern University School of Law** will present the 49th Annual Short Course for Defense Lawyers in Criminal Cases from **July 24-27, 2006**, in Chicago, Illinois. In addition to work and presentations on trial skills, the training will focus on forensics, including pathology, DNA analysis, crime scene investigation, computer forensics and use of digital evidence, psychology and psychiatry, jury psychology, and eyewitness testimony. Panel discussions will address ethics and updates will cover Fourth Amendment issues, confessions, child witnesses and the "CSI Effect." Registration is \$750, which includes lunches and materials. For more information or to register, contact (312) 503-8932 or professional-ed@law.northwestern.edu.

The **National Association of Criminal Defense Lawyers (NACDL)** will host its annual meeting and seminar, titled "Crossing Your Way to 'Not Guilty': Keys to Winning Your Case on Cross," on **July 26-29, 2006**, in Miami, Florida. The faculty will include Larry Pozner and Prof. Ed Imwinkelreid, who will join others in examining such topics as examination of child witnesses and informants. More information will appear at www.nacdl.org as program details become available.

The **National Association of Criminal Defense Lawyers (NACDL)** will host the 5th Annual State Legislative Network Conference on **July 27-28, 2006**, in Miami Beach, Florida. National experts will provide media training and skill-building sessions, with focus on issues for the second day of training. Among the issues: crime labs and DNA evidence, eyewitness identification, juvenile justice and sex offenders. Registration fees range from \$100 to \$150, with special room rates available at the conference hotel. For more information, see www.nacdl.org/SLN, or call Scott Ehlers at (202) 872-8600.

Wright State University and Forensic Bioinformatics will present "The Science of DNA Profiling: A National Expert Forum," on **August 11-13, 2006**, in Dayton, Ohio. Leading DNA experts will address the issues surrounding DNA evidence today, including cutting-edge research in the field.

Registration ranges from \$295 to \$425, and more information is available at <http://www.bioforensics.com/conference06/index.html>.

The **Criminal Defense Attorneys of Michigan (CDAM)** will present its Third Annual Trial Practice College, **August 18-23, 2006**, to be held at the state-of-the-art courtroom facilities at the Thomas M. Cooley Law School in Lansing, Michigan. The participants will not only learn through lectures by nationally recognized trial lawyers, but will also apply what they have learned in daily small group training sessions. Under the instruction of the workshop faculty, the participants will engage in individual performances and receive feedback and analysis. Participants will be provided materials in advance, and will have the opportunity to prepare for each phase of the trial in the evenings, after hearing the lectures. The cost of the college includes all registration fees, course materials, hotel accommodations at the Radisson Hotel in downtown Lansing, and most meals, except for dinner. Cost for attendees has yet to be determined, but will be available soon. The Criminal Defense Resource Center also will offer a number of full scholarships for qualifying trainees (application deadline June 30, 2006). For up-to-date information, please contact jerihall3@msn.com or (517) 490-1597.

The **National Child Abuse Defense & Resource Center** will host its 13th International Conference on "Child Abuse Allegations: Science vs. Junk Science in the Courtroom," on **September 28-30, 2006**, in Las Vegas, Nevada. Attorneys, judges and investigators will hear from international experts, who will discuss the most current medical, scientific and psychological research, procedures and studies. Attendees will learn how to separate fact from fiction, confession from coercion and harm from hyperbole. Registration fees range from \$475 to \$600, and discounted room rates are available. For more information or to register, call (419) 865-0513.

The **National Association of Criminal Defense Lawyers (NACDL)** will present "DWI Means: Defends with Ingenuity," a three-day seminar on **October 12-14**,

2006, in Las Vegas, Nevada. The program consists of presentations by the leading DUI defense attorneys and specialists from across the country, as well as multiple breakouts for small group and focused learning. More details will be posted at www.nacdl.org as they become available, or contact gerald@nacdl.org.

The **National Association of Criminal Defense Lawyers (NACDL)** will hold its 2006 Fall Meeting & Seminar on **October 25-28, 2006**, in Boston, Massachusetts. More details will be posted at www.nacdl.org as they become available, or contact gerald@nacdl.org.

U.S. Supreme Court: Selected Certiorari Granted Summary

CONFRONTATION -- Right To RETROACTIVITY

Whorton v Bockting

#05-595

May 15, 2006

79 CrL 180

The Court will decide whether the decision in Crawford v Washington, 541 US 36 (2004), barring admission of testimonial hearsay evidence, should be applied retroactively to cases on collateral review. The Ninth Circuit Court of Appeals found that Crawford announced a new "watershed" rule essential to the fairness and accuracy of criminal proceedings. **Case below:** 399 F3d 1010 (CA9, 2005).

U.S. Supreme Court: Selected Opinion Summaries

HABEAS CORPUS -- Federal MOTION FOR NEW TRIAL -- Newly Discovered Evidence

Paul Gregory House v Ricky Bell

#04-8990, June 12, 2006

79 CrL 305

Reversed judgment of Court of Appeals dismissing federal petition; remanded for further proceedings. **Case below:** 386 F3d 668 (CA6, 2004).

Petitioner met the gateway standard for defaulted claims on habeas review by demonstrating that, in light of new innocence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. Here, petitioner established that the semen on the victim's nightgown came from her husband and not petitioner; that the blood on petitioner's jeans came from autopsy samples, not the victim's body; and that the husband had the motive and opportunity to commit the murder. Although not presenting a case of conclusive exoneration, the new evidence would reinforce doubts about petitioner's guilt.

DEATH PENALTY

Clarence E. Hill v James R. McDonough, Interim Secretary, Florida Department of Corrections, et al

#05-8794, June 12, 2006

79 CrL 301

Reversed judgment of Eleventh Circuit Court of Appeals dismissing habeas petition as successive. **Case below:** 437 F3d 1084 (CA11, 2006).

Petitioner's claim challenging the constitutionality of Florida's method of administering a lethal injection need not be brought by an action for writ of habeas corpus; it may proceed as an action for relief under the Civil Rights Act, 42 USC 1983. Petitioner's challenge, which leaves the state free to use an alternative lethal injection procedure, would not bar the execution of his sentence and therefore does not create the kind of "negative legal implication" that would require him to proceed in a habeas action.

SEARCH AND SEIZURE -- Announcement of Identity and Purpose SEARCH AND SEIZURE -- Forcible Entry

Booker T. Hudson v Michigan

#04-1360, June 15, 2006

79 CrL 349

Affirmed judgment of Michigan Court of Appeals reversing trial court order suppressing evidence. **Case below:** 472 Mich 862 (2005).

The exclusionary rule is inappropriate for violations of the knock and announce requirement. The deterrent benefits do not outweigh the substantial social costs. The interests protected by the requirement include protection of human life, the protection of property, and the privacy of the homeowner, but have never included a person's interest in preventing the government from seeing evidence described in the warrant. Since the interests that were involved in this case had nothing to do with the seizure of evidence, the exclusionary rule was inapplicable. Civil liability is a sufficiently effective deterrent, and the increasing professionalism and internal discipline of police forces

also deters civil rights violations. Resort to the "massive" remedy of suppressing evidence of guilt is unjustified.

SPEEDY TRIAL -- Constitutional Right

Jacob Zedner v United States
#05-5992, June 5, 2006
79 CrL 270

Reversed judgment of Court of Appeals affirming conviction. **Case below:** 401 F3d 36 (CA2, 2005).

A defendant may not prospectively waive the application of the Speedy Trial Act. The Act has no provision excluding periods of delay during which a defendant waives its application, and this omission is apparently intentional. The provision on waivers of complete violations does not indicate that Congress intended to allow prospective waivers as well. Allowing such waivers would be contrary to the public's interest in having trials take place promptly. A trial judge's failure to make findings in support of a continuance can never be harmless error. Defendant was not judicially estopped from raising the issue.

SENTENCING AND PUNISHMENT -- Guidelines -- Blakely

Washington v Arturo R. Recuenco
#05-83, June 26, 2006
79 CrL 415

Reversed judgment of Washington Supreme Court granting resentencing. **Case below:** 154 Wash2d 156; 110 P3d 188 (2005).

Failure to submit a sentencing factor to the jury in violation of Blakely v Washington, 542 US 296 (2004), is not a structural error and is therefore subject to harmless error analysis. An instruction that omits an element of the offense does not necessarily render a trial fundamentally unfair, and elements and sentencing factors must be treated the same for Sixth Amendment purposes.

COUNSEL -- Right To -- Counsel of Choice

United States v Cuauhtemoc Gonzalez-Lopez
#05-352, June 26, 2006
79 CrL 408

Affirmed judgment of Eighth Circuit Court of Appeals vacating conviction of conspiracy to distribute marijuana. **Case below:** 399 F3d 924 (CA8, 2005).

The erroneous deprivation of a criminal defendant's counsel of choice is structural error, which entitles the defendant to a new trial. The Sixth Amendment right to counsel of choice commands not that a trial be fair, but that a particular guarantee of

fairness be provided, and that the accused be defended by the counsel he believes to be best. Defendant's right to counsel of choice was violated, and no additional showing of ineffectiveness of substitute counsel or prejudice is required to make the violation "complete." The erroneous deprivation of the right to counsel of choice qualifies as structural error, not subject to harmless error analysis, which would be a speculative inquiry. This decision does not qualify previous holdings that the right to counsel of choice does not extend to defendants who require appointed counsel.

DEATH PENALTY

Kansas v Michael Lee Marsh, II
#04-1170, June 26, 2006
79 CrL 420

Reversed judgment of Kansas Supreme Court reversing death sentence; remanded for further pro-ceedings. **Case below:** 278 Kan 520; 102 P3d 445 (2004).

The Kansas law providing for the death penalty if aggravating circumstances are not outweighed by mitigating circumstances, including when the aggravating evidence and mitigating evidence are in equipoise, does not violate the constitution. The Court in Walton v Arizona, 497 US 639 (1990), held that a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances; therefore, Kansas' death penalty statute may require imposition of the death penalty when the aggravating and mitigating circumstances are in equipoise. Moreover, the state statute is constitutional because it rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination. It does not create a presumption that death is the appropriate sentence for capital murder.

CONFRONTATION -- Right To EVIDENCE -- Hearsay -- Excited Utterance

Adrian Martell Davis v Washington
Hershel Hammon v Indiana
#05-5224, 05-5705, June 19, 2006
79 CrL 370

Affirmed judgment of Supreme Court of Washington affirming conviction of domestic violence; reversed judgment of Supreme Court of Indiana affirming conviction of domestic battery. **Cases below:** 154 Wash2d 291; 111 P3d 844 (2005); 829 NE2d 444 (Ind., 2005).

Statements made during a 911 call are nontestimonial, and therefore not subject to the Confrontation Clause requirements, when they are

made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Statements made in the course of police interrogation are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Trial courts will recognize the point at which statements in response to interrogations become testimonial.

A 911 call is ordinarily not designed primarily to prove a past fact, but to describe current circumstances requiring police assistance. In Davis, the declarant was speaking about events as they were happening, the 911

conversation was a call for help, the statements elicited were necessary in order to resolve the emergency, and the declarant was frantic; she was not acting as a "witness." In Hammon, the interrogation was part of an investigation into possibly criminal past conduct, there was no emergency in progress, and the narrative was given at a time removed from the danger being described.

One who obtains the absence of a witness by wrongdoing forfeits the right to confrontation, and the government bears the burden of demonstrating such forfeiture by the preponderance of the evidence standard. If a hearing on forfeiture is required, hearsay evidence, including the unavailable witness's out-of-court statements, may be considered.

Michigan Supreme Court: Selected Leave Granted Summary

DOUBLE JEOPARDY -- Multiple Punishment

People v Bobby Lynell Smith
#130353
May 30, 2006

Michael J. McCarthy, attorney for Defendant-Appellee.

The Court granted the prosecutor's application for leave to appeal and directed the parties to include among the issues to be briefed: 1) whether Blockburger v Unites States, 284 US 299; 52 SCt 180; 76 LEd 306 (1932), or People v Robideau, 419 Mich 458; 355 NW2d 592 (1984), sets forth the proper test to determine when

multiple punishments are barred on double jeopardy grounds, and 2) whether the defendant's convictions of armed robbery and felony murder based on a predicate felony of larceny violated double jeopardy under either Blockburger or Robideau. The Court of Appeals panel (Whitbeck, Talbot, Murray) rejected the prosecutor's argument that it was unnecessary to vacate defendant's armed robbery convictions because the predicate felony was larceny. The Court also stated, in a footnote, that it agreed with Justice Corrigan's dissent in People v Curvan, 473 Mich 896; 703 NW2d 440 (2005), that felony-murder is a distinct category of murder and not an enhanced form of robbery. **Case below:** unpublished opinion (#257353, 12-27-05).

Michigan Supreme Court: Selected Opinion Summaries

ACCESSORY -- Aiding and Abetting

People v Kevin M. Robinson
#126379, May 31, 2006
NEIL LEITHAUSER

Reversed judgment of Court of Appeals reversing bench-tried conviction of second-degree murder. **Case below:** unpublished opinion (#237036, 4-29-04).

A defendant who aids or abets the commission of a crime is liable for that crime as well as the "natural and probable consequences" of that crime. When the Legislature abolished the distinction between principals and accessories, it intended for all offenders to be convicted of the natural and probable consequences of the intended offense as well as the specifically intended offense. Therefore, the prosecution must prove that "the defendant aided or abetted the commission of an offense and that the

defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense."

In the instant case, although defendant intended only to "beat up" the victim and left before his accomplice shot him, he is guilty of murder because a homicide "might [have been] expected to happen if the occasion should arise" within the common enterprise of committing an aggravated assault. The trial court found that defendant intended to inflict great bodily harm, and that intent was sufficient for a conviction of second-degree murder.

Justice Cavanagh, dissenting, would affirm the Court of Appeals decision. Justice Cavanagh agreed that an aider and abettor is liable for the natural and probable consequences of the crime he intends to aid

and abet, but in the instant case, the trial court's findings do not support the conclusion that the death was a natural and probable consequence of the beating; the shooting was unforeseen and not agreed to by defendant. The majority's rationale destroys the basic principle that there can be no criminal liability without individual culpability.

Justice Kelly, dissenting, would also affirm the Court of Appeals decision. According to Justice Kelly, the majority improperly extends the aiding and abetting statute to include a rationale for finding criminal liability without the requisite element of intent. "Natural and probable consequences" cannot substitute for intent under an aiding and abetting theory. Homicide by gun is not a natural and probable consequence of an intended assault and battery.

DOUBLE JEOPARDY -- Multiple Punishment

**People v Joezell II
#128294; 128533, May 31, 2006
NEIL J. LEITHAUSER**

Affirmed judgment of Court of Appeals vacating conviction and sentence for larceny. **Case below:** (#246706, 1-27-05).

The Court of Appeals was correct in affirming one conviction of first-degree murder based on two theories (premeditated and felony murder) and in vacating the conviction of the underlying offense, larceny, in order to avoid double jeopardy implications. If defendant's murder conviction is reversed on grounds only affecting the murder, there is no fear that the defendant will "go free:" entry of a judgment of conviction of larceny may be directed by the appellate court.

Justice Weaver, dissenting, would affirm defendant's conviction of larceny.

Justice Corrigan, dissenting, would hold this case in abeyance pending People v Smith (#130353), *lv grt'd* 475 Mich ___ (2006). The Court will decide in Smith whether the appropriate test for resolving a "multiple punishment" double jeopardy claim should be the test established in People v Robideau, 419 Mich 458; 355 NW2d 592 (1984) or Blockburger v United States, 284 US 299; 52 SCt 180; 76 LEd 306 (1932) [Smith was convicted of armed robbery and felony murder based on larceny]. Justice Corrigan would find that first-degree murder and the underlying felony of larceny from the person "simply are not the 'same offense.'"

FELONIOUS DRIVING

-- Sufficiency of Evidence

**People v Macario G. Yamat, Jr.
#128724, May 31, 2006
JOLENE J. WEINER-VATTER**

Reversed judgment of Court of Appeals affirming dismissal of charge of felonious driving. **Case below:** 265 Mich App 555 (2005).

The plain language of the felonious driving statute, MCL 257.626c, requires only "actual physical control," not exclusive control of a vehicle. Defendant's girlfriend was driving, but defendant grabbed the wheel, causing the vehicle to strike a jogger. Causing the vehicle to change direction and veer off the road meets the statutory requirement of actual physical control, which means the "power to guide the vehicle."

Justice Weaver, concurring, wrote to voice her disagreement with the majority's criticism of Farm Bureau Gen Ins Co v Riddering, 172 Mich App 696; 432 NW3d 404 (1988) [cited by the Court of Appeals for its holding that "operation" means "control over all the parts that allow the vehicle to move, not just the steering function."]

Justice Cavanagh, dissenting, would grant leave to appeal and decide the case after full briefing and oral argument.

Justice Kelly, dissenting, would affirm the dismissal of the felonious driving charge. According to Justice Kelly, the majority's use of "control" is interchangeable with "influence," and holds the prosecutor to a lesser standard than the Legislature intended. Here, defendant did not control the vehicle by his simple act of grabbing the steering wheel; he did not "operate a motor vehicle," he merely interfered with the control of a motor vehicle.

OPERATING UNDER THE INFLUENCE OF CONTROLLED SUBSTANCE DUE PROCESS -- Failure to Give Notice and Opportunity to be Heard DUE PROCESS -- Strict Liability Crime

**People v Delores Marie Derror
People v Dennis Wayne Kurts
#129269, 129364, June 21, 2006
SADO - CHRISTINE PAGAC**

**for Defendant Derror
JERRY M. ENGLE for Defendant Kurts**

Reversed judgment of Court of Appeals holding that 11-carboxy-THC is not a controlled substance; reversed judgment of Court of Appeals reversing conviction of MCL 257.625(8). **Case below:** 268 Mich App 67; 706 NW2d 451 (2005).

11-carboxy-THC is a schedule 1 controlled substance under MCL 333.7212, and a person operating a motor vehicle with that chemical in his or her system may be prosecuted under MCL 257.625(8) for operating a motor vehicle with any amount of a schedule 1

controlled substance in the body. Although the statute defining a schedule 1 controlled substance, MCL 333.7212(1)(c), does not list 11-carboxy-THC as a controlled substance, it does list marijuana, and every "compound and derivative of the plant or its seeds or resin" is included in the definition of marijuana. 11-carboxy-THC is a derivative of THC (tetrahydrocannabinol), the psychoactive ingredient of marijuana. Neither MCL 333.7212 nor MCL 257.625(8) require that a substance have pharmacological properties to constitute a schedule 1 controlled substance; nor does MCL 257.625(8) require that a defendant be impaired while driving.

The prosecution is not required to prove beyond a reasonable doubt that the defendant knew that he or she might be intoxicated in a prosecution for operating a motor vehicle with any amount of a schedule 1 controlled substance in the body. MCL 257.625(8) simply requires that the driver have "any amount" of a schedule 1 controlled substance in his or her body when operating a motor vehicle.

The statute, as here interpreted, is not unconstitutional; it does not fail to provide an ordinary person with notice of the prohibited conduct.

Justice Cavanagh, dissenting, joined by Justices Weaver and Kelly, opined that the majority's statutory interpretation disregards the statutory language chosen by the Legislature and results in a violation of the federal and state constitutions. The dissenters pointed out that weeks, months, or even years after marijuana is ingested, and long after the risk of impairment has passed, a driver will be breaking the law if the presence of 11-carboxy-THC is detected in his or her system. The majority's interpretation also makes criminals of those who unwittingly have passively ingested marijuana smoke.

The dissenters would find that 11-carboxy-THC is not a schedule 1 controlled substance because it is not a derivative of marijuana and it does not have a "high potential for abuse." The majority's interpretation of the statute is unconstitutional; it does not provide an ordinary person with notice about what conduct is prohibited, there is a tremendous potential for arbitrary and discriminatory enforcement, and it is not rationally related to the objective of the statute. 11-carboxy-THC has no pharmacological effect on a person and therefore cannot affect a person's driving.

Michigan Court of Appeals: Selected Published Opinion Summaries

CORPUS DELICTI DEFENSES -- Lack of Jurisdiction

People v Genevieve Violarose King
#259295, June 6, 2006
SAWYER, Kelly, Davis
ANTHONY CICHELLI

Affirmed convictions of accessory after the fact to UDAA and accessory after the fact to murder.

The corpus delicti of accessory after the fact is the same as the corpus delicti of the underlying crime itself. There is no requirement that there be evidence independent of the confession that the accused assisted the principal. Such a requirement would be too restrictive since the purpose of the rule is prevent the use of a confession to convict someone of a crime that did not occur.

Jurisdiction to try a charge of accessory after the fact lies in the county in which the underlying crime occurred, even if the actual assistance was rendered outside that county. One of the elements of accessory after the fact is that the underlying crime was committed. Because the murder and UDAA occurred in Benzie County, jurisdiction was proper there even though the assistance was not given until after defendant left Benzie County.

SENTENCING AND PUBLISHING -- Guidelines -- Scoring

People v Frank J. Mattoon, III
#259822, June 6, 2006
SAWYER, Kelly, Davis
HELEN NIEUWENHUIS

Reversed sentence for kidnapping.

According to the plain language of the statute, offense variable 7 of the sentencing guidelines may be scored at 50 points where there is emotional or psychological, but not physical abuse of the victim. Subsection (3) of OV 7 defines "sadism" to mean "conduct" that subjects the victim to extreme or prolonged "humiliation," as well as prolonged pain. There does not have to be physical abuse in order to produce humiliation. The title of the variable, "aggravated physical abuse," is just a "catch line heading," which is not to be considered in interpreting a statute.

**INSTRUCTIONS -- Included Offense
-- Requested by Prosecutor and
Objected to by Defendant**
**EVIDENCE - Hearsay
-- Co-conspirator's statement**
RACKETEERING -- Sufficiency of Evidence
RACKETEERING -- Instructions on Elements

HOUSE OF PROSTITUTION
-- Sufficiency of Evidence
HOUSE OF PROSTITUTION
-- Instructions on Elements

People v Bobby Dean Martin
People v Roger D. Thompson
People v Roger W. Brown
People v Billy Ray Martin
People v James B. Frasure
#256461; 256463; 256464; 261025; 261088
June 13, 2006
SMOLENSKI, Owens, Donofrio
TIMOTHY MURPHY for Defendants Martin,
Thompson and Brown
PATRICK J. MCQUEENEY for Defendant Martin
MICHAEL L. DONALDSON for
Defendant Frasure

Reversed convictions of Bobby Martin, Thompson, and Brown of keeping a house of prostitution; affirmed convictions of racketeering as to remaining defendants.

The trial court committed reversible error when it instructed the jury on keeping a house of prostitution as a lesser included offense of racketeering. The Legislature did not intend the predicate offenses supporting a racketeering charge to be considered lesser included offenses of that charge; it was intended to be a separate and distinct offense punishable cumulatively with the underlying predicate offense. The convictions of the lesser offense must be vacated, but the error was harmless as to those defendants who were convicted of the charged offense.

The affidavits supporting the search warrants contained sufficient facts to establish probable cause to issue a search warrant for the strip bar and the manager's two houses. The affidavits included statements from a dancer that prostitution occurred in the basement and that the manager told her he kept videotapes at his home, which could have meant either of two homes. The contents of the statements, as well as the amount of detailed information, indicated that the dancer spoke from personal knowledge.

The search warrant affidavits were sufficiently particular as to the description of the places to be searched and the items to be seized. The addresses were provided and the premises were described. The items were described, and the officers' discretion was limited to searching for items connected to prostitution and drug trafficking. None of the items seized, including computers and tax forms, were outside the scope of the search warrant exception.

The officers were not required to give a copy of the affidavit supporting the search warrant to the person whose home was searched.

The trial court did not err in refusing to grant defendant's request for an evidentiary hearing pursuant to Franks v Delaware, 438 US 154 (1978), because defendant failed to make a substantial preliminary showing that the affiant intentionally made any false statements. Even if the statements were omitted, the remaining allegations were sufficient to find probable cause.

The evidence established an agreement between Billy and Bobby Martin to maintain the lounge as a house of prostitution, thus allowing the prosecutor to introduce hearsay statements made during the furtherance of the conspiracy. The conversations concerned the activities covered by the conspiracy, and the one statement that was not made in furtherance of the conspiracy was admissible as a statement against penal interest.

The evidence of racketeering was sufficient. The lounge was an enterprise and defendant knowingly participated in the affairs of the enterprise. The prosecution did not have to prove that defendant participated in the management or operation of the enterprise, or had a position of authority. Finally, the evidence was sufficient that defendant participated in the commission of keeping a house of prostitution, as well as the offense of accepting the earnings of a prostitute for financial gain.

Allowing the trial court to order a defendant to pay the costs associated with investigating and prosecuting the racketeering offense based on findings not made by a jury does not violate the constitution. Indeterminate sentencing systems are not subject to the requirements imposed by Blakely v Washington, 542 US 296 (2004), and defendant did not have a Sixth Amendment right to have a jury determine the amount of the costs incurred. The trial court also had the authority to order defendant to pay further costs consisting of costs incurred by the prosecutor to respond to defendant's motion for new trial.

The trial court did not sever the defendants' trials or limit their ability to call and cross examine witnesses. The court's attempt to determine the order of witnesses to save time may have benefited the other defendants, but the trial court corrected the perceived error, there was no evidence that defendant was prejudiced, and there was no plain error.

The trial court did not err by failing to give the unanimity instruction. Materially distinct proofs of alternative acts were not presented.

The evidence was sufficient that the disc jockey participated in the enterprise and committed the predicate offenses for financial gain. The testimony established that this defendant knew the dancers were

performing sex acts in exchange for money and that the dancers tipped defendant ten percent of their total take.

It was not error to fail to give the corporate agent instruction. There was no reason to believe that the jury would convict defendant merely because he was associated with the lounge; he was charged with offenses based on his own conduct.

The instructions on keeping a house of prostitution were sufficient. The house of ill fame can be resorted to for purposes of prostitution or lewdness,

not solely for prostitution. The court did not err in failing to define "house of ill fame," "bawdy house," "to keep," "to maintain," or "to operate." These terms were susceptible of ordinary comprehension to lay people.

The instructions on racketeering were not erroneous. Taken in context, the trial court's instruction did not tell the jury that it could find defendant guilty of racketeering without committing the predicate offenses for financial gain.

Michigan Court of Appeals: Selected Unpublished Opinion Summaries

Language in MCR 7.215(C) allows parties to cite an unpublished opinion, even though it is not precedentially binding, as long as a copy is provided to the court and opposing parties. To obtain a copy of any of the following opinions, contact Michigan Lawyers Weekly at 1-800-678-5297 (charge of \$4.00 per order plus \$2.00 per page, plus tax), providing the "MLW" number for each case, or download the opinions for free from the Court's website, www.courtsofappeals.mjud.net.

SENTENCING AND PUNISHMENT -- Credit for Time Spent in Prior Custody

People v Harold Leonard Standberry
#258632
April 18, 2006
MLW #09-58961 (7pp)
SADO - MICHAEL L. MITTLESTAT

Affirmed convictions of manslaughter and felony firearm; remanded for correction of amended judgment of sentence.

On resentencing, the trial court failed to include the amount of jail credit to which defendant was entitled for time served prior to the original sentencing.

DOUBLE JEOPARDY -- Multiple Punishment

People v Anthony Sturm
#256570, April 18, 2006
MLW #09-58947 (3pp)
DANIEL J. RUST

Affirmed conviction of first-degree felony murder; vacated armed robbery conviction and sentence.

Defendant's conviction and sentence for both first-degree felony murder and the underlying felony violate the constitutional prohibition against double

jeopardy. Moreover, the legislature did not intend to impose punishments for both felony murder based on the predicate offense of robbery and the predicate crime of armed robbery itself.

SENTENCING AND PUNISHMENT -- Standards for Imposing Sentence -- Mistake of Law

People v Marco Deshawn Smith
#258929, April 20, 2006
MLW #09-59003 (2pp)
NEIL J. LEITHAUSER

Affirmed convictions of conspiracy to kidnap, conspiracy to entice a female under 16, conspiracy to transport a female for prostitution, conspiracy to prostitute, conspiracy to accept earnings from a prostitute, conspiracy to commit extortion, and conspiracy to do a legal act in an illegal manner; vacated sentences for counts three, four, five, and six; remanded for resentencing.

The trial court erred by imposing a 15-year minimum sentence for 20-year maximum offenses. The trial court may not impose a minimum in excess of two-thirds of the statutory maximum without articulating a substantial and compelling reason for departure.

UTTERING AND PUBLISHING -- Sufficiency of Evidence

People v Napoleon Anderson
#259298, April 25, 2006
MLW #09-59077 (4pp)
MICHAEL J. MCCARTHY

Vacated conviction of uttering and publishing; remanded for entry of conviction of attempted uttering and publishing.

Insufficient evidence was presented to support defendant's conviction of uttering and publishing. A required element of uttering and publishing is presentment of a forged instrument for payment. Defendant presented a false instrument to a bank teller, but not for payment. The withdrawal slip was only used to provide an account number.

**SENTENCING AND PUNISHMENT -- Guidelines
-- Scoring**

**People v William A. Shelton
#259301, April 25, 2006
MLW #09-59078 (3pp)
CHARLES P. REISMAN**

Affirmed conviction of possession with intent to deliver less than 50 grams of cocaine; remanded for resentencing.

The trial court erred by assigning ten points for OV 13, "continuing pattern of criminal behavior." Defendant had three convictions for crimes against a person or property, but none of them were committed during the five years immediately preceding commission of the instant offense. The error affected the sentencing guidelines range, making resentencing necessary.

**EVIDENCE -- Proof of Other Crimes
-- To Prove Motive, Intent, etc.**

**People v Coral Eugene Watts
#266959
April 25, 2006
MLW #09-59096 (16pp)
JEFFREY GETTING**

Affirmed in part and reversed in part circuit court order denying prosecutor's motion to introduce similar acts evidence; remanded for preliminary examination.

The circuit court excluded all of the previous assaults and 15 murders committed by notorious serial killer Coral Eugene Watts. The trial court did not abuse its discretion with regard to four of the prior murders. There were several differences between the circumstances of those crimes and the offense for which defendant was being tried; the differences diminished the probative value of the evidence on identity and common plan.

**EVIDENCE -- Hearsay
WITNESSES -- Improper Expression of Opinion
PROSECUTOR -- Comments
-- Credibility of Witnesses**

**People v Valerie Denise Young
#259438
April 27, 2006
MLW #09-59113 (10pp)
LINDA D. ASHFORD**

Reversed conviction of assault with intent to murder.

Defendant's substantial rights were violated by the admission of hearsay testimony and a police officer's opinion as to the credibility of witnesses. A police officer testified to the substance of his conversation with the victim, introducing the victim's prior consistent statement which was offered to prove the truth of the matter asserted. There was no valid non-hearsay purpose for this evidence. The officer also stated that he believed the defendant was the aggressor, implying that the victim was credible and defendant was not. Because the trial was a credibility contest, defendant was put at an unfair disadvantage.

The prosecutor committed misconduct by eliciting the hearsay evidence and the officer's opinion on defendant's guilt. Trial counsel was ineffective for failing to object because the errors were outcome-determinative. The cumulative effect of the errors requires a new trial.

Judge Fitzgerald, dissenting, would affirm. The dissenter would find that the victim's statements to the officer were admissible for a non-hearsay purpose, that the officer did not testify to the ultimate issue in the case, and that the defendant was not denied effective assistance of counsel.

COUNSEL -- Waiver

**People v Kenyon Clinton
#258438
May 2, 2006
MLW #09-59133 (5pp)
DANIEL J. RUST**

Reversed conviction of assault with intent to rob while armed, conspiracy to commit kidnapping, conspiracy to commit armed robbery, and two counts of felony firearm.

Defendant did not unequivocally waive his right to counsel or voluntarily assert his right to represent himself. The trial court failed to inform the defendant of the dangers of self-representation, and made no attempt to determine whether defendant's request to represent himself was intelligently made. Even if defendant's assertion of his right to self-representation on the third day of trial was

unequivocal, the trial court failed to comply with the factors set forth in People v Anderson, 398 Mich 361 (1976), and MCR 6.005(D). Moreover, a mid-trial waiver of counsel, even if valid, does not constitute a valid waiver of counsel with respect to previous proceedings. Since defendant experienced a total deprivation of counsel, reversal was necessary.

**SENTENCING AND PUNISHMENT -- Guidelines
-- Scoring**

**People v Albert Urell Hathorn
#258570, May 2, 2006
MLW #09-59134 (4pp)
PATRICK K. EHLMANN**

Remanded for resentencing.

The trial court erred in scoring 25 points for OV 13 for "continuing pattern of criminal behavior." The five-year period containing the sentencing offense includes only two offenses.

SENTENCING -- Agreement

**People v Jessie Lee Wilson
#258801 March 21, 2006
MLW #09-58649 (3pp)
RONALD AMBROSE**

Remanded to allow defendant to withdraw nolo contendere plea to two counts of operating a motor vehicle while license suspended causing death and failure to stop at the scene of a serious injury accident.

Defendant has the right to withdraw his plea because the trial court did not impose a sentence in accordance with the Cobbs agreement. At the plea proceeding, the trial court stated that it would "give [defendant] the low end of the guidelines," but at sentencing, the trial court stated that a sentence within the lower half of the guidelines complied with the agreement. A sentence at the upper end of the lower half of the guidelines is not one at the low end of the guidelines.

**SENTENCING AND PUNISHMENT -- Guidelines
-- Departure Reasons
SENTENCING AND PUNISHMENT
-- Trial Court's Mistake of Law**

**People v Oteago Williams
#257334, March 23, 2006
MLW #09-58686 (2pp)
CHRISTINE DUBOIS**

Affirmed sentence for possession of marijuana; remanded for resentencing on felon in possession of a firearm.

The trial court erred by failing to acknowledge that it was departing from the sentencing guidelines and by failing to state substantial and compelling reasons for departure. The guidelines recommended a maximum minimum of 11 months and the trial court imposed a sentence of one to seven years in prison.

**CRIMINAL SEXUAL CONDUCT --
Complainant's Prior Sexual Conduct
DEFENSES -- Right to Present Defense
EVIDENCE -- Proof of Other Crimes
-- To Show Motive, Intent, etc.**

**People v David Richard Command
#259296, May 9, 2006
MLW #09-59184 (12pp)
DEBORAH CHOLY**

Reversed conviction of first-degree criminal sexual conduct.

The trial court abused its discretion and implicated defendant's due process right to present exculpatory evidence by applying the rape-shield statute to exclude evidence that semen from someone other than defendant was found in the complainant's underwear 14 hours after the alleged assault. The DNA evidence was highly relevant on the issue of whether someone other than defendant caused complainant's vaginal injuries. The danger of unfair prejudice to the prosecution did not outweigh the probative value of this evidence. Rather than being character evidence the rape-shield statute was designed to exclude, the DNA evidence was specifically allowed by the statute.

Defendant's failure to comply with the notice provision of the statute was caused by the prosecution's failure to timely complete the DNA testing and was not cause for excluding the evidence.

The trial court abused its discretion by admitting evidence that defendant had previously committed a non-consensual sexual penetration when he was 16-years old. The court erred in finding a reasonable inference of a common scheme from the similar act. The evidence was used as improper propensity evidence as it showed that defendant had a character flaw he could not resist.

Judge Schuette, concurring in part and dissenting in part, would find that the evidence of the prior similar act was admissible to establish a common scheme or plan.

CARJACKING

People v Donald Juan Dearmin
#259432
May 11, 2006
MLW #09-59235 (4pp)
ROBIN M. LERG

Reversed conviction of carjacking; affirmed conviction of assault with intent to murder.

Defendant was improperly convicted of a version of the carjacking statute that was not in effect at the time of the offense. Defendant's substantial rights were affected because he was tried for a crime that was substantively different from the crime as it existed on the date of his conduct, and the distinction between the statutes likely affected the outcome of the trial. The trial court's instructions did not include the required element that defendant intended to permanently deprive the owner of the property.

SENTENCING AND PUNISHMENT -- Guidelines -- Scoring

People v Johnny Martin
#259716, May 11, 2006
MLW #09-59237 (4pp)
ARTHUR H. LANDAU

Affirmed convictions of felon in possession of a firearm, felony firearm, and assault with intent to do great bodily harm; remanded for resentencing.

The trial court erred by scoring five points under PRV 2, using a previous felony firearm conviction as a "prior low severity conviction." Felony firearm is not specifically listed as a class E, F, G, or H offense; therefore, under a strict statutory interpretation of MCL 777.52(2), felony firearm is not a prior low severity offense as defined by the statute.

SENTENCING AND PUNISHMENT -- Ministerial Correction

People v Jairus Andrae Perkins
People v Juanita Michelle-Lynn Elam
People v John Henry Ray
#259865; 259866; 260161
May 16, 2006
MLW #09-59274 (20pp)
JONATHAN D. SIMON

Affirmed Perkins' and Elam's convictions; remanded the Ray case for correction of judgment of sentence.

The trial court properly vacated Ray's first-degree home invasion conviction, the underlying offense of his felony murder conviction, in order to eliminate a double jeopardy violation. The judgment of sentence must be corrected by removing the conviction and sentence for home invasion.

SENTENCING AND PUNISHMENT -- Scoring -- Guidelines

People v Amos Garrett Nickles
#258850/263448
June 8, 2006
MLW #09-594058 (7pp)
SADO - PETER VAN HOEK

Affirmed convictions of one count of third-degree criminal sexual conduct and two counts of second-degree CSC; remanded for resentencing.

The trial court used incorrect scoring guidelines to determine defendant's minimum sentence for his third-degree CSC conviction. The court used the legislative guidelines, but defendant was convicted based on an incident that occurred in 1998 and the statutory guidelines only apply to felonies committed on or after January 1, 1999. Although defendant's other offenses occurred after the effective date of the statutory guidelines, the trial court should use the third-degree CSC to calculate the guidelines because it is the highest-class offense.

SENTENCING AND PUNISHMENT -- Guidelines -- Departure Reasons

People v Hugh Robert Hedeem, Jr.
#259798, June 6, 2006
MLW #09-59443 (6pp)
SADO - ANNE YANTUS

Reversed sentence of 10 to 15 years in prison for third-degree criminal sexual conduct.

Although the trial court had a substantial and compelling reason to depart from the sentencing guidelines, that defendant impregnated a 15-year-old girl twice in seven months, this reason did not support the particular departure imposed. Defendant and the complainant were living together and he had no prior convictions; defendant was not in the most severe class of offenders. The three-fold departure was not proportional to the offense and the offender.

Judge Fort Hood, concurring in part and dissenting in part, dissented from the conclusion that the sentence violated the principle of proportionality.

Complete details on the training events listed below appear at page 13 of this month's newsletter.

July 24 - 27, 2006	Short Course for Defense Lawyers	NUSL - Chicago, IL
July 26 - 29, 2006	Annual Meeting & Seminar	NACDL - Miami, FL
July 27 - 28, 2006	State Legislative Network Conference	NACDL - Miami, FL
August 11 - 13, 2006	DNA Profiling	WSU/FB - Dayton, OH
August 18 - 23, 2006	Trial Practice College	CDAM - Lansing, MI
September 28 - 30, 2006	Child Abuse Allegations	NCAD/RC - Las Vegas, NV
October 12 - 14, 2006	Drunk Driving Defense	NACDL - Las Vegas, NV
October 25 - 28, 2006	Fall Seminar	NACDL - Boston, MA

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