Criminal Defense Newsletter

August, 2008
Volume 31, Number 11

.

Features

Departments

Appellate Courts

The Silence of the Labs

Less and less information is finding its way into the lab reports and case files prepared by the Michigan State Police DNA labs. Just a few years ago, Data Tabulations detailing the allelic makeup of individual DNA profiles were a regular feature of MSP lab reports. These tabulations allowed the reader to review the reasoning employed by the analyst in reaching their conclusions. They are no longer included in MSP reports.

STR Worksheets were once so much a standard component of MSP lab case files that they appeared on technical review checklists. These Worksheets served much the same purpose as the Data Tabulations: they formally recorded the allele calls made by the analysts in their interpretation of results. These are also no longer completed.

This change is curious, especially considering the requirements of Michigan's revised MRE 702. As evidentiary gatekeepers, courts are required to scrutinize whether "testimony is based on sufficient facts or data" and whether "the witness has applied the principles and methods reliably to the facts of the case." The elimination of this documentation has made the reasoning of DNA analysts much more opaque.

Shoddy Work & Cheating

In recent years, a number of DNA laboratories have been caught cheating, performing shoddy work and reaching the wrong results. Contrary to its TV image, forensic DNA is not foolproof. DNA interpretation is complex ***and highly subjective***. Some analysts have exploited these features to deliberately manipulate their conclusions. In other documented cases, labs have overlooked or withheld exculpatory DNA results.

In 2003, the Houston DNA lab was shut down following a scathing state audit that discovered lab employees were ignoring established protocols and misinterpreting results. To hide their shoddy work and prevent retesting, some analysts made sure all of the evidentiary samples were consumed during processing. [*Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could be Vast*, Adam Liptak, New York Times, March 11, 2003].

The vaunted FBI DNA Analysis Unit suffered similar embarrassment in 2002. A twenty-two year veteran analyst, Jacqueline Blake, was discovered to have systematically falsified her negative DNA controls, the step that tests for sample contamination. She ultimately ***resigned***, but questions remain as to how this went undetected while she processed the evidence from more than one hundred DNA cases. [*The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities*, USDOJ Office of the Inspector General, Executive Summary, May 2004] Available online at: www.usdoj.gov/oig/special/0405/exec.htm.

In October of 2003, Michigan's CODIS Admini-strator ***falsified his own External Proficiency Test to the federal government.*** As CODIS Administrator, he was the person in charge of submitting Michigan's DNA entries into NDIS, the FBI's national DNA data-base. He had a subordinate take the proficiency exam in his place. This was reported to the MSP lab's Assis-tant Division Commander as it was happening, but the Michigan State Police did not inform federal authorities until July of 2004. [July 30, 2004 correspondence to Dr. Thomas Callaghan, NDIS Custodian, from Michael F. Thomas, MSP Forensic Science Division Commander; August 18, 2004 corre-spondence to Hon. Glen A. Fine, Inspector General, Office of the Inspector General, USDOJ, from Donald W. Thompson, Jr., Acting Assistant Director, USDOJ-OIG, Inspection Division; October 19, 2004 Question-naire About the Former CODIS Administrator, completed under the supervi-sion of David Gaschke, Assistant Regional Audit Manager, Chicago Regional Audit Office, USDOJ-OIG].

Before calling Quantico, the MSP tried to tidy up a bit. Ten of the MSP's CODIS samples were deleted; they decided to have a proficiency-tested analyst take a look at them before being resubmitted. They also de-cided to permanently remove another sample that the Administrator had personally entered into the system.

As to the cheating, the MSP took no official action against those who falsified the proficiency test. The CODIS Administrator later ***retired***. The analyst who took the test for him is still handling forensic casework.

In 2004, after finally being notified of the cheating, the FBI, USDOJ Office of the Inspector General, NDIS and the National Forensic Science Technical Center descended upon Lansing to conduct six months of audits. They identified a number of deviations from the national standards governing CODIS activities. Of one hundred forensic profiles randomly selected for review, two were "not available and could not be located." The question of what happened to these samples was not answered.

Subjective Analysis

Dishonesty and incompetence in forensic science presents one set of challenges; the *subjectivity* of DNA interpretation presents another. At a Human Identifi-cation E-Symposium in 2005, Dr. Peter Gill, a pioneer in the developmental validation of current generation DNA typing stated: ***"If you show 10 colleagues a mixture, you will probably end up with 10 different answers."*** *[NIST Mixture Interpretation Interlaboratory Study 2005 (MIX05)*, John M. Butler and Margaret C. Kline, Poster #56 at 16th International Symposium on Human Identi-fication, Grapevine, TX, Sept 26-28, 2005]. Available on-line at: www.cstl.nist.gov/div831/strbase/interlab/MIX05/MIX05poster.pdf.

In 2005, the National Institute of Standards and Technology (NIST) conducted a study of forensic DNA laboratories to assess uniformity in the interpretation of DNA mixtures. Dr. John M. Butler of NIST, who headed the study, delivered its results to a packed auditorium during the 2008 Annual Meeting of the American Academy of Forensic Sciences.

For the "MIX 05" study, identical data was sent to 94 enrolled labs. Sixty-nine returned results, 50 made allele calls and 29 provided statistical estimates. Only one, the Massachusetts State Police lab, got all the answers right. [*Interlab Mixture Studies*, John M. Butler, American Academy of Forensic Sciences 2008 Work-shop #16, Washington DC, February 19, 2008].

What makes this study particularly noteworthy is that it required no laboratory bench work. The proce-dures of DNA extraction, quantification, and amplifica-tion were all eliminated as variables…the labs were simply asked to interpret data. Based solely on dif-ferences in the methodologies the labs used to deduce results, their reported statistics differed by as much as ***ten orders of magnitude.*** This translates into calculated frequencies ranging from 1 in 31,710 to 1 in 213,000,000, 000,000 (two hundred thirteen ***trillion***). Looking at the exact same data, labs reported very different conclu-sions.

The evidentiary implications of this study are ob-vious and significant. If the estimated frequency of a DNA profile is one in 31,710, one might reasonably argue that there could be more than ***a quarter million*** people with matching profiles on our planet of 8 bil-lion. The alternative calculation of one in two hundred thirteen trillion leaves much less for a lawyer to argue.

The MIX 05 study graphically demonstrates just how open to interpretation DNA results really are. Assuming identical facts with identical evidence (and

even assuming identical evidentiary handling, processing and laboratory bench work) ***which lab interprets the data can be determinative of what the evidence "proves" in a given case.***

Legally, the gap between the statistical results reported in MIX 05 is where the prophylactic rule of People v Coy can be brought to bear. Coy held that where testing indicates someone is a possible contribu-tor to evidentiary DNA, the proponent of the evidence must present a scientifically valid statistical estimate of the significance of the inclusion before the testimony is admissible. People v Coy, 243 Mich App 283 (2000).

Reproducibility is the benchmark of good science. If one gives the exact same DNA data to ninety-four different labs, one expects, within reasonable limits, to get the same results. That is unless there is a problem. While forensic DNA interpretation may be well estab-lished in the peer-reviewed literature, its practical reali-zation in the hands of forensic labs appears troubled. When the reproducibility of forensic testing is in doubt, it raises questions under Daubert [Daubert v Merrell Dow Pharmaceuticals, Inc., 509 US 579; 113 SCt 2786; 125 LEd2d 469 (1993)] and for that matter, even the old Frye [Frye v US, 293 F 1013 (CADC, 1923)] standard.

The MIX 05 findings are not issues of math or statistics. The findings cast doubt on the criteria being used to interpret output from the detection instruments. Worse, MIX 05 suggests not only inter-laboratory, but even ***intra-laboratory*** variation in DNA reporting.

Vague Protocols

The culprit here is ***vagueness*** in DNA protocols. Some protocols are quite rigid, spelling out what is to be done in almost every conceivable situation. Others give too much leeway to the individual analyst. The NIST MIX 05 study concluded that labs with detailed and rigorous interpretational protocols perform better than those that allow wide latitude to individual analysts and their "experience."

There is nothing shocking in this finding. The interpretation of DNA evidence is no place for gut instincts. Protocols that permit analysts unfettered discretion are an invitation to bad science, and open the door to abuse. MIX 05 bears this out.

It has already been shown that some forensic labs have been willing to conceal their mistakes, even when egregious. External audits are useful in that they provide some ***objective assessment of lab performance.*** Audits are a lab's report cards. Yet labs and prosecutors are becoming resistant to the release of these documents in discovery.

Secrecy is anathema to good science, just as the insufficiency of discovery is anathema to due process. MRE 702 and the Daubert standard are predicated on public discussion and frank exchange in the scientific marketplace of ideas. Compliance with established DNA standards, empirical studies and the process of scientific peer-review are the proper criteria by which science is judged; their discovery does not threaten Homeland Security.

If this brief survey suggests anything, it is that the conclusions of DNA laboratories cannot be accepted on blind faith. Nor should discovery in DNA cases be suffered to remain incomplete due to procedural gamesmanship. Prosecutors have an ethical and constitutional duty to ensure openness. They must be especially careful to avoid being co-opted into helping forensic laboratories play cover-up. Good science is tough stuff; it can withstand scrutiny.

There are many issues in DNA that have yet to be litigated, and no single case will resolve them. As with any forensic science, DNA cases require lawyers who are technically proficient. The defense of due process calls for advocates willing to expend the necessary effort and intellectual horsepower.

You can do your part as a defense attorney to competently represent your clients and promote transparency in the forensic sciences:

- Never accept a lab analyst's conclusions at face value.
- Always insist on full discovery of all supporting data. If you don't know what to demand, find out from a colleague who does.
- Take the time to learn what the discovery shows, and what it doesn't. Regardless of the topic, textbooks are readily available which can help raise your level of technical proficiency; the cost is generally under $200.
- Never accept a lab analyst's off-the-record "explanation" that differs in any way from the conclusions stated in their report. The phrase, "what that really means is…" should serve as warning that you need to get the witness on the stand and develop their opinions under oath.
- Have the wisdom to seek assistance when you are in over your head; help is available.

by Brian Zubel
bzubel@comcast.net

Brian Zubel is a 1984 graduate of the University of Michigan Law School, and began his career as a trial attorney with the Oakland County Prosecutor's Office. In 1995, he went on to become Michigan's Training Attorney for prosecutors, working for the Department of Attorney General for ten years. Specializing in cases involving DNA, Forensic Medicine and Analytical Chemistry, Brian continues his service in the role of private attorney, forensic science legal consultant and lecturer. He belongs to the Jurisprudence Section of the American Academy of Forensic Sciences.

Technical Tips: Flash Drives

If you do not have a USB flash drive, you need to get one! USB flash drives are sometimes referred to as thumb drives or junk drives. These small devices are ideal for transporting client files, courtroom PowerPoint presentations and electronic books. They are quickly becoming the preferred method to back up your computer. With the price of this technology as low as $10 for several gigs of storage space, why don't you already have several of these flash drives? Look for a good deal on flash drives by shopping on-line with Amazon.com or Pricegrabber.com, keywords "flash drive." After carrying your critical files in your pocket, you'll wonder why you did not purchase one years ago.

Having difficulty solving a technology related issue? Feel free to forward your technology questions to John Powell (john@ sado.org) for solutions.

by John Powell,
CDRC Webmaster
John@sado.org

In a Manner of Speaking . . .

A lawyer's daydream, from voir dire in an anonymously-submitted criminal trial:

COURT: Right. What are you getting your husband for Christmas?

JUROR TWELVE: Couple pair a pants, a shirt.

COURT: What are you looking for, anything special or just –

JUROR TWELVE: I need a suing machine.

COURT: Does he know that?

JUROR TWELVE: They all know that.

Have you an amusing anecdote, quotation or transcript excerpt? Consider passing it along to us for publication in the Criminal Defense Newsletter, anonymously if you wish. Contributions should be addressed to Dawn Van Hoek at the Criminal Defense Resource Center, 3300 Penobscot Building, 645 Griswold, Detroit, MI 48226.

DUI Defense Column: Can the DataMaster Ever Accurately Measure Blood Alcohol?

It is well known that alcohol has the potential to deleteriously impact one's ability to drive. Because of this we have, as a society, decided to make drunk driving unlawful. It is also well known that alcohol can have this deleterious impact because of the manner in which alcohol impacts a person's central nervous system and most notably, the brain. Because alcohol reaches the brain via the blood it is the alcohol in the blood that is relevant to a charge of drunk driving, and it is blood alcohol which we should strive to accurately and reliably measure.

Human breath has become the preferred medium for testing only because blood is much more difficult and costly to obtain and measure. Most evidentiary breath testing devices measure breath alcohol using an infrared energy. As infrared breath testing devices were being developed, it was necessary to demonstrate their efficacy by demonstrating that they could produce similar results during replicate testing, meaning the results could be duplicated. A device called an "Alcoholic Breath Simulator" was invented by B. J. Britt and R. F. Borkenstein for this purpose. In order for these breath simulators to have any relevance they had to mimic human breath in two ways; first, the simulator solution used to produce the measured air/alcohol vapor had to be set at the correct temperature, meaning the temperature of expired human breath, and second, the simulator solution had to have the correct partition ratio, meaning that the amount of alcohol in the breath could be converted to the same amount of alcohol in the blood.

Harger, who is generally credited with establishing 34C as expired breath temperature, reported in 1950 that the temperature of expired air

rose from 31C at the beginning of expiration to 35C at the end of expiration for six subjects.[1] It was Harger's conclusion that his results agreed with the findings presented in a previous study by Winslow, and that 34C is the average temperature of expired breath.[2]

Temperature is of critical importance because as temperature changes, so does partition ratio. This change includes both human breath as well as the simulator vapour. The most important thing to understand in this discussion is that the DataMaster itself never calculates or applies a particular partition ratio. The reason for this is that when the DataMaster is calibrated, the operator passes a known solution through the device and "tells" it "this is what a .08 looks like." From that point forward, when the device "looks" at any new sample, be it human breath test or simulator vapour, it compares this unknown with the prior established reference. Thus, the only partition ratio that applies is that which is involved in the various simulator and calibrator solutions.

Turning to simulator solutions, some states use premixed, manufactured solutions to test their breath testing equipment, while in others, including Michigan, the solution is prepared by the person maintaining the equipment. In either event there is an issue: what partition ratio to use for this simulator solution? According to LaBianca, the breath/blood partition ratio in humans can range from about 1187/1 – 3400/1.[3] Nevertheless, the "average" ratio that is used throughout the United States is 2100/1.

Addressing pre-packaged simulator solutions, manufacturers apply the 2100/1 assumption by pro-ducing solutions that they say and certify will read at .08 g per 210 L on a breath instrument when the solu-tion is heated to 34 C +/- .02C. The theory here, or at least the underlying assumption, is that the number of alcohol molecules in a given volume of simulator vapor from a solution heated to 34C will be equal to the number of alcohol molecules exchanged between the blood and the alveolar air (of the same volume) of an average human being and will be equal to the number of alcohol molecules in a sample (of the same given volume) of (end) expired air when introduced into a breath machine and analyzed. Thus when calibrating the machine the operators are merely telling it: "read the signal received from analyzing this solution at .08 g per 210 L" and, " if you receive this same signal in ana-lyzing any other samples report it as .08 g per 210 L."

Turning back to the central question now, it should be clear that there is little if any real relationship between the "number" that comes out of a DataMaster and an individual's true blood alcohol level. This is true because there is an assumption that the individual being tested has a breath temperature of 34C and a partition ratio of 2100/1. It may be true that neither assumption applies to a specific individual, and more than that, simulator vapor composed of distilled water and alcohol is not the same as human breath. Consequently, it is fair to say that the answer to the question posed is that the DataMaster cannot ever accurately measure a specific individual's blood alcohol level.

The author would like to acknowledge and thank Ohio Attorney Tim Huey and Wisconsin Forensic Scientist Mary McMurray for their contributions to this article.

by Patrick T. Barone

Patrick T. Barone is an adjunct professor at Cooley Law School where he teaches "Drunk Driving Law and Practice." Mr. Barone is also the co-author of two books on DUI-related issues, including De-fending Drinking Drivers (James Publishing), a well-known and highly respected multi-volume national legal treatise. Additionally, he is the executive editor of The DWI Journal: Law & Science (Whitaker Newsletters, Inc.), a nationally circulated legal periodical dedicated to improving the know-ledge and success rate of defense attorneys in drunk driving cases. He is also a frequent lecturer on trial practice and drunk driving defense tactics. He can be contacted on the web at: www.baronedefensefirm.com.

End Notes

1. Harger, Forney and Barnes; "Estimation of Level of Blood Alcohol from Analysis of Breath", Journal of Laboratory and Clinical Medicine; Vol. 36; 1950; pp 306-18.

2. Winslow, Herrington and Nelbach; "The Influence of Atmospheric Temperature and Humidity Upon the Dryness of the Oral Mucosa" Am. J. Hygiene, Vol. 35, 1942, pp 27-39.

3. Labianca D.A. and Simpson G., Medicolegal Alcohol Determination: Variability of the Blood- to Breath-Alcohol Ratio and Its Effect on Reported Breath-Alcohol Concentrations, *Eur. J.*

Spotlight On: Cheryl Carpenter

You recently obtained a favorable order in District Court suppressing evidence and dismissing charges. Please summarize the main issues.

Defendant was charged with possessing marijuana under 25 grams. On a winter weekday morning, Defendant drove with his girlfriend to an auto repair shop. He missed the shop and tried to turn around in a gas station. While turning around, the brakes in the car failed and Defendant's car ended up in dirt pile in the gas station parking lot. The gas station attendant called 911 to report a possible drunk driver. Defendant was trying to get his car out of the dirt pile when the police officer arrived on scene. The officer investigated for OWI and determined Defendant was not intoxicated. The officer verified that there was a brake failure in Defendant's car. However, the officer stayed on scene. The officer asked Defendant for consent for a patdown search because he was acting suspiciously by continuously and nervously putting his hands in pockets. Defendant consented to a patdown search. Officer found a baggie of marijuana in Defendant's pants pocket.

Where and when was the hearing, who was the presiding judge?

Evidentiary hearing and oral arguments were heard on July 3, 2008 in the 35th District Court before Judge Michael J. Gerou. (Order)

What were the prosecution and defense arguments?

The prosecution had two arguments: 1) Defendant consented to search, and 2) the officer could remove the item from Defendant's pocket under the Plain Feel Doctrine because the officer thought the item was a knife.

I argued that Defendant gave limited consent for a patdown search only. There was no permission to search inside his pockets. The officer could not remove the item from his pocket because it was not immediately apparent as contraband or a weapon. I also argued that Defendant was illegally seized because the officer should have let Defendant go after he cleared him of OWI. Defendant was detained longer than necessary to complete the OWI investigation.

Did the case involve any unusual factors?

The officer was a rookie and had been on the force less than a year. The officer was honest and straightforward during cross-examination. He testified that he thought the item in the pocket was a knife but conceded during cross that it could have been many other items, such as a wad of paper. Judge Gerou was very attentive during testimony and asked a few questions of the Officer about how he tested Defendant's brakes to indicate brake failure. Judge Gerou listened to my arguments after the evidentiary hearing and asked me questions about the search and the Officer's right to a patdown search.

What did you learn from the case?

This case reaffirmed my belief that criminal defense attorneys need to know their witnesses. I spoke with the Officer about an hour before the evidentiary hearing. From our conversation, I knew this Officer would be rather honest during cross-examination. I was able to cross-exam the Officer in a way that I knew he would not hurt me if I asked a specific question. I have had many cases where police officers are combative and argumentative on the stand. I tailor my cross examinations based on the witness's personality. I also learned that a lot of prosecutors will try to give away the farm to avoid evidentiary hearings. In this case, Defendant already had a marijuana case under 7411. The prosecutor offered possession of drug paraphernalia with non-reporting probation. My client believed me when I said we had a very good argument for suppression and he turned down the plea offer. It never gets easier to turn down a good plea deal but many times the risk is worth it.

Any suggestions that you would make to other defense attorneys?

Pre-trial motions must be filed in our cases. We can win some of these issues but they are not being challenged and fought enough. I would also suggest that reading a police report or witness statement is not enough for trial and evidentiary hearing preparation. We need to live in our witnesses' shoes. Witnesses are the stars of the trial or evidentiary hearing. We need to understand how to question them in a way that gets out the story for our clients. The only way to do this is if we understand the witnesses' motivation for testifying. Where is the witness coming from? What kind of person is this witness? Why are they here? When we answer these questions, we have the foundation of a storytelling cross-examination.

Please describe your practice, including how long you have been a criminal defense attorney?

I have been a criminal defense attorney for 12 years. I started my practice as a public defender in St. Louis at the Missouri Public Defender Office. My love of criminal defense was cemented for life there. I moved back home to Michigan and started a solo practice consisting of only criminal defense work with an emphasis on criminal sexual conduct and issues concerning the Michigan Sex Offender Registry.

by Neil Leithauser
Associate Editor

Circuit Court Opinion of the Month: Search Warrant Found Unconstitutional

Kent County Circuit Court Judge Kolenda was faced with a suppression motion involving several searches using the same overly-broad search warrant. The defendants, husband and wife, had been investigated, based on an informant's tip, for buying stolen merchandise and selling it at their gas station and their party store. The warrants were issued for the defendants' two businesses, their home, and the wife's purse. Pursuant to the judge's findings, some of the evidence was admissible, but most of it was suppressed.

Probable cause was lacking for some of the evidence. The warrant applications stated no reason to believe that goods sold to the defendants between August 2004 and December 2005 would still be on the premises when the warrants were executed, on January 10, 2006. On the other hand, there was probable cause that some of liquor sold by the informant on January 9, 2006, would be found at the party store. The affiant failed to include the information that stolen baby formula had been removed from the store by a third party; therefore, there was no reasonable expectation of finding those items. Finally, information concerning a crime ring selling stolen goods in 2004 did not support a finding of probable cause in January of 2006 to believe that defendant was then fencing stolen merchandise. The information was stale. Consumable merchandise cannot be expected to remain for more than one year.

Judge Kolenda found that the police had probable cause to search the businesses for illicitly-obtained WIC packets. It was illegal for defendant to buy WIC packets, making them contraband for which searches are permissible. And, although too much time passed to allow the conclusion that the packets sold by the informant were still present, it was reasonable to deduce that other WIC packets were still present.

There was insufficient cause to expect to find most of the records sought by the warrants at the defendants' business establishments. It does not follow from trafficking in stolen goods that records would be kept of those transactions. Such illegal transactions are, by definition, "off the books." Nor was there probable cause to search defendants' home for anything; there was no information that pertinent records might be found there.

Judge Kolenda went on to find that the warrants were overbroad. They authorized the police to "rummage through and seize virtually every, if not every, piece of paper on the premises." The warrants were not limited by time, subject, or any other way. The judge found that the warrants in this case were indistinguishable from the general warrants the Fourth Amendment was meant to eliminate. They were not saved by reference to the attached affidavits, or by the exception that general classifications are acceptable when a more precise description is not possible. (However, some of the stolen items were admissible under the "plain view" exception.).

The judge found that the search of the wife's purse exceeded the scope of the warrant. It was seized far from the businesses and the home, and the purse was not related to those places.

Finally, Judge Kolenda addressed the "good faith" exception and ruled that the exception did not overcome the warrants' transparent overbreadth regarding the records. The warrants' "breathtaking reach" was not a mere technical mistake; it was a patent violation of the Fourth Amendment. The court reasoned that the good faith exception does not apply to the execution of a warrant, but even if it did, it would not apply to the search of the purse, which plainly exceeded the scope of the warrant.

People v Narinder Kaur and People v Gurminder Singh, #07-01160-FH and #07-01221-FH, Kent County Circuit Court, August 8, 2007.

Narinder Kaur was represented by Larry Willey. This case was dismissed. Gurminder Singh was represented by Paul Mitchell.

Report on Michigan's Corrections System

In June, 2008, the Citizens Research Council of Michigan issued a report titled "Growth in Michigan's Corrections System: Historical and Comparative Perspectives." Between the years 1973 and 2007 the prison population grew by 538 percent, despite an overall 42 percent reduction in the crime rate between 1976 and 2006. The report noted that Michigan has the ninth highest incarceration rate in the nation, the fifteenth highest annual cost per prisoner, and above-average Corrections employee salaries.

The Michigan Department of Corrections ["DOC"] projected that by 2012 there will be 56,134 inmates, about 5800 more than the 2007 level. Projected expenditures will rise by at least $46 million per year, so that by 2012 the total DOC budget will exceed $2.6 billion. Health care costs for inmates, especially as the inmate population ages, will be ever-increasing. The DOC projected increased expenditures of at least $15 million more per year, so that by 2012 total health care costs will exceed $364 million.

Michigan has a greater incarceration rate than other states in the Great Lakes region. The report compared the average incarceration rates of the seven other states bordering the Great Lakes [Illinois, Indiana, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin] and found that by 2006 Michigan's rate was forty-seven percent higher than found in the other states. Michigan also holds prisoners longer on average longer than other states. The average time served by a prisoner serving a first prison sentence in 2003 was 3.7 years before release; the national average was 2.5 years. Compared to other reporting states, Michigan paroles fewer violent and sex crime offenders; also, parole rates have declined over the years. For example, in 1990 the parole approval rate for violent offenders was 61.2 percent; in 2005 the rate was 37.5 percent. Parole approval rates for sex offenders similarly dropped, from 46.5 percent in 1990 to 13.8 percent in 2005.

The return rate of parole violators, for either a new crime or a technical violation, was 17% in 2006; that figure matched the national average [also 17%], but was slightly higher than the rate for the other Great Lakes states.

The report also examined incarceration patterns in intervals from 1973 – 1978, 1979 – 1984, 1985 – 1989, 1990 – 2002, 2003 – 2004, and 2005 – 2006. In the 1970s there was a greater emphasis on prosecution of habitual offenders, and the inmate population almost doubled; the admission rate increased and the inmates were kept longer. After 1979 the incarceration rate was relatively stable, and there actually was a net decrease in inmate population. Parole approvals were at an almost historically high level of 68.5%, and recidivism rates were at record lows. During that time disciplinary credits were introduced reducing the length of an inmate's stay. Also, the Prison 4Overcrowding Emergency Powers Act of 1980 ["POEPA"] permitted further 90-day reductions of the population levels.

Between 1985 and 1989 there was a 16.8% growth in the inmate population to 31,834 inmates in 1989. DOC expenditures also nearly doubled, with the addition of employees and the operation and maintenance of an additional 20 facilities. The report attributed the high growth-rate in part to some high-profile crimes, which led to reduced parole rates; the "War on Drugs," which led to a 482% increase in drug-related prison commitments in that five-year period; the repeal of the POEPA in 1988; and the removal of good-time credits for all prisoners in April, 1987.

Between 1990 and 2002 there was steady inmate population growth averaging 3.6% per year, resulting in a total 50,591 inmates by the end of 2002. Also contributing to an increase in the prison population were the major changes to the Parole Board in 1992, leading to a 20% reduction in parole approvals, and the implementation of the Sentence Guidelines and truth-in-sentencing in 1998. Additionally, the number of technical parole violators doubled, and recidivism increased by 11%.

There was a decline of 1760 prisoners between 2003 and 2004, with comparable reductions in the Corrections staff. The drug-law reforms of 2002, allowing retroactive parole eligibility and removing mandatory minimum sentences, a slight decrease in recidivism, and an increase in parole approvals added to the reduced population number.

Between 2005 and 2006 the prison population again increased. A high profile case involving multiple murders by an erroneously-released prisoner led to more arrests, more prison sentences, fewer paroles, and more parole revocations.

In 2007 there was a slight decrease, largely attributable to DOC efforts initiating paroles for drug and certain other prisoners, and to the Michigan Prison Re-entry Initiative.

The report provided demographical information of the prison population. In February, 2007 there were 51,404 inmates. 96% of the inmates were male, 4% were female. The inmates' ages ranged from 15 to 92, and 62% of the inmates were serving a first prison term. Alcohol and/or drug abuse histories were found in 57% of the inmates and 25% of the inmates had a history of mental health issues. The offenses for which the inmates were sentenced were: 44% for violent crimes, 23% for non-violent crimes, 24% for sex crimes, and 9% for drug crimes. 52% of the inmates were black, 45% were white, 2% were Hispanic, and less than 1% were Asian, American Indian, or other.

Source:
http://crcmich.org/PUBLICAT/2000s/2008/rpt350.pdf.

by Neil Leithauser
Associate Editor

Proposed Amendment of MCR 6.302 and 6.310

These proposed amendments would preclude judicial involvement in negotiating plea agreements and limit the ability of defendants to withdraw guilty pleas. A provision would be added to 6.302 stating that "The Court shall not participate in discussions between the prosecutor and the defendant's lawyer or the defendant, if the defendant is proceeding pro se, concerning a plea agreement." The provision that a defendant must be allowed to withdraw his plea if the court had agreed to a specific term or range it was unable to honor would be deleted from 6.310.

The comment period ended July 1, 2008; the large collection of comments is posted at http://courts.michigan.gov/supremecourt/resources/administrative/index.htm#proposed.

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.

Discovery of Witness's Criminal Record

The defendant was denied his state and federal constitutional right to the effective assistance of trial counsel, where trial counsel failed to request the criminal records of the prosecution witness, and failed to discover and make use of critical impeachment evidence regarding the witness. **BB 10700**.

Redaction of Interrogation Statement

The failure to appropriately redact the irrelevant and highly unfairly prejudicial portions of the tape-recorded interrogations played for the jury denied defendant's constitutional rights to a fair trial. The failure constituted prosecutorial misconduct and ineffective assistance of counsel entitling defendant to a new trial. **BB 10696**.

Adjournment of Probation Violation Hearing

The trial court violated appellant's due process rights by refusing to adjourn the contested probation violation hearing pending the outcome, including direct appeal, of the district court prosecution resulting in the charged violation. **BB 10710**.

Juror Consideration of Defendant's Silence

Defense trial counsel was constitutionally ineffective in failing to challenge a biased juror for cause where the juror stated he might hold appellant's silence against him at trial, and appellant did not testify. **BB 10697**.

Juror Consideration of Outside Evidence

Due process requires a new trial or at least an evidentiary hearing where one of the jurors wrote a letter to the trial court after the verdict, disclosing that the jurors relied on information about back injuries form a juror's doctor who did not testify at trial and was not subject to cross-examination. **BB 10712**.

Counsel of Choice

The trial court violated appellant's due process rights by refusing to grant a reasonable adjournment of trial so that appellant could retain defense trial counsel of choice. **BB 10703**.

Delivery Near School

The defendant's right to due process was violated because the jury was not properly instructed on all of the elements of the offense, specifically that MCL 333.7410(3) requires that he possess with intent to

deliver to another person who is within 1,000 feet of school property, not simply intend to deliver anywhere while in possession within 1,000 feet of a school. **BB 10699**.

Right to Allocute at Sentencing

Due process requires resentencing where the trial court interrupted appellant and pronounced sentence without affording appellant a reasonable opportunity for allocution. **BB 10699**.

Possession of Weapon for RA Purposes

Evidence was insufficient to prove armed robbery, where the complainant had merely a subjective and unreasonable belief that the defendant possessed a weapon. **BB 10708**.

Refiling of Charges

The prosecutor violated appellant's due process rights by refilling the charges following dismissal with prejudice at trial in an adjoining county; furthermore, defense trial counsel was constitutionally ineffective in failing to object. **BB 10702**.

Mere Presence

Due process requires vacating appellant's convictions and sentence where there was legally insufficient evidence that appellant possessed the gun and cocaine found inside the driver's door control panel of a parked car in which appellant had been seated on the passenger side. **BB 10716**.

Communication of Plea Offer

Defense trial counsel was constitutionally ineffective in failing to communicate a mid-trial plea offer from the prosecutor that appellant would have accepted, and which would have resulted in a substantially reduced sentence. **BB 10716**.

Expert Witness on Defendant's Credibility

The court abused its discretion and denied defendant a fair trial when it permitted the prosecution to present an expert witness to testify that defendant lied and was not trustworthy. **BB 10713**.

Bolstering Witness Credibility

The prosecutor engaged in misconduct and denied defendant a fair trial when he bolstered the testimony of the investigating officer by eliciting testimony from another witness that the officer was qualified and competent and never known to do "an improper following of a case or leads." **BB 10713**.

Inflammatory Pretrial Publicity

Defendant was denied her due process right to an impartial jury as well as her right to the effective assistance of counsel because her attorneys failed to move for a change of venue where extensive and inflammatory pretrial publicity permeated the community and tainted the entire jury pool. **BB 10709**.

Sentencing Consideration of Impaired Mental Status

The trial court did not properly consider defendant's impaired mental status in its determination of the sentence, rendering the sentence unconstitutional and violative of constitutional guarantees to due process and against cruel and unusual punishment. **BB 10704**.

From Other States

Kansas: Limits on Police Questions Unrelated to Traffic Stop

The Kansas Supreme Court held that police officers conducting routine traffic stops must have particularized suspicion before asking motorists for permission to conduct searches unrelated to the traffic violation, even if the request and the search do not prolong the length of the traffic stop. The Court reaffirmed prior decisions that have interpreted the Fourth Amendment as requiring traffic stops to "last no longer than is necessary" and requiring officers to employ the "least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." If no illegal activity is found during the time necessary to check the motorist's license and perform a computer check, the motorist must be allowed to leave without further delay, the Court emphasized. State v Smith, ___ Kan ___; 184 P3d 890 (2008); full text at http://pub.bna.com/cl/96189.pdf.

Colorado: Resuming Discussion 30 Seconds Later Did Not Nullify Rights Invocation

A suspect who had invoked his Miranda rights did not open the door to further police questioning by resuming a conversation with his interrogators 30 seconds later, held the Colorado Supreme Court. Although in a prior case, the Court found a valid waiver in the accused's re-initiation of an interrogation only 20 minutes after invoking the right to counsel, the 30-second pause in this case did not constitute cessation of interrogation by police and its voluntary resumption by the defendant. The police did not

scrupulously honor the defendant's invocation of the request for counsel; the officer should have terminated the interrogation and left the room, the Court stated. People v Redgebol, ___ Colo ___; 184 P3d 86 (2008); full text at http://pub.bna.com/cl/07sa112.pdf.

Third Circuit: Conviction of Both Possession and Delivery of Same Porn Violates Double Jeopardy

The Third Circuit Court of Appeals held that convictions for both receiving and possessing child pornography based on the same images violate the double jeopardy clause's prohibition of multiple punishments for a single offense. The Court applied the Blockburger [Blockburger v United States, 284 US 299 (1932)] test, and found that the possession offense is a lesser included offense of receiving. The Court rejected the government's argument that an affirmative defense creates an additional element to the possession charge, finding that the elements of the offense are to be compared in the abstract. The Court found no evidence that the Legislature intended multiple punishments for the offense. United States v Miller, 527 F3d 54 (CA3, 2008); full text at http://pub.bna.com/cl/065187.pdf.

Third Circuit: Giving Common-Sense Advice Does Not Constitute Harboring

Merely giving an illegal alien advice on how to avoid attracting the attention of immigration authorities does not amount to shielding, harboring, and concealing an alien within the meaning of the federal statute, the Third Circuit Court of Appeals held. The Court stated that telling an illegal alien to stay out of trouble does not tend "substantially" to facilitate the alien remaining in the country, or to prevent the authorities from detecting his unlawful presence. Convictions under the statute generally involve defendants providing aliens with affirmative assistance, noted the Court. The Court did uphold the conviction for aiding and abetting bribery based on the defendant's promise to get an illegal alien "inside" help from immigration officials. United States v Ozcelik, 527 F3d 88 (CA3, 2008); full text at http://pub.bna.com/cl/064245.pdf.

West Virginia: Burden of Proof Cannot Be Shifted to Defense

The West Virginia Supreme Court held that a state law that makes it a crime to persistently fail to pay a child support obligation if one can reasonably do so, but that provides an affirmative defense if the defendant can prove he is unable to pay, unconstitutionally shifts the burden of proof on an element of the offense to the accused. The Court stated that while a defendant can be required to prove any affirmative defense he may choose to assert, the state may not place the onus on him to prove any material element of the offense. The Court decided that it could salvage the rest of the statute by severing the affirmative-defense provision. State v Stamm, ___ W Va ___; ___ SE2d ___ (#33505, 5-23-08); full text at http://pub.bna.com/cl/33505.pdf.

Ninth Circuit: Cunningham Applies Retroactively to Final State Sentences

The Ninth Circuit Court of Appeals held that the U.S. Supreme Court's rejection, in California v Cunningham, 80 CrL 399 (2007), of state courts' attempts to distinguish their sentencing schemes from the one struck down in Blakely v Washington, 542 US 296 (2004), did not announce a new rule and, therefore, the ruling applies on federal habeas corpus review to state sentences that were final when Cunningham was decided. The Court decided that all the justices did in Cunningham was apply the rule established in Apprendi v New Jersey, 530 US 466 (2000), Blakely v Washington, 542 US 296 (2004), and United States v Booker, 543 US 220 (2005), that a sentencing scheme in which the maximum possible sentence is set based on facts found by a judge is not consistent with the Sixth Amendment. Butler v Curry, 528 F3d 624 (CA9, 2008); full text at http://pub.bna.com/cl/0756204.pdf.

California: Discovery Laws Don't Authorize Exam by State Expert

The California Supreme Court found that the state constitutional amendments and statutes intended to provide reciprocal discovery in criminal cases do not authorize prosecutors to have their own experts conduct pretrial psychological examinations of defendants who plan to raise the insanity defense. Recognizing that the state could more effectively challenge a defendant's anticipated mental defense if a prosecution expert were granted access to him for purposes of a mental exam, the Court decided that denial of such access does not violate the constitution. The Court pointed out that the prosecution will have access to the report by the defense expert, which they can have reviewed by their own experts. Verdin v Superior Court, 43 Cal4th 1096; 77 Cal Rptr 3rd 287 (2008); full text at http://pub.bna.com/cl/s143040.pdf.

Tenth Circuit: Evidence of Defendant's Good Character Admissible

The Tenth Circuit Court of Appeals held that evidence of a defendant's good character is admissible in cases in which the sole issue is whether the accused undertook his undisputed acts with a prohibited state of mind. The Court stated that Evidence Rules 404b

and 405a make clear that, although propensity evidence generally is not allowed, an exception exists for situations in which the defendant concedes he engaged in the conduct alleged but seeks to prove he did not act with a prohibited mind set. The Court concluded that the exclusion of the evidence relevant to the heart of his defense affected the defendant's substantial rights. United States v Yarborough, 527 F3d 1092 (CA10, 2008). Fulltext at http://pub.bna.com/cl/033141.pdf.

West Virginia: Defense Witnesses in Prison Garb Violated Fair Trial

A trial court's decision in a prison-murder trial to allow inmates testifying for the prosecution to appear in street clothes but compel defense witnesses to take the stand wearing prison garb and shackles violated the defendant's right to a fair trial, according to the West Virginia Court of Appeals. Although there is no constitutional right to have witnesses appear without restraints, under the circumstances here, where the case hinged on the credibility of the prison witnesses, the Court stated that the "drastic contrast in the physical appearance of the parties' incarcerated witnesses . . . unfairly influenced the jury's judgment of the witnesses' credibility." Gibson v McBride, ___ WVa ____ (#33321, 6-12-08). Fulltext at http://pub.bna.com/cl/83CrL 390.pdf.

DC Circuit: Federal Statute Criminalizing Government Cover-Ups

The Court of Appeals for the District of Columbia held that government officials' statements to ethics investigators are not covered by the federal law that prohibits falsifying, concealing or covering up material facts in a government matter. A federal employee had sought an ethical opinion as to whether he could accept a free ride with lobbyist Jack Abramoff to a golf outing in Scotland, but he concealed facts concerning his purpose in taking the trip. The Court stated that if an employee violates a standard of conduct, he may be subject to disciplinary action, but "we cannot see how this translates into criminal liability ... whenever someone seeking ethical advice or being interviewed by a GSA investigator omits 'relevant information.'" Accordingly, the court held that the federal statute's requirement of proof of a legal duty to speak was not satisfied. United States v Safavian, ___ F3d ___ (CADC, #06-3139, 6-17-08); full text at http://pub.bna.com/cl/0613139.pdf.

First Circuit: Judge's Disagreement with Sentencing Provisions Can Justify Departure

The First Circuit Court of Appeals held that federal judges who disagree with the policy decisions made by the U.S. Sentencing Commission when it promulgated the career-offender provisions of the federal sentencing guidelines are now free to impose lower sentences on career offenders. The Court decided that the lesson from Kimbrough v United States, 82 CrL 275 (2007) (the 100:1 powder/crack ratio case) is that district judges may deviate from the guidelines even on the basis of categorical policy disagreements with its now-advisory provisions. These disagreements are not any less permissible a reason to deviate than disagreement with the policy judgment at issue in Kimbrough, the First Circuit opined. United States v Boardman, 528 F3d 86 (CA1, 2008); full text at http://pub.bna.com/cl/071030.pdf.

DC Montana: Federal Law Requiring Local Sex Offender Registration Unlawful

Congress exceeded its authority under the Commerce Clause when it enacted a provision of the federal Sex Offender Registration and Notification Act that requires individuals convicted of sex crimes to register as sex offenders with local authorities regardless of whether they travel in interstate commerce, the U.S. District Court for the district of Montana held. The Court observed that the law has nothing to do with commerce or any sort of economic enterprise; rather, it regulates purely local, non-economic activity. Therefore, the Court reversed a defendant's conviction under a provision that makes it a crime for someone who is required to register to travel in interstate commerce to fail to register at the destination. United States v Waybright, ___ FSupp2d ___ (DCMont, #CR 08-16-M-DWM, 6-11-08); full text at http://pub.bna.com/cl/0816.pdf.

Ninth Circuit: Juvenile Interrogation Limits Apply Regardless of Knowledge of Age

The Ninth Circuit Court of Appeals held that a police officer who arrests a minor must comply with the limits on interrogation set forth in the Juvenile Justice and Delinquency Prevention Act, regardless of whether the officer knows or has reason to know of the arrestee's juvenile status. On its face, the Court said, the statute does not allow for exceptions in situations in which an officer has no reason to know of an individual's age or in which the juvenile lies about his age. The Court concluded that Congress meant to substantially increase the procedural safeguards available to juveniles immediately following arrest, and recognizing exceptions to that general rule would undermine Congress's intent. United States v Juvenile Male, ___ F3d ____ (CA9, #07-50107, 6-12-08); full text at http://pub.bna.com/cl/0750107.pdf.

Maryland: Inconsistent Verdicts Not Allowed

The Maryland Court of Appeals decided that inconsistent verdicts, which were allowed in only limited circumstances anyway, would no longer be

tolerated in criminal trials. The defendant challenged his conviction of possessing a firearm during a drug trafficking crime as being inconsistent with his acquittal by the jury on the drug-trafficking charges. Inconsistent verdicts were impermissible in bench trials, and the Court decided to extend the rule to jury trials, emphasizing that inconsistent verdicts violate the duty of the jury to decide a criminal case according to established rules of law. There is no way to know whether inconsistent jury verdicts are a result of leniency or mere confusion on the part of jurors, the Court said. Price v State, ___ Md ___ (#19, 6-9-08); full text at http://pub.bna.com/cl/19a.

Indiana: Standard to Differentiate Between Discipline and Assault

A parent charged with assaulting his or her child can establish a "parental discipline" defense by showing the force was reasonable in the circumstance and was reasonably believed to be necessary to control the child and prevent misconduct, ruled the Indiana Supreme Court. The Court balanced the parents' constitutionally protected liberty interest in maintaining familial relationships with their children and directing their upbringing against the state's "powerful interest" in preventing and deterring the mistreatment of children. The Court set forth several factors, including the age of the child, the nature of his "offense," and the proportionality of the discipline to the offense. Willis v State, ___ Ind ___ (#4902-0707-CR-295, 6-10-08); full text at http://pub.bna.com/cl/9S020707.pdf.

Tenth Circuit: Personal Finance Crime Did Not Justify Occupational Restriction

The Tenth Circuit Court of Appeals held that a former corporate executive's convictions arising out of a personal loan he made to a bank official who hid it from the bank did not justify a condition of supervised release that barred him from accepting any employment in an executive capacity or from engaging in financial dealings involving any business without court approval. The Court pointed out that the district court did not explain how the restriction was connected to the defendant's abuse of a management position for a criminal purpose, nor did the district court adequately explain how the occupational restrictions were "reasonably necessary to protect the public." Finally, the Court found that there was no indication that the district court considered any less restrictive alternatives. United States v Wittig, 528 F3d 1280 (CA10, 2008); full text at http://pub.bna.com/cl/73051.pdf.

Ninth Circuit: Presumption of Reasonableness Rejected

The en banc Ninth Circuit Court of Appeals declined to adopt the "presumption of reasonableness" that other courts have established for the sentences recommended by the U.S. Sentencing Guidelines. The Court stated that a "'presumption' carries baggage as an evidentiary concept that we prefer not to import." The Court decided to simply follow the Supreme Court's admonition that when the sentence is "in the mine run of cases," it is probably reasonable. A list of principles for appellate review of sentences, and also for the district judges' explanation of their sentences, was provided by the Court. United States v Carty, 520 F3d 984 (CA9, en banc, 2008); full text at http://pub.bna.com/cl/0510200.pdf.

Seventh Circuit: Attempt to Rip Off Informer Not Attempted Robbery of U.S. Money

A would-be robber who attempted to rip off an empty-handed government informer during a drug sting may not be convicted of attempting to rob a person with custody of money of the United States, held the Seventh Circuit Court of Appeals. The problem was, said the Court, that the informer had no money; a person cannot steal something the victim does not actually possess. The Court further held that the defendant was not subject to prosecution for conspiring to steal money from the United States given his lack of knowledge as to the informer's status. United States v Salgado, 519 F3d 411 (CA7, 2008); full text at http://pub.bna.com/cl/072163.pdf.

Washington: No Harmless Error in Blakely Errors

The Washington Supreme Court held that a sentence enhancement that is based on a fact found by a judge in violation of the right to a jury trial may not be affirmed as "harmless error" when the jury's verdict can stand by itself without the additional finding. The State conceded the *Blakely* error in the trial court enhancing the sentence for use of a firearm when the jury convicted the defendant of use of a deadly weapon (which calls for fewer enhancement points). The Court found that no harmless error analysis can apply to a case where the State specifically adds an enhancement allegation and asks the jury to make the specific finding supporting the enhancement sought, and where the jury returns the verdict. State v Recuenco, 163 Wn2d 428; 180 P3d 1276 (2008); full text at http://pub.bna.com/cl/749647.pdf.

USDC Florida: Sex-Offender Registration Law Stricken Down

The statute that makes it a federal crime for people convicted as sex offenders in state court to travel to other states without complying with their state registration obligations exceeds Congress's authority under the Constitution's commerce clause, according to the United States District Court for the Middle District of Florida. The Court reasoned that if an individual's mere unrelated travel in interstate commerce is sufficient to establish a Commerce Clause nexis with purely local conduct, then "virtually all criminal activity would be subject to the power of the federal government." United States v Powers, 544 FSupp2d 1331 (2008); full text at http://pub.bna.com/cl/607cr221.pdf.

Iowa: No Foundation for Admission of Federal Reserve E-Mails

The Iowa Supreme Court held that a local bank employee failed to lay a proper foundation for the admission, as business records, of e-mailed error reports created by the Federal Reserve and sent to her bank. The Court agreed with the defendant that the witness's testimony was insufficient to satisfy the state's burden to establish that the statements in the e-mails and error reports from the Federal Reserve were made either "by a person with knowledge" or by a reliable, non-hearsay, computer-generated source. The Court held that the reports were inadmissible, but that their admission was harmless error. State v Reynolds, 746 NW2d 836 (2008); full text at http://pub.bna.com/cl/060344.pdf.

Massachusetts: Racial Profiling May Justify Suppression of Evidence

The Massachusetts Supreme Court ruled that suppression of evidence is an available remedy for an otherwise lawful traffic stop that was motivated by racial profiling in violation of the equal protection clause of the state constitution. The Court found this entirely consistent with the policy underlying the exclusionary rule, to deter intentional unconstitutional behavior. The Court stated that the defendant has the initial burden of presenting evidence that raises a reasonable inference of impermissible discrimination, and if he satisfies that burden, the prosecutor must rebut the inference. The Court emphasized that statistical evidence must address the crucial question of whether one class is being treated differently from another class that is similarly situated. Commonwealth v Lora, 451 Mass 425; 886 NE2d 688 (2008); full text at http://pub.bna.com/cl/sjc10111.pdf.

DC Circuit: Due Process Requires Post-Restraint, Pretrial Probable Cause Hearing

The United States Court of Appeals for the District of Columbia held that forfeiture claimants' rights to due process and to counsel under the Fifth and Sixth Amendments require that they be afforded an adversarial post-restraint, pretrial hearing for the purpose of establishing whether there was probable cause as to both their guilt of the underlying offense and the forfeitability of the assets they claim are needed for a meaningful exercise of their right to counsel. The Court noted that the claimants' interest was more than merely a desire to use their property however they saw fit; rather, it involved the Sixth Amendment right to counsel of choice. United States v E-Gold Ltd., 521 F3d 411 (CADC, 2008); full text at http://pub.bna.com/cl/073074.pdf.

Indiana: Instruction Allowing Inference on Intent Erroneous

The Indiana Supreme Court held that an instruction in a murder trial that jurors could infer the defendant's intent to kill "from evidence that a mortal wound was inflicted upon an unarmed person with a deadly weapon in the hands of the accused" denied the defendant a fair trial. The Court stated that the instruction allowed a conviction based on proof of only three out of four offense elements and relieved the state of its burden of proving intent. The victim died six days after the attack, and it was not obvious that a properly instructed jury would find an intentional or knowing killing. As the principal issue at trial was the defendant's intent, the error was not harmless, concluded the Court. McDowell v State, 885 NE2d 1260 (2008); full text at http://pub.bna.com/cl/34S050711.pdf.

Ninth Circuit: DNA Testimony Concerning Probabilities Misleading

The Ninth Circuit Court of Appeals granted habeas relief where an expert witness inaccurately testified that DNA analysis proved that there was a 99.99967 percent chance that DNA recovered at the scene of the rape was the same as defendant's, a conclusion that was later shown to be inaccurate. The state court had upheld the conviction, finding sufficient evidence based on a corrected calculation of the DNA probability. The Ninth Circuit held that the state court unreasonably applied federal law by not excluding all of the DNA testimony from its assessment of the sufficiency of the evidence. The admission of the expert's misleading testimony rendered the petitioner's trial fundamentally unfair, the Court concluded. Brown v Farwell, ___ F3d ___ (CA9, #07-15592, 5-5-08); full text at http://pub.bna.com/cl/0715592.pdf.

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.

GPS Monitoring

2008 PA 191 **[HB 4330, eff. 07-10-08] amends** MCL 791.236**.** This Act provides for GPS monitoring of individuals convicted of aggravated stalking. If a victim of aggravated stalking has registered to receive notices about the defendant under the Crime Victim's Rights Act, the parole order for the prisoner must require his location to be monitored by a global positioning monitoring system (GPS) during the parole period.

2008 PA 192 **[HB4453, eff. 07-10-08] amends** MCL 765.6b**.** Another Act providing for GPS monitoring, this law allows a judge to order a defendant charged with domestic violence to wear a GPS device as a condition of release; allows the victim to receive information from the offender's GPS; requires that the authorities be informed of a violation of an order protecting the victim; and requires the court to impose a condition that the defendant not purchase or possess a firearm.

Training Events

The **Criminal Defense Attorneys of Michigan (CDAM)** will present its Fifth Annual Trial Practice College, **August 22-27, 2008**, 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 which is $900 for double occupancy or $1,025 for single occupancy. The fee includes all registration fees, course materials, hotel accommodations at the Radisson Hotel in downtown Lansing, and most meals, except for dinner. The Criminal Defense Resource Center also will offer ten full scholarships for quail-fying trainees: see www.sado.org/cdn/cdam2008.pdf. For up-to-date information, please see www.cdam.net.

The National Child Abuse Defense & Resource Center will host its 14th International Conference, titled "Child Abuse Allegations: Separating Scientific Fact from Fiction," on **September 18-20, 2008**, in Las Vegas, Nevada. The conference is designed for attorneys, judges investigators and other professionals who need to keep abreast of the most current medical scientific and psychological research, procedures and studies in order to be able to separate fact from diction, confession from coercion and harm from hyperbole. The very interesting agenda includes sessions on infant death, traumatic brain injury and shaken baby syndrome, DNA evidence, assessing the quality of investigative interviews, injury biomechanics, adolescent complainants, and suggestibility of young children. The event takes place at the Riviera Hotel, and discounted rooms are available. Registration fees range from $496 to $625: see www.falseallegation.org for more information.

The National Association of Criminal Defense Lawyers (NACDL) and National College for DUI Defense (NCDD) will host "Winning With DUI: Offense, Defense & Special Teams," on **September 18 - 20, 2008**, in Las Vegas, Nevada. Sessions will cover appellate persuasion, discovery of chemical test results, ethics, evidence suppression, closing argument, blood lab secrets, and voir dire of experts. Registration fees range from $400 to $750. For more information, contact Viviana Sejas at (202) 872-8600, x232.

The **National Criminal Defense College (NCDC)** will present "Advanced Cross-Examination" on **October 3-5, 2008**, in Atlanta, Georgia. The seminar presents a comprehensive approach, using concrete examples, of the "why and how" of cross-examination. Attorneys at all experience levels find the program informative and useful in defining and honing cross-examination skills. Small group workshops will be supplemented by demonstrations and lectures from an experienced faculty. Tuition is $550, discounted hotel rates are available, and enrollment is limited. For more information, contact NCDC at www.ncdc.net or (478) 746-4151.

The **Michigan Appellate Assigned Counsel System (MAACS)** will host "Technology and the Law: How to Work Smarter and Faster" on **October 9, 2008** (Grand Rapids), **October 16, 2008** (Lansing) and **October 30, 2008** (Troy). More information will be available in September or contact MAACS at (517) 334-1200.

The National Association of Criminal Defense Lawyers (NACDL) will host its 2008 Fall Meeting & Seminar, titled "Succeeding With Juries: Selection & Persuasion," on **October 23-26, 2008**, in Tampa, Florida. The training will cover topics including opening statements, impeachment, cross-examination, use of technology for persuasion, and jury selection and voir dire. Registration fees range from $270 to $520, depending on membership status, and discounts are available at the conference hotel. For more information, contact NACDL at (202) 872-8600.

The **Criminal Defense Attorneys of Michigan (CDAM)** will host its Fall Training Conference on **November 13-15, 2008**, in Traverse City, Michigan. Details will appear here and at www.cdam.net as they become available.

The National Legal Aid & Defender Association (NLADA) will hold its Annual Conference, titled "Creating Change, Achieving Justice," on **November 19-22, 2008**, in Washington, DC. Details are not yet available, but will appear at www.nlada.org/training.

U.S. Supreme Court: Selected Certiorari Granted Summaries

HABEAS CORPUS -- Federal
DEATH PENALTY

Bell v Kelly
Unpublished opinion (CA4, #06-22, 2008)
cert grt'd ___US___; 128 SCt 2108;
171 LEd2d 228 (2008)

The Court granted certiorari on the issue of whether the Fourth Circuit Court of Appeals applied the incorrect standard when reviewing a state supreme court's conclusion that a habeas petitioner was not denied effective assistance of counsel at his capital sentencing proceeding. The Fourth Circuit applied the deferential standard of 28 USC 2254(d), which is reserved for claims adjudicated on the merits in state court, where the evidence of prejudice was not considered by the state court and was received for the first time at the evidentiary hearing in federal court.

DISCOVERY
HABEAS CORPUS -- Federal

Cone v Bell
492 F3d 743 (CA6, 2007)
cert grt'd ___US___ (#07-1114, 06-23-08)

The Court granted review in this Sixth Circuit Court of Appeals case on whether the petitioner is entitled to habeas review on his claim that the state suppressed material evidence in violation of Brady v Maryland, 373 US 83 (1963). The Court will decide whether the claim is procedurally defaulted because it has been presented twice to the state courts.

SEARCH AND SEIZURE -- Investigative Stops
-- Automobiles

Arizona v Johnson
217 Ariz 58; 170 P3d 667 (2007)
cert grt'd ___US___ (#07-1122, 06-23-08)

The issue is whether an officer who has made a traffic stop is allowed to conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and dangerous, but has no reasonable grounds to believe that he is committing or has committed a criminal offense.

COUNSEL -- Right To

Harbison v Bell
503 F3d 566 (CA6, 2007)
cert grt'd ___US___ (#07-8521, 06-23-08)

The Court granted review to decide whether a federally funded habeas counsel is permitted to represent a condemned inmate in state clemency proceedings when the state has denied state-funded counsel for that purpose, and whether a certificate of appealability is required to appeal an order denying the request for federally funded counsel.

HABEAS CORPUS -- Federal
COUNSEL -- Ineffectiveness Of
-- Failure to Present Defense

Knowles v Mirzayance
Unpublished opinion
(CA9, #04-57102, 2007)
cert'd grt'd ___US___ (#07-1315, 06-27-08)

The questions presented are whether the Ninth Circuit erred in granting habeas relief without considering whether the state-court decision was unreasonable under clearly established federal law, and whether the federal appellate court may substitute its own factual findings and credibility determinations for those of the district court without finding whether the district court's findings were clearly erroneous. The Ninth Circuit found that trial counsel's advice to petitioner to withdraw his insanity plea constituted ineffective assistance of counsel.

HABEAS CORPUS -- Federal

Lakhdar Boumediene, et al v George W. Bush
Khaled A.F. Al Odah v United States
___US___; ___SCt___; ___LEd2d___
83 CrL 392; (#06-1195v; 06-1196, 06-12-08)

Reversed judgment of D.C. Court of Appeals finding that federal court lacked jurisdiction to consider habeas application.

Aliens detained as enemy combatants at the U.S. Naval Station at Guantanamo Bay enjoy the constit-utional privilege of habeas corpus. Congress's decision to block the federal courts from considering the de-tainees' habeas petitions without affording them any adequate substitute violated the Constitution's suspen-sion clause. The procedural protections afforded alien detainees before military Combatant Status Review Tribunals (CSRTs) fall well short of those that would eliminate the need for habeas review. The government offered no credible arguments that the military mission at Guantanamo would be compromised if habeas cor-pus courts had jurisdiction to hear the detainees claims.

HABEAS CORPUS -- Federal

Mohammad Munaf, et al v Pete Green
Pete Green, et al v Sandra K. Omar
and Ahmed S. Omar
___US___; ___SCt___; ___LEd2d___
83 CrL 432; (#06-1666; 07-394, 06-12-08)

Vacated judgment of D.C. Court of Appeals affirming district court order dismissing habeas petition for lack of jurisdiction.

The habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command. The troops' participation in a multinational force did not bar application of habeas jurisdiction. However, the district court abused its discretion in granting preliminary injunctive habeas relief on the basis of the difficulty of the jurisdictional question, without considering the plaintiff's likelihood of success on the merits.

SENTENCING AND PUNISHMENT -- Guidelines
-- Blakely

Richard Irizarry v United States
___US___; ___SCt___; ___LEd2d___
83 CrL 442; (#06-7517, 06-12-08)

Affirmed judgment of Eleventh Circuit Court of Appeals affirming sentence of 60 months in prison.

The federal rule that requires a sentencing judge to give notice to the parties prior to any departure from the sentencing range recommended by the U.S. Sentencing Guidelines does not require judges to give notice prior to exercising their discretion to impose a non-guidelines sentence pursuant to United States v Booker, 543 US 220 (2005). Any expectation that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive the decision in Booker. Defendants and prosecutors are already on notice of the considerable leeway that districts judges now enjoy to impose non-guidelines sentences.

COUNSEL -- Right To

Indiana v Ahmad Edwards
___US___; ___SCt___; ___LEd2d___
83 CrL 470; (#07-208, 06-19-08)

Vacated judgment of Indiana Supreme Court affirming opinion of intermediate court of appeals granting a new trial.

The Sixth Amendment does not forbid states from forcing a defendant to proceed with counsel where the accused has been found to be competent to stand trial but is deemed incompetent to represent himself. Mental illness can vary in degree and can interfere with a defendant's functioning at different times in different ways. A right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel.

SENTENCING AND PUNISHMENT
-- Resentencing
APPEALS -- Scope Of

Michael Greenlaw v United States
___US___; ___SCt___; ___LEd2d___
83 CrL 478; (#07-330, 06-23-08)

Vacated judgment of Court of Appeals ordering district court to increase defendant's sentence by 15 years.

Absent a government appeal or cross-appeal, the Court of Appeals cannot, on its own initiative, order an increase in a defendant's sentence to correct a district court's mistake. The courts are to rely on the parties to frame the issues, acting solely as neutral arbiters. Also, the cross-appeal rule precludes an appellate court from altering a judgment to benefit a non-appealing party. Even if there are some circumstances where it might be proper for an appellate court to initiate plain-error review, a sentencing error that the government refrained from pursuing does not present such a circumstance.

COUNSEL -- Right To

Walter A. Rothgery v Gillespie County
___US___; ___SCt___; ___LEd2d___
83 CrL 487; (#07-440, 06-23-08)

Reversed judgment of Fifth Circuit Court of Appeals affirming district court order granting summary judgment to respondent.

The Sixth Amendment right to counsel is triggered by the arrestee's initial appearance before a judicial officer at which he is formally apprised of the accusations against him and restraints are placed on his freedom, regardless of whether a prosecutor is aware of the arrest. By the time the defendant is brought before a judicial officer, the state's relationship with the defendant has become "solidly adversarial." Even if prosecutors are completely unaware of the accusations made by arresting officers, the arrestee at that point requires counsel to begin navigating the complexities of criminal law.

RICO

John Bridge, et al v Phoenix Bond & Indemnity Co., et al
___US___; ___SCt___; ___LEd2d___
83 CrL 361; (#07-210, 06-09-08)

Affirmed judgment of Seventh Circuit Court of Appeals reversing district court order dismissing RICO claims.

A plaintiff asserting a Racketeer Influence and Corrupt Organization Act (RICO) claim predicated on mail fraud need not show that it relied on the defendant's alleged misrepresentations, either as an element of its claim or to show proximate causation of its injury. The language of the RICO Act requires only that the plaintiff be injured in his business or property by reason of a violation of the Act, and the plaintiffs' loss of valuable liens as a result of the alleged fraud satisfied that requirement.

DEATH PENALTY

Patrick Kennedy v Louisiana
___US___; ___SCt___; ___LEd2d___
83 CrL 530; (#07-343, 06-25-08)

Reversed judgment of Louisiana Supreme Court upholding conviction of child rape and death sentence.

A death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments. As it relates to crimes against individuals, the death penalty should not be expanded to instances where the victim's life was not taken. There is a national consensus against capital punishment for the crime of child rape, which may be devastating in harm but cannot be compared to murder in terms of "severity and irrevocability." Moreover, there are many reasons why allowing capital punishment in cases of child rape would only compound the harm to the victim.

CONFRONTATION - Right To

Dwayne Giles v California
___US___; ___SCt___; ___LEd2d___
83 CrL 549; #07-6053, 06-25-08)

Reversed judgment of California Supreme Court affirming conviction of domestic violence.

The forfeiture-by-wrongdoing exception to the right of confrontation does not allow prosecutors to present testimonial hearsay in the absence of a showing that, at the time the accused engaged in the wrongful acts that rendered the declarant unavailable, the accused was acting with an intent to prevent the declarant from testifying. The manner in which the rule was applied in early cases makes plain that unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. Where defendants killed their victims for reasons unrelated to the victims later testifying in court, the victims' statements were not admitted unless they fell within the hearsay exception for dying declarations.

RIGHT TO BEAR ARMS

District of Columbia, et al v Deck Anthony Heller
___US___; ___SCt___; ___LEd2d___
83 CrL 565; (#07-290, 06-26-08)

Affirmed judgment of D.C. Court of Appeals enjoining the District of Columbia from enforcing a law providing that residents are required to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock.

The Second Amendment protects the individual right to have and use weapons for self-defense, and the District of Columbia's ban on handguns in the home violates that right. The Amendment guarantees the individual right to possess and carry weapons in case of confrontation. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia "fits poorly with the operative clause's description of the holder of that right as 'the people.'" Like most rights, the right to bear arms is not limited, and restrictions on carrying concealed weapons, possession of a firearm by felons, or carrying dangerous or unusual weapons, are not unconstitutional.

U.S. Court of Appeals: Selected Sixth Circuit Opinion Summary

SENTENCING AND PUNISHMENT -- Guidelines -- Scoring

United States v Frank Henry Hall
___F3d___ (#07-1883, 06-24-08)
Merritt, Clay, GILMAN

Remanded for resentencing.

The district court erred by using defendant's two prior misdemeanor offenses to add criminal history points and thereby enhance his sentence because in both instances, defendant was given full credit for time served on earlier unrelated offenses and, therefore, did not actually serve any time in prison for the misdemeanor offenses. The statute allows prior offenses to be counted only if the sentence was a term of imprisonment of at least 30 days. The critical question is whether the defendant actually served time on those sentences.

Michigan Supreme Court: Selected Order Summaries

GUILTY PLEA -- Insufficient Factual Basis

People v Brian Lamorand
___Mich___ (#135247, 06-13-08)
MITCHELL T. FOSTER

In lieu of granting leave to appeal, the trial court's order denying defendant's motion to withdraw his guilty plea was reversed because of an insufficient factual basis to support the plea of guilty to maintaining a drug house. The issue was adequately preserved when defendant argued at the motion to withdraw his plea that the factual basis was insufficient.

Justice Kelly, concurring, would adopt the decision in In re Ibarra, 34 Cal3d 277 (1983), which set forth factors that must be considered before it can determine that a defendant's plea was voluntary and not coerced by the pressures that accompany package-deal plea agreements. Because no consideration was given to those factors when the trial court accepted defendant's plea, he should be allowed to withdraw the plea.

Justice Weaver, dissenting, would deny leave to appeal because defendant did not suffer any injustice.

Justice Corrigan, dissenting, would find that the issue was not preserved for appeal.

ECONOMIC PENALTIES -- Attorney Fees

People v Joseph Allen Trapp
___Mich___ (#136056, 06-11-08)
SADO - VALERIE NEWMAN

In lieu of granting leave to appeal, the case was remanded to the court of Appeals to consider whether the circuit court, before ordering reimbursement of attorney fees, was required to comply with People v Dunbar, 264 Mich App 240 (2004), in particular the requirement that it consider the defendant's current and future financial circumstances and ability to pay.

CRIMINAL SEXUAL CONDUCT -- Complainant's Prior Sexual Conduct (Rape Shield)

People v Wayne Douglas Dabb
___Mich___ (#135734, 06-20-08)
SADO - CHRISTINE PAGAC

The Court denied leave to appeal to the prosecutor.

Justice Kelly, concurring, stated that the Court of Appeals correctly held that the trial court erred by excluding evidence of the victims' prior sexual acts. The evidence would have been admissible to show bias and an ulterior motive for making the charge, and was not excluded by the rape-shield statute. Admission of the evidence was necessary to preserve defendant's right of confrontation.

Justice Corrigan, dissenting, would find that the trial court properly found that the evidence did not satisfy the standards for admissibility, and that exclusion of the evidence did not violate defendant's confrontation rights.

Justice Young would grant leave to appeal.

COUNSEL -- Absence at Critical Stage

People v Bernard Chauncey Murphy
___Mich___ (#132421, 06-25-08)
ROBIN LERG

Reversed decision of Court of Appeals granting a new trial. The Court of Appeals held that trial counsel was ineffective in failing to oppose the prosecution's application for leave to appeal the trial court order suppressing evidence, which the Court of Appeals

granted. The Court of Appeals found that an interlocutory appeal constitutes a critical stage of the criminal proceedings, and that counsel's failure to file a responsive brief amounted to a complete denial of counsel during a critical stage, requiring automatic reversal. The Supreme Court remanded instead for a new appeal of the suppression issue with appointed appellate counsel, stating that the Court of Appeals is not bound by the "law of the case." If the Court of Appeals determines that it would have affirmed the trial court order suppressing the evidence, the Court must assess the impact of the improperly admitted evidence on the defendant's trial.

Justice Markman, dissenting, would remand to the Court of Appeals to determine whether the absence of counsel was harmless error.

ECONOMIC PENALTIES -- Attorney Fees

People v Darin Keith Rounsoville
People v John Charles Ranson
___Mich___ (#134841, #134545, 06-27-08)
CHRISTINE DUBOIS for Defendant Rounsoville
SADO - MARLA MCCOWAN for Defendant Ranson

In both of these cases, in lieu of granting leave to appeal, the Court remanded to the trial court for a decision on attorney fees that considers defendant's ability to pay now and in the future. Any order to reimburse attorney fees must be in a separate order.

Justice Corrigan, dissenting, would find that neither the Sixth nor the Fourteenth Amendment requires a court to state that it considered the defendant's ability to pay before ordering attorney fees. Also, according to Justice Corrigan, the consideration of ability to pay is only relevant when the order is actually enforced.

SENTENCING AND PUNISHMENT -- Indeterminate Sentence

People v Charlie Lee Floyd
___Mich___ (#135940, 06-27-08)
DANIEL RUST

In lieu of granting leave to appeal, reversed in part the judgment of the Court of Appeals, vacated sentence and remanded for resentencing. The 62-year minimum sentences exceed two-thirds of the 80-year maximum sentences, in violation of MCL 769.34(2)(b) and People v Tanner, 387 Mich 683 (1972).

Justice Markman, concurring, stated his belief that all of defendant's sentences should be scored under the sentencing guidelines.

OBSTRUCTION OF JUSTICE -- Sufficiency of Evidence

People v Barbara Sue Williams
___Mich___ (#135851, 07-02-08)
SADO - ROLF BERG

In lieu of granting leave to appeal, reversed the judgment of the Court of Appeals reversing the trial court order denying defendant's motion to withdraw her guilty plea to obstruction of justice, and remanded for reinstatement of the trial court's order. Defendant knowingly violated a no-contact order when she wrote to the victim, asking her to drop the charges against her, and, in order to conceal her violation of the no-contact order, she put a false return address on the envelope. Actual intimidation of the witness is not required. A factfinder could convict defendant based on her use of unlawful means to dissuade a witness from testifying.

Justices Cavanagh and Kelly would deny leave to appeal.

Michigan Supreme Court: Selected Opinion Summaries

SENTENCING AND PUNISHMENT -- Guidelines -- Scoring

People v Trumon Dontae Cannon
___Mich___ (#131994, 06-04-08)
NEIL SZABO

Remanded to Court of appeals for reconsideration of guidelines scoring.

Points should be assessed under OV 10 only when it is readily apparent that the victim was vulnerable, i.e., was susceptible to injury, physical restraint, persuasion, or temptation. Predatory conduct inherently involves some level of exploitation. To assess 15 points for predatory conduct, the sentencing court must determine: (1) that the offender engaged in conduct before the commission of the offense; (2) that the conduct was directed at a specific victim[s] who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation; (3) that victimization was the offender's primary purpose for engaging in the preoffense conduct. The Legislature did not intend that 15 points be assessed for preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or escape without detection.

Justice Cavanagh, concurring in part and dissenting in part, agreed with the interpretation of OV 10, but would review the record to determine whether there was evidence that defendant exploited a vulnerable victim.

SENTENCING AND PUNISHMENT -- Economic Penalties

People v Barbara Lemmen
___ Mich ___ (#135405, 06-04-08)
MARY L. JABIN

Affirmed judgment of Court of Appeals affirming modification of child or spousal support.

The statutes allowing modification of child or spouse support, MCL 552.17(1) and MCL 552.28, are exceptions "otherwise provided by law" to the rule that after a claim of appeal is filed or leave to appeal is granted, the trial court may not amend the judgment, MCR 7.208(A). To require the trial court to wait until after an appeal is completed is contrary to the plain language of the statutes and would defeat their purpose of adjusting child or spousal support where there has been a change in circumstances.

DOUBLE JEOPARDY -- Multiple Punishment

People v David Gordon Ream
___ Mich ___ (#134913, 06-11-08)
SHIRLEY J. BURGOYNE

Reversed judgment of Court of Appeals vacating first-degree criminal sexual conduct conviction and reinstated that conviction and sentence; denied defendant's application for leave to appeal.

Convicting and sentencing a defendant for both felony murder and the predicate felony does not violate double jeopardy if each offense has an element the other does not, and People v Wilder, 411 Mich 328 (1981) is overruled. Wilder did not apply the Blockburger [Blockburger v United States, 284 US 299 (1932)] same-elements test adopted in People v Nutt, 469 Mich 565 (2004). The abstract statutory elements, not the particular facts of the case, are determinative with regard to a double-jeopardy challenge. Because first-degree felony murder and first-degree criminal sexual conduct each contains an element that the other does not, they are not the "same offenses" and, therefore, defendant may be punished separately for each offense.

Justice Cavanagh, dissenting, stated that the majority has misapplied the test enunciated in Blockburger by comparing the abstract elements of a compound offense to one of its predicate offenses rather than comparing the actual elements of the offense of which defendant was convicted, contrary to the approach taken in Whalen v United States, 445 US 684 (1980), and subjecting defendant to multiple punishment for the same offense. In the absence of clear legislative intent to the contrary, Justice Cavanagh would conclude that the Legislature did not intend to impose multiple punishments for felony murder and its necessarily required predicate felony.

Justice Kelly, dissenting, objected to the majority's "unprecedented crusade to dismantle Michigan's historic double jeopardy jurisprudence." Wilder adopted what is essentially a modified version of the same-elements test applicable to compound crimes, an approach that is consistent with federal authority. Justice Kelly, who dissented in People v Smith, 478 Mich 292 (2007) (overruling People v Robideau, 419 Mich 458 (1984)) would find that the Legislature does not intend to permit convictions of both felony murder and the predicate felony, citing the rule of lenity.

ATTORNEY DISCIPLINE

In re Honorable Beverley Nettles-Nickerson
___ Mich ___ (#133929, 06-13-08)
PAUL J. FISHER

Adopted in part recommendations of Judicial Tenure Commission; ordered respondent removed from office.

Respondent committed misconduct, including making false statements under oath, soliciting false statements, improper docket management, and recklessly flaunting her judicial office.

Costs were imposed in the amount of $12,000.

Justice Weaver, concurring in part and dissenting in part, disagreed with the majority's decision to assess the costs of the Judicial Tenure Commission proceeding. There is no constitutional authority to assess costs against a judge. It should be left to the people of Michigan to decide, by constitutional amendment, whether to assess costs against disciplined judges.

SENTENCING AND PUNISHMENT -- Guidelines

People v Theodore Muttscheler
___ Mich ___ (#136101, 136199, 06-18-08)
SADO - ANNE YANTUS

Affirmed judgment of Court of Appeals reversing trial court order denying motion to withdraw plea and granting specific enforcement of plea bargain.

A defendant whose recommended minimum sentence range requires the imposition of an indeterminate sanction may not be sentenced to serve time in prison rather than jail, absent a substantial and compelling reason for departure. The statute unequivocally states that a prison sentence is not an intermediate sanction. Because the parties agreed to a sentence within the guidelines, the trial court violated the agreement not only by sentencing defendant to prison, but also by imposing a determinate sentence under which defendant could be imprisoned for longer than the 12-month maximum allowed by the indeterminate sentence statute.

SENTENCING AND PUNISHMENT -- Guidelines -- Scoring

People v Dennis Mervyn Sargent
___Mich___ (#133474, 06-18-08)
JOHN ROACH

Reversed in part judgment of Court of Appeals; remanded for resentencing.

When scoring Offense Variable 9 (number of victims), only those placed in danger of injury or loss of life when the sentencing offense was committed (or during the same criminal transaction) may be considered. MCL 769.31(d) suggests that, generally, only conduct relating to the offense being scored may be taken into consideration. The offense variable statutes state unambiguously when behavior outside the offense being scored is to be taken into account. The trial court erred in scoring 10 points for the abuse of the complainant's sister, which did not arise out of the same criminal transaction as the abuse of the complainant.

EVIDENCE – Impeachment

People v Junior Fred Blackston
___Mich___ (#134473, 06-25-08)
PATRICK K. EHLMANN

Reversed judgment of Court of Appeals reversing murder conviction.

The trial court did not abuse its discretion by excluding at defendant's second trial the written recantations of two unavailable witnesses whose testimony from the first trial was admitted against defendant. Although the statements qualified for admission under MRE 806, their prejudicial nature outweighed their probative value. The witnesses had been effectively impeached during cross-examination at the first trial. Their recantations were highly prejudicial, full of potentially misleading allegations. Any error in their exclusion was harmless since the untainted evidence established defendant's guilt beyond a reasonable doubt.

Justice Markman, joined by Justices Cavanagh and Kelly, dissenting, would find that the trial court abused its discretion. The recantations would have impeached two critical prosecutorial witnesses and cannot possibly be considered "marginally probative." The only "unfair prejudice" was caused by the trial court's exclusion of the recanting statements because it resulted in the jury being painted a false picture. The error was not harmless; the evidence was by no means overwhelming and exclusion of the statements may well have been outcome-determinative. The error may have resulted in the conviction of an actually innocent defendant.

SENTENCE ENHANCEMENT -- General Habitual Offender Proceedings

People v Caprese D. Gardner
___Mich___ (#131942, 07-23-08)
ARTHUR J. RUBINER

Affirmed sentence of 25 to 50 years in prison for second-degree murder as a third felony offender.

According to the unambiguous language of the habitual offender statutes, each separate felony conviction that preceded the sentencing offense must be counted. When the Legislature's language is clear, the Court is bound to follow its plain meaning. The holdings of People v Stoudemire, 429 Mich 262 (1987), and People v Pruess, 436 Mich 714 (1990), that each previous felony conviction must arise from a separate criminal incident (the same-incident test), directly contradict the plain text of the statutes, and they are overruled. The Court in Stoudemire and Pruess erroneously relied on legislative history and intent, that habitual offender sentencing should apply only to a person who had had two (three or four) opportunities to reform.

Stare decisis does not prevent the overruling of Pruess and Stoudemire because those decisions were erroneous, and the same-incident test has not created reliance interests that will be thwarted.

Justice Cavanagh, dissenting, would find that the Court in Pruess and Stoudemire properly understood legislative intent and properly applied the habitual-offender statutes to persons who persist in crime after having been convicted, which has been the uniform holding of this Court since the statutes' enactment in 1927. The system of graduated enhancements for subsequent felonies indicates that the legislature did not intend habitual-offender sentence enhancement to apply to simultaneous criminal acts.

Justice Kelly, dissenting, concurred with Justice Cavanagh's dissent, and wrote separately to strongly disapprove of the majority's efforts to overturn all

caselaw with which it disagrees, however destabilizing the effect may be. Key to the doctrine of stare decisis is that some precedent should be upheld notwithstanding its flaws. Justice Kelly pointed out that something more than a notion that an earlier case was incorrectly decided should be required before precedent is overruled. Just because the majority proclaims a statute free from ambiguity does not make it so.

SENTENCING AND PUNISHMENT -- Guidelines
-- Reasons for Departure
-- Upward Departure Reversed

People v Gary Thomas Smith
___ Mich ___ (#134682, 07-31-08)
SADO - JACQUELINE MCCANN

Reversed judgment of Court of Appeals, vacated sentences of 30 to 50 years for CSC I, and remanded for resentencing.

The trial judge articulated adequate reasons to support an upward departure from the sentencing guidelines, but failed to justify the extent of the departure. The long period of abuse of the nine-year-old victim, defendant's threat to evict her family if she reported the abuse, and the traumatic effect of the gynecological examination were objective and verifiable, not accounted for in the guidelines, and provided substantial and compelling reasons for departure.

However, the departure was an abuse of discretion because the trial judge did not establish why the sentences were proportionate to the offense and the offender. The judge gave no explanation for the extent of the departure independent of the reasons given to impose a departure sentence. In deciding whether and how much to depart from the guidelines, trial courts should consider the following:

- The trial court bears the burden of articulating the rationale for the departure; a reviewing court may not speculate about its reasons.
- The trial court must articulate one or more substantial and compelling reasons that justify the particular departure it made.
- The articulation of reasons must be sufficient to allow adequate appellate review.
- The minimum sentence must be proportionate; the sentence must adequately account for the gravity of the offense and relevant characteristics of the offender.
- The court must explain why its substantial and compelling reasons justify the minimum sentence imposed.
- It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid.
- Departures cannot be assessed with mathematical precision. The trial court must comply with its obligation to further the legislative goal of sentencing uniformity.

Justice Markman, concurring, disagreed with Justice Corrigan's dissent, finding that her approach would shield departures from meaningful appellate review and undermine the overall purpose of the sentencing guidelines.

Justice Weaver, dissenting, would affirm the opinion of the Court of Appeals that the reasons for departure were substantial and compelling and that the sentences imposed were proportionate.

Justice Corrigan, dissenting, criticized the majority for imposing an overly burdensome task on sentencing courts.

Michigan Court of Appeals: Selected Published Opinion Summary

COUNSEL -- Ineffectiveness Of
-- Failure to Object
PROSECUTOR -- Disqualification
SENTENCING AND PUNISHMENT -- Guidelines
-- Departure Reasons
-- Upward Departure Affirmed

People v Mark Robert Petri
___ Mich App ___ (#275019, 05-15-08)
Approved for Publication June 26, 2008
PC: Wilder, O'Connell, Whitbeck
SADO - BRANDY ROBINSON

Affirmed conviction of second-degree CSC and sentence of 14 years 10 months to 22 ½ years in prison.

Defense counsel was not ineffective for failing to challenge the admissibility of defendant's two prior convictions for second-degree CSC under MRE 404b. The prosecutor also relied on MCL 768.27a, and it is clear from the record that the trial court considered the admissibility of the evidence. Also, defendant failed to overcome the presumption of sound trial strategy where the evidence was used in his defense.

Counsel was not ineffective for failing to adequately cross-examine the detective concerning an incident at a daycare center. Declining to emphasize this matter to the jury was reasonable trial strategy, especially where defense counsel established that defendant had an alibi for the incident.

Defense counsel was not ineffective for stipulating to the admission of a certified copy of his prior convictions instead of verbally stipulating, and he was not ineffective in failing to request the redaction of the fact that defendant was sentenced to probation. The jury was not informed of the possible penalty, and defendant's mother had already testified that she spoke to defendant's probation agent.

Counsel was not ineffective for failing to object to the detective's testimony about "grooming." It was not necessary for the prosecutor to qualify her as an expert because she was not offering a technical or scientific analysis. Any error was harmless because the detective would have qualified as an expert.

The trial court did not err in denying defendant's motion to disqualify the prosecutor. The court properly determined that the prosecutor was not a necessary witness, and appropriately considered the untimeliness of the motion and the hardship caused by disqualifying the prosecutor most familiar with the case. Defendant was not deprived of a substantial defense.

The trial court did not err by imposing a 6-year departure from the sentencing guidelines. The court's determination that the guidelines failed to adequately consider the similar nature of defendant's pattern of felony crimes, and the aggravating circumstances, satisfied the statutory exception. The court properly drew inferences about defendant's behavior from objective and verifiable evidence. The degree of departure was not an abuse of discretion. The sentence was within the range of reasonable and principled outcomes and proportionate to the seriousness of defendant's crimes, past and present.

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.courtofappeals.mijud.net.

SENTENCING AND PUNISHMENT
-- Guidelines -- Scoring

People v Nicholas Moncivais
Unpublished opinion of 05-01-08
(Court of Appeals #276992)
MLW #09-66389 (3pp)
PC: White, Hoekstra, Smolenski
ROBERT DUNN

Remanded for resentencing.

The trial court did not use the appropriate guidelines range and erroneously believed that it was sentencing defendant at the bottom of the appropriate guidelines range. Resentencing is necessary.

SENTENCING AND PUNISHMENT
-- Economic Penalties -- Attorney Fees

People v Wilbert Lewis Elie
Unpublished opinion of 05-06-08
(Court of Appeals #277988)
PC: White, Hoekstra, Smolenski
SADO - MARLA MCCOWAN

Affirmed convictions of assault with intent to do great bodily harm, felon in possession, and felony firearm; remanded for consideration of ability to pay attorney fees.

The trial court erred when it ordered defendant to pay $600 in attorney fees without inquiring into his ability to pay. The amount ordered to be reimbursed should bear a relation to the defendant's foreseeable ability to pay, and the court must ensure that repayment is not required as long as the defendant remains indigent.

INSTRUCTIONS -- Lesser Offenses
ASSAULT WITH INTENT TO MURDER
-- Included Offenses
APPEALS -- Waiver

People v Jerrell Anthony Fox
Unpublished opinion of 05-13-08
(Court of Appeals #277140)
MLW #09-66508 (3pp)
PC: Donofrio, Sawyer, Murphy
SADO - BRANDY ROBINSON

Vacated bench convictions of three counts of felonious assault.

The trial court committed plain error in considering felonious assault as a lesser offense of assault with intent to murder. Felonious assault is not a necessarily included lesser offense of assault with intent to murder.

Although defense counsel failed to object, he never affirmatively agreed to the trial court's consideration of felonious assault. Therefore, defendant did not waive the error; rather, counsel's statements amounted to forfeiture, making plain error review appropriate.

SENTENCING AND PUNISHMENT
-- Guidelines -- Scoring

People v Eric Lee Norris
Unpublished opinion of 05-13-08
(Court of Appeals #268893)
MLW #09-66482 (3pp)
PC: Bandstra, Fitzgerald, Markey
SUSAN WALSH

Affirmed convictions of OWI, fourth-degree fleeing and eluding, and resisting and obstructing a police officer; remanded for resentencing.

The trial court committed plain error by basing its departure on the wrong sentencing grid. The court considered the scoring for the fleeing and eluding conviction, a class G offense, instead of the more serious offense of resisting and obstructing, a class F offense, and departed above the guidelines range because the OV and PRV scoring was far above that needed to place defendant in the highest grid. However, defendant's scores would not have exceeded the maximum grid for the resisting and obstructing conviction.

SENTENCING AND PUNISHMENT
-- Administrative Action

People v James Franklin Simmons
Unpublished opinion of 05-13-08
(Court of Appeals #277239)
MLW #09-66509 (3pp)
PC: Donofrio, Sawyer, Murphy
MARLA N. RICHARDSON

Affirmed convictions of attempted breaking and entering and fingerprinting refusal; remanded for correction of judgment of sentence.

The judgment of sentence must be amended to reflect that defendant was found guilty of attempted breaking and entering.

CRIMINAL SEXUAL CONDUCT
-- Sufficiency of Evidence

People v Angelo Arthur Santini
Unpublished opinion of 05-15-08
(Court of Appeals #271491)
MLW #09-66525 (3pp)
PC: Donofrio, Sawyer, Cavanagh
AARON J. GAUTHIER

Reversed adjudication of CSC I; remanded for entry of adjudication of CSC III.

There was insufficient evidence to support the adjudication of first-degree criminal sexual conduct based upon personal injury to a mentally incapable victim. The prosecution failed to present sufficient evidence that the victim was mentally incapable. Although school records indicated that the victim had some characteristics of Asperger's Syndrome, there was no testimony that the victim was easily manipulated or controlled, or that he could not appreciate the social or moral significance of his actions.

SENTENCING AND PUNISHMENT
-- Economic Penalties -- Attorney Fees

People v Douglas Lee Leche, Jr.
Unpublished opinion of 05-15-08
(Court of Appeals #275476)
MLW #09-66537 (5pp)
PC: Wilder, O'Connell, Whitbeck
SADO - MARLA MCCOWAN

Affirmed convictions of first-degree home invasion and first-degree criminal sexual conduct; vacated order for repayment of attorney fees.

The trial court erred in ordering defendant to reimburse the county for the cost of his court-appointed attorney without determining whether he had the ability to pay. Contrary to the prosecutor's argument, MCL 769.1k(b)(iii) does not eliminate the requirement that a trial court consider the defendant's ability to pay now and in the future.

HABITUAL CRIMINAL PROCEEDINGS
-- Notice of Charge

People v Ismael A. Malik
Unpublished opinion of 05-27-08
(Court of Appeals #274507)
MLW #09-66642 (3pp)
PC: Fort Hood, Talbot, Borrello
DANIEL J. RUST

Remanded for determination of habitual offender notice.

The trial court failed to decide whether the habitual offender third notice was timely filed. The prosecutor notified the court that he would amend the information, but there was no express statement on the record that the habitual offender second notice in the original information would be amended to habitual offender third.

ECONOMIC PENALTIES -- Attorney Fees

People v Peter Christopher Moses
Unpublished opinion of 06-03-08
(Court of Appeals #277151)
MLW #09-66726 (4pp)
PC: Davis, Murray, Beckering
SADO - MARLA MCCOWAN

Affirmed bench-tried convictions of first-degree criminal sexual conduct and second degree CSC; remanded for consideration of ability to pay attorney fees and for correction of presentence report.

The trial court committed plain error by assessing attorney fees without providing some indication that it considered defendant's ability to pay. On remand, the trial court is directed to correct the misstatement in the presentence report that defendant's convictions were by guilty plea.

SENTENCING AND PUNISHMENT -- Guidelines
-- Departure

People v Joshua Willis
Unpublished opinion of 06-03-08
(Court of Appeals #277653)
MLW #09-66730 (3pp)
PC: Davis, Murray, Beckering
JAMES B SCHLAFF

Affirmed convictions of felonious assault and felony firearm; vacated sentence of six months to four years in prison and remanded for resentencing.

The trial court erred by departing from the guidelines without stating a substantial and compelling reason for departure. The guidelines recommended a minimum sentence of zero to six months, requiring the imposition of an intermediate sanction, which does not include a prison sentence.

SENTENCING AND PUNISHMENT -- Guidelines
-- Scoring

People v Harry Jacob Walton
Unpublished opinion of 06-03-06
(Court of Appeals #276161)
MLW #09-66722 (4pp)
PC: Davis, Murray, Beckering
IN PRO PER

Vacated denial of motion for relief from judgment; remanded for further consideration of sentencing guidelines as applied to defendant's sentence of 40 to 60 years in prison.

The trial court erred by finding that the legislative sentencing guidelines did not apply because defendant was convicted of a second criminal sexual conduct offense, pursuant to MCL 750.520f, that provides for a mandatory minimum sentence of five years. The actual offense defendant committed was first-degree criminal sexual conduct; MCL 750.520f does not define an independent felony, but rather provides for sentencing enhancement. If defendant's minimum sentence under the guidelines would place the upper end at less than 40 years, defendant has established prejudice and good cause because the trial court failed to state a substantial and compelling reason for departure.

ECONOMIC PENALTIES -- Attorney Fees

People v Elliott Dale Reed
Unpublished opinion of 06-03-08
(Court of Appeals #278188)
MLW #09-66737 (2pp)
PC: Dais, Murray, Beckering
RICHARD W. GLANDA

Affirmed convictions of felon in possession of a firearm and felony firearm; remanded for reconsideration of order imposing attorney fees.

The trial court failed to consider defendant's financial circumstances before ordering reimbursement of attorney fees. Remand is required for reconsideration in light of defendant's current and future ability to pay.

PROBATION -- Revocation
-- Inadequate Notice of Charge
GUILTY PLEA -- Failure to Establish
Factual Basis

People v Donald Allen Holoweski
Unpublished opinion of 06-03-08
(Court of Appeals #278029)
MLW #09-66733 (2pp)
PC: Davis, Murray, Beckering
MADELAINE P. LYDA

Reversed conviction and sentence for probation violation.

Defendant did not receive notice of the probation violation sufficiently in advance of the hearing where the charges were suddenly changed during the hearing and defendant did not have the opportunity to consult with counsel before being asked whether he wanted to plead guilty.

The trial court failed to establish a factual basis to support the plea. The trial court merely asked defendant how he wished to plead to the allegation that he had left the courtroom at a prior hearing and failed to report thereafter, and defendant replied "guilty." Defendant's response was not a factual basis

elicited from defendant sufficient to permit a trier of fact to conclude that defendant was guilty.

CONFRONTATION -- Right To

People v Karrie Munlin, Jr.
Unpublished opinion of 06-05-08
(Court of Appeals #272019)
MLW #09-66748 (6pp)
PC: Saad, Murphy, Donofrio
JAMES C. HALL

Reversed conviction of first-degree criminal sexual conduct and remanded for evidentiary hearing.

The trial court may have violated defendant's constitutional right of confrontation when it prohibited him from asking the complainant about her history of schizophrenia. There is an insufficient record to determine whether the complainant's condition might impair her ability to perceive or recall particular events, or whether the trial court properly exercised its discretion in excluding questions about her mental history.

Judge Murphy, dissenting, saw no sound basis to remand.

PROBATION -- Revocation
-- Hearing -- Sufficiency of Evidence

People v Priscilla Kathryn Scroi
Unpublished opinion of 06-10-08
(Court of Appeals ##273366; 280678)
MLW #09-66769 (6pp)
PC: Zahra, Cavanagh, Jansen
ROBERT S. TOMAK

Affirmed conviction of third-degree child abuse; reversed conviction of probation violation.

There was insufficient evidence to conclude by a preponderance of the evidence that defendant violated her probation by having unsupervised visits with her child (the victim). Defendant testified that she had overnight visits but was never alone with the victim, and that she stopped the visits after having been told by her probation agent that she was violating probation by having overnight visits.

ECONOMIC PENALTIES -- Attorney Fees

People v Djuan Vincent Barnes
Unpublished opinion of 06-17-08
(Court of Appeals #278271)
MLW #09-66881 (2pp)
MEM: Davis, Murray, Beckering
SADO - CHRISTINE PAGAC

Affirmed conviction of larceny in a building and stealing a financial transaction device; remanded for hearing on defendant's present and future ability to pay attorney fees.

The trial court plainly erred by ordering defendant to pay court appointed attorney fees without any indication that it considered defendant's ability to pay.

ECONOMIC PENALTIES -- Attorney Fees

People v James Alonzo Lewis
Unpublished opinion of 06-26-08
(Court of Appeals #277755)
PC: Markey, White, Wilder
SADO - VALERIE NEWMAN

Affirmed convictions of criminal sexual conduct; vacated portion of judgment of sentence ordering defendant to pay attorney fees and remanded.

The trial court plainly erred by ordering defendant to pay $4050.00 in court appointed attorney fees without considering defendant's current and future ability to pay.

DEFENSES -- Insanity
DEFENSES -- Right To
CONTINUANCE/ADJOURNMENT

People v Jerome Corey Pahoski
Unpublished opinion of 06-17-08
(Court of Appeals #272906)
MLW #09-66844 (7pp)
PC: Gleicher, O'Connell, Kelly
MICHAEL SKINNER

Conditionally affirmed convictions of first-degree murder and felony firearm; remanded for psychological testing.

The trial court abused its discretion by denying an adjournment for necessary neuropsychological testing requested by defendant's forensic examiner. The trial court failed to articulate any reason for denying the request other than the firm trial date and the court's personal skepticism of the insanity defense. Defense counsel did not act negligently and sought no previous adjournments, and defendant was prejudiced by being prevented from presenting his insanity defense. On remand, the trial court must grant defendant an opportunity to have the testing done, and then determine whether a new trial should be granted.

Judge Gleicher, concurring in part and dissenting in part, would require the trial court to grant a new trial if defendant decides to present an insanity defense. The trial court should not be allowed to restrict defendant's right to present the defense based on the court's own interpretation of the neuropsychological test results.

Training Calendar

Complete details on the training events listed below appear at page 15 of this month's newsletter.

August 22 - 27, 2008	Trial Practice College	CDAM - Lansing, MI
September 18 - 20, 2008	Child Abuse Allegations	NCADRC - Las Vegas, NV
September 18 - 20, 2008	Drunk Driving Defense	NACDL/NCDD - Las Vegas, NV
October 3 - 5, 2008	Advanced Cross-Examination	NCDC - Atlanta, GA
October 9, 2008	Technology and the Law	MAACS - Grand Rapids, MI
October 16, 2008	Technology and the Law	MAACS - Lansing, MI
October 23 - 26, 2008	Fall Meeting	NACDL - Tampa, FL
October 30, 2008	Technology and the Law	MAACS - Troy, MI
November 13 - 15, 2008	Fall Conference	CDAM - Traverse City, MI
November 19 - 22, 2008	Annual Conference	NLADA - Washington, DC

Criminal Defense Newsletter

August, 2008
Volume 31, Number 11

Dawn Van Hoek, Director CDRC & Editor
Chari Grove, Associate Editor
Neil J. Leithauser, Associate Editor
Bill Moy, Layout & Word Processing
Maria Sanchez, Mailing & Subscriptions
John Powell, Web & Database

3300 Penobscot Building
645 Griswold
Detroit, MI 48226

(313) 256-9833
www.sado.org

Address Service Requested