Criminal Defense Newsletter

September - October, 2008
Volume 31, Number 12
Volume 32, Number 1

.

Features

Departments

Appellate Courts

Firearms Identification Reconsidered

2008 has been a bad year for firearms forensics. Highly publicized cases have exposed firearms examiners for mishandling evidence and testifying to results that were clearly wrong. In addition, a report from the National Research Council to the US Department of Justice has questioned the scientific basis of firearms identification itself.

This spring, several cases cast doubt on the integrity of the Detroit Police Department's firearms lab (DPD). In one shooting case, the lab misidentified a bagful of shell casings as having all been fired from the same weapon. Subsequent testing by a defense examiner indicated that at least two different rifles had been used; the private analyst's conclusions were later confirmed by the Michigan State Police (MSP) lab. [*Accuracy of crime lab is questioned*, Eric D. Lawrence and Ben Schmitt, Detroit Free Press, April 26, 2008]

In another case, the DPD lab claimed to have made an identification between a .40 caliber shell casing and test firings taken from the defendant's pistol. Careful review of the chain of custody proved that the questioned shell casing actually originated from an unrelated suicide. In fact, no shell casings had been recovered from the scene of the homicide in question. *People v Howard*, Wayne County Circuit Court, Case No. 08-1381-01, before the Hon. Patricia P. Fresard; ***Note: the Defendant was acquitted at trial.***

Panic in Detroit

On April 25, 2008, then-Police Chief Ella Bully-Cummings took the unprecedented step of ***shutting down the DPD firearms lab and suspending operations***. A random-audit program by the MSP was promulgated in an attempt to assess the scope of the problem. [*Police halt gun lab testing*, Doug Guthrie, The Detroit News, April 26, 2008]

A second closure of the DPD forensic lab was announced on September 25, 2008, by Detroit's new Mayor, Ken Cockrel Jr., and new Police Chief, James Barren. The MSP random audit of DPD firearms cases had turned up a ***10% error rate***. The audit report defined the errors discovered in the DPD lab tests as "Class I" inconsistencies . . . the type which includes ***false identification***:

> "The ASCLD/LAB [American Society of Crime Laboratory Directors/Laboratory Accreditation Board] defines three classes of inconsistencies as follows:
>
> "Class I: The nature and cause of the inconsistency rates immediate concern regarding the quality of the laboratory's work product. Examples of a Class I inconsistency may include an erroneous identification, false identification, or false positive.
>
> "Of the 33 adjudicated cases from the Wayne County Prosecutor's Office that were reanalyzed, ***3 exhibited Class I inconsistencies***." [*Detroit Police Department Firearms Unit Preliminary Audit Findings as of September 23, 2008*, Michigan State Police Forensic Science Division, page 3, *emphasis added*]

The MSP audit report concluded:

> "If this 10% error rate holds, the negative impact on the judicial system would be substantial, with ***a strong likelihood of wrongful convictions and a valid concern about numerous appeals***." [*Id*, *emphasis added*]

As shocking as these findings are, documentation of the DPD lab's Class I inconsistencies amounts to just the fine detail of the forensic firearms problem. 2008 has seen the very basis of firearms identification questioned within the scientific community.

The 2008 National Research Council Report

In 2004, the National Institute of Justice (NIJ) of the U.S. Department of Justice requested that the National Academies appoint a committee of experts to "assess the feasibility, accuracy and reliability, and technical capability of developing and using a national ballistic database as an aid to criminal investigations." The DOJ was considering an expansion of the role (and funding) for NIBIN, the national firearms database.

The National Research Council released its final Report in March, 2008. Part of the committee's assignment required an answer to the fundamental question of whether the markings left on fired bullets and shell casings are truly unique - whether they can be shown to have come from one weapon to the exclusion of all others. Following an exhaustive review of the scientific literature and validation studies, the Report concluded:

> "Accordingly, we believe it important to make the committee's finding clear and unambiguous:
>
> **Finding: the validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated**." [National Research Council (2008) *Ballistic Imaging* Committee to Assess the Feasibility, Accuracy and Technical Capability of a National Ballistics Database; Cork, D L, Rolph, J E, Meieran, E S and Petrie, C V, editors, Washington DC: The National Academies Press, page 81]

The fact that firearms markings are not necessarily unique is ***not*** news (although getting a firearms/toolmark examiner to admit this under oath has sometimes been a challenge). Firearms manufacturing techniques such as hammer-forging of barrels and polygonal rifling have rendered the identification of bullets fired from some weapons a practical impossibility:

> "The smoothness and subtlety of polygonal rifling can make it difficult to discern even gross features on recovered bullets—the shoulders defining lands and grooves—much less fine individual detail. Heard concludes that 'generally speaking it is possible, although extremely difficult, to match bullets from polygonally rifled barrels.'" [*Ballistic Imaging*, supra, at page 46, *reference omitted*].

The Glock struck one . . . and the rest escaped through forensic ambiguity

Glock pistols use hammer-forged barrels with polygonal rifling. They are of special significance because the .40 caliber Glock is the most widely-used police sidearm in the United States. It has been reported that some 60% of departments nationwide use Glocks of one caliber or another.

The advanced manufacturing techniques that helped make these weapons a commercial success have also left forensic examiners scratching their heads, and

scratching their barrels - literally. Firearms examiner Lucien C. Haag observed:

> "It is well known among firearm examiners that bullets fired from any of the various calibers of Glock pistols can seldom be matched back to the firearm from which they were discharged. This appears to be due to the mirror-like finish of the hammer forged polygonal bores in these pistols." [*Identifiable bullets from Glocks in 60 seconds*, Haag, L C; summary available online at: www.afte.org/TrainingSeminar/AFTE2003/Summaries/afte2003_wed.htm].

Haag developed a method to impart Glocks with a readily identifiable ballistic signature. He found that firing a bullet coated with a few drops of a silicon-carbide abrasive compound through a Glock "will produce fine striae the full length of the barrel . . . . [s]ubsequent test fired bullets discharged through treated Glock barrels are easy to match." The point here is that unless they are *scratched or damaged* in some way, Glock barrels are effectively indistinguishable . . . together with the bullets fired from them.

Subjectivity of firearms examination

Measured against the scientific rigor of forensic DNA typing, firearms examination comes up short. In addition to concluding that the reproducibility of firearms markings has not been fully demonstrated, the NRC Report also detailed the troubling ***subjectivity*** of this forensic *art*, specifically contrasting it with DNA:

> "Toolmark evidence and DNA evidence are markedly different in another crucial respect, which is the subjectivity inherent in the analysis.
>
> Ultimately, as firearms identification is currently practiced, an examiner's assessment of the quality and quantity of resulting toolmarks and ***the decision of what does or does not constitute a match comes down to a subjective determination based on intuition and experience***. By comparison, DNA analysis is practically unique among forensic science specialties as having a strong objective basis for determination and as being amenable to formal probability statements." [*Ballistic Imaging*, at pages 54-55, *emphasis added*].

This contrast between firearms examination and DNA is especially poignant. Not only are the reproducibility and uniqueness of firearms markings in doubt, forensic firearms examination lacks objective differential criteria to determine what even constitutes a "match" in the first place. It further lacks the ability to quantify the significance of its claims of association between pieces of evidence in statistical terms.

Daubert/FRE 702 admissibility rulings ***predating*** the release of the NRC Report exhibited a compromise response to the limitations inherent in firearms examination. While precluding testimony that the claimed match was "to the exclusion of every other gun in the world," courts have generally permitted evidentiary matches to be admissible. *United States v Green*, 405 F Supp 2d 104; US Dist 2005 LEXIS 34273; *United States v* Monteiro, 407 F. Supp. 2d 351; 2006 US Dist LEXIS 227; *United States v Diaz*, 2007 US Dist LEXIS 13152; *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 SCt 2786; 125 LEd2d 469 (1993)

This is consistent with commentary from the NRC Report:

> "*Conclusions drawn in firearms identification should not be made to imply the presence of a firm statistical basis when none has been demonstrated.*" [*Ballistic Imaging*, page 82].

This statistical caveat is of particular legal relevance in Michigan. In the context of forensic DNA, Michigan courts previously ruled that where a forensic "match" between pieces of evidence is not unique, a scientifically-valid estimate of the significance of the association must be available before the claimed results are admissible. *People v Coy*, 243 Mich App 283 (2000). The admissibility of firearms identification in Michigan may ultimately founder, not necessarily as the result of *Daubert* and MRE 702 scrutiny, but rather the principles articulated in *People v Coy*.

Recent developments make it clear that forensic firearms identification, an art dating back to the Nineteenth Century, requires serious legal and scientific reconsideration. The extent to which these techniques will survive to see a modern era is now up to the lawyers and courts.

by Brian Zubel
bzubel@comcast.net

Brian Zubel serves as the Defense Forensic Science/Legal Consultant in the several Wayne County criminal cases which brought the 2008 DPD lab scandal to light. In May, 2008, he presented a formal request to the US Attorney's Office and the Office of the Independent Monitor for the expansion of existing federal oversight over the DPD to include its crime lab operations. On September 23, 2008, he made a formal request to the FBI and MSP for the investigation of the DPD and its lab for perjury and falsification of test results. A 1984 graduate of the University of Michigan Law School, he belongs to the Jurisprudence Section of the American Academy of Forensic Sciences.

House Adopts Resolution Recognizing Constitution Day in Michigan

A number of Michigan House Representatives recently spoke up via resolution on the constitutional crisis facing the state's public defense system, adopting a resolution declaring September 17, 2008 as Constitution Day. The group included Reps. Condino, Accavitti, Amos, Ball, Bauer, Bieda, Brandenburg, Brown, Byrnes, Constan, Cushingberry, Dean, Garfield, Gillard, Green, Hammel, Hammon, Hansen, Hopgood, Horn, Rick Jones, Robert Jones, Lahti, Leland, Lemmons, Marleau, Meisner, Moss, Nitz, Palmer, Pastor, Pearce, Polidori, Proos, Sak, Scott, Shaffer, Sheltrown, Alma Smith, Spade, Tobocman, Vagnozzi and Valentine. Full text follows:

House Resolution No. 429.

A resolution declaring September 17, 2008, as Constitution Day in the state of Michigan. Whereas, We recognize the urgent need to uphold Michigan's constitutional obligation to provide for adequate public defense services for the state's adults and children; and Whereas, September 17, 2008, marks the 221st anniversary of the adoption of the Constitution of the United States of America by the Constitutional Convention in Philadelphia and is recognized today throughout our county, by our president and by our governor, as Constitution Day in America; and Whereas, In remembering the enduring importance of the Constitution, we also recognize our responsibility as citizens to respect and defend the values of our founding; and Whereas, The Sixth Amendment of the U.S. Constitution sets forth rights related to criminal prosecutions and guarantees that "…the accused shall enjoy the right to… have the Assistance of Counsel for his defense;" and Whereas, Today, as outlined in a recent study by the National Legal Aid and Defenders Association, Michigan is failing to meet its constitutional obligations to provide an adequate public defense for adults and children alike. It is one of only a handful of states with no statewide standard for monitoring trial level public defense services; and Whereas, The tragic stories of Michigan men like Eddie Joe Lloyd, Ken Wyniemko and Walter Swift, all incarcerated for crimes they did not commit and as a result of an inadequate defense provided them at trial, remind us vividly of the human price paid when our constitutional obligations go unmet; and Whereas, Scarce public tax dollars are misspent and the public's safety is put at risk when an inadequate defense puts the wrong person in jail and allows the real perpetrator to remain free; and Whereas, The time is now and the opportunity is here for Michigan to recognize the need for reform; now, therefore, be it Resolved by the House of Representatives, That the members of this legislative body declare September 17, 2008, as Constitution Day in the state of Michigan; and be it further Resolved, That we do hereby recognize the urgent need to uphold Michigan's constitutional obligation to provide for adequate public defense services for all state residents.

Public Defense Updates

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

The Michigan Campaign for Justice is in full swing this fall, following up the successful rollout of the National Legal Aid and Defender (NLADA) report on Michigan's trial level public defense system. The Campaign staff and volunteers are working with our partners, especially the State Bar of Michigan, examining how adequate statewide funding and national standards can be implemented in Michigan, meeting with key stakeholders, and keeping the media spotlight on the issue.

We want to particularly thank all of you who have taken an active role in the Campaign – from attending round table sessions, to speaking out in your communities or inviting Stephanie Chang or me to speak to a group, or to forward information, cases or suggestions.

You will continue to find ongoing excellent coverage of the media response to the report, Public Defense Task Force conference, and suggestions for assisting in the all-important task of coalition building at www.michigancampaignforjustice.org. If you have not yet signed up for E-Alerts about the progress of the Campaign, now is the time to do so, as events will start to move very quickly.

When you visit our website, please take time to check out the section for volunteering. We have listed some talking points for you to use when encountering candidates asking for your vote. We can't begin to tell you how important it will be for candidates to hear that public defense reform is an important issue for their constituents. Please help by being our eyes, ears and – if you can contribute more – our voice. Just get in touch with Stephanie Chang, Campaign Deputy Director, at schang@michigancampaignforjustice.org, if you would like more information about what you can do to support the movement for reform.

(continued next page)

The trouble with low-bid contracts

As events unfolded following the NLADA report release over the summer, a handful of local attorneys registered their objections to aspects of the report that criticized the growing use by cash-strapped counties of low bid flat fee contracts for public defense services.

Some attorneys who are providing the best possible services under these very difficult circumstances were understandably uncomfortable with the NLADA findings. Attorneys were forced to bid on contracts violating minimum national standards because the State of Michigan has failed to meet its constitutional duty to adequately fund indigent defense services. However, the State's dereliction of duty does not absolve counties from their obligations to provide defense services that meet national standards, nor does it remove the problems inherent in providing services under the terms of such contracts.

Flat fee contracts based primarily on cost considerations violate national standards on the effective provision of Constitutionally adequate counsel to indigent clients. Those standards are embodied in the American Bar Association's *Ten Principles for an Effective Public Defense Delivery System,* a set of standards that "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient high quality, ethical, conflict free representation to accused persons who cannot afford to hire an attorney. (The ABA Ten Principles and the State Bar of Michigan's Eleven Principles, identical, except for the addition of the 11th or "Michigan Principle," are available online under the Resources tab on the Campaign website.)

The Eighth Principle directs, "Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services."

The primary goal of fixed price contracting is not quality representation but limiting costs to counties. Flat fee, low bid contracts encourage attorneys to process cases quickly, to make up in volume what is lost in per case fees. Such contracts discourage attorneys from investigations, consulting experts or specialists, and/or from taking cases to trial.

That is why such contracts always create a conflict of interest between attorneys and their clients, in violation of well-settled ethical proscriptions compiled in the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services,* written by the NLADA and adopted by the ABA in 1985 (also on our website under Resources).

When counties take the lowest bidder in a fixed price contracting process, they are effectively making it clear that the highest priority is cost containment – not the constitutional obligation to the clients. Ironically, resulting system costs – wrongful convictions, sentencing errors, and increased recidivism – can make low bid fixed price contracts a penny-wise and pound-foolish proposition for local units of government.

David Carroll, lead researcher for the NLADA report, noted that Michigan was the first system in which the team of experts found the system devolving to flat rate low bid contracts, even as they were conducting their assessments.

We know that our counties are facing daunting realities. The unfunded mandate to provide indigent defense services shifts a vital, constitutional obligation onto local units of government ill-equipped to adequately fund, monitor and oversee compliance with national standards. While counties vary as to how they have met the challenge over the last 150 years, it is clear that they are now at the breaking point. It is long past time to lay the responsibility for funding trial level defense services at the door of the State of Michigan, where it has belonged all along.

The vast majority of attorneys are doing the best they can to discharge their constitutional obligations to the men, women and children they represent. However, rather than bristle at the conclusions of the NLADA report, we hope these competent attorneys, rendered less effective by the system they are forced to operate within, will join forces with the Campaign to ensure that the State provides adequate statewide funding and that national standards are implemented and enforced.

In the meantime, attorneys can urge their county officials to ensure that such contracts at minimum include standards regarding qualifications, training, caseloads and the use of investigators and expert witnesses.

Ethical county commissioners would never award a construction contract to a bidder – lowest or otherwise – that did not set certain standards for ensuring public safety. A public defense contract should be no different. Failing to ensure a quality public defense puts public safety at risk and leaves the county open to enormous liabilities.

Your feedback, comments, and anecdotes related to this article are welcome.

by Laura Sager
Director, Campaign for Justice
lsager@michigancampaignforjustice.org

A Sampling of Summer Successes

In recent months criminal defense attorneys in Michigan secured a number of successes; here are a few:

- Robyn Frankel and Mitch Ribitwer received the news in late August, 2008, that charges against James Perry would [finally] be dismissed. See the Spotlight article on Ms. Frankel in the July, 2008 Criminal Defense Newsletter, Volume 31, Number 10. http://www.sado.org/cdn/pdf/31cdn10.pdf.

- Timothy Corr won acquittals in a multi-count CSC1 prosecution in July, 2008 in Oakland County Circuit Court; the case involved a child complaining witness.

- William J. Maze won peremptory reversal from the Court of Appeals (People v Wyrybkowski, Docket No. 283673, decided 8/05/2008) from a trial court order precluding the defense expert from challenging a Horizontal Gaze Nystagmus test. http://coa.courts.michigan.gov/documents/coa/public/orders/2008/283673(18)_order.pdf.

- James Williams won suppression and dismissal in a minor in possession case [students in a dormitory] in August, 2008; the case implicated Fourth and Fifth Amendment rights.

- Dennis Shrewsbury brought a motion to show cause on police for failure to produce the in-car video/DVD in a pedestrian-walking-in-the-street gun case, and won dismissal in early August, 2008 from Wayne County Circuit Judge Boykin.

- Lisa Kirsch Satawa won a directed verdict of acquittal in a child abuse 4 and assault and battery prosecution in August, 2008. See the Spotlight article on Ms. Kirsch Satawa in the May, 2008 Criminal Defense Newsletter, Volume 31, Number 8. http://www.sado.org/cdn/pdf/31cdn8.pdf.

- Vincenzo Manzella won acquittals in a multi-count CSC1 prosecution in early September, 2008 in Macomb County Circuit Court; the case involved a child complaining witness.

- Steven ["the Gun Guru"] Howard won an acquittal in early September, 2008 in a Lansing Cedar Fest riot prosecution.

Well done!

by Neil Leithauser
Associate Editor

Circuit Court Opinion of the Month: Judge Rules Sexual Delinquent Life Sentence Not Mandatory

Defense attorney John D. Lazar brought a motion for "Correction of Sentence and/or Resentencing" challenging an amended judgment of sentence which, after prompting by the MDOC, Oakland County Circuit Judge Nanci J. Grant had issued to impose a life maximum sentence for the defendant's sexually delinquent person conviction. The defendant initially pled guilty to aggravated indecent exposure and sexually delinquent person* and received a sentence including jail time as part of a five-year term of probation. After a probation violation, Judge Grant held that the statutory guidelines** applied to the offenses and sentenced the defendant to a prison term of 27 months to ten years. The MDOC later advised Judge Grant that a life maximum was required, and Judge Grant subsequently issued an amended judgment of sentence imposing a life maximum.

The prosecution not only opposed Mr. Lazar's motion, but also argued that the original sentence, in March, 2007, was invalid under the statutory amendments effective February, 2006, and that a sentence of one day to life was required. Mr. Lazar argued that MCL 777.16q, as amended and effective August 24, 2006, specifically made the indecent exposure and sexually delinquent person sections subject to the sentencing guidelines. Judge Grant held that the amendments did not divest the court of sentencing discretion because mandatory language (such as "shall") was not in the statutory amendment. Judge Grant further held that the Court could impose minimum and maximum sentences within the range specified by the statute, i.e., between one day and life, and reinstated the original ten-year maximum term. The prosecution has not appealed. *People v Charles Grant Wilson*, 2006-212020-FH, 02/07/2008.

by Neil Leithauser
Associate Editor

*MCL 750.335a and 750.335(a)(2(c). http://www.legislature.mi.gov/documents/mcl/pdf/mcl-750-335a.pdf.

**MCL 777.16q. http://www.legislature.mi.gov/documents/mcl/pdf/mcl-777-16q.pdf.

ABA Endorses Changes to Federal Rule of Criminal Procedure 32

During its annual meeting in August, 2008, the American Bar Association proposed changes to the federal rules [FRCP 32] to allow defense attorneys the same access as the government to information given to probation officers. The suggested language is: "[a]ny party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer." Additionally, if oral information is given to the probation officer [other than by the defendant] the probation officer must provide to the parties a written summary of the information.

Source: Criminal Law Reporter, 8/13/2008, p. 720.

From Our Readers: Five Suggested Reforms for Eyewitness Identification Procedures

An August 24, 2008, Detroit Free Press article written by Professor David A. Moran and Kenneth Wyniemko, "Reform procedures so innocents aren't convicted," proposed five simple reforms which could improve the accuracy of identification procedures. Professor Moran is co-director of the Michigan Innocence Clinic at the University of Michigan Law School; Mr. Wyniemko, who had been wrongly convicted and imprisoned for nine years for a rape and armed robbery, was ultimately exonerated through DNA evidence.

The five suggested reforms are:

- the person running the lineup should not also be involved in the criminal investigation, and should not know which of the participants is the suspect;
- the witness should be told that the suspect may not even be in the lineup;
- the lineup participants should be viewed one at a time, rather than in a group;
- if an identification is made by the witness, the witness should immediately be asked how confident the witness is in that identification; and
- the entire lineup proceeding should be visually recorded.

Our thanks to Washtenaw Public Defender Lloyd E. Powell for forwarding the article to the SADO Forum.

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

Technical Tips: Power Your Electronic Devices from Your Computer

Are you frustrated with all the different types of adapters, converters or chargers for all of your electronic devices? I have often wondered when someone would invent a USB adapter that could recharge different devices from iPods to cell phones to Blackberries to digital cameras. Ecosol has developed the *Powerstick* that can free you from the chargers and allow you to recharge from any USB port anywhere, at any time.

To learn more about the *Powerstick*, see www.powerstick.com/catalog/.

by John Powell,
CDRC Webmaster
John@sado.org

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

Spotlight On: Christine Grand

Christine, you are an experienced trial lawyer in major felony cases, a board member of the Wayne County Criminal Advocacy Program (CAP), a Director-at-Large of the Wayne County Criminal Defense Bar Association, and a busy mother of four young children. Could you please describe your practice, including the types of cases that you handle?

I practice only criminal defense in state court. I do felonies and misdemeanors, and I handle a lot of traffic tickets, including a lot of CDL [Commercial Driver's License] tickets. After 5 ½ years at the Wayne County Defenders Office, I found I loved the work too much to leave and went out on my own in June of 2000.

Please describe an interesting case you were involved in; what were the main issues?

To help a fellow colleague, I substituted in right before trial in a case involving a nurse that was charged with absconding on bond from a homicide case that several members of the Forum were involved in. Since the trial date on the homicide had been adjourned and sent to a different judge, on a different date in a different building, the issue was knowledge of the new trial date and location.

Anything unusual or novel about either the prosecution or defense theories?

The prosecution endorsed and was allowed to call both of the defendant's homicide defense attorneys, over their objections of attorney-client privilege, regarding defendant's knowledge. They were both threatened with contempt and immediate incarceration. Our defense was the prosecution could not prove defendant had actually been given notice before the trial date of the new date, location and judge. Despite the admission that defendant knew he was being arrested for his failure to appear at trial, he was still found not guilty in under 10 minutes. Because I dug through the court files (they were enormous), I was able to show that the court mailed him notice of the capias, and therefore the knowledge could have come after the fact and the acknowledgment made when he was arrested was not evidence of knowledge when he missed his trial date.

Were experts needed? If so, what kind of expert testimony was involved?

I called one expert, a supervisor in the clerk's office and a former clerk in Frank Murphy Hall of Justice for 15 years, to explain to the jury what should have been done originally to give the defendant notice, and to explain all of the documents that should have been in the file, but were not. I also introduced nine separate exhibits, all court records or examples of court records, pulled from the file. Introducing that number of exhibits is quite unusual for me.

What did you learn from the case?

Thorough pre-trial interview of the prosecution's witnesses will stop you from uncovering what you do not want to find out during trial. Also, a lot of evidence introduced by the prosecution is a two-edged sword, and the People generally miss that fact. Seizing on one small piece of evidence and turning it against them can many times be fatal to the prosecutor's case.

Any suggestions that you would make to other defense attorneys?

Don't give up when they don't give you what you want, even where there is a confession. Some of the fastest not guilty verdicts I have had have been with "full confessions" and where the prosecution asks me, "Why are you bothering with a trial, they confessed?"

Any advice to newcomers?

Don't be afraid to lose. Winning always feels better, but Neil Fink always told me, "If you don't lose any cases, then you aren't trying any cases." As soon as you start pushing back, trying cases and making them work, the better deals your clients are offered, in my opinion.

You have represented several defense lawyers (as clients!) in some traffic matters. Are there any hints or suggestions you can share about handling traffic cases?

Do not be afraid to come back if they don't give you what you want the first time. They may forget they said "no" the last time; the cop may not appear; someone else more reasonable may appear representing the city the next time; or you may just wear them down. Let's be honest, they don't really want to do a two-hour hearing with a criminal defense attorney who can ask hundreds of variations of the same two or three questions.

Also, keep a copy of the Offense Code Index for traffic violations (you can download it from the Secretary of State website) in your briefcase if you do traffic tickets. Many city attorneys and their cheat sheets are wrong as to what points offenses carry (an example being the cheat sheet in 35th District Court in Plymouth).

by Neil Leithauser
Associate Editor

Link to Offense Code Index: http://www.michigan.gov/documents/OffenseCode_738777_7.pdf.

DUI Defense Column: Michigan Court of Appeals Says Heidi's Law Not Ex Post Facto

On January 3, 2007, Governor Granholm signed into law legislation [known as "Heidi's Law"] that removed the 10-year "look back" period for all prior drunk driving offenses. Since this time Michigan's prosecutors have applied the new law to create felonies using priors that are sometimes many decades old. The defense bar's response has been to contest the enhancement by routinely filing motions based on a variety of legal theories. Although these motions had met with little success, the hope remained that the courts would redress this perceived injustice created by the legislature. Those few motions that did meet with success were appealed, and for the many months that the appeals were pending, the defense bar held its collective breath.

On August 19, 2008, in a published opinion,[1] the Court of Appeals found that the law was constitutional as written. Soon afterwards, the defense bar let out its disaffected exhale. It just seemed so clear that the new law was unjust. But on second thought this new opinion could easily be understood when set next to the long list of recent cases that all seem to create unjust precedent.

In *Perkins* the two cases that were before the Court of Appeals had the defendants arguing that the law was unconstitutional for three reasons:

1. It violated the rule prohibiting the *ex post facto* application of laws;
2. It was not intended to include prior convictions that were time-barred when the statute was passed, based on statutory construction; and
3. It violated a defendant's right to due process.

In summary, the *Perkins* panel disagreed with the defendants' arguments, and found that there was no constitutional violation because the new law neither punished acts committed before its effective date, nor did it make the punishment for the new crime more burdensome after it was committed. Also, the new law did not deprive the defendant of any defense.[2] Finally, the court found that use of prior convictions, specifically those that are more than 10-years-old, was not time-barred.[3]

Webster's defines "justice" as "the assignment of merited rewards or punishments"[4]. One way to think about the Court's *Perkins* opinion, then, would be to ask whether or not there is "merit" to enhancing the punishment of a new drunk driving offense using prior convictions that are twenty, thirty or even forty years old? It would appear that the Michigan Court of Appeals made the public policy determination that there is merit to such enhancement, and then interpreted the precedent accordingly.

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 Defending 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 knowledge 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.

Endnotes

1. *People v Perkins,* NW2d , 2008 WL 3852048 (Mich App).
2. Quoting *Dobbert v Florida,* 432 US 282, 292-293; 97 SCt 2290; 53 LEd2d 344 (1977).
3. *People v Russo,* 439 Mich 584; 487 NW2d 698 (1992).
4. http://www.merriam-webster.com/dictionary/justice.

In a Manner of Speaking . . .

Reminds us of the perennial "what do women want?" question:

COURT: So, he was convicted of two different crimes based upon the same evidence?

PROSECUTOR: Correct.

COURT: And, that's okay?

PROSECUTOR: Correct.

COURT: What does double jeopardy mean, then?

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.

Some Surveillance News

Indian brain-scan technology used in criminal trial to get conviction

A September 15, 2008, New York Times article from Anand Giridharadas, reporting from Mumbai, India, described how India was the first country to convict someone of murder in part on the basis of brain scanning technology. The scanner is said to produce images of the human mind in action and can reveal if the person remembers details of a crime. The judge found that the scan revealed the defendant's brain held "experiential knowledge" about the crime. The defendant maintains her innocence.

In the United States there have been some attempts, usually by defense counsel, to utilize the technology, but in attempts to show a defendant's mental impairment or innocence [see *Harrington v Iowa*, 659 NW2d 509 (Iowa 2003), wherein the Iowa Supreme Court reversed a murder conviction, the admissibility of a 'brain fingerprinting' scan was upheld, and the scan evidence was used to support the defendant's innocence and alibi].

Sources:
http://www.nytimes.com/2008/09/15/world/asia/15brainscan.html?_r=1&scp=6&sq=brainscan&st=cse&oref=slogin and http://www.brainwavescience.com/IowaSupCourtPR.php.

Search and Seizure Guidelines for Border Agents Eased

In July, 2008, federal guidelines for document searches by border agents were eased and reasonable suspicion to detain materials, and probable cause to seize and copy them, was no longer required. A September 23, 2008 article by Ellen Nakashima of the Washington Post, reprinted by the Detroit News September 25, 2008, noted that the July, 2008 changes allow documents and electronic devices to be detained for an unspecified period of time, and allows agents to copy data from books, documents, and laptop devices without probable cause. The new guidelines changed the former rule, from 1986, which required probable cause before material could be copied.

Sources: Detroit News article: http://www.detnews.com/apps/pbcs.dll/article?AID=20088 09250333 and Washington Post article: http://www.washingtonpost.com/wpdyn/content/article/20 08/09/22/AR2008 092202843.html.

Homeland Security 'pre-crime detector' project

A September 23, 2008, article in the New Scientist Magazine by Paul Marks, technology correspondent, described the Future Attribute Screening Technologies (FAST) program [formerly called Project Hostile Intent] in the Department of Homeland Security)(DHS) as a means to discover persons that should be questioned. The subject walks through an area of sensors, including cameras and eye-safe lasers, and readings are obtained on pulse and breathing rates, skin temperatures, and fleeting facial expressions. DHS science spokesman John Verrico was quoted in the article as saying the testing was "running at about 78% accuracy on mal-intent detection, and 80% on deception." The technology was installed in a trailer to make it mobile, so that a screening unit could be moved to and utilized at "any sports or music event as required" [as well as to air, sea and land ports].

Sources:
http://www.newscientist.com/blogs/shortsharpscience/2008/09/precrimedetectoisshowingp.html and DHS descriptive pamphlet: http://www.homelandsecurity.org/StakeholdersMay07/Br40_Burns.pdf.

British traffic cameras capture all miles driven; info retained five years

It was reported by Paul Lewis in a September 15, 2008 article in *The Guardian* that British police have a plan to map all of the travels of drivers on major roads through a network of roadside automatic number plate recognition (ANPR) cameras, and comparable police cruiser and helicopter cameras; the data would be stored for five years. The cameras have the capability to read 50 million plate numbers each day, and the movements of the drivers could as a result be reconstructed by police. The database will be able to store information on 18 billion license plates when fully implemented by January, 2009. Police authorities cited a "strong link between illegal use of motor vehicles on the road and other types of serious crime." Police are instructed to "fully and strategically exploit" the database.

Source:
http://www.guardian.co.uk/uk/2008/sep15/civilliberties.police.

by Neil Leithauser
Associate Editor

Practice Note: Record Retention

Attorneys are reminded that Michigan Rules of Professional Conduct (see Sources below), require that they have a written policy concerning retaining files and record retention. Materials which have legal significance (e.g., originals of wills, deeds, etc.), and all materials provided by the client must be maintained for at least five years, and cannot be destroyed without first being offered to the client. All other materials are property of the lawyer and may be destroyed without notice to the client and at any time; the client maintains a right to access to materials that are kept.

Thanks to attorney Tom Loeb for the following suggested language, perhaps for use in fee agreements or early correspondence:

> RECORD RETENTION POLICY: It is the policy of this office to destroy or dispose of files maintained in representation of a client at any time within my discretion five years after the date that representation ends. If you desire to obtain the file, or any papers, documents, or exhibits contained in the file, you must make a written request to me within that five year period. Copies of any portion of your closed file(s) will be provided at your expense.

Additionally, the following excerpt is from a sample fee agreement provided on the State Bar website:

> All of your original client materials will be returned to you, or you will have an opportunity to retrieve your original client materials, immediately upon the conclusion of the representation. If you do not pick up your original client materials within 12 months of receiving the notice that they are available, they may be destroyed without further notice to you. Your file may be destroyed by _____ [*month*] of 20___ without further notice to you. If any notification is sent to you, it will be to the last current address we have on file for you.
>
> You may obtain a copy of your file, not including the attorneys' and legal assistants' personal notes and memoranda, at a charge of ___ cents per page in addition to a retrieval fee of $_____.

Sources: Record Retention Kit from the State Bar: http://www.michbar.org/opinions/ethics/RecordRetention/ and State Bar Record Retention Plan article (with checklist): http://www.michbar.org/pmrc/articles/0000105.pdf

New Services, New Subscription Year

October 1st marks the beginning of a new subscription year for SADO's Criminal Defense Resource Center (CDRC), our 32nd year of supporting the criminal defense community in Michigan. From modest beginnings (a brief bank organized on 3 x 5 cards), we've developed a wide range of services essential to anyone practicing criminal law. Since the CDRC is part of a state agency, and receives grant funding, these services are available at low cost.

New for 2008-09 is the CDRC's Defense Wiki, an online collection of user-driven information about Michigan courts. We've set up a template for each jurisdiction that will allow subscribers to add information about local practices, rules, forms, and attorneys practicing in that court. A great way to check before you go, or put yourself out as a local practitioner!

Also new is the segmenting of our very popular listserv, the Forum. Available to subscribing criminal defense attorneys, the Forum will have three message groups; general, drunk driving defense, and off-topic. Get it all, or limit your intake, still a great way to stay connected with your colleagues.

The CDRC also is expanding certain collections (transcripts of expert witness testimony), adding an online trial practice manual, and improving the functionality of form motions. These enhancements, and the new services, join the tools already in the CDRC toolbox: the four-volume Defender Books, trial and appellate brief bank, summaries of appellate court decisions, research assistance (help@sado.org), monthly Criminal Defense Newsletter, and over a dozen technology training events each year.

There is no better support for an effective, and cost-effective, criminal defense practice! Built upon the foundation of a vibrant law office, the State Appellate Defender Office, the CDRC has the expertise to analyze and present the information and training you need. Because the services are web-based, you have access 24/7, whenever you have to research a legal question, draft a legal document, or consult with the 600+ Forum members.

Use the enclosed order form to subscribe, or go to the CDRC's award-winning web site, www.sado.org.

Sentencing Project Report on Expanding the Vote

A report examining felony disenfranchisement reform in 19 states was released by the Sentencing Project on September 25, 2008. The report, written by policy analyst Ryan S. King, noted a national momentum for reform of restrictive voting laws, and in the years between 1997-2008 an estimated 760,000 people had regained the right to vote.

Nineteen states* [Michigan was not one] amended felony disenfranchisement policies. Nine states repealed or amended lifetime disenfranchisement provisions; two states expanded rights to persons under supervision [parole and probation]; five states eased the process for those who have completed sentence requirements; and three states improved information sharing.

In Michigan, a person who has been legally convicted and sentenced to jail or prison may not vote during the period of confinement. MCL 168.758b. The right is restored upon release. Registration is foreclosed during a period of jail confinement, as well. MCL 168.492a.

An estimated five million people still are expected to be disenfranchised from voting in the November, 2008 elections, including an estimated 4 million under sentence or supervised status in those states with prohibitions on voting due to the felon status.

The report examines the changes in each of the 19 states, as well as describing the disenfranchised populations; that is, whether the state prohibits those from voting who are in prison, on probation, parole, or in post-sentence status. Additionally, disenfranchise-ment rates are provided for each state both for the total percentage disenfranchised, and the rate for the African American population disenfranchised in that state. The disparities between the two rates are significant. Some examples are illustrative: in Alabama, the total disenfranchisement rate is 7.37%; for African Americans the rate is 15.3%. In Connecticut, the total rate is 0.86%; for African Americans the rate is 6.72%. In Florida the total disenfranchisement rate is 9.01%; for African Americans the rate is 18.82%. In Hawaii the total rate is 0.68%; for African Americans the rate is 1.71%. In Iowa the total rate is 4.77%; for African Americans the rate is 22.7%. The disenfranchisement rates average out to one of every eight adult African American males being ineligible to vote.

Mr. King reported that public opinion surveys show that 80% of Americans support voting rights for persons who have completed their sentences, and two-thirds support voting rights for persons on probation or parole.

*Alabama, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Nebraska, Nevada, New Mexico, North Carolina, Rhode Island, Tennessee, Texas, Utah, Virginia, and Wyoming

Sources: "Expanding the Vote, State Felony Disenfranchisement Reform, 1997-2008": http://sentencingproject.org/Admin/Documents/publications/fd_statedisenfranchisement.pdf. Art. II, §2: http://www.legislature.mi.gov/documents/mcl/pdf/mcl-Article-II-2.pdf. MCL 168.492a: http://www.legislature.mi.gov/documents/mcl/pdf/mcl-168-492a.pdf.

Study Examines Lack Of Standards for Appointing Counsel

A nationwide study released in September, 2008, by the Access to Justice Project at the Brennan Center for Justice at New York University School of Law considered current national standards, national practices, case law, and views of assigned defenders [public defenders, assigned and contract counsel] from 61 jurisdictions in 28 states, Guam, and a sovereign Indian nation, in an examination of procedures and processes used for determining an accused's eligibility for assigned counsel. The report writers found a "disaster" and a lack of uniform standards and criteria. The report presented "an easy-to-follow blueprint" for a screening process that would meet the demands of the Sixth Amendment, be flexible enough for different jurisdictions to adapt to their particular needs, and conserve tax dollars.

Six recommendations were described: 1) screening to ensure that only those individuals unable to afford their own lawyers receive assigned lawyers. Effective screening would focus limited resources to those actually in need and reduce public backlash against the public defense system over concern that tax money was being spent on wealthy defendants; 2) communities should establish written, uniform screening criteria, to reduce disparate treatment; 3) communities should protect the screening process from conflicts of interest, and the screening should be done by a person or entity not directly involved in a particular case; that is, the presiding judge, the particular defense counsel, and the prosecutor should be excluded from the eligibility for counsel determination; 4) the screening process should compare the individual's actual available income and daily living expenses (including food, housing, clothing, medical, child care, and transportation expenses, and also considering and subtracting the value of any debt owed by the individual) to the actual cost of retaining private counsel (including necessary investigative and expert assistance); 5) a rebuttable

presumption of eligibility should be applied to those individuals receiving public benefits, incarcerated, residing in mental health facilities, or who have income below federal poverty guideline levels. A more streamlined process would be more efficient and cost-effective; and 6) procedural protections must be estab-lished to protect confidentiality of information obtained in the screening process. For example, an accused should not be forced to choose between the Sixth Amendment right to counsel and the Fifth Amendment right against compelled self-incrimination.

Sources: http://brennan.3cdn.net/c8599960b77429dd22_y6m6ivx7r.pdf. Michigan was referenced in the report only in passing; for a more detailed look at the public defense system in Michigan, review the June, 2008 National Legal Aid & Defender Association report Evaluating Trial-Level Systems in Michigan: http://michbar.org/publicpolicy/pdfs/indigentdefense_report.pdf.

Summarized in the July, 2008 Criminal Defense Newsletter, Volume 31, Number 10: http://www.sado.org/cdn/pdf/31cdn10.pdf.

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.

Illusory plea offer

The defendant is entitled to plea withdrawal where the agreement to dismiss the habitual offender notice was illusory and the guilty plea was rendered involuntary under the state and federal due process clauses. **BB 10721**.

Delay in executing probation violation warrant

The court lost jurisdiction to proceed against the defendant where the probation revocation warrant was issued after the term of probation had expired. And, the defendant is entitled to discharge and release from his sentence where Macomb County authorities delayed in executing the probation violation warrant from February 2007 through January of 2008. **BB 10717.**

Late fees

The defendant asks the trial court to waive the 20% late fee. **BB 10717**.

Innocence assertion considered at sentencing

The defendant must be resentenced where the trial court violated his constitutional right against self-incrimination by increasing his sentence because he maintains that he is innocent. **BB 10724.**

Irrelevant evidence

The trial court committed plain error entitling the defendant to a new trial in admitting evidence regarding the lack of sexual relations between him and his wife. The trial court also committed plain error entitling defendant to a new trial in admitting evidence regarding a practical joke played on the complainant for his fourteenth birthday. The complained-of evidence was irrelevant, MRE 401, MRE 402. Further, any probative value of this evidence was substantially outweighed by the danger of unfair prejudice, MRE 403. Alternatively, the defendant is entitled to a new trial because his attorney's failure to object to the admission of this evidence deprived him of his state and federal constitutional rights to the effective assistance of counsel. **BB 10729**.

Coerced guilty plea

Due process entitled defendant-appellee to withdraw his guilty plea where defense trial counsel had frightened defendant-appellee into pleading guilty, and defendant-appellee attempted to withdraw his plea before sentencing. **BB 10720**.

False allegations of sexual assault

The defendant was denied due process when an expert witness testified that it is rare for children who have been touched to make false allegations of sexual assault. The prosecutor wrongfully argued that the expert's testimony was evidence of defendant's guilt, and defense counsel was ineffective for failing to object to the testimony of the witness and the arguments of the prosecutor. **BB 10723.**

Reasons for guidelines departure

The trial court failed to give any substantial and compelling reasons for a guideline departure which sent this pregnant teenager to prison to give birth and then be separated from her newborn. **BB 10728**.

Sexual delinquency sentencing

The trial court's determination that defendant would be sentenced subject to the enhanced sentence provisions of the sexual delinquency statutes was not determined in accordance with statutory requirements, violating defendant's state law and due process rights under US Const, Ams VI, XIV; Const 1963, Art 1, §§17,20. **BB 10727**.

Admission of uncharged bad acts

The trial court violated appellant's due process rights by admitting unfairly prejudicial evidence of an uncharged alleged abduction not involving criminal sexual conduct, and by mentioning the previously dismissed charge of sexual penetration while HIV-infected with an uninformed person. **BB 10718**.

Evidence mis-handled in crime lab

Due process requires a new trial based on newly-discovered evidence that the Detroit Police Crime Laboratory may have mishandled the biological evidence in appellant's case. **BB 10718**.

Influence of ID witness

The police violated appellant's due process rights by improperly informing the complainant that she had picked out the "wrong" house as the location where the incident allegedly occurred; furthermore, defense trial counsel was constitutionally ineffective in failing to move for suppression of the complainant's trial testimony. **BB 10718**.

From Other States

Kansas: Changes to Juvenile Justice Code Gave Rise to Right to Jury

The Kansas Supreme Court held that minors prosecuted under Kansas's Juvenile Code have a Sixth Amendment right to a jury trial. The Court decided that the protections afforded by the state's juvenile justice system have eroded over the past two decades to such an extent that affording juveniles only bench trials will no longer be adequate. The Court stated that the "paternalistic protections" previously accorded juveniles, that distinguished the juvenile system from the adult system, had been removed, making the availability of the jury-trial right essential. In re L.M., ___ Kan ___; 186 P3d 164 (2008); full text at http://pub.bna.com/cl/96197.pdf.

Ninth Circuit: Notice of Intent to Depart from Federal Guidelines Range

Federal sentencing judges are still required to give notice of intent to "depart" from the U.S. Sentencing Guidelines range, even though the U.S. Supreme Court held that they do not have to give notice of plans to deviate from the guidelines altogether, according to the Ninth Circuit Court of Appeals. The Court stated that the Supreme Court case, Irizarry v United States, ___ US ___; 128 SCt 2198; 171 LEd2d 28 (2008), did not control the result in the case before it because the district court did not sentence at variance from the recommended guidelines range based on the statutory sentencing factors, but departed as the term was used before United States v Booker, 543 US 220 (2005). United States v Evans-Martinez, 530 F3d 1164 (CA9, 2008); full text at http://pub.bna.com/cl/0510280a.pdf.

Colorado: Fair-Cross-Section Jury Challenge

The Colorado Supreme Court held that no type of statistical measure is off-limits to a defendant seeking to make out a prima facie case that his jury was chosen in violation of the Sixth Amendment's fair cross-section requirement. The defendants in two cases claimed that Native Americans and African Americans were underrepresented on their juries. The Court decided that no specific statistical measure should be excluded in a court's analysis of a fair-cross section claim. The United States Supreme Court has never expressly prohibited the use of statistical measures other than absolute disparity and comparative disparity, the Court reasoned. However, the Court concluded that the underrepresentation of the two minority groups called for jury service did not make out a prima facie Sixth Amendment violation. Washington v People, ___ Colo ___; 186 P3d 594 (2008); full text at http://pub. bna.com/cl/07sc614.pdf.

Kansas: Misrepresentation by Agent Made Confession Involuntary

The Kansas Supreme Court held that a confession given by a defendant who was not in custody was made involuntary by a government agent's misrepresentation of the purpose of the interview that produced it. The Court noted that the defendant had counsel, and had the defendant known that the agent was conducting a criminal investigation, she would not have agreed to the interview without her lawyer's presence. Moreover, the court stated, the defendant mistakenly believed that the criminal investigation had come to a close and that the agent's investigation was merely administrative. Under these circumstances, the agent's misrepresentation rendered the statement involuntary, concluded the Court. State v Morton, ___ Kan ___; 186 P3d 785 (2008); full text at http://pub.bna.com/cl/97848.pdf.

Connecticut: Reach of Kidnapping Statute Limited

The Connecticut Supreme Court reversed its prior caselaw that interpreted the state's kidnapping statutes to allow a conviction when the restraint involved in the commission of the kidnapping was merely incidental to the commission of a separate underlying offense against the victim. The Court adopted instead the "modern" view taken by most other states and held

that to commit a kidnapping in conjunction with another crime, a defendant must intend to restrict the victim's freedom for a longer period of time or to a greater degree than that which is necessary to commit the other crime. The Court concluded that the state legislature intended to exclude from the scope of kid-napping the confinement of a victim that is merely inci-dental. State v Salamon, 287 Conn 509; 949 A2d 1092 (2008); full text at http://pub.bna.com/cl/17610.pdf.

Second Circuit: Finagling Timing of Stock Transaction Was Not "Deceptive"

The government failed to prove that a specialist at the New York Stock Exchange violated a section of the Securities Exchange Act when he arbitraged buy and sell orders to generate more than 4.5 million in illegal profits for his firm, according to the Second Circuit Court of Appeals. The statute in question prohibits the use of any "manipulative or deceptive device or contrivance" in connection with the purchase or sale of securities. The Court held that, although the defendant's practice of "inter-positioning" violated NYSE rules, it did not involve the type of deception required to obtain a conviction under the Securities Exchange Act. United States v Finnerty, 533 F3d 143 (CA2, 2008); full text at http://pub.bna.com/cl/071104.pdf.

Third Circuit: Law Designed to Protect Kids from Online Porn Ruled Unconstitutional

The Third Circuit Court of Appeals held that the federal Child Online Protection Act, aimed at shielding minors from access to pornography on the Internet, facially violates the First and Fifth Amendments. The Court found that the government's interest in children's well-being is compelling, but that the statute is not narrowly tailored to achieve that purpose. There was nothing in the statute to limit its application solely to commercial pornographers or to limit the phrase "material that is harmful to minors" to include material that only is harmful to older minors. The COPA also does not employ the least restrictive alternative to advance the government's compelling interest. American Civil Liberties Union v Mukasey, 534 F3d 181 (CA3, 2008); full text at http://pub.bna.com/cl/072539.pdf.

Third Circuit: Depiction of Animal Cruelty Constitutes Protected Speech

The federal statute that criminalizes the creation, sale, or possession of depictions of animal cruelty violates the First Amendment, held the en banc Third Circuit Court of Appeals. The primary purpose of the statute was to prohibit the sale or possession of "crash videos," a type of pornography that involves the depiction of women torturing small animals by crushing them with their high-heeled shoes. In order to uphold the statute, however, the Court concluded that it would have to invent a new category of unprotected speech, and decided that it should not do so. The Court rejected the government's argument that depictions of animal cruelty are analogous to the images of child pornography. The Court concluded that the statute serves no compelling state interest, is not narrowly tailored to achieve any such an interest, and does not provide the least restrictive means to achieve a compelling state interest. United States v Stevens, 533 F3d 218 (CA3, 2008); full text at http://pub.bna.com/cl/052497.pdf.

Washington: Arresting Everyone in Vehicle Violated State Constitution

The Washington Supreme Court held that a police officer's detection of the odor of marijuana emanating from a vehicle with multiple occupants did not provide probable cause under the state constitution to arrest all of the occupants. The Court found the sate constitution more protective than the Fourth Amendment, and held that, unless the police can clearly associate a crime with a particular person, all the occupants are to remain "free from unnecessary police intrusion." The Court stated that "The protections of [the state constitution] do not fade away or disappear within the confines of an automobile." State v Grande, ___ Wash ___ (#81068-1, 7-17-08); full text at http://pub.bna.com/cl/sc810681.pdf.

EDNY: Convicts Have Constitutional Right to Court-Ordered DNA Test

The Due Process Clause's protection of a prisoner's liberty interest in "meaningful access to existing executive mechanisms of clemency" entitles him to access to evidence for DNA testing, according to the U.S. District Court for the Eastern District of New York. The Innocence Project was going to pay for the test. The Court found that the state's decision to prevent a prisoner from obtaining evidence of innocence of unimpeachable reliability that is sufficient to undermine confidence in the outcome of the trial does not literally bar the prisoner from making a plea for clemency, but it "so effectively thwarts his plea as to deny him meaningful access to the clemency mechanism." McKithn v Brown, ___ FSupp2d ___ (EDNY, #02-CV-1670 (JG)(LB), 7-21-08); full text at http://pub.bna.com/cl/020167043.pdf.

Ninth and First Circuits: Identity Theft Law Requires Proof Defendant Knew ID Belonged to Real Person

The Ninth and First Circuit Courts of Appeals held that the federal statute that defines the crime of aggravated identity theft as the unauthorized use of a "means of identification of another person" requires proof that the defendant knew the bogus identifying

information belonged to an actual person. The terms of the statute could plausibly be read to require knowledge only of the transfer, possession, or use of a means of identification, but both Courts reasoned that ambiguity in the statute requires application of the rule of lenity. United States v Miranda-Lopez, 532 F3d 1034 (CA9, 2008) and United States v Godin, 534 F3d 51 (CA1, 2008); full text at http://pub.bna.com/cl/0750123.pdf and http://pub.bna.com/cl/072332.pdf.

Second Circuit: Prisoner's Excessive-Force Lawsuit Did not Render Psychiatric Records Non-privileged

The Second Circuit Court of Appeals held that a prison inmate's disavowal of any claim for mental or emotional injury in an excessive-force civil rights action against prison guards precludes the courts from compelling him to disclose his mental health records to the defendants. The Court decided that the prisoner did not waive his psychotherapist-patient privilege when he testified during a deposition about his communications with mental health professionals. The Court reversed a district court order directing him to turn over his psychiatric records to the prison guards. In re Sims, 534 F3d 117 (CA2, 2008); full text at http://pub.bna.com/cl/06044.pdf.

Training Events

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 state-ments, impeachment, cross-examination, use of techno-logy 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 **Wayne County Criminal Advocacy Program ("CAP") seminars** are scheduled as follows: **October 24, 2008**, Alternative Case Resolution and Sentencing; **November 7, 2008**, Sentencing Updates; **November 14, 2008**, Forensic Issues: Criminal Responsibility & Com-petency; **November 21, 2008**, Michigan Law Update; **December 5, 2008**, U.S. Supreme Court Update. All seminars begin at 1:30 p.m. and take place in the Thirteenth-Floor Auditorium of the Coleman A. Young Municipal Center in Detroit, Michigan. For more in-formation, and to download each seminar's handouts, see www.capwayne.org.

The **Criminal Justice Section of the American Bar Association (CJS/ABA)** is offering a "Sentencing Advocacy, Practice and Reform Institute" on **October 24, 2008**, at George Washington University in Washington, D.C. The Institute will offer programs on white collar crime, corrections and policy, including an update on sentencing legislation and court decisions, and a session on practice and procedure. Members of the U.S. Sentencing Commission will provide a report, and another panel will discuss mediation, diversion, and drug courts. Registration fees range from $175 to $250: seating is limited. For more information, contact Carol Rose at (202) 662-1519, ormailto:carolrose@staff.abanet.org.

The **Michigan Appellate Assigned Counsel System (MAACS)** will host "Technology and the Law: How to Work Smarter and Faster" on **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)** and Georgetown Law CLE will present "Defending the White Collar Case," on **November 6-7, 2008**, in Washington, D.C. Presenters will explore international criminal investigation, successful litigation strategies from a judicial perspective, issue preservation from an appellate perspective, expert testimony, defense of corporations, grand jury practice, and financial institution crime. Registration fees are between $695 - $895, and some scholarships are available, as are hotel discounts. For more information, see www.nacdl.org/meetings, or call (202) 872-8600.

The **National Association of Criminal Defense Lawyers (NACDL**) will present "Defending Drug Cases," a seminar on **November 13-14, 2008**, in Houston, Texas. Topics will include forfeiture, sentencing, wiretapping and surveillance, cross-examination of informants, jury selection, bail and detention, crime lab issues, cross-examination of police and experts, and motions to suppress. Registration fees range from $210 to $525, depending on membership status; hotel discounts also are available. For more information, contact NACDL at (202) 872-8600, or see www.nacdl.org/meetings.

The **Criminal Defense Attorneys of Michigan (CDAM)** will host its advanced practice conference on **November 13-15, 2008**, in Traverse City, Michigan. Optional Thursday seminars include "A is for Attorney," intended for new lawyers, an afternoon workshop on opening statements, another workshop on federal sentencing guidelines, a technology workshop focusing on trial presentations, a seminar on delinquency proceedings, and an appellate practice

seminar. On Friday, November 15th, presenters will address discovery, high-tech investigation, mental health experts' testing and evaluations, and obtaining experts in assigned cases. The Saturday morning session will address recent developments in criminal law, motions in limine, "tips from the trenches," and Michigan Sentencing Guidelines. Registration is $50 for CDAM members and $90 for non-members. For more information, see www.cdam.net.

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. A defender track will focus on cutting edge issues facing public defense systems, such as securing resources and public support for indigent defense. Registration fees range from $450 to $750. More information is available at www.nlada.org.

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

DOUBLE JEOPARDY -- Multiple Prosecutions
RICO
SENTENCING AND PUNISHMENT
-- Mandatory Sentencing

United States v James L Wheeler
___ F3d ___ (#05-3140, 08-01-08)
Daughtrey, Gilman, ROGERS

Reversed RICO and RICO conspiracy convictions; affirmed conviction of drug conspiracy. (Part of a consolidated appeal involving members of the Outlaw Motorcycle Club, "OMC").

Defendant was indicted for the same pattern of racketeering activity in both Florida and Ohio, and the substantive RICO and RICO conspiracy charges violated the Double Jeopardy Clause. The indictments involved an overlap in time period, participants, and statutory offenses involved. Defendant's prosecution in Ohio sought to punish the same activity that he was previously prosecuted for in Florida.

Defendant's successive indictment for drug conspiracy did not violate double jeopardy. Although there was some overlap between the co-conspirators involved in each conspiracy, the conduct the government sought to punish in Ohio was different in scope and nature from the conduct charged in the Florida indictment.

Defendant's mandatory life sentence was properly imposed as defendant had two or more prior convictions for a felony drug offense. Any sentencing error relating to Booker would be harmless as defendant cannot receive a sentence lower than the statutory maximum.

SEARCH AND SEIZURE -- Warrant
-- Validity of Underlying Affidavit
RICO -- Sufficiency of Evidence
EVIDENCE -- Proof of Other Crimes
SENTENCING AND PUNISHMENT
-- Consecutive Sentencing

United States v Jason Gregory Fowler
___ F3d ___
(#04-4472/4473, 08-01-08)
Daughtrey, Gilman, ROGERS

Affirmed convictions of RICO offense, RICO conspiracy, conspiracy to distribute drugs and conspiracy to use a firearm during the commission of a drug trafficking crime; vacated 10-year consecutive sentence. (Part of a consolidated appeal involving members of the Outlaw Motorcycle Club, "OMC").

The affidavit in support of the search warrant provided the magistrate with a substantial basis for finding probable cause. The affidavit related specific details about defendant's criminal activities and possession of contraband, explained the basis for the information, and provided implicit assurances of the reliability of the information. The fact that the affidavit did not explicitly vouch for the confidential informant's reliability did not undermine the finding of probable cause.

There was insufficient evidence for a Franks [Franks v Delaware, 438 US 154 (1978)] hearing that the ATF agents intentionally misled the magistrate by failing to acknowledge the confidential informant's involvement in ongoing criminal activity, and such an omission would not have had an impact on the finding of probable cause.

The district court did not err in admitting defendant's post-arrest statements to the police. No adversarial judicial proceedings had been initiated against him at the time he was questioned, so there could not have been a Sixth Amendment violation. There was no Fifth Amendment violation as defendant's statements were not coerced or involuntary. Defendant was intelligent, had been advised of his Miranda rights, the length of time he was questioned did not have a coercive effect, there was no type of abuse, and no promises of leniency.

The evidence of both the substantive and conspiracy RICO charges was sufficient. There was evidence that defendant participated in the drug distribution enterprise of the motor cycle gang (OMC), he had some part in directing the enterprise's affairs, and there was evidence of a pattern of racketeering activity. There was little doubt that the OMC was a long-term association that existed for criminal purposes. The government supplied proof of the conspiracy by evidence that defendant intended to further an endeavor which would constitute a substantive RICO offense.

The district court did not err in failing to instruct on the lesser offenses of manslaughter and criminal confinement. Defendant was not actually charged with the offense of murder. Murder was alleged as one of his RICO predicate acts, and there is no such thing as a lesser-included-predicate-act instruction.

Any error in the introduction of evidence against a co-defendant was harmless, and there was no error in the admission of evidence that defendant murdered a witness who possessed incriminating photographs. The evidence was properly admitted to show defendant's membership in the conspiracy by demonstrating that he was attempting to preserve the criminal enterprise.

Defendant's sentence must be vacated in its entirety because the district court erred in imposing a 10-year consecutive sentence for the firearm offense. The sentences imposed for the RICO and conspiracy offenses should be vacated as well because the district court's decisions with respect to these offenses were most likely influenced by its erroneous belief that a 10-year consecutive sentence was mandated.

PRETRIAL MOTIONS -- Motion for Severance
CONFRONTATION -- Right To
RICO -- Sufficiency of Evidence
SENTENCING AND PUNISHMENT
-- Guidelines -- Scoring

United States v Gregory A. Driver
___ F3d ___
(#04-4470/4471, 08-01-08)
Daughtrey, Gilman, ROGERS

Reversed two RICO convictions, affirmed drug conspiracy conviction, vacated sentence. (Part of a consolidated appeal involving members of the Outlaw Motorcycle Club, "OMC").

The district court did not err in failing to sever defendant's trial. Defendant failed to show compelling, specific, and actual prejudice from the refusal to grant the motion for separate trials. There was no evidence that the jury was unable to heed the district court's instructions to consider separately the evidence against each defendant.

The district court did not err in allowing the government to introduce out-of-court statements made by a co-defendant. The statements did not facially incriminate or even mention defendant. Any error would have been harmless.

The evidence was sufficient for a rational trier of fact to conclude that members of the motorcycle gang (OMC) agreed to violate drug laws and that defendant intentionally participated in the conspiracy. However, the record does not support the jury's finding that defendant violated the Travel Act. That defendant rode in the same vehicle as the OMG member who attended an OMG meeting does not establish that defendant assisted or encouraged the other member's travel. The record is not sufficient to sustain the conspiracy conviction as there was insufficient evidence that defendant agreed to two or more predicate acts.

The evidence provided a sufficient basis from which the district court could conclude that defendant was responsible for trafficking in 15 kilograms of cocaine in determining the base offense level of 34. The district court did err in failing to impose a two-level dangerous-weapon increase. The evidence proved by a preponderance of the evidence that defendant possessed a dangerous weapon while engaged in the drug conspiracy.

CARJACKING -- Sufficiency of Evidence
SENTENCING AND PUNISHMENT

United States v Stephan Fekete
___ F3d ___ (#07-5616, 08-05-08)
GILMAN, Cook, Cohn

Affirmed convictions of carjacking and brandishing a firearm.

The evidence was sufficient to sustain the conviction of carjacking with intent to cause death or serious bodily harm. There was evidence that defendant used his .40 caliber pistol during the carjackings, and the jury had reason to disbelieve defendant's assertion that he thought the vehicle was unoccupied. In the absence of physical touching, the government is not required to prove beyond a reasonable doubt that the firearm was loaded.

The district court did not err in counting the two carjacking convictions as separate offenses for purposes of sentencing even though he was also convicted of conspiracy to commit multiple carjackings.

Michigan Supreme Court: Selected Leave Granted Summary

CONFRONTATION -- Right To
EVIDENCE -- Hearsay
-- Dying Declaration

People v Richard Perry Bryant
Unpublished opinion of
03-06-07
(Court of Appeals #247039)
___ Mich ___
(#133725, 09-17-08)

Peter Van Hoek, attorney for Defendant-appellant.

The Supreme Court granted leave to defendant, limited to the issue of whether a witness's statements to police constituted inadmissible testimonial hearsay in violation of Crawford v Washington, 541 US 36 (2004). The Court of Appeals found that the injured declarant's statements were not testimonial because they were made to police "under circumstances indicating that his primary purpose was to enable police assistance to meet an ongoing emergency."

Michigan Supreme Court: Selected Order Summaries

ARREST – Delay

People v Charles William Mercer, Jr.
___ Mich ___
(#135811, 07-25-08)
CHRIS A. BERGSTROM
Co-Counsel LINDA L. WIDENER

In lieu of granting leave to appeal, the Supreme Court remanded to the Ingham County Circuit Court to rule on defendant's motion to quash the bindover. The circuit court had dismissed the case because of a 40-year prearrest delay, and the Court of Appeals reversed that decision. The Supreme Court declined to reach the constitutional prearrest delay issue.

Justice Cavanagh, dissenting, would address the "jurisprudentially significant" issue of whether due process may require dismissal of a prosecution where there is actual and substantial prejudice, and he would reverse the Court of Appeals and uphold the trial court's decision. The intent of the prosecution is only one factor for the court's analysis, and a showing of bad faith is not necessary when the defendant has been so prejudiced by the delay that a criminal trial would be fundamentally unfair, according to Justice Cavanagh.

EVIDENCE – Hearsay – Prior Testimony

People v Christian Sierra
___ Mich ___
(#135772, 07-25-08)
SANFORD A. SCHULMAN

The Supreme Court ordered oral argument on the following issues: what constitutes a "similar motive" to develop testimony under MRE 804(b)(1), and whether the trial court abused its discretion in concluding that the prosecution lacked a similar motive at a prior trial to introduce the testimony of an unavailable witness at defendant's trial.

APPEALS

People v Randal Scott Highland
___ Mich ___
(#128180, 07-23-08)
JAMES LOVEWELL

In lieu of granting leave to appeal, the Court remanded to the Kent County Circuit Court. The trial court failed to issue an order disposing of defendant's motion for reconsideration of the denial of his motion to withdraw his plea. Defendant's case was pending on direct review when Halbert v Michigan, 545 US 605 (2005) was decided, entitling him to the appointment of counsel. The Court of Appeals should have dismissed defendant's application for leave to appeal as premature rather than dismissing it as untimely. (Counsel was appointed for defendant while the application to the Supreme Court was pending.)

SENTENCING AND PUNISHMENT

People v Steven Robert Olsen
___ Mich ___
(#129223, 07-23-08)
THOMAS SPARROW

In lieu of granting leave to appeal, the Court vacated the trial court order amending the judgment of sentence to add a provision barring contact with minor children. The circuit court lacked authority to make substantive changes to the judgment of sentence after entry, because it is the final judgment in the case.

FAILURE TO REPORT PATIENT ABUSE
MISCELLANEOUS -- Statutory Construction
-- MCL 333.21771

People v Elizabeth Ann Edenstrom
___ Mich ___ (#277291, 08-5-08)
Zahra, CAVANAGH, Jansen
ROBERT E. FORREST

Affirmed order dismissing complaint charging failure of nursing home administrator to report patient abuse.

Defendant, a nursing home administrator, was not required to report an incident in which a nursing assistant lit a patient's cigarette, igniting the residual oxygen in the patient's nasal cannula and burning the patient. The incident was considered an accident because the assistant had turned off the oxygen tank and did not know oxygen would remain in the cannula. According to the definitions provided in the Social Welfare Act, the nurse's assistant did not "harmfully neglect" the patient or fail to carry out her duties. Although an act of neglect need not be wilfull in order to be reportable under MCL 333.21771, not all incidents that result in injury to a resident are required to be reported; the reporting statute does not apply to accidents.

Judge Zahra, dissenting, would find that the fact that the employee followed a deficient and hazardous policy to assist oxygen dependent patients to smoke did not relieve defendant of her duty to report the incident.

EX POST FACTO LAWS
SEPARATION OF POWERS
SENTENCING AND PUNISHMENT
-- Mandatory Minimum

People v Larry Eugene Wilcox
___ Mich ___ (#278189, 07-31-08)
PC: Davis, Murray, Beckering
P. E. BENNETT

Affirmed conviction of first-degree criminal sexual conduct.

The enactment of MCL 768.27a, allowing evidence that the defendant committed a prior sexual offense against a minor, does not violate the separation of powers because it is a substantive rule of evidence and does not principally regulate the operation or administration of the courts.

MCL 768.27a does not violate the Ex Post Facto Clause because its altered standard for admission of evidence does not lower the quantum of proof or value of the evidence needed to convict a defendant.

Defendant's 10-40 year sentence satisfies the requirement of the second-offense statute that the minimum sentence be "at least" five years, and it is not a departure from the recommended minimum range of the sentencing guidelines.

MISTREATING A PATIENT
MISCELLANEOUS -- Statutory Construction
-- MCL 333.21715(2)

People v Tahirah Haseena Shakur and
People v Keisa Yvette Cooper and
Ericka Nichole Jackson
___ Mich ___ (#283360, 08-14-08)
Murray, Whitbeck, TALBOT
JOHN GORNIAK for defendant Shakur
JOSEPH TOIA for defendant Cooper
DEREK S. WILCZYNSKI for defendant Jackson

Reversed misdemeanor conviction of mistreating a patient.

A deceased person cannot be considered a "patient" subject to mistreatment, abuse, or neglect. Defendants took pictures of themselves posing and hugging a deceased patient at a nursing home. According to the unambiguous language of the statute, MCL 333.21715(2), the care and services that a patient receives in a nursing home setting are necessarily those provided to a live individual. Because the deceased was not receiving statutorily defined care and services, she cannot be construed as a patient for purposes of the statute.

EX POST FACTO LAWS

People v James Doyle Perkins and
People v Joseph Wayne Lesage
___ Mich ___ (#281959, 08-19-08)
PC: Markey, Whitbeck, Gleicher
CHRISTOPHER E. GOGGIN
for defendant Perkins
ROSEMARY A. GORDON PANUCO
for defendant Lesage

Reversed trial court decision granting motion to quash information charging third-offense OUIL and third-offense OWI.

For offenses occurring after the effective date of amended MCL 257.625 (January 3, 2007), the state may properly charge defendants based on prior convictions that occurred more than ten years before the date of the amendment. The amendment, which eliminated the 10-year limitation period for prior convictions used to enhance a drunk driving charge to a felony, did not attach legal consequences to the prior offenses, but, rather, made the consequences of their current offenses

more severe based on the prior convictions. Therefore, the trial court erred in finding that defendant's defendants' prosecution under the amendment violated ex post facto protections.

APPEALS -- Standards of Review
PROSECUTOR -- Comments
EVIDENCE -- Gang Affiliation

People v Roy Blackmon
___ Mich ___ (#277184, 08-19-08)
Markey, White, WILDER
STEVEN FISHMAN

Affirmed convictions of second-degree murder and assault with intent to murder.

The errors committed during defendant's trial were non-constitutional errors; therefore, the Court on direct appeal applied the proper standard of review, and did not err in failing to apply the "harmless beyond a reasonable doubt" standard in affirming the convictions. There is no constitutional right to exclude gang-affiliation evidence. All prosecutorial error is not *per se* constitutional error. Where there is no allegation that prosecutorial misconduct violated a specific consti-tutional right, in order to constitute error under the federal constitution, the misconduct must have "so in-fected the trial with unfairness as to make the convic-tion a deprivation of liberty without due process of law."

COUNSEL -- Ineffectiveness
-- Failure to Object

People v Gary Edward Davenport
___ Mich ___ (#271366, 08-28-08)
SAAD, Murphy, Donofrio
MARK SATAWA

Remanded criminal sexual conduct case for evidentiary hearing.

Defense counsel's failure to raise a potential conflict of interest constituted an objectively unreasonable error. Defendant's first attorney joined the prosecutor's office after representing defendant at the preliminary examination. Had trial counsel objected, the trial court would have been obligated to inquire into the conflict and potential prejudice and to make sure that the prosecutor's office employed appropriate safeguards.

At the evidentiary hearing, the prosecutor must show that "effective screening procedures have been used to isolate the defendant's former counsel from the prosecution of the substantially related criminal charges." The trial court should consider, among other things, the prosecutor's failure to come forward with this matter voluntarily, and the office's ability to "quarantine" the conflict of interest when the office employs only two attorneys.

SORA

People v Ryan Derrek Althoff
___ Mich ___ (#274906, 09-02-08)
PC: Fitzgerald, Smolenski, Beckering
DEVIN S. GENTRY

Affirmed order requiring defendant to register as sex offender.

For purposes of the catch-all provision of the Sex Offender Registration Act, the particular facts of a violation are to be considered in determining whether the violation "by its nature constitutes a sexual offense against an individual who is less than 18 years of age." The possession of child pornography constitutes an offense against a child under the age of 18; the child depicted in the pornography is a victim of the offense. The use of children as subjects of pornography is harmful to the physiological, emotional, and mental health of the child.

A sentencing court may consider all record evidence in determining if a defendant must register under SORA, so long as the defendant has the opportunity to challenge the relevant facts and any challenged facts are substantiated by a preponderance of the evidence. The rules of evidence would not apply to a hearing to determine if a defendant must register under SORA.

Considering the evidence in this case, including the detective's testimony describing the physical appearance of the females in the photographs, the trial court did not clearly err in finding that the victims were under the age of 18. Expert testimony is not necessary to establish the ages of the children in the pornographic images.

ECONOMIC PENALTIES -- Attorney Fees

People v Joseph Allen Trapp
___ Mich ___ (#282662, 09-09-08)
PC: Whitbeck, Bandstra, Donofrio
SADO - VALERIE NEWMAN

Remanded for hearing regarding attorney fees.

The trial court failed to indicate that it considered defendant's ability to pay, at the present or in the future, prior to ordering reimbursement of attorney fees in the amount of $300.00. MCL 769.1k, which authorizes the sentencing court to impose "expenses of providing legal assistance to the defendant," did not eliminate the requirement that the trial court consider a defendant's ability to pay prior to imposing attorney fees.

MAINTAINING A DRUG HOUSE
-- Sufficiency of Evidence

People v Erick Lamont Louis
Unpublished opinion of 06-17-08
(Court of Appeals #275652)
MLW #09-66854 (6pp)
PC: Gleicher, Fitzgerald, Hoekstra
SUZANNA KOSTOVSKI

Affirmed convictions of possession with intent to deliver marijuana and vicodin; vacated conviction of maintaining a drug house.

The evidence was insufficient to prove that defendant maintained a drug house. While there was evidence that defendant had illegal drugs in his house, the evidence of continuity was lacking. The evidence showed only that defendant used the apartment to keep or maintain drugs on one occasion, insufficient to prove that he kept the apartment for the purpose of keeping or selling drugs.

ECONOMIC PENALTIES -- Attorney Fees
SENTENCING AND PUNISHMENT
-- Presentence Report - Correction

People v Felicia Lenette Hill
Unpublished opinionof 07-08-08
(Court of Appeals #273910)
MLW #09-67051 (5pp)
PC: Saad, Borrello, Gleicher
SADO - PETER VAN HOEK

Affirmed convictions of larceny by false pretenses and failure to pay wages; remanded for reconsideration of order to pay attorney fees and for correction of presentence report.

The trial court erred by ordering defendant to pay $1075.00 in attorney fees without considering defendant's ability to pay. The court's statement that the amount ordered was reasonable was insufficient.

The trial court acknowledged an error in the presentence report but failed to order it stricken, necessitating a remand to correct the report.

SENTENCE ENHANCEMENT
-- General Habitual Offender Proceedings

People v Murray Keith Warren
People v Marcus Andrew Strong
People v David Jovon Dunbar

Unpublished opinion of 06-24-08
(Court of Appeals ##'s
276090, 276425, 276685)
MLW #09-66921 (7pp)
PC: Servitto, Cavanagh, Kelly
NEIL LEITHAUSER for Defendant Warren
JONATHAN D. SIMON for Defendant Strong
DANIEL J. RUST for Defendant Dunbar

Affirmed convictions of voluntary manslaughter and witness intimidation; vacated sentences and remanded for resentencing.

The trial court erred in sentencing defendants as habitual offenders based on convictions that occurred after the date the sentencing offenses were committed, contrary to the plain language of the habitual offender statute. Resentencing is required because the minimum sentences imposed exceed the unenhanced guidelines ranges.

DEFENDANT -- Physically Restraining

People v Andrew Paul Colbert
Unpublished opinion of 06-26-08
(Court of Appeals #277621)
MLW #09-66957 (8pp)
PC: Zahra, Cavanagh, Jansen
JONATHAN D. SIMON

Affirmed in part conviction of first-degree murder; remanded for evidentiary hearing.

It is unclear whether the jurors were able to see defendant's leg irons at any point during trial. An evidentiary hearing must be conducted concerning whether there was adequate justification for requiring defendant to wear shackles, and whether the jurors were able to see the shackles. The individual jurors shall be questioned, and the transcript of the hearing and the judge's findings are to be provided to this Court.

Judge Zahra, concurring in part and dissenting in part, stated his opinion that ordering the judge to question the jurors is an "unnecessary and a dangerous practice." Moreover, the use of leg irons did not contribute to the jury's verdict, according to Judge Zahra.

SENTENCING AND PUNISHMENT -- Guidelines
-- Scoring

People v Bobby Perry

Unpublished opinion of 07-01-08
(Court of Appeals #278484)
MLW #09-67012 (3pp)
PC: Meter, Smolenski, Servitto
RONALD D. AMBROSE

Vacated sentences of 9 to 40 years for carjacking and kidnapping; remanded for resentencing.

The trial court erred in assessing ten points under OV 4 for psychological injury to a victim. The trial court's assumption that the victim suffered psychological injury was reasonable, but was not supported by record evidence. The victim did not make any statements regarding the possible psychological impact that the incident had on her or her children, and she did not speak at sentencing.

The minimum terms were within the guidelines range, but not consistent with the agreement that defendant be sentenced at the low end of the guidelines. Defendant is therefore entitled to resentencing.

ECONOMIC PENALTIES -- Attorney Fees

People v Michael Guerra Jimenez
Unpublished opinion of 07-17-08
(Court of Appeals #271931)
MLW #09-67155 (10pp)
PC: Talbot, Cavanagh, Zahra
SADO - JACQUELINE MCCANN

Affirmed convictions; remanded for clarification of imposition regarding attorney fees.

Because of the apparent inconsistency of assessing defendant's attorneys' fees in the amount of $2970.00 for two trials when only one trial occurred, a remand is necessary for clarification and, if necessary, a re-assessment of attorney fees.

INSTRUCTIONS -- Included Offenses
-- Requested by Defendant but Refused by Court
FELONIOUS ASSAULT -- Included Offenses

People v Terrell Johnson
Unpublished opinion of 07-22-08
(Court of Appeals #276086)
PC: Whitbeck, O'Connell, Kelly
SADO - PETER VAN HOEK

Reversed conviction of felonious assault; remanded for entry of verdict of misdemeanor assault or a new trial.

The trial court erred by denying defendant's request for a jury instruction on simple assault. The instruction was not inconsistent with the defense of self-defense (and would not be precluded even if it were). Simple assault is a necessarily included lesser offense of felonious assault because it would be impossible to commit felonious assault without committing simple assault; felonious assault is a simple assault aggravated by the use of a weapon. The instruction on simple assault was supported by the evidence, and the jury was denied the opportunity to choose a verdict consistent with defendant's theory of the case.

Judge O'Connell concurred in part.

SENTENCING AND PUNISHMENT -- Guidelines -- Scoring

People v Rafiel Riggins
Unpublished opinion of 02-05-08
(Court of Appeals #274093)
MLW #09-65544 (3pp)
PC: Beckering, Sawyer, Fort Hood
SADO - JONATHAN SACKS

Affirmed convictions of assault with intent to murder, felony firearm, and felon in possession of a firearm; remanded for correction of sentencing guidelines.

The trial court erred in scoring 25 points for OV 13, for a pattern of criminal behavior, because the defendant's previous offenses did not occur within five years of the sentencing offense. Resentencing is not necessary because the error did not affect the guidelines range, but the score must be corrected on remand because a scoring error may affect a defendant's parole eligibility.

ACCESSING A COMPUTER WITHOUT AUTHORITY -- Sufficiency of Evidence

People v James Benjamin Brunk, Jr.
Unpublished opinion of 02-12-08
(Court of Appeals #273858)
MLW #09-65593 (7pp)
PC: Davis, Murphy, White
SADO - PETER VAN HOEK

Reversed conviction of intentionally accessing a computer network without authorization.

The evidence was insufficient to establish that defendant did not have authority to access the computer network and download a template for purposes of programming radios to be used by police and firefighters in responding to emergencies. The prosecutor did not present any policy or rule requiring

defendant to have a work order. The prosecutor also failed to present any evidence that defendant did not have the authority to give the template to the person he allegedly aided and abetted, or that that person lacked the authority to accept the template. There were no written rules or procedures at all regarding programming.

SENTENCING AND PUNISHMENT
-- Consecutive Sentencing

People v Eric Theordor Walker
Unpublished opinion of 07-10-08
(Court of Appeals #278071)
MLW #09-67080 (3pp)
PC: Meter, Smolenski, Servitto
SADO - DESIREE FERGUSON

Affirmed conviction of felony-firearm; remanded for correction sentence.

The trial court erred by ordering that defendant's sentence for felony firearm run consecutively, rather than concurrently, with his probationary sentence for possession with intent to deliver marijuana. A probationary sentence cannot run consecutively with a term of imprisonment for felony firearm.

SENTENCING AND PUNISHMENT
-- Presentence Report -- Correction
ECONOMIC PENALTIES -- Attorney Fees

People v Emmett Alonzo Jones
Unpublished opinion of 07-15-08
(Court of Appeals #273576)
MLW #09-67098 (13pp)
PC: Murphy, Bandstra, Beckering
MARY A. OWENS

Affirmed conviction of unarmed robbery; vacated order requiring defendant to pay attorney fees and remanded.

The trial court erred by failing to strike from the presentence report the charges for which a nolle prosequi was entered because the trial court determined that this information was not relevant to its sentencing decision. When a court disregards information as irrelevant, it must strike the information from the PSIR.

The trial court erred in ordering him to pay $1208.00 in court costs and attorney fees without indicating that it considered defendant's ability to pay. A remand is necessary for reconsideration of attorney fees in light of defendant's foreseeable ability to pay.

ECONOMIC PENALTIES -- Attorney Fees

People v Marc Paul Sanders
Unpublished opinion of 07-15-08
(Court of Appeals #273929)
MLW #09-67099 (4pp)
PC: Fitzgerald, Talbot, Donofrio
FREDERICK M. FINN

Affirmed trial court's order denying motion to correct sentence; vacated order to reimburse attorney fees.

The trial court committed plain error when it failed to consider defendant's ability to pay before ordering reimbursement for court-appointed attorney fees.

JUDGE -- Rereading testimony

People v Reginald Eugene Holmes
Unpublished opinion of 07-15-08
(Court of Appeals #277816)
MLW #09-67132 (4pp)
PC: Fitzgerald, Talbot, Donofrio
SARAH ROBINSON

Reversed convictions of felon in possession of a firearm, CCW, and felony firearm.

The trial court erred when it responded to the jury's request to be provided a transcript of the trial. The court told the jury to use its collective memory and that "at this juncture we do not have a transcript." The jurors were left with the impression that they had to move forward without rehearing the testimony because the trial court did not present the possibility that the court reporter could read back portions of the testimony. The error was not harmless. It was significant that the jury was not allowed to take notes and the jurors had problems coming to a verdict.

DOUBLE JEOPARDY -- Multiple Punishment

People v Jason Owens Treadwell
Unpublished opinion of 07-15-08
(Court of Appeals #277363)
MLW #09-67125 (7pp)
PC: Owens, O'Connell, Davis
JONATHAN B. SIMON

Affirmed convictions of first-degree murder, assault with intent to murder, carjacking, armed robbery, and felony firearm; remanded for correction of judgment of sentence.

Defendant's convictions of both premeditated murder and felony murder violated his constitutional protection against double jeopardy. The judgment of sentence must be corrected to reflect one conviction of first-degree murder supported by two theories. Attempted larceny, the predicate offense of defendant's felony-murder conviction, was subsumed into the charge of assault with intent to rob while armed, and the assault conviction must also be vacated to protect against double jeopardy.

ECONOMIC PENALTIES -- Attorney Fees

People v John Earl Easley
Unpublished opinion of 07-17-08
(Court of Appeals #278832)
MLW #09-67176 (3pp)
PC: Saad, Fort Hood, Borrello
RICHARD N. GLANDA

Affirmed in part, vacated in part, remanded for hearing with regard to attorney fees.

The trial court plainly erred by failing to consider defendant's ability to pay before ordering him to reimburse the county $472 for appointed counsel costs. The trial court gave no indication that it considered defendant's disability benefits when imposing the attorney fees.

SENTENCING AND PUNISHMENT
-- Guidelines - Scoring
SENTENCING AND PUNISHMENT
-- Presentence Report -- Correction
ECONOMIC PENALTIES -- Attorney Fees

People v Harold Troy Priddy
People v Nancy Lynn Bradshaw-Love
Unpublished opinion of 07-22-08
(Court of Appeals #276125; 276397; 276399)
MLW #09-67210 (11pp)
PC: Markey, White, Wilder
JOHN W. GROVES for defendant Priddy
MICHAEL SKINNER for defendant Love

Affirmed Priddy's convictions of conspiracy to aid the escape of a prisoner and assault with intent to do great bodily harm but remanded for correction of presentence report; affirmed Bradshaw-Love's convictions of conspiracy to commit assault with intent to do great bodily harm and escape, but vacated order to reimburse county for attorney fees.

The trial court erred by scoring 25 points for OV 3 for "life-threatening or permanent incapacitating injury to a victim" on the basis of a threatened injury. It is appropriate only to score points under OV 3 for physical injury to a victim, not for potential or threatened injury. The error did not affect the guidelines range, but the trial court must correct the score on remand. Challenged information in the presentence report disregarded by the trial court, that defendant Priddy threatened to kill the prosecutor and judge, must be stricken from the presentence report .

The trial court erred when it required defendant Bradshaw-Love to reimburse the county $500 in attorney fees without considering her ability to pay.

SENTENCING AND PUNISHMENT
-- Consecutive Sentencing

People v Domaco Sims
Unpublished opinion of 07-17-08
(Court of Appeals #274236)
MLW #09-67158 (5pp)
PC: Murphy, Bandstra, Beckering
DANIEL J. RUST

Affirmed convictions of two counts of assault with intent to do great bodily harm, CCW, felon in possession of a firearm, resisting and obstructing a police officer, felon firearm, and third-degree fleeing and eluding; remanded for correction of judgment of sentence.

Defendant's sentence for CCW was erroneously ordered to run consecutive to his sentence for felony-firearm. Because a CCW conviction cannot be the underlying felony for a felony-firearm conviction, the felony firearm statute does not authorize a CCW sentence to be served consecutive to a felony-firearm sentence.

SENTENCING AND PUNISHMENT
-- Guidelines -- Scoring

People v Queshon Quamon Barkus
Unpublished opinion of 07-22-08
(Court of Appeals #278761)
MLW #09-67218 (2pp)
PC: Saad, Fort Hood, Borrello
GARY L. KOHUT

Affirmed convictions of delivery of 50 to 449 grams of a controlled substance, felon in possession of a firearm, possession of less than 25 grams, and two counts of felony firearm; remanded for resentencing.

The trial court erred in scoring 25 points for OV 13 based on three crimes against a person that were committed in 1990. These crimes were beyond the five-

year period that included the sentencing offense. Resentencing is necessary where the corrected guidelines range is lower and the trial court agreed to sentence defendant at the low end of the range.

COUNSEL -- Right To -- On Appeal

People v Juan Villafane Martinez
Unpublished opinion of 07-22-08
(Court of Appeals #270187)
MLW #09-67198 (2pp)
PC: Murphy, Bandstra, Beckering
IN PRO PER

Reversed and remanded for appointment of counsel.

Defendant was entitled to the appointment of counsel for his first-tier appellate review. The trial court denied defendant's request, made after Halbert [Halbert v Michigan, 545 US 605(2005)] was decided, without giving a reason. Defendant did not waive his right to counsel when he pleaded guilty, before Halbert, because there was not a recognized right that he could elect to forego.

EVIDENCE -- Proximate Cause
EVIDENCE -- Relevance

People v Matthew Joseph Soares
Unpublished opinion of 07-24-08
(Court of Appeals #273333)
MLW #09-67239 (6pp)
PC: Owens, O'Connell, Davis
SADO - BRANDY ROBINSON

Reversed convictions of OWI causing death and manslaughter.

The trial court abused its discretion in excluding evidence of the victim's use of marijuana. There was evidence that his reaction time might have been slowed by the marijuana, and this evidence was clearly relevant to the issue of whether defendant's negligence caused the victim's death.

Judge Davis, dissenting, would afford more deference to the trial court's discretion in excluding the evidence as more prejudicial than probative.

COUNSEL -- Ineffectiveness Of
-- Failure to Investigate

People v Matthew Charles Holbrook
Unpublished opinion of 07-29-08
(Court of Appeals #271562)
MLW #09-67272 (3pp)
PC: Fitzgerald, Talbot, Donofrio
MICHAEL SKINNER

Reversed convictions of second-degree murder and felony firearm; remanded for new trial.

Defendant was denied his right to effective assistance of counsel by his trial attorney's failure to have the victim's clothing tested for gunshot residue. A positive result would have supported defendant's claim that he fired the shot that killed the victim in self-defense after the victim fired a weapon at him. The failure to test the victim's clothing was not a reasonable strategic decision. Even if the test were negative, counsel could have argued that the residue had dissipated due to the failure of the police to timely conduct a residue test.

SENTENCING AND PUNISHMENT - Correction

People v Cedric Lamar Tennessee
Unpublished opinion of 07-31-08
(Court of Appeals #278483)
MLW #09-67308 (2pp)
PC: Meter, Smolenski, Servitto
GERALD FERRY

Affirmed convictions of CCW, felon in possession of a firearm, and felony firearm; remanded for correction of judgment of sentence.

The trial court erred in wording the judgment of sentence. The sentence for felony firearm may not be consecutive to the sentence for CCW. Felon in possession of a firearm is the only felony underlying the felony-firearm conviction.

SENTENCING AND PUNISHMENT
-- Presentence Report -- Correction

People v Claxton Johnson, II
Unpublished opinion of 07-31-08
(Court of Appeals #277571)
MLW #09-67304 (9pp)
PC: Murphy, Bandstra, Beckering
SADO - CHARI GROVE

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

The presentence report erroneously reported that the instant offense was the third felony offense defendant had committed while on parole. The report must be corrected to state that this was only the first felony defendant committed while on parole.

SENTENCING AND PUNISHMENT
-- Guidelines -- Scoring
ECONOMIC PENALTIES -- Attorney Fees

People v Terrell Jenkins
Unpublished opinion of 08-05-08
(Court of Appeals #276763)
MLW # 09-67336 (5pp)
PC: Sawyer, Jansen, Hoekstra
SADO - JONATHAN SACKS

Affirmed convictions of attempted unlawful imprisonment and domestic violence; remanded for consideration of defendant's ability to pay attorney fees.

The trial court erred in scoring 25 points for OV 13 as the record fails to establish that defendant committed two other felonies against a person within a five-year period. The court could not rely on the aggravated stalking charge because the jury found defendant not guilty of that offense and, because defendant engaged in only one act of stalking, he could not have committed aggravated stalking. The court could not rely on charges that were subsequently dismissed because the court failed to determine by a preponderance of the evidence that defendant actually committed those crimes.

The trial court plainly erred in ordering defendant to reimburse the county $400 for the costs of his appointed attorney without determining whether he had the ability to pay.

SENTENCING AND PUNISHMENT
-- Guidelines -- Scoring

People v Thomas Lewis Plair
Unpublished opinion of
08-07-08
(Court of Appeals #274575)
MLW #09-67346 (5pp)
PC: Markey, Meter, Murray
SADO - CHARI GROVE

Affirmed convictions of first-degree CSC and two counts of second-degree CSC; remanded for resentencing.

The trial court erred in scoring five points under OV 3 for bodily injury to the victim. There was no bodily injury that could be attributed to defendant. The victim acknowledged other voluntary intercourse, and the examining physician could not say which sexual contact caused the injury to the complainant's hymen.

Fifteen points were erroneously scored for OV 8 because there was no evidence that defendant transported the victim to another place or held her captive.

It was error to score 25 points under OV 9 for ten or more victims as there was only one victim.

The trial court erred in scoring 25 points for OV 11 because points should not be scored for the one penetration that formed the basis of a CSC offense, and there was no evidence of penetration beyond the one occurrence for which defendant was convicted.

The trial court erred in scoring 50 points for OV 13, continuing pattern of criminal behavior. The evidence showed at least three CSC offenses in the last five years, but only one penetration. Fifty points is appropriate only when there have been three or more sexual penetrations against a child under the age of 13.

COUNSEL -- Ineffectiveness Of

People v Raymond Craig Jones
Unpublished opinion of 08-12-08
(Court of Appeals #276690)
MLW #09-67379 (12pp)
PC: Markey, White, Wilder
SADO - DESIREE FERGUSON

Reversed conviction of first-degree CSC.

Defendant was denied effective assistance of counsel when his trial attorney elicited highly prejudicial evidence of his propensity for child sexual molestation. There could be no reasonable trial strategy in eliciting that defendant had been accused of molesting another child, whether or not the allegation was recanted. This evidence would have been inadmissible had the prosecutor sought to introduce it. Without the damaging evidence, there is a reasonable probability that the outcome may have been different. While sufficient, the evidence of defendant's guilt was not overwhelming.

The trial court abused its discretion when it granted an amendment to the information during trial. The original information stated that the offense occurred in 2003, and was amended to add the first six months of 2004. The difference was important because a great deal of testimony focused on whether defendant had his driver license when the incident was alleged to have occurred, and he received his license in October of 2003. The trial would have proceeded differently had the amendment been made timely.

Judge Markey concurred in result only.

Judge Zahra concurred in part and concurred in the judgment.

Training Calendar

Complete details on the training events listed below appear at page 16 of this month's newsletter.

October 23 - 26, 2008	Fall Meeting	NACDL - Tampa, FL
October 24, 2008	Alternative Case Resolution	CAP - Detroit, MI
October 24, 2008	Sentencing Advocacy	CJS/ABA - Washington, DC
October 30, 2008	Technology and the Law	MAACS - Troy, MI
November 6 - 7, 2008	White Collar Defense	NACDL - Washington, DC
November 7, 2008	Sentencing Updates	CAP - Detroit, MI
November 13 - 14, 2008	Defending Drug Cases	NACDL - Houston, TX
November 13 - 15, 2008	Fall Conference	CDAM - Traverse City, MI
November 14, 2008	Forensic Issues	CAP - Detroit, MI
November 19 - 22, 2008	Annual Conference	NLADA - Washington, DC
November 21, 2008	Michigan Law Update	CAP - Detroit, MI
December 5, 2008	US Supreme Court Update	CAP - Detroit, MI

Criminal Defense Newsletter

September - October, 2008
Volume 31, Number 12
Volume 32, Number 1

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