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The *Michigan Criminal Law Annual Journal* is the official journal of the Criminal Law Section of the State Bar of Michigan. This *Journal* is the first annual journal of the Section, in keeping with the Section's mission statement, is a significant addition to the Section's extensive program of publications, seminars, conferences, legislative liaison and other activities of the Section for the professional development and education of its members and the Bar.

The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by attorneys experienced in the subject matter covered.



Readers are invited to submit articles, comments, correspondence to Karen Dunne Woodside, Editor, State Bar of Michigan Criminal Law Annual Journal, Wayne County Prosecutor's Office, Frank Murphy Hall of Justice, 1441 St. Antoine, Detroit, Michigan 48226. The publication and editing thereof are at the discretion of the Editor. A cumulative index of articles will be printed in future journals, and will be available on the Criminal Law website:

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Guide to New Anti-Terrorism Laws

By Karen Dunne Woodside, Assistant Wayne County Prosecutor
& Alan Gershel, Chief Assistant U.S. Attorney, E-D Michigan, Chief of Criminal Division

The terrorist attacks on September 11, 2001 were a defining day for America in many ways. They brought swift federal and state legislative responses to prevent and punish such acts despite concerns of civil libertarians that elimination of some traditional safeguards jeopardizes our democracy. Practitioners should be aware of the new anti-terrorism laws that pervade many areas across criminal, computer, and banking law, to health codes and emergency management.

USA PATRIOT ACT of 2001

The federal response was the USA PATRIOT ACT of 2001, which President Bush signed into law on October 26, 2001 after being expedited through Congress in about five weeks. The acronym stands for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism,”¹

The complex bill — 342 pages long — makes sweeping changes, varying in magnitude, to over fifteen different statutes. The Patriot Act provides greater powers to both domestic law enforcement and foreign intelligence agencies, while eliminating some traditional judicial review. The scope of the Patriot Act is extensive, and its key components are only summarized here.

Some major highlights of the Patriot Act are the provision for assistance of victims of the September 11 attacks, increasing cyber-crime-fighting capabilities, translation facilities, and expansion of traditional surveillance tools, such as wiretaps, search warrants, pen registers/trap and trace orders, and subpoena powers. 18 U.S.C. section 3103 (a) has been amended to allow for delayed notice of a search warrant without prior judicial authorization. The government must demonstrate that immediate notice would have an “adverse result.”² The act permits sharing of grand jury information among federal law enforcement officials, intelligence, immigration, national defense, and national security personnel. The court must be notified when this information sharing has taken place. Sharing of grand jury information with state and local law enforcement is permitted with court authorization. The Patriot Act increased detention authority by the Attorney General regarding individuals deemed to be a threat to national security.

Further expanded are the corresponding sections under the Foreign Intelligence Surveillance Act (FISA). The bill amended the FISA wiretap provisions to allow for the interception in terrorism investigations even where the sole purpose is not the interception of foreign intelligence. The government may now monitor for terms entered on search en-

gines by explaining to a judge that the information is relevant to an ongoing criminal investigation, and may obtain user information from ISP’s and other entities that handle or store information (including cable records), with or without subpoena. The Patriot Act now allows the government to subpoena the non-content portions of e-mail such as header information without a court order. Wiretap power has been expanded giving the government the ability to serve a single wiretap, or FISA wiretap, or pen/trap order on any person or entity nationwide. A number of the bill’s sections have four-year sunset provisions, especially those related to the expanded surveillance powers concerning telephones and computers.

The definition of terrorism now encompasses “domestic terrorism” and expands three other definitions to broaden the scope of surveillance. Section 802 now defines “domestic terrorism” (amending 18 USC 2331) and additionally expands three previous definitions of terrorism to include “harboring” and “material support” liability under section 803, section 805.³ The bill allows enhanced sharing of information, such as wiretap information, among federal law enforcement, intelligence, immigration, national security and national defense personnel.⁴ In addition, § 503 now authorizes collection of DNA samples from “terrorists” which are then added to the DNA database.

The Patriot Act authorized a threefold increase in Border Patrol, Customs Service, and INS personnel along the Northern Border states. On November 12, 2002, northern border INS authorities (citing recently increased staff), began to stop and search vehicles within 25 miles of a border crossing looking for immigration violators, which is common practice along the southern border with Mexico.

Subsequent to the Patriot Act’s enactment, it is now more difficult for terrorists and criminals to access U.S. banks, to conduct money-laundering operations, and carry out illicit operations. All U.S. financial institutions now have a legal requirement to exercise due diligence in knowing their customers, and the source of monies prior to allowing foreign financial entities access to the U.S. financial systems. Finally, penalties for many crimes enumerated in the Patriot Act have been increased significantly. For example, Computer Fraud and Abuse Act (CFAA)⁵ penalties have doubled the terms of incarceration and broaden the scope of acts, and prior state offenses included for sentencing purposes.

Michigan Anti-Terrorism Act

On March 29, 2002, Governor Engler signed into law the comprehensive bi-partisan Michigan anti-terrorism leg-

islative package consisting of thirty bills to enhance security, safety, and protect the citizens of the State of Michigan.⁶ The legislation created a chapter on terrorism under the Penal Code known as the “Michigan Anti-Terrorism Act,” and significantly revised the Emergency Management Act to encourage local governments to work in partnership to effectively manage emergencies.

Initially, civil rights groups, community and labor organizations, and the ACLU expressed concern over the definition of the word “terrorist” to be so broad as to include public protesters involved in demonstrations that “went awry.” They cautioned that the United Nations has struggled for sixty years to arrive at an internationally accepted definition of “terrorist,” and still has not defined it. Under the new package, terrorist organizations have been defined and clarified that no organization shall be prosecuted for actions protected by the First Amendment to the United States Constitution.⁷

The Michigan Anti-Terrorism Act⁸ defines an “act of terrorism” as a willful and deliberate act that is a violent felony, that the person knows or has reason to know is dangerous to human life, and is intended to coerce or intimidate a civilian population or influence a government through coercion or intimidation. Under this new definition of terrorism, a person is guilty of terrorism, if he or she knowingly, and with premeditation commits an act of terrorism. Upon conviction, the offender is subject to a life sentence in prison without parole. Penalties are enumerated for offenders convicted of aiding terrorists, obstructing or hindering prosecution of terrorists, and for actually making terrorist threats, or false threats.

The anti-terrorism package includes legislation that allows a judge to suppress an affidavit to protect an ongoing investigation, witness, or victim in an investigation. It also provides that search warrants, affidavits, and tabulations are non-public information, while exempting certain information involving terrorist risk assessments and other sensitive information from the Freedom of Information Act (FOIA).⁹ Communications between law enforcement agencies on terrorism offenses are exempted from grand jury secrecy provisions.

Key provisions of the Michigan Act include:

- Possession or obtaining blueprints, or architectural diagrams of vulnerable targets with the intent to commit an act of terrorism are prohibited and punishable as a felony with up to 20 years in prison, and up to a \$20,000 fine.¹⁰
- Vulnerable targets are now defined to include: stadiums, transportation structures, public transit vehicles, airports, port facilities, power plants, power and waterlines.
- Use of explosives involving an enumerated “vulnerable target” carries an enhanced penalty.¹¹
- Computers and other electronic devices are prohibited from being used for purposes of commit-

ting a willful and deliberate act that is a felony under Michigan law; that the person knows or has a reason to know is dangerous to human life; and is intended to coerce or intimidate a civilian population or government.¹² Transportation of hazardous materials is prohibited without a hazardous materials endorsement, and now provides for imprisonment up to one year for violation.

Penalties for possessing, obtaining, or delivering false driver’s licenses and for possessing multiple false drivers’ licenses range from misdemeanors with imprisonment up to one year and/or a \$2,000 fine to felony offenses punishable by imprisonment up to ten years and/or a \$20,000 fine. Minors that purchase alcohol under the Michigan Liquor Control Code are exempt from these penalty provisions.¹³

Sentencing guidelines for the new terrorism package have been provided, and the statute of limitations for terrorism offenses has been repealed under the new Chapter 10 of the Penal Code, and for violations for poisoning food or water supplies. These terrorism violations are now predicate offenses for racketeering. Persons convicted of terrorism offenses must reimburse governments for the costs related to the terrorist act, including extradition expenses. Forfeiture of property used in terrorist acts is provided, and convicted terrorists must pay restitution to victims.¹⁴

The Michigan anti-terrorism package mandates that hospitals develop and maintain plans for biohazard detection and handling legislation, and provides the governor with authority to declare a heightened state of emergency due to suspected terrorist activities. It enables the Emergency Management Division of the State Police authority to administer state-wide mutual aid agreements, adds the judiciary and large universities, and clarifies indemnification immunity protection for professional and disaster relief personnel. Under PA 121 of 2002, PA 133 of 2002, Michigan National Guard members are now provided with certain arrest authority, civilian job protection, and indemnification protection for guard members responding to terrorist activities.

The success of the new state and federal legislation and its intended protection remains to be determined. There have already been several court challenges to the new acts, however, at the time of this writing, no final court decisions have been made.

Karen Dunne Woodside has been an Assistant Wayne County Prosecuting attorney since 1988 and is the immediate past Chairperson of the State Bar of Michigan Criminal Law Section and the Prosecuting Attorneys Association of Michigan Representative on the Criminal Law Council 2000-2003.



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Our Supreme Court's Abdication ...

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- 6 For example, under MCR 6.005(D) there is a right to appointed counsel in circuit court cases regardless of whether incarceration is imposed and, under MCR 6.005(F), the right to appointed counsel also includes the right to counsel separate from a codefendant, regardless of potential conflict of interest.
- 7 *People v Jackson* 391 Mich 323, 338. See also, *People v Franklin Anderson*, 389 Mich 155 (1973).
- 8 *People v Stevens*, 460 Mich. 626 (1999). (drugs seized following entry too soon after knocking, admissible under inevitable discovery doctrine).
- 9 See e.g., *People v. Levine*, 461 Mich. 172, 178 (1999).
- 10 *People v. Bullock*, 440 Mich. 15 (1992), held that mandatory life without parole for possessing more than 650 grams of cocaine violated art 1, § 16, after *Harmelin v. Michigan*, 501 U.S. 957 (1991) held it not to violate the 8th Amendment.
- 11 M.C.L. §768.21b requires notice of the defense of duress when breaking prison is charged and says what evidence may be considered, but it does not prescribe the requirements of the defense. The latter is by caselaw. See e.g., *People v Hocquart*, 64 Mich.App. 331,(1975).
- 12 One hundred years later, the Model Penal Code § 210.3(1)(d) (Proposed Official Draft 1962) adopted a standard similar to *Maher's* in that no particular type of provoking event was required.
- 13 409 Mich. at 722, citing MICH. CONST. 1963, art. 3, § 7, quoted in the Introduction, *supra*).
- 14 416 Mich. 383,(1982).
- 15 *Id.* at 384, 331 N.W.2d at 143.
- 16 the majority said that “the general intent specific intent dichotomy [is] an unsatisfactory concept” and “strongly recommended” legislative reform, but refused to alter or abolish the doctrine.¹⁶
- 17 *People v. Langworthy*, 416 Mich. 630, 653, (1982). See *infra*, footnote 24 for the Legislature’s “solution.”
- 18 *Saunders v People*, 38 Mich. 218, (1878).
- 19 See *People v Johnson*, 466 Mich. 491, 485 (2002), which cited *People v Juillet*, 439 Mich 34 (1991) for the following:
Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding , person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated.
- 20 *Id.* at 417. Note 8 of the opinion also criticized *People v. Stevenson, supra*.
- 21 *Id.* at 424 (opinion by Justice Levin, in which Justice Griffin concurred).
- 22 Citing the Constitution, art 3, §2, the separation of powers provision, and art 6, §1, “The judicial power of the state is vested in one court of justice” (Justice Archer, joined by Justice Cavanagh.)
- 23 407 Mich 196 (1979).
- 24 M.C.L. §768.37 provides in part:
. . . it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound
Suppose a statute requires proof that a defendant knows a certain fact, e.g. for larceny the property taken is owned by another. Does mean that defendant cannot raise a reasonable doubt as to that element by showing that he thought, because he was drunk, that the property was his own? Did the Legislature intend to thus change the definition of larceny?

Guide to Anti-Terrorism Laws

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Alan Gershel is Chief Assistant and head of the Criminal Division of the U.S. Attorney's Office in Detroit. He is also an Adjunct Professor of Law at the University of Detroit Mercy School of Law.

Endnotes

- 1 Pub.L. 107-56, 115 Stat. 272, reproduced in 2002 *U.S. Code Cong. & Admin. News*.
- 2 18 U.S.C. 2705(2).
- 3 (See 18 USC section 2331 (international terrorism), 18 USC section 2332b (terrorism that transcends national borders under 18 USC section 2332(b)(g)(5)(B)).
- 4 SB 936, 939, both tie-barred to SB 930.
- 5 18 USC ‘1030.
- 6 2002 P.A. 113.
- 7 PA 131 of 2002.
- 8 PA 113 of 2002.
- 9 PA 112 of 2002, PA 120 of 2002, PA 130 of 2002.
- 10 PA 113, 114, and 115 of 2002.
- 11 PA 116, PA 140 of 2002.
- 12 PA 117, PA 116 of 2002.
- 13 PA 118; PA 126 of 2002.
- 14 PA 137, PA 119, SB PA 120, PA 122 of 2002; PA 117; PA 124, PA 113 (tie-barred to PA 135 of 2002); PA 127 of 2002; PA 141, 142 of 2002.

Notes