

# MICHIGAN CRIMINAL LAW

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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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# Criminal Law Section 2001-2002 Annual Report

Consistent with our Mission Statement, the Criminal Law Section (CLS) provided educational seminar programs and materials to its members, and for the first time, placed materials on the CLS website for all State Bar of Michigan members to download. Our first program at the State Bar September Annual Meeting was unlike any other, immediately following the tragic events of September 11, 2001. The scheduled speakers were unable to attend because airports were closed and all State Bar activities/programs ended at noon on Friday. The slightly-abbreviated program, "Indigent Defense Representation" was one of our most insightful and profound programs ever presented. Panelists who appeared on short notice were: James Neuard, from the State Appellate Defender's Office, George Gish, former-Court Administrator of the Recorder's Court for the City of Detroit/Third Judicial Circuit-Criminal Division, and Joanne Vallarelli, an Ingham County criminal defense attorney, and James Shonkwiler, editor of CLS News and Views. The panelists delved into the indigent defense funding programs in Michigan. Mr. Neuhard provided an overview of the current and proposed funding levels of indigent defense programs in Michigan and nationally. Michigan ranks 48<sup>th</sup> in the nation in indigent defense funding. Ms. Vallarelli, defense counsel from Ingham County related how she represented a client in a complex murder trial and was lambasted and ridiculed by a judge that refused to approve any extraordinary costs for her services. Former Court administrator George Gish indicated that court administrators were able to cut the fees for indigent defense representation, knowing that the attorneys would still vigorously represent their clients, and further that they are ethically bound to do so. Jim Shonkwiler, former Executive Director of the Prosecuting Attorneys Association of Michigan, speaking as an appointed member of the Indigent Defense Task Force reiterated that the entire justice system benefits from equitable indigent defense representation.

Our second program, held at the Mid-Winter Ski Conference at Shanty Creek, had record attendance. Timothy A. Baughman, Chief of Research, Training and Appeals for the Wayne County Prosecutor's Office, provided the Shanty Creek traditional conference opening program-an overview of all noteworthy significant appellate decisions from 2001- through February of 2002. The second day of the program addressed, "Why Go to Trial If You Don't Have To? Effective Pretrial Strategies for Practitioners", and "Demonstrative Evidence." Noted criminal defense-attorney Steven Fishman presented a plethora of pre-trial motion examples that had been effectively utilized by practitioners. Hon. Timothy M. Kenny, Chief Judge of the Third Judicial Circuit Court Criminal Division provided a thorough judicial perspective of appropriate pre-trial motions and resolution of issues and cases before trial. Matthew Smith, Program Chair/criminal defense attorney and Grand Rapids criminal defense attorney, John Beason closed the conference with a presentation on demonstrative evidence, "Trial on the Cheap."

The Council implemented the Grand Hotel Spring Biennial Conference initiatives from the meeting held at Mackinac Island in May of 2001. In an historic overture, State Bar President Bruce Neckers attended our Criminal Law Council meeting in December of 2001 to meet with us to establish dialogue, solicit ideas, and to further one of his main issues: defense delivery systems. With our input, he wrote an article advocating change and uniformity in defense delivery systems in Michigan in the January 2002 *Michigan Bar Journal*.

One of the Council's goals to encourage input and action from other groups, including the State Bar, resulted in a resolution that was passed on April 27, 2002 by the State Bar of Michigan Representative Assembly. It adopted the recommendations of the Defender System and Services Committee, State Bar of Michigan Task Force on Defense

## Criminal Law Section Publications Committee

Karen M. Woodside,  
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Kimberly Reed Thompson,  
Assistant Co-Editor of *Journal*

T. Lynne Hopkins,  
Assistant Co-Editor of  
*Journal*

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*News and Views*

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## Statement of Editorial Policy

*Michigan Criminal Law Annual Journal* is printed annually by the Criminal Law Section of the State Bar of Michigan. Views expressed in articles and case commentaries are those of the authors, and not necessarily those of the Council, the Section or the State Bar. We encourage Section members and others interested in criminal law to submit articles, letters, and other material for possible publication.

To submit an article please contact Karen M. Woodside, Editor. See page one preamble.

Delivery and Quality of Public Defense Services in Michigan. The Council liaison and committee chairperson, Norris Thomas, Jr. of the State Appellate Defender Office, worked closely with Bruce Neckers, State Bar President, to ensure that this resolution was adopted by the State Bar.

Following through on Mackinac Conference initiatives from the June, 2001:

- Reactivate the Sentencing Guidelines Commission pursuant to statute.
- Restore appropriate judicial discretion for drug offenses by reviewing and limiting mandatory penalties.
- Develop parole guidelines that compliment the sentencing guidelines, and respect the minimum sentence imposed by the court.
- Identify a mechanism to permit judicial review when parole board policies operate to undermine the intent of the sentencing judge.
- Refine requirements of the sex offender registry to insure that it only includes individuals who are sexual predators, by eliminating CSC4 violators and re-examining its overall operation.

The Mackinac proposals were referred to the newly established committees on Policy (Co-Chaired by Hon. Vera Massey Jones and Michael Brady), and the Legislative Committee (Chaired by Sherrie P. Guess) for recommendations on how to accomplish action by the CLS section. The Council formally requested reinstatement of the Sentencing Guidelines Commission, however, the legislature declined to re-establish the Sentencing Commission.

The Council voted to proactively propose legislative initiatives to the legislature. With respect to the Council's vote to support HB 5163 repealing certain provisions of the sex offender registry, the council additionally urged that the this bill amendment be expanded to include revisiting the age of consent, and exclude consensual acts between two minors, particularly when only the male minor is typically charged, and to clarify ambiguity with juvenile and HYTA laws. An almost bizarre aspect of Sex Offender Registry is the interpretation that juveniles are only exempt for the period that they are juveniles. Once they reach the age of majority, they are then placed on the sexual offender registry for life, and defendant's that avail themselves of the Holmes Youthful Trainee Act (HYTA) also are placed on the registry despite the contrary provisions of HYTA. The Council voted to oppose SB 733, 734 which would allow a hearsay exception for domestic violence crime victims statements. Unfortunately, the proposed bill did not contain adequate procedural safeguards necessary to prevent abuse. While the drafters intended to aid crime victims, the proposed exceptions were not allowed in murder cases, and MRE 404b had adequate provisions to allow similar acts into a trial. The proposal would legisla-

tively amend the court rules, and the Council has opposed legislative efforts to become involved in the promulgation of court rules and matters of procedure that lie within the province of the courts.

The 25<sup>th</sup> Donald S. Leonard Award was presented to Michigan State Police Sgt. Lance R. Cook of the MSP Traffic Services Division. The Donald Leonard award is presented to a Michigan State Police officer who has excelled in the pursuit of continuing education by the CLS. The award was established in 1977 in memory of Hon. Donald S. Leonard (1903-1976). Judge Leonard was a Detroit Recorder's Court judge and Commissioner of the Michigan State Police from 1947-1952. He had a life-long interest in the continuing education of law enforcement professionals. This year's Leonard Award was presented to Sgt. Cook after he received his B.A. Summa Cum Laude from Saginaw Valley State University, and maintained his 4.0 G.P.A. throughout his M.S. studies at Central Michigan University. Sgt. Cook has acquired over 5,000 hours of in-service training during the course of his law-enforcement career, and is an instructor at the MSP on a number of different subjects. The award was presented at a Michigan State Police ceremony.

Pursuant to the Criminal Law Section By-laws amendment approved by the general membership in September of 2000, section dues were raised from \$15 to \$20, the increase took effect for the 2001-2002 dues calendar year. With the reorganization and budget constraints at the State Bar, it appears that the slight increase in dues is offset by the increased benefits and services the CLS section provides to our members.

The Biennial Summer Conference was held June 7 and June 8 at the Eagle Crest Conference Center in Ypsilanti. It featured Search and Discovery of Computer Records; Computer Crimes and Searches with Richard S. Murray, Assistant US Attorney-Western District of Michigan. Hon. Kirk Tabbey of Ypsilanti District Court and James E. Phillips, an Ohio attorney, who is nationally known for his articles and speeches on the topic. Forfeiture was addressed by the panel of Prof. Gary Maveal of the University of Detroit Mercy Law School, and Thomas Capezza, Assistant U.S. Attorney-Eastern District. Pretrial Detention was addressed by John O'Brian, of the US Attorney's Office-Eastern District and former Chief Assistant in the Oakland County Prosecutor's Office. Finally, the section is publishing its first annual *State Bar of Michigan Criminal Law Journal* in the fall of 2002. The February 2003 *Michigan Bar Journal* has been designated as the "Criminal Law" theme issue. Co-Editors T. Lynn Hopkins, and Kimberly Reed Thompson are assisting Editor Karen Woodside with the publication of the Annual Journal and the theme issue of the *Michigan Bar Journal*.

*Continued on page 48*

# After Apprendi...

*"It's so complicated. I'm so frustrated. . . . I hate it."*

Caroline Dawn Johnson

By Jerrold Schrottenboer

## **APPRENDI V NEW JERSEY**

Justice O'Connor's dissent in *Apprendi v New Jersey*,<sup>1</sup> calls *Apprendi* "a watershed change in constitutional law." Using that phrase to compare subsequent Sixth Circuit decisions with Michigan decisions interpreting *Apprendi* leads to a rather odd image. On the one side is a raging, flooding torrent of cases (Sixth Circuit). On the other side is a dry creek bed (Michigan). Barely a month goes by between Sixth Circuit opinions applying *Apprendi* to a new set of facts. On the other hand, in Michigan, *Apprendi* has hardly been noticed at all.

Unfortunately, *Apprendi* and its progeny are not that particularly easy to understand. Not only are the concepts difficult, but the law is also in flux. Recently, the Sixth Circuit stated that it has "an inordinately complicated *Apprendi* doctrine," and an "*Apprendi* cacophony."<sup>2</sup> This case summarized the law as follows:

Under our current doctrine, a district judge may sentence a defendant to a term of imprisonment which exceeds, but does not equal, the mandatory minimum of a higher penalty range without concern that such a sentence will raise an inference that she felt herself constrained by the mandatory minimum. However, if evidence in the record indicates that the judge thought herself constrained to sentence the defendant within the higher statutory range, such evidence will demonstrate a potential *Apprendi* violation. A penalty which exactly equals the bottom of the higher range is probative of such a perception of constraint.<sup>3</sup>

Get that? To understand, I merely had to reread *Apprendi* and every intervening Sixth Circuit case.

To a certain extent, a lot of this "cacophony" stems from *Apprendi* itself. Not only is this subject matter difficult itself, but the opinion is written in a way that allows, at times, for varying interpretations. Quite probably, the Supreme Court itself does not yet fully understand *Apprendi*'s full ramifications.

In any event, given this flood of cases (at least in the federal court) and the continued flux, this article may easily be hopelessly outdated by the time that it is published. As I have not yet completely perfected predicting the future, I will restrict myself to the opinions that have been released before I write this article.

*Apprendi*'s facts themselves are straight forward enough. By firing some shots into a home, Charles Apprendi

violated a New Jersey statute which called for a sentence between 5 and 10 years. He ended up pleading guilty to that charge. New Jersey, however, has a "hate crime" enhancement provision. If, at sentencing, the judge finds by a preponderance of the evidence that the defendant committed the crime intending to intimidate the victim because of race, then, through this provision, the sentence must be between ten and twenty years. Given the victim's race and certain statements that the defendant had made, the sentencing judge eventually concluded that the defendant had in fact committed a hate crime. He then sentenced the him to 12 years, 2 years above the maximum for the underlying offense.

Essential here is understanding that New Jersey's hate crime statute is not a separate substantive offense like Michigan's felony firearm statute. Instead, it is an enhancement statute like Michigan's habitual offender statutes. It would be as if Michigan's robbery statute merely required the prosecution to prove robbery, a 15 year felony. If the judge, however, finds that the defendant was armed, then the maximum would be life. This extra fact, found by a mere preponderance, raises the maximum penalty.

In an 5 - 4 decision, the Supreme Court said that this racial *mens rea* enhancement aspect is really an element of the offense that needs to be decided beyond a reasonable doubt, not merely by a preponderance: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>4</sup>

## **SIXTH CIRCUIT**

The federal defense lawyers did not take long to find the *Apprendi* motherlode. The federal drug statutes contain enhancement provisions that classically violate *Apprendi*. A maximum sentence may be raised if (1) death resulted, (2) the quantity is over a certain amount, or (3) the defendant has prior drug convictions.<sup>5</sup> About two months after *Apprendi*, the Sixth Circuit released *United States v Rebmann*.<sup>6</sup> There, the defendant pled to distributing heroin, a 20 year offense. Because a person died, however, the maximum became life. The judge then sentenced her to 24 years, 4 months, imprisonment. Because the indictment had not alleged death resulting nor did the defendant admit such a fact in pleading guilty, the Sixth Circuit found an *Apprendi* violation and remanded for resentencing.

At least to me, *Rebmann* naturally flows from *Apprendi*. Other cases as well have properly ordered resentencing under

*Apprendi* (at least if one ignores certain procedural problems, to be discussed later). In *United States v Page*,<sup>7</sup> one of the defendants was convicted of conspiracy to distribute cocaine base, a 20 year offense. Because of how much cocaine was involved, however, he received a sentence over 20 years. Because the jury had not decided that particular element, the drug amount, the Sixth Circuit remanded for resentencing. Similar cases are *United States v Martinez*,<sup>8</sup> and *United States v Graham*,<sup>9</sup>

Other cases have similarly correctly rejected applying *Apprendi* to situations too far off the mainstream, so to speak. In a number of cases, the Sixth Circuit has rejected any claim that *Apprendi* applies to mere guidelines calculations.<sup>10</sup> It has also ruled that *Apprendi* does not apply to either forfeitures<sup>11</sup> or restitution orders.<sup>12</sup> Last, it has rejected any attempt to expand *Apprendi* to habitual offender type statutes.<sup>13</sup> Even though *Apprendi* itself has questioned this particular exception, it did not overrule it. The Sixth Circuit has been firm on this point. As stated in *Matthews*, “[t]he Supreme Court, however, has recently reminded us that though its decisions may have cast doubt on earlier opinions, we should give the Court the opportunity to overrule them, and district and circuit courts should not overrule its decisions.”<sup>14</sup>

Unfortunately, in at least three areas, the cases have been rather difficult to follow. One deals (or dealt) with mandatory minimums. In cases like *United States v Flowal*,<sup>15</sup> *United States v Ramirez*,<sup>16</sup> *United States v Strayhorn*,<sup>17</sup> *Gibson v United States*,<sup>18</sup> and *Humphrey*, the Sixth Circuit remanded for resentencing merely because the amount involved had put a mandatory minimum sentence into effect, even though the sentence imposed was not over the maximum penalty for the underlying offense, the mandatory minimum, was not over the maximum penalty for the underlying offense. These cases, at least on their face, became a little difficult reconciling with *United States v Muñoz*,<sup>19</sup> *United States v Page* (three of the defendants),<sup>20</sup> *United States v Neuhausser*,<sup>21</sup> and *United States v Hough*,<sup>22</sup> where the Sixth Circuit did not order resentencing even though the judge had improperly decided a certain fact by a mere preponderance. They reasoned that *Apprendi* does not require resentencing unless the sentence exceeds the maximum. Matters then became even more complicated with *United States v García*,<sup>23</sup> *United States v King*,<sup>24</sup> and *United States v Lucas*,<sup>25</sup> where the Sixth Circuit upheld the sentences in situations because “nothing indicates that the district court thought itself constrained by a specific statute to impose the sentence it did.”<sup>26</sup>

*Humphrey* is right. This is a “cacophony.” Fortunately, the Supreme Court cleared up the matter in *Harris v United States*.<sup>27</sup> There, the enhancement factor was brandishing a firearm during the drug trafficking crime, which required a seven year mandatory minimum, precisely the sentence that he received. Although much can be said both ways, *Harris*

(5-4) simplified matters immensely. It said that the Constitution allows a judge to decide facts that merely impose mandatory minimums without also taking the sentence above the maximum.

The second confusing area deals with issue preservation. In *Page*, the Sixth Circuit said that, because the defendant did not object at sentencing, the court reviews for plain error only. It then found plain error in the case because the sentence imposed was not authorized by law.<sup>28</sup> The *Apprendi* violation had substantially increased the sentence.<sup>29</sup> This becomes confusing when one remembers that this is not the plain error standard. Plain error concerns itself with realities, not with whether or not the matter would have been reversed had the issue been preserved. Fortunately, the Supreme Court cleared up this matter too. In *United States v Cotton*,<sup>30</sup> the Court unanimously found no plain error even though the sentence was not authorized by law simply because the evidence showing this element had been overwhelmingly established. This is the real plain error test. Since *Cotton*, the Sixth Circuit abandoned *Page* and correctly found no plain error where, once again, this particular element had been overwhelmingly shown.<sup>31</sup>

The last confusing area deals with the most confusing case of all, *United States v Stubbs*,<sup>32</sup> which found a quasi-*Apprendi* violation in the judge using a guidelines cross reference provision. The defendant had pled to conspiracy to use firearms during a drug trafficking crime.<sup>33</sup> Because of a guidelines cross reference,<sup>34</sup> he was sentenced under a different statute<sup>35</sup> which called for a consecutive sentence (though not above the maximum for what the defendant had pled to). *Stubbs* ordered resentencing, using the new discredited *Page* plain error analysis. At least on its face, reconciling it with *Harris*,<sup>36</sup> which found no *Apprendi* violation in using a cross reference provision, is difficult. Further it probably cannot survive the Supreme Court’s *Harris* and *Cotton* decisions.

One more matter. Recently, the Sixth Circuit found an *Apprendi* violation in a consecutive sentence situation.<sup>37</sup> Although the court declined to reverse noting that the plea agreement waived such an issue, it opened up interesting new vistas to ponder.

In any event, *Apprendi* has changed the practice. Either the prosecutors have begun putting the drug amount into the indictment<sup>38</sup> or they ensure that the defendant’s plea includes the amount.<sup>39</sup>

## MICHIGAN

The Sixth Circuit’s vast wealth of cases contrasts sharply with Michigan’s dearth. So far, only two published cases have even mentioned *Apprendi*. The first one, *People v Bearss*,<sup>40</sup> merely cites it. The second one, *People v Mass*,<sup>41</sup> discussed *Apprendi* at length but, unfortunately, may have misanalyzed it. In finding that Michigan law requires knowledge of the drug amount as an element for conspiracy, the

majority relied on *Apprendi* and *Page*. Perhaps I am missing something, but such an analysis baffles me. As Justice Markman’s concurrence points out, *Apprendi* says nothing of the kind. It does not impose any knowledge requirement.<sup>42</sup> Further, no cases say that the Constitution requires knowledge of the amount as a conspiracy element.<sup>43</sup>

## SUMMARY

In the end, the confusion and complication probably stems from no one really knowing where the stream will take us. To use a hackneyed phrase, these are “uncharted waters.” As pointed out above, the Supreme Court itself probably does not yet fully see where *Apprendi* is taking us. The next number of years could give us plenty more cases to ponder.

*Jerrold Schrottenboer is both the Jackson County Prosecuting Attorney’s Office Chief Appellate Attorney and a Special Assistant Attorney General (handling Jackson County federal habeas cases). He graduated from the UCLA School of Law in 1981. He has since clerked for the Michigan Court of Appeals and the U.S. District Court — Eastern District of Michigan. He handles all of his office’s appeals and extraditions.*

## ENDNOTES

- 1 530 US 466, 523; 120 S Ct 2348; 147 L Ed 2d 435 (2000).
- 2 *United States v Humphrey*, 287 F3d 422, 450 (CA 6, 2002).
- 3 *Id.*
- 4 530 US 490.
- 5 21 USC 841(b).
- 6 226 F3d 521 (CA 6, 2000).
- 7 232 F3d 536, 545 (CA 6, 2000), cert den 532 US 1056; 121 S Ct 2202; 149 L Ed 2d 1032 (2001).
- 8 253 F3d 251, 255-256 (CA 6, 2001).
- 9 275 F3d 490, 521-524 (CA 6, 2001), cert den US ; 122 S Ct 1625; 152 L Ed 2d 636 (2002).
- 10 *United States v Corrado*, 227 F3d 528, 542 (CA 6, 2000); *United States v Harris*, 238 F3d 777, 779 (CA 6, 2001); *United States v Laster*, 258 F3d 525, 531-532 (CA 6, 2001), cert den US ; 122 S Ct 1116; 151 L Ed 2d 1010 (2002); *United States v Schulte*, 264 F3d 656, 660 (CA 6, 2001); *United States v Orlando*, 281 F3d 586, 598 (CA 6, 2002); *United States v Fitch*, 282 F3d 364, 368 (CA 6, 2002).

- 11 *United States v Corrado*, 227 F3d 543, 550-551 (CA 6, 2000).
- 12 *United States v Bearden*, 274 F3d 1031, 1042 (CA 6, 2001).
- 13 *United States v Gatewood*, 230 F3d 186, 192 (CA 6, 2000), cert den US ; 122 S Ct 911; 151 L Ed 2d 878 (2002); *United States v Adams*, 265 F3d 420, 425 (CA 6, 2001); *United States v Matthews*, 278 F3d 560, 563 (CA 6, 2002), cert den US 122 S Ct 1991; 152 L Ed 2d 1038 (2002); *United States v Aparco-Centeño*, 280 F3d 1084, 1089 (CA 6, 2002), cert den US ; 122 S Ct 2638; 153 L Ed 2d 818 (2002).
- 14 278 F3d 563.
- 15 234 F3d 932, 936-938 (CA 6, 2000).
- 16 242 F3d 348, 351-352 (CA 6, 2001).
- 17 250 F3d 462, 469 (CA 6, 2001).
- 18 271 F3d 247, 257 (CA 6, 2001).
- 19 233 F3d 410, 413-414 (CA 6, 2000).
- 20 232 F3d 536, 544-545 (CA 6, 2000), cert den 532 US 935; 121 S Ct 1389; 149 L Ed 2d 312 (2001).
- 21 241 F3d 460 (CA 6, 2001), cert den US ; 122 S Ct 181; 151 L Ed 2d 125 (2001).
- 22 276 F3d 884, 890 (CA 6, 2002), cert den US ; 122 S Ct 986; 152 L Ed 2d 1042 (2002).
- 23 252 F3d 838, 843-844 (CA 6, 2001).
- 24 272 F3d 366, 374-376 (CA 6, 2001).
- 25 282 F3d 414, 421 (CA 6, 2002).
- 26 252 F3d 843.
- 27 US ; 122 S Ct 2406; 153 L Ed 2d 524 (2002).
- 28 232 F3d 544.
- 29 232 F3d 545.
- 30 US ; 122 S Ct 1781; 152 L Ed 2d 860 (2002).
- 31 *United States v Harris*, 293 F3d 970 (CA 6, 2002).
- 32 279 F3d 402, 409 (CA 6, 2002).
- 33 21 USC 846 and 18 USC 924(o).
- 34 2K2.1(c).
- 35 18 USC 924(c).
- 36 238 F3d 779.
- 37 *United States v Sykes*, 292 F3d 495, 497 (CA 6,2002).
- 38 *United States v Garcia*, 268 F3d 407, 415-416 (CA 6, 2001), cert den 5/20/02.
- 39 *United States v Sandlin*, 285 F3d 407, 413-414 (CA 6, 2002).
- 40 463 Mich 623, 629; 625 NW2d 10 (2001).
- 41 464 Mich 615, 639-644; 628 NW2d 540 (2001).
- 42 464 Mich 666.
- 43 464 Mich 667.

# Keeping Habeas in Mind: The Importance of Raising and Exhausting Federal Issues in State Criminal Cases

By David A. Moran & F. Martin Tieber

## Introduction

In the last decade, a criminal defendant's chances of winning in the Michigan appellate courts have declined markedly.<sup>1</sup> Consequently, many criminal defendants with strong appellate issues that formerly would have resulted in new trials or resentencings are now completing their direct state appeals without obtaining any relief at all.

It should not be surprising, therefore, that in recent years there has been a striking number of Michigan prisoners who have obtained federal habeas corpus relief. Even though the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>2</sup> was designed to make it more difficult for state prisoners to obtain habeas corpus relief, federal district and appellate courts have granted habeas petitions to Michigan prisoners more than thirty-five times since AEDPA took effect in 1996.<sup>3</sup> In each of those cases, the district or appellate court found, as required by AEDPA, that a Michigan appellate court had issued a decision that was contrary to, or an unreasonable application of, binding United States Supreme Court precedent.

Given this trend, it is very important for criminal defense attorneys, both at the trial and the appellate levels, to understand federal habeas corpus law and procedure and to anticipate the possibility that their clients may have to go all the way to federal court to obtain relief for a serious constitutional error. The purpose of this article, therefore, is to raise awareness among practitioners about the need to litigate criminal trials and criminal appeals with habeas corpus in mind.

## A Basic Introduction to Habeas Corpus and AEDPA

A criminal defendant who has unsuccessfully appealed his or her conviction or sentence in state court may file a petition for a writ of habeas corpus in federal district court. Before the federal district court will hear the petition on the merits, the petitioner must meet five requirements. First, the petitioner must be "in custody" at the time the petition is filed.<sup>4</sup> That is, the petitioner must be in prison, on parole, on bond, or under some other type of correctional restraint as a direct result of the challenged state court criminal judgment.<sup>5</sup>

Second, the petition must allege that the petitioner's custody is "in violation of the Constitution or laws or treaties of the United States."<sup>6</sup> Since federal statutes and treaties do not normally govern state criminal cases, this means that a Michigan petitioner must show that the state court

decision he or she is attacking is wrong as a matter of federal constitutional law.

Third, the petitioner must demonstrate that all of the federal constitutional issues in the petition were completely "exhausted" in state court.<sup>7</sup> In other words, the petitioner must have presented each of the federal constitutional issues to both the Michigan Court of Appeals and the Michigan Supreme Court.

Fourth, the petitioner must show that the federal constitutional issues were not "procedurally defaulted" in state court. That is, the petitioner must prove that each of the state courts to reject the issue did so not because of an adequate and independent state law ground, such as failure to properly preserve the issue or failure to timely perfect an appeal.<sup>8</sup>

Fifth, the petitioner must have filed the petition in federal district court within one year of the conclusion of direct appellate review in state court.<sup>9</sup> This one-year period is tolled, but not reset to zero, if the petitioner pursues state collateral relief after the end of his or her direct appeals in order to raise a federal constitutional issue in state court.<sup>10</sup>

## Preserving Federal Issues In the Trial Court

Most federal habeas corpus petitions are denied not for lack of merit but because the issues in the petition were procedurally defaulted or not exhausted in state court. By far the most common form of procedural default is failure to object in the trial court.

In order to preserve any type of issue for appeal, a party must normally raise the issue in a timely fashion in the trial court and create an adequate record for appellate review. In other words, the Michigan Court of Appeals generally refuses to reach the merits of an issue that was not adequately raised in the trial court. That refusal constitutes an adequate and independent state ground for the denial of relief that will preclude a federal court from reaching the merits of the federal constitutional issue.

It is imperative, therefore, that trial counsel in a criminal case recognize a constitutional error when one occurs, make a timely objection to the error, and alert the trial judge to the constitutional nature of the error. If necessary, counsel must also make an offer of proof or create a factual record sufficient for appellate review.

The first of these requirements is the most basic; a good trial attorney must keep abreast of federal case law, particularly United States Supreme Court decisions, so that he or she knows when a constitutional error occurs. As a

good example of the importance of keeping up to date, Michigan trial and appellate courts sometimes admit, as substantive evidence of guilt, the out-of-court declarations of non-testifying codefendants under Michigan's version of the "statement against interest" hearsay exception, even though the United States Supreme Court has clearly and repeatedly held that the admission of such statements violates the Sixth Amendment Confrontation Clause.<sup>11</sup>

After recognizing the error, the trial attorney must, of course, make a timely objection or the issue will be unpreserved for appellate review. For federal habeas corpus purposes, however, a simple objection may not be sufficient. If, for example, the prosecution attempts to introduce a statement from a non-testifying co-defendant, the defense attorney would have to do more than simply say, "objection," or "objection, hearsay," since these objections would not alert the trial judge to the *constitutional* nature of the error. On the other hand, the defense attorney does not need to deliver a lecture on constitutional law. It is enough for the attorney to raise the constitutional nature of the error by simply mentioning the constitutional right at stake or by citing a state or federal case deciding the constitutional issue: "objection, violates my client's right to confront the evidence against her," or "objection, *Bruton* violation."

Finally, the attorney must, if necessary, make an adequate factual record for appellate and habeas corpus review. If, for example, the allegedly erroneous ruling excludes certain defense testimony or evidence, the attorney must normally make an offer of proof in order to establish exactly what the testimony or evidence would have proved. It is critical that the trial attorney make such a record because AEDPA provides that, except in extremely rare circumstances, a federal court cannot hold an evidentiary hearing if the defendant failed to create an adequate factual record for review of the constitutional issue in state court.

### **Preparing for Habeas Corpus Litigation During the State Appellate Process**

Unlike most other states, Michigan has a "unified" appeal process that allows a criminal defendant to raise issues such as newly discovered evidence and ineffective assistance of counsel as part of the initial round of direct appeals. It is important, therefore, to use these mechanisms to preserve all available federal constitutional issues in a timely manner. Doing so will go a long way toward avoiding procedural default.

The first step is to review and investigate everything that occurred during the trial court proceedings from inception through the beginning of the appellate process. The goal is to identify and timely raise all arguable issues and, with an eye on future habeas litigation, to identify and develop all reasonable federal constitutional issues.

Two key areas of concern are exhaustion and procedural default. The restrictive attitude of the federal courts reflected in the exhaustion and procedural default requirements is rooted in comity and federalism.<sup>12</sup> Federal courts will not interfere with a state's incarceration of a convicted criminal defendant unless and until the state courts have had a full and fair opportunity to determine any federal constitutional challenges to the conviction at issue.

The exhaustion doctrine is premised on the notion that, under our concepts of federalism, the state courts have the primary role in making sure federal law is enforced in state criminal cases.<sup>13</sup> Thus, before a state criminal defendant can seek relief from incarceration in federal court by way of a petition for writ of habeas corpus, she must "fairly present" the substance of her federal constitutional claims to the state courts.<sup>14</sup> Federal courts require that the federal constitutional issue be adequately identified as such in the state courts and that the factual basis for the issue be essentially identical in both forums.<sup>15</sup> Thus, when appealing for relief in state court, it is critical that appellate practitioners identify the distinct federal constitutional provisions claimed to have been violated, cite appropriate United States Supreme Court caselaw, and carefully build an appropriate factual basis for the issue. Whether the federal constitutional appellate issue was raised in the trial court initially or for the first time in the Michigan Court of Appeals, the issue must be presented to the Michigan Supreme Court by way of an application for leave to appeal before it is ripe for federal habeas review under the exhaustion doctrine.<sup>16</sup> Just as in the trial court, counsel for a criminal defendant must strive to avoid procedural on appeal in order to preserve for the federal claim to be cognizable on habeas corpus.<sup>17</sup> The linkage with the exhaustion doctrine is clear. If a state has set up a procedural bar to reviewing the substance of a federal constitutional claim, then a hopeful habeas petitioner cannot exhaust her state court remedies and is locked out of federal court.

For example, suppose an instance of prosecutorial misconduct rises to the level of a federal constitutional due process denial as it implicates the fair trial rights of a criminal defendant. If, however, the state appellate courts refused to address the substance of the issue during the state appellate process because there was no objection at trial, the federal courts will consider the issue procedurally defaulted and will not review it, unless cause and prejudice can be shown. The issue will also be procedurally defaulted if the defendant failed to adequately raise the issue on appeal or failed to timely perfect the appeal.

A frequent example of "cause" to excuse procedural default and allow federal court review is ineffective assistance of trial or appellate counsel. Thus, in the example above the petitioner would argue that the failure to object to the prosecutorial misconduct constitutes ineffective assistance of trial counsel or that the failure to raise the issue on

appeal constitutes ineffective assistance of appellate counsel. If the habeas litigant can meet the “cause” standard using the *Strickland* test for ineffective assistance of counsel,<sup>18</sup> and prejudice can be established for the prosecutorial misconduct, federal habeas review can proceed. It is critical to note that the cause for a procedural default can itself be procedurally defaulted and state appellate litigants therefore diligently raise their cause claims at the earliest available opportunity.<sup>19</sup> Finally, a state procedural rule cannot bar federal habeas review where the substantial requirements of the rule have essentially been met<sup>20</sup> and any state procedural bar, to be effective, must be “firmly established and regularly followed.”<sup>21</sup>

In order to lay the groundwork to build a successful federal habeas claim, state appellate litigants must clearly identify federal constitutional issues and raise them at the first available opportunity. The factual base of the issue must be carefully built, returning to the trial court for evidentiary work if necessary, and the substance of the federal claim must be clearly identified with citation to the appropriate federal constitutional provision and citation to federal authority. The federal claim must be fully litigated at each step of the state appellate process and it should be raised in essentially the same form as it will later be litigated in federal court.

### **Preparing and Filing the Habeas Corpus Petition**

Assuming you have laid the proper foundation for your federal constitutional claims at trial and on appeal in the state system, and have been denied relief by the state, you are now ready to file a federal civil suit against the warden confining your client. The petition itself is a concise pleading that should briefly identify the petitioner and the respondent warden, state that the action is a habeas corpus petition under 28 USC section 2254, claim that the respondent is confining petitioner in violation of a distinct federal constitutional provision, explain how and when the constitutional issue was exhausted at each level of the state court system, state that no previous federal habeas petitions have been filed challenging the conviction at issue, and state the relief requested. The petition should be accompanied by a memorandum or brief in support of the petition, which fully sets forth the constitutional argument.

The petition must be filed within one year of the end of direct review, which in Michigan is generally the denial of relief by the Michigan Supreme Court. Due to the wording of the AEDPA, however, the Sixth Circuit has held that the end of direct review occurs at the expiration of the 90-day period after the state supreme court’s denial of relief during which certiorari can be sought in the United States Supreme Court, even if no certiorari petition is filed.<sup>22</sup> Thus the one-year time limit would not start to run until 90 days following denial of leave in, or affirmance of the conviction by, the Michigan Supreme Court. If a certiorari petition is

filed, the end of direct review occurs on the date that the United States Supreme Court denies relief. If there is a need to conduct state post-conviction proceedings after the end of direct review, under MCR 6.500 for example, the running of the one-year time limit is stopped or “tolled” (but not reset) while the state post-conviction process runs its course.<sup>23</sup> Care must be taken to timely pursue post-conviction relief all the way to the Michigan Supreme Court so as to keep the clock tolled. Once the Michigan Supreme Court denies a post-conviction motion, the one-year clock immediately begins running again without a 90-day grace period.<sup>24</sup>

The habeas petition must be filed in the federal district where the petitioner is incarcerated or where the conviction arose. In Michigan there are two federal districts, Eastern and Western. If, for example, the petitioner was convicted in Grand Rapids (Kent County, Western District) but is incarcerated in Detroit (Wayne County, Eastern District), the petition could be filed in either district.

### **Conclusion**

Despite all of the obstacles a habeas petitioner faces, dozens of Michigan prisoners have been able to obtain habeas relief in the last few years by showing that the state had clearly violated their federal constitutional rights. Therefore, it is important for criminal defense counsel to litigate cases at every stage with an eye on the possibility that federal habeas corpus proceedings will be necessary to safeguard their clients’ federal constitutional rights.

*David A. Moran is an assistant professor at Wayne State Law School. He teaches and writes on criminal law and procedure and evidence. After graduating from Michigan Law School, Moran clerked for the Hon. Ralph B. Guy, Jr., of the U.S. Court of Appeals for the Sixth Circuit and was an assistant defender at SADO before joining the faculty at Wayne State. Moran continues to litigate several habeas corpus and civil rights cases in the federal courts.*



*F. Martin Tieber recently retired from the State Appellate Defender Office, where he directed the Lansing office since 1978, to begin a private law practice as of counsel to the Reynolds Law Firm in Lansing. For nearly two decades he taught several courses at the Thomas M. Cooley Law School in Lansing. Mr. Tieber is a member of the National Association of Criminal Defense Lawyers and is currently president of the Criminal Defense Attorneys of Michigan. He founded Michigan’s Innocence Project and served as the first chair of the Innocence Project Commission in 2000-2001.*



Continued on next page

## Endnotes

- 1 In its annual report for 2001, the Michigan State Appellate Defender Office notes a marked decline in relief rates from 1993-2000 for the approximately 25 percent of Michigan appeals that office handles. In 1993 the relief rate was 25.4 percent and by 2000 it had dropped to 16.76 percent.
- 2 Pub L No 104 - 132, 110 Stat 1213 (codified, *inter alia*, at 28 USC 2244 *et seq.*)
- 3 See, for example, *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999), cert. den, *Killinger v. Nevers*, \_\_\_ U.S. \_\_\_, 119 S. Ct. 2340 (1999); *Northrop v. Trippett*, 265 F.3d 372 (6th Cir. 2001), cert. den, *Trippett v. Northrop*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 1358 (2002); *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999), cert. den, *Yukins v. Barker*, \_\_\_ U.S. \_\_\_, 120 S. Ct. 2658 (2000); *Bulls v. Jones*, 274 F.3d 329 (6th Cir. 2001); *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000); *McGraw v. Holland*, 257 F.3d 513 (6th Cir. 2001); *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001); *Hill v. Hofbauer*, 195 F. Supp. 2d 871 (E.D. Mich. 2001); *Mathis v. Berghuis*, 202 F. Supp. 2d 715 (E.D. Mich. 2002).
- 4 28 U.S.C. section 2254 (a).
- 5 See, e.g. *Garlotte v. Fordice*, 515 U.S. 39 (1995) (discussing custody requirement).
- 6 28 U.S.C. section 2254(a).
- 7 28 U.S.C. section 2254(b)(1)(A).
- 8 See, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991) (holding claim procedurally defaulted because petitioner's lawyer filed state appeal three days late).
- 9 28 U.S.C. section 2244(d).
- 10 In Michigan, a criminal defendant may file a so-called "6500 Motion" (Michigan Court Rules 6.501, *et. seq.*) in the trial court after the conclusion of his or her direct appeals in order to raise new issues that were not litigated during the direct appeal.
- 11 Compare, e.g., *People v. Schutte*, 613 N.W.2d 370 (Mich. Ct. App. 2000) (holding, under authority of *People v. Poole*, 506 N.W.2d 505 (Mich. 1993), that non-testifying codefendant's statement implicating defendant admissible under statement against interest hearsay exception), with *Lilly v. Virginia*, 527 U.S. 116 (1999) (admission of non-testifying accomplice's statement implicating defendant violates Confrontation Clause doctrine of *Bruton v. United States*, 391 U.S. 123 (1968)).
- 12 *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).
- 13 *Rose v. Lundy*, 455 U.S. 509, 518 (1982).
- 14 *Picard v. Connor*, 404 U.S. 270, 275-278 (1971); *Lyons v. Stovall*, 188 F.3d 327, 331 (6th Cir. 1999).
- 15 *Id.* at 332.
- 16 *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).
- 17 *Murray v. Carrier*, 477 U.S. 478 (1986).
- 18 Counsel's performance must have fallen below an objective standard of reasonableness and there must be a reasonable probability that, but for counsel's conduct, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).
- 19 *Edwards v. Carpenter*, 529 U.S. 446 (2000).
- 20 *Lee v. Kemna*, 534 U.S. 362 (2002).
- 21 *Ford v. Georgia*, 498 U.S. 411, 423-424 (1991).
- 22 *Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). Caution should be exercised on this point, however, as the United States Supreme Court has not yet spoken on the issue.
- 23 *Artuz v. Bennett*, 531 U.S. 4 (2000); *Carey v. Saffold*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 2134 (2002).
- 24 *Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000).

# The Legislative Sentencing Guidelines: Michigan's Transition to a Limited-Discretion Sentencing Scheme

By Anne Yantus, Assistant Defender with the State Appellate Defender Office

Any significant change in the law is likely to cause a period of adjustment. This was true with the judicial sentencing guidelines when they were first introduced in 1983,<sup>1</sup> and so it is true with the legislative sentencing guidelines, effective for all felony offenses committed on or after January 1, 1999.<sup>2</sup> Unlike the judicial sentencing guidelines, where the recommended ranges were advisory and based on past sentencing practices of the state's trial judges,<sup>3</sup> the new legislative guidelines provide mandatory ranges with departures only for substantial and compelling reasons.<sup>4</sup> The new guidelines also reflect policy judgments as to the length of a sentence vis-a-vis the severity of the crime (i.e., crimes of violence are treated more severely), and the new guidelines are supposed to consider prison capacity in reaching the recommended ranges.<sup>5</sup> Moreover, the new guidelines apply to habitual offender sentences.<sup>6</sup>

How has Michigan fared with these new guidelines? Fairly well, it seems. While no official compliance rate exists, both word of mouth, and published and unpublished appellate decisions suggest the state's trial judges are following the recommended ranges in most cases. There are only a handful of judges who publicly disagree with the wisdom of the guidelines,<sup>7</sup> or otherwise act as if they are not bound by the new guidelines.<sup>8</sup>

Are there problems with the new guidelines? But of course. As with any comprehensive set of laws, especially laws written for a wide variety of situations, there are areas of imprecision and uncertainty. The Legislature did not define many of the terms found within the guidelines, and there will be endless litigation over the departure standard of "substantial and compelling reasons." The Legislature also unwittingly confused many trial judges with the departure standard for intermediate sanction cells (i.e., many trial judges do not realize that a prison sentence represents a departure from an intermediate sanction cell).<sup>9</sup> And there was a brief period of debate over the scope of appellate review of departure sentences - this despite statutory language expressly defining it.<sup>10</sup>

What do the new appellate cases say about the guidelines? In general, the decisions focus on three areas: procedure, departure sentences and scoring issues. On the procedural front, it certainly comes as no surprise that the Court of Appeals has spent much time and energy defining this area. The Court first leapt into action with published decisions on the standard of review,<sup>11</sup> and quickly deter-

mined that the guidelines were not to be applied retroactively.<sup>12</sup> The Court also determined that the guidelines are not in violation of due process, equal protection or the separation of powers principle.<sup>13</sup> Moreover, there is no right to a jury determination of the facts leading to a guidelines scoring.<sup>14</sup> The Court is now immersed in the middle of a debate over the requirement of a contemporaneous objection at sentencing to scoring challenges. The Court's first published decision on this topic held that an objection at sentencing is necessary to preserve the issue for appellate review - this despite contrary language in MCL 769.34(10).<sup>15</sup> A more recent published decision would hold that the statute controls on matters of issue preservation.<sup>16</sup> And yet a third published decision avoids the issue entirely by finding plain error where no objection was raised at sentencing.<sup>17</sup> Several cases have also concluded that a defendant can raise a claim of ineffective assistance of counsel for failure to raise a winning guidelines challenge at sentencing.<sup>18</sup>

As for the new departure cases, the Michigan Supreme Court has twice generally addressed the topic,<sup>19</sup> but the Court of Appeals has provided relatively little guidance in published decisions. The Court of Appeals affirmed a significant downward departure in *People v Babcock*,<sup>20</sup> but then affirmed a significant upward departure in *People v Armstrong*.<sup>21</sup> Both were criminal sexual conduct cases. The Court also held that the recommended ranges of the legislative sentencing guidelines would not constitute a substantial and compelling reason to depart from the mandatory minimum terms for certain drug offenses.<sup>22</sup>

The unpublished decisions of the Court of Appeals are more instructive on the issue of sentence departures. Several trends can be observed from these decisions, the first being that the Court of Appeals is generally reversing departure sentences based on reasons already considered within the guidelines range.<sup>23</sup> The Court is also not easily impressed with speculation over what might have occurred had the crime been more serious.<sup>24</sup> In a surprising move, the Court of Appeals seems willing to relax its general policy against resentencing before another judge if the original judge shows a pattern of disregarding the recommended ranges.<sup>25</sup> And finally, if there is any trend in allowing departure sentences, it is for the excessively brutal, violent or "loathsome" crime.<sup>26</sup>

In terms of guideline scoring issues, the Court of Appeals has moved slowly but surely to address this sub-

ject. While there was little published guidance as of mid-April 2002, the Court has issued seven published decisions in the last four months. A comprehensive list of the published and unpublished decisions addressing each offense and prior record variable follows this article.

Perhaps the most important point to be made about the new guidelines, and one not lost on the appellate courts, is the return to a legislatively prescribed sentencing scheme. The Court of Appeals noted in *People v Babcock*<sup>27</sup> (MSC Leave Granted) that the “Legislature has now reasserted its constitutional authority over the sentencing process” with the new guidelines. The Michigan Supreme Court similarly stated in *People v Hegwood*<sup>28</sup> that “the ultimate authority to provide for penalties from criminal offenses is constitutionally vested in the Legislature. . . . It is, accordingly, the responsibility of a circuit judge to impose a sentence, but only within the limits set by the Legislature.”<sup>29</sup>

Overall, the sentencing law in Michigan remains in a period of adjustment, although the transition period has been less than difficult. The trial and appellate judges of this state seem willing to follow the recommended ranges of the new guidelines in most cases. The courts also appear willing to recognize the Legislature’s authority to restrict sentencing. Whether the legislature will further restrict sentencing remains to be seen, but it is safe to say that Michigan now functions under a limited-discretion sentencing scheme.

*Anne Yantus is an assistant defender with the State Appellate Defender Office, specializing in guilty plea and sentencing appeals. She also teaches and writes on plea and sentencing law.*

## Endnotes

- 1 Admin Order 1983-3, 417 Mich cxxi (1983).
- 2 MCL 769.34.
- 3 *People v Milbourn*, 435 Mich 630, 655-656; 461 NW2d 1 (1990).
- 4 MCL 769.34(1)&(3).
- 5 MCL 769.33.
- 6 MCL 777.21(3).
- 7 See e.g., *People v Joshua Keeling*, Grand Traverse Circuit Court No. 00-8158 FC (Sentence transcript pp. 14-15) (“The legislature has some pretty pro-criminal, theft-friendly guidelines.”); *People v Matthew Connor*, Antrim Circuit Court No. 01-3446 FH (Sentence transcript pp. 9-10) (“The legislature has indicated with these guidelines that they aren’t seriously concerned with the ramifications of this kind of behavior [drugs] as it goes through the community.”).
- 8 See e.g., *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001) (reversed where trial judge indicated not bound by new guidelines); *People v Joyce*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 2002 (Docket No. 235376) (same); *People v Stutzman*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 222546) (reversed in part for comment that guidelines “utterly unjust” and intrusion on judicial authority).
- 9 *People v Stauffer*, 465 Mich 633; 640 NW2d 869 (2002); *People v Burrell*, 465 Mich 923 (2001); *People v Sam Smith*, 465 Mich 929 (2001).

- 10 Compare *People v Babcock*, 244 Mich App 64, 77; 624 NW2d 479 (2000) (no review of extent of departure) with *People v Hegwood*, *supra* (extent of departure reviewed for proportionality).
- 11 The standard of review for departure sentences is set forth in *People v Babcock*, 244 Mich App 64; 624 NW2d 479 (2000); and *People v Babcock*, 250 Mich App 463; 648 NW2d 221, lv gtd 651 NW2d 921 (2002). See also *People v Hegwood*, *supra*. For review of guidelines scoring issues, the Court of Appeals has said that a challenged scoring will be upheld if evidence supports it, *People v Leversee*, 243 Mich App 337; 622 NW2d 325 (2000), although application of the statutory sentencing guidelines is a question of law subject to de novo review, *People v Libbett*, 251 Mich App 353; 650 NW2d 407 (2002).
- 12 *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).
- 13 *People v Follman*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2002 (Docket No. 228018); *People v Bradley*, unpublished opinion per curiam of the Court of Appeals, issued July 26, 2002 (Docket No. 230567).
- 14 *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued September 6, 2002 (Docket No. 225346).
- 15 *People v McGuffey*, 251 Mich App 155; 649 NW2d 801 (2002).
- 16 *People v Wilson*, 252 Mich App 390; 652 NW2d 488 (2002). See also *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2002 (Docket No. 229665) (citing the statute for issue preservation).
- 17 *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002).
- 18 *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001); *People v Wilson*, *supra*; *People v Hudson*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2002 (Docket No. 230893).
- 19 *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001) (see note 7 *supra*); *People v Stauffer*, 465 Mich 633; 640 NW2d 869 (2002) (see text accompanying note 8 *supra*).
- 20 250 Mich App 463.
- 21 247 Mich App 423; 636 NW2d 785 (2001).
- 22 *People v Izarraras-Placante*, 246 Mich App 490; 633 NW2d 18 (2001).
- 23 See *People v Hamilton*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2002 (Docket No. 231965) (brutality of crime and seriousness of injuries already scored under OV 3 and OV 7); *People v Range*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2002 (Docket No. 229330) (guidelines already considered touching with weapon under OV 1, lethal potential of the weapon under OV 2, and bodily injury requiring medical treatment under OV 3); *People v Ashbaker*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2001 (Docket No. 232967) (use of weapon considered under OV 1 and OV 2, defendant on probation for prior felony considered under PRV 2 and PRV 6); *People v Gatson*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2001 (Docket No. 223538) (noting departure reasons all included within guidelines factors).
- 24 *People v Vandeventer*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 230137) (fact that victim almost died not substantial and compelling and considered under OV 1, OV 3 and OV 6); *People v Range*, *supra* (that victim might have died not substantial and compelling, especially where injuries not life threatening).
- 25 See *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 2002 (Docket No. 231252); *People v Joyce*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 2002 (Docket No. 235376). See also *People v Trammel*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2002 (Docket No. 229168).
- 26 See e.g., *People v Arnold*, unpublished opinion per curiam of the Court of Appeals, issued April 2, 2002 (Docket No. 223792) (excessive brutality); *People v Ellis*, unpublished opinion per curiam of the Court of Appeals, issued February 22, 2002

(Docket No. 227339) (severity of attack); *People v Montes*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2002 (Docket No. 223539) (“particularly loathsome” acts); *People v Williams*, unpublished per curiam opinion of the Court of Appeals, issued May 21, 2002 (Docket No.

232255) (cold-blooded nature of crime); *People v Ross*, unpublished per curiam opinion of the Court of Appeals, issued May 24, 2002 (Docket No. 227964) (violence of act).  
27 244 Mich App at 71-72. (MSC Leave Granted)  
28 465 Mich at 436-437.  
29 *Id* (emphasis in original).

## Guidelines Scoring Cases

### Offense Variable 1

*People v Lange*, 251 Mich App 247; 650 NW2d 691 (2002)(glass mug used as a weapon sufficient for 10 points).

*People v Libbett*, 251 Mich App 353; 650 NW2d 407 (2002) (15 points proper even where co-defendant assessed only 5 points).

*People v Holbrook*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 2002 (Docket No. 228693) (bare hands sufficient for 10 points where conviction offense did not require use of deadly weapon).

*People v Jordan*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2002 (Docket No. 232246) (25 points proper where co-defendant shot gun at occupied car).

*People v Fryer*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 232252) (proper to score acts against multiple victims).

*People v Ellis*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2002 (Docket No. 232247) (25 points proper where defendant fired gun at occupied vehicle).

*People v Tullis*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2002 (Docket No. 228041) (sufficient evidence defendant aimed and fired weapon toward victims).

*People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued December 18, 2001 (Docket No. 226746, 226747) (25 points proper where multiple offender situation and codefendant scored 25 points).

*People v Sutton*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2001 (Docket No. 225189) (properly scored based on unchallenged evidence of uncharged assault).

*People v Nottingham*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2001 (Docket No. 222021) (testimony suggested primary victim was in reasonable apprehension of immediate battery with grease knife).

### Offense Variable 2

*People v Kurzawa*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2001 (Docket

No. 220906, 229264) (properly scored where defendant possessed propane tank).

*People v Nottingham*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2001 (Docket No. 222021) (evidence supported conclusion that grease knife was potentially lethal weapon).

### Offense Variable 3

*People v Britt*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 228017) (100 points improperly scored where sentencing offense is homicide).

*People v Hudson*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2002 (Docket No. 230893) (ineffective assistance for failing to object to 100 points where sentencing offense was homicide).

*People v Mitchell*, unpublished decision of the Court of Appeals, issued September 28, 2001 (Docket No. 224540) (affirming score of 100 points for victim of UDAA).

*People v Hauser*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2002 (Docket No. 239688) (ten points improperly scored where victim died; cannot score points for injury to victim where victim died).

*People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328) (error to score for life threatening injury where defendant’s behavior was life threatening, but there was no injury).

*People v Oldham*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2002 (Docket No. 229334) (miscored where court assumed shot to face was per se life threatening).

*People v Banks*, unpublished opinion per curiam of the Court of Appeals, issued August 20, 2002 (Docket No. 232254) (variable properly scored where officer observed apparently recent abrasion to victim’s hand and forearm).

*People v Bradford*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2001 (Docket No. 224790) (properly scored based on medical testimony that injuries life threatening).

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# Criminal Immigration: The Consequences of Criminal Convictions on Non - U.S. Citizens

By Ronald Kaplovitz

The Immigration & Nationality Act (INA) has the potential to create severe consequences for criminal convictions by non-U.S. citizens aliens.<sup>1</sup> “Aliens” are defined as being “any person, not a citizen or national of the United States.”<sup>2</sup> There are three categories of aliens: lawful permanent residents, commonly known as green cardholders;<sup>3</sup> non-immigrants who are legally in the United States in a temporary capacity, such as visitors, students, and non-immigrant workers;<sup>4</sup> and illegal aliens, individuals who entered the country illegally or who entered the country legally and have remained beyond their authorized stay.

## Definition of Criminal Conviction for Immigration Purposes

The Immigration & Naturalization Service (INS) defines a conviction as a formal judgment of guilt, or if a judgment is withheld, where there is some type of plea, and/or admission of facts warranting guilt and the imposition of some type of penalty.<sup>5</sup>

Any type of criminal adjudication, such as Holmes Youthful Training Act,<sup>6</sup> rehabilitative drug dispositions like 7411,<sup>7</sup> domestic violence pleas under advisement,<sup>8</sup> and any other type of criminal plea where a judgment of conviction is withheld, is considered to be a conviction for immigration purposes, and can be used by the INS as grounds for deportation.

The only exception to this rule might involve 17 year old persons who receive Youthful Training Status, as these crimes have been equated to being the equivalent of a federal juvenile delinquent status, and as such, may not necessarily be convictions for immigration purposes. Specifically, the Board of Immigration Appeals in the case of *In Re: Miguel Devison Charles*<sup>9</sup> ruled that if a state youthful status conviction is comparable to the Federal Juvenile Delinquency Act (FJDA),<sup>10</sup> then the alien was not convicted of a crime and is not subject to deportation as the FJDA applies to individuals under 18 years of age. Only those aliens 17 years of age and under would be protected.

## Deportable vs. Inadmissible Crimes

Under the INA, criminal convictions may make an alien ineligible for admission into the United States.<sup>11</sup> Specifically, convictions that are covered under this section apply to aliens who are not permanent residents, such as non-immigrant aliens, illegal aliens as noted above, or individuals outside of the country. These grounds, as covered in the statute will make it difficult, if not impossible, for the aliens above-noted to obtain permanent residency in the United States.

Criminal conviction can make aliens deportable or inadmissible. Deportable aliens are those individuals who the government desires to remove from the United States. Deportation, now referred to as removal, involves the act of placing the alien in proceeding before an Immigration Judge.<sup>12</sup> Inadmissible aliens are aliens who are attempting to obtain entry into the United States or aliens who are in the United States and are seeking permanent resident status (Green Card).<sup>13</sup>

It is not unusual, however, to see an alien who has been admitted in some sort of non-immigrant category, or illegal aliens, to be placed in deportation/removal proceedings. These aliens are both inadmissible, as well as deportable. There are however various differences between these categories. Consideration by criminal practitioners in resolving their criminal cases can affect the future rights of these aliens. Specifically, crimes that subject an alien to deportation may not cause those aliens to be inadmissible.

A prime example of these differences involves the treatment of domestic violence convictions. Domestic violence<sup>14</sup> is a deportable offense. However, it is not an offense that makes an individual inadmissible for admission into the United States.<sup>15</sup> In other words, a person convicted of domestic violence might be deportable or removable from the United States. However it would be possible to have him readmitted to the United States should he be otherwise eligible.

An example of this is a permanent resident alien married to a U.S. citizen. If the alien is not entitled to relief from deportation/removal, the U.S. citizen can reapply to have the alien admitted as a permanent resident.

The two categories of crimes listed above provide for a variety of crimes that can make an alien inadmissible and/or deportable from the United States. While the groups are not identical, there are some similarities. The crimes listed below are the primary crimes that are used by INS and affect the rights of aliens.

## Moral Turpitude Crimes

Crimes involving moral turpitude where the penalty exceeds one year or more<sup>16</sup> can make an alien deportable or inadmissible. Moral turpitude, under immigration law, has been defined by case law and is extremely broad. These crimes include all frauds, thefts, burglaries, robberies, murder, manslaughter, income tax evasion, drunk driving, assaults with weapons, domestic violence, conspiracy related crimes, and drug trafficking.<sup>17</sup>

Moral turpitude crimes that provide for a penalty of less than one year, such as drunk driving, retail fraud, or

simple assaults, generally will not create problems for aliens if there is a single criminal conviction. The sole exception to this rule includes crimes for domestic violence.<sup>18</sup>

### **Domestic Violence**

Domestic violence convictions are deportable, but not inadmissible offenses. Thus your standard, routine domestic violence conviction for a permanent resident, green card holder can and will result in his deportation from the United States regardless as to whether this crime is taken under advisement pursuant to the applicable Michigan<sup>19</sup> or local statutes.<sup>20</sup> For that reason, attorneys representing aliens should avoid pleading their clients to any charge of domestic violence. Disorderly conduct or a like conviction is preferable because it is not the type of crime that automatically makes the alien deportable. These convictions can, however, be considered if there are multiple convictions.

The deportation provision for domestic violence also applies to crimes involving stalking, as well as violation of a Personal Protection Order (PPO).<sup>21</sup> While PPOs are not necessarily criminal in nature, an alien found in violation of a PPO is subject to deportation.

### **Crimes Against Children**

The same statute that involves domestic violence also provides for deportation for crimes involving child abuse, child neglect, or child abandonment. These crimes would include 90-day misdemeanors.

Sexual abuse of a minor is considered an aggravated felony pursuant to statute.<sup>22</sup> These crimes are not only deportable, but as aggravated felonies virtually no relief is available. Immigration Courts have held criminal sexual conduct convictions that are misdemeanors are, in fact, aggravated felonies under immigration law.<sup>23</sup>

### **Miscellaneous Crimes**

Aliens who have multiple convictions involving moral turpitude, not arising out of a single scheme, are deportable and inadmissible.<sup>24</sup> A single scheme has been defined under immigration law as a situation where an alien did not have any opportunity between the commission of two crimes to reflect or think about the crimes, or the crimes occurred as a result of a single action.<sup>25</sup> Two misdemeanor convictions can trigger deportation procedures.

Drug convictions are treated harshly under the INA. Specifically, any drug conviction, other than for the personal use of 30 grams or less of marijuana provides for deportation or lack of admission into the United States.<sup>26</sup> In addition, special provisions relating to drug traffickers provide for deportation and inadmissibility, but are so severe and so harsh that waivers for these types of criminal convictions are not permitted. These aliens are classified as aggravated felons and are not eligible for relief as will be discussed below.<sup>27</sup>

Convictions for firearms offenses,<sup>28</sup> high speed flight offenses,<sup>29</sup> and other types of crimes are listed as crimes that cause aliens to be deported. Keep in mind that these various specified crimes can also qualify as moral turpitude crimes.

“Aggravated felony crimes,” as defined by the INA, are grounds for deportation<sup>30</sup> and for limiting or precluding certain waivers. Examples of the most prevalent aggravated felonies include any type of violence for which a sentence of one year or more is imposed, theft offenses for which a sentence of one year or more is imposed,<sup>31</sup> drug trafficking,<sup>32</sup> sexual abuse of minors,<sup>33</sup> fraud exceeding \$10,000,<sup>34</sup> and obstruction of justice.<sup>35</sup>

It should be noted that the INS will often charge an alien as being deportable under several different sections of the statute, even though only one crime occurred. An example of this would be drug traffickers who are deportable pursuant to “crimes of moral turpitude,”<sup>36</sup> as “aggravated felons”<sup>37</sup> and violation of “controlled substance” provisions.<sup>38</sup>

### **Waivers of Relief From Deportation**

As noted above criminal convictions can make an alien deportable and/or inadmissible. The immigration laws provide aliens the opportunity to seek a waiver that may allow them to remain in, or be admitted to the United States. Conviction for an aggravated felony is an absolute bar to one type of waiver (Cancellation of Removal) and a virtual bar to a waiver of inadmissibility.<sup>39</sup>

Cancellation of Removal<sup>40</sup> is a waiver applicable in two situations. The first is for permanent residents who have resided in the United States for a minimum of seven years, with at least five years in permanent residence status.<sup>41</sup> Although not specifically stated in the statute, hardship to the alien’s relatives may be a factor. This waiver is the most common waiver used today for criminal aliens and is available for most felonies, which are not aggravated felonies. Criminal practitioners must pay special attention to the cancellation of removal rules, as minor adjustments of the nature and/or sentence for a crime can make all the difference.

Sentences for theft or violence offense of even one day less than a year may make an alien eligible for cancellation of removal. Another example would be to plead a defendant guilty to a non-fraud offense when more than \$10,000 is involved. Often when judges or prosecutors are advised of the problem, accommodations can be made to fashion convictions or sentences that allow for immigration relief.

The second cancellation of removal waiver applies to non-permanent residents (illegals) who have been in the U.S. for ten years.<sup>42</sup> Proof of “good moral character” is required. Virtually *any* criminal conviction will prevent a finding of “good moral character”.

Waiver of Inadmissibility<sup>43</sup> is applicable to non-permanent residents who have a criminal conviction

rendering them inadmissible. An example of such a person would be a non-permanent resident who is currently married to a United States citizen, but who has previously been convicted of a theft crime. The requirements for this type of waiver are different from those of the cancellation waivers in two significant ways: no residency requirement is necessary, and conviction for possession of controlled substances cannot be waived unless the conviction is for possession of less than 30 grams of marijuana. A waiver is not required for a single 90-day misdemeanor.

### Strategies

The immigration consequence of a criminal conviction of an alien often far outweighs the criminal punishment imposed. By carefully evaluating the immigration consequences, criminal practitioners can often mold a resolution that will allow an alien to avoid deportation/removal or to be eligible for a waiver or readmission into the U.S. As noted above, judges and prosecutors may work with criminal attorneys to create circumstances that may allow aliens to remain in the U.S.

*Ronald E. Kaplovitz currently practices criminal and immigration law in his Bloomfield office. He is a past chairman of the Oakland County Immigration and Criminal Law committees. He is currently a member of the American Immigration Lawyers Association. Mr. Kaplovitz is a 1982 graduate of the Case Western Reserve School of Law in Cleveland, Ohio.*

### Endnotes

- 1 8 USC section 1182 (a)(2) INA section 212(a)(2); 8 USC section 1227(a)(2), INA section 237(a)(2)
- 2 8 USC section 1101(a)(3); INA section 101(a)(3)
- 3 8 USC section 1101(a)(20); INA section 101(a)(20)
- 4 8 USC section 1101(a)(15)(A-V); INA section 101(a)(15)(A-V)
- 5 8 USC section 1101(a)(48); INA section 101(a)(48)
- 6 MCL section 762.11

- 7 MCL section 333.7411
- 8 MCL section 769.4(a)
- 9 *In Re: Miguel Devison Charles*, Executive Office for Immigration Review (B.L.A. #3435, 2001).
- 10 18 USC section 5031-5042 (1994 & Supp II 1996)
- 11 8 USC section 1182(a)(2); INA section 212(a)(2)
- 12 8 USC section 1227(a)(2); INA section 237(a)(2)
- 13 8 USC section 1182(a); INA section 212(a)
- 14 8 USC section 1227(a)(2)(E)(i); INA section 237(a)(2)(E)(i)
- 15 8 USC section 1182(a)(2); INA section 212(a)(2) (Note, it is specifically absent)
- 16 8 USC section 1182(a)(2)(i)(I), INA section 212(a)(2)(i)(I); 8 USC section 1227(a)(2)(i); INA section 237(a)(2)(i)
- 17 Extensive case law from the Executive Office of Immigration Review (B.L.A.)
- 18 8 USC section 1227(a)(2)(E)(i); INA section 212(a)(2)(E)(i)
- 19 MCL section 769.4(a)
- 20 Varies by local jurisdiction
- 21 8 USC section 1227(a)(2)(E)(i)(ii); INS section 237(a)(2)(i)(ii)
- 22 8 USC section 1101(a)(43)(A); INA section 101(a)(43)(a)
- 23 *In Re: Anderson Davis Justin Small*, 23 I & N Dec (448)(B.L.A. 2002)
- 24 8 USC section 1182(a)(2)(B); INA section 212(a)(2)(B); 8 USC section 1127(a)(2)(A)(ii); INA section 237(a)(2)(A)(ii)
- 25 *In Re: Matter of Adetiba*, 20 I & N Dec 506 (1992)
- 26 8 USC section 1227(a)(2)(B); INA section 237(a)(2)(B); 8 USC section 1182(a)(2)(B); INA section 212(a)(2)(B)
- 27 8 USC section 1101(a)(43)(B); INA section 101(a)(43)(B)
- 28 8 USC section 1227(a)(2)(C); INA section 237(a)(2)(C)
- 29 8 USC section 1227(a)(2)(A)(IV); INA section 237(a)(2)(A)(IV)
- 30 8 USC section 1101(a)(43); INA section 101(a)(43)
- 31 8 USC section 1101(a)(43)(F)(G); INA section 101(a)(43)(F)(G)
- 32 8 USC section 1101(a)(43)(B); INA section 101(a)(43)(B)
- 33 8 USC section 1101(a)(43)(A); INA section 101(a)(43)(A)
- 34 8 USC section 1101(a)(43)(M)(i); INA section 101(a)(43)(M)(i)
- 35 8 USC section 1101(a)(43)(S); INA section 101(a)(43)(S)
- 36 8 USC section 1227(a)(1); INA section 237(a)(i)
- 37 8 USC section 1227(a)(iii); INA section 237(a)(iii)
- 38 8 USC section 1227(B); INA section 237(B)
- 39 8 USC section 1182(h); INA section 212(h)
- 40 8 USC section 1229(b); INA section 240(A)
- 41 8 USC section 1229(b)(a); INA section 240(A)(a)
- 42 8 USC section 1229(b)(b); INA section 240(A)(b)
- 43 8 USC section 1182(h); INA section 212(h)

# Implications and Illumination of MRE 404(b) Other Acts Evidence

*“The law hath not been dead, though it hath slept.”*  
Shakespeare—*Measure for Measure*, Act II, Sc. 2.

By William M. Worden, Sr. Assistant Prosecuting Attorney, Eaton County, Michigan

Other acts evidence is alive and well in Michigan. A plethora of recent opinions, both published and unpublished, support this conclusion. Until recently, some lawyers considered MRE 404(b) as a rule of exclusion. That thinking should take a 180-degree turn in light of recent court decisions.

Among those recent decisions is *People v Martzke*, wherein the Court of Appeals included the salient facts and set forth the law in a thoughtful, articulate manner that provides a guidepost for trial courts to follow regarding Rule 404(b) evidence. In *Martzke*, the defendant, a day-care provider, was charged with child abuse in the first degree. The prosecution sought to introduce other acts evidence of suspicious injuries that appeared on two other infants and one toddler while they were in the defendant’s exclusive care. The trial court granted defendant’s motion to suppress on the ground that such evidence was impermissible character evidence precluded by MRE 404(b). The Court of Appeals reversed and remanded for further development of the record.

The only defense submitted in *Martzke* was a *general denial*. Implicit in this position is the underlying suggestion that *someone else is responsible* for the infant’s injuries. The *Martzke* panel cited Supreme Court precedent for the legal proposition that no judge can be expected to correctly assess the evidentiary issue unless and *until the court is presented with a concrete theory of defense* that allows the judge to determine relevancy. Without such a concrete presentation, a defendant’s general denial requires the trial judge to *assume the relevancy of other acts proffered under noncharacter theories of admissibility*.

The *Martzke* decision provides an excellent primer on Rule 404(b) evidence. First, the *Martzke* Court noted, MRE 404(b) is a *rule of inclusion*, allowing other acts evidence as long as it is not being admitted *solely* to demonstrate criminal propensity. Citing *People v Crawford*, the defense attorney in *Martzke* argued that MRE 404(b) is a rule of exclusion. It is true that the *Crawford* Court wrote: “The fundamental principle of exclusion, codified by MRE 404(b), is woven into the fabric of Michigan jurisprudence . . .”

However, as the *VanderVliet* Court explained, MRE 404(b), “is actually a rule of inclusion rather than exclusion, since only one use is forbidden and several permissible uses of such evidence are identified.”

In *VanderVliet*, the Michigan Supreme Court adopted the four-step process described in *Huddleston v United States*, to determine whether other acts evidence is admissible under MRE 404(b). First, the evidence must be relevant to a proper purpose under MRE 404(b) and must not be offered to show propensity. The list of purposes for admission of other acts evidence within MCR 404(b) is illustrative, not exhaustive. Second, it must also be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact or consequence at trial. Third, the trial judge must balance the evidence to insure that the probative value of the proffered evidence is not substantially outweighed by unfair prejudice under MRE 403. Fourth, the trial court, upon request, may provide a limiting instruction under MRE 105.

On its face, Rule 404 limits only one category of logically relevant evidence. If the prosecution’s only theory of relevance is that the other act shows defendant’s inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible.

The *VanderVliet* Court diagrammed what it called “the forbidden theory of relevancy” in a footnote. Under “the forbidden theory of relevancy,” the defendant’s uncharged act is the evidence. The defendant’s subjective character is the intermediate inference. The defendant’s conduct in conformity with character is the ultimate inference.

MRE 404(b) permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct. The proffered evidence must be probative of something other than defendant’s propensity to commit the crime. Permissible uses of other acts evidence includes intent, identity, and absence of accident when they are material. Intent, identity, and absence of accident were the three “proper purposes” identified by the prosecution in *Martzke*.

The prosecutor must offer the other acts evidence under something other than a character to conduct theory. Evidence must be relevant to an issue other than propensity under Rule 404(b), to “protect against the introduction of extrinsic act evidence when that evidence is offered *solely* to prove character.”

In *Martzke*, the prosecution did not seek to introduce other acts evidence *solely* to prove defendant’s character. Instead, the prosecution sought to introduce evidence that

other children left within defendant's exclusive care also developed suspicious bruises, in part, to establish defendant's intent and absence of mistake.

The *Martzke* Court wrote: "[t]o be sure, evidence that other children left within defendant's exclusive care developed suspicious bruises may be relevant to whether defendant intentionally inflicted the victim's injuries or whether they resulted from accidents." The *Martzke* Court found it could not conclude, as the trial court had, that the purpose advanced by the prosecution for the admission of other acts evidence ran afoul of the proscriptions contained in MRE 404(b).

The next inquiry to determine admissibility of other acts evidence is whether the proffered evidence is relevant. "Logical relevance" is the touchstone of the admissibility of uncharged misconduct evidence. The concept of relevance is concerned with the relationship between the proffered evidence and a material fact at issue in the case. The evidence makes the material fact at issue more probable than it would be without the evidence. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence more probable or less probable than it would be without the evidence.

In *Martzke*, the defendant denied committing first-degree child abuse. When a defendant pleads not guilty, *all* elements that comprise the offense are placed "at issue." For defendant to be found guilty of first-degree child abuse, the prosecutor must establish, beyond a reasonable doubt, that defendant knowingly or intentionally caused serious physical or mental harm to a child.

The wording of the applicable statute, coupled with the defendant's not guilty plea, may render defendant's intent a material fact that is "at issue." Because defendant contends she did nothing at all to cause the victim's injuries, her intent and absence of mistake may become facts "at issue" *as the proceedings develop* and the defense theories solidify.

After assessing materiality and relevance, the third step in the analysis is to determine whether the potential for *unfair* prejudice *substantially* outweighs the probative value of the evidence. *Unfair prejudice* exists when there is a danger that the jury will give marginally probative evidence undue weight. The prosecution argued that the evidence in *Martzke* is not marginally probative; it establishes the ultimate inference, that defendant knowingly or intentionally, and not accidentally, engaged in physically abusive conduct.

The prosecution argued that this 404(b) evidence is powerfully, not marginally, probative of defendant's guilt. Thus, the danger of unfair prejudice cannot substantially outweigh the evidence's highly probative value. Also, the more probative the evidence, the less unfair it is. All relevant evidence is inherently prejudicial. The question is whether it is *unfairly* prejudicial, and whether that *unfair* prejudice *substantially* outweighs its probative value.

"Unfair prejudice" occurs where either "a probability

exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect," or "it would be inequitable to allow the proponent of the evidence to use it."

If the trial court ultimately determines that the probative value of the proffered evidence is not substantially outweighed by its potential for unfair prejudice, defendant is entitled to a carefully crafted limiting instruction. This limiting instruction must advise jurors that they are to consider the other acts evidence only as indicative of the reasons for which the evidence is proffered to cushion any prejudicial effect flowing from the evidence. A carefully constructed limiting instruction rendered by the trial court would be sufficient to counterbalance any potential for prejudice spawned by the other acts evidence.

Taking a "wait and see" approach is the preferred method of dealing with Rule 404(b) evidence. In *Sabin*, our Supreme Court urged trial courts to delay determining whether other acts evidence is admissible until the trial court has had the opportunity to view the proofs as they are actually presented at trial. By waiting to determine the admissibility of other acts evidence, the trial court is able to forestall gamesmanship by the parties and insure the admission of evidence that possesses significant probative value. The ultimate goal is an enlightened basis for the trial court's conclusion of relevance and the attendant inquiry under MRE 403.

Many of the recent Rule 404(b) cases involve child victims. In *People v Hine*, the Supreme Court reinstated the defendant's conviction. The Court of Appeals had reversed because of the admission of other acts evidence. Paramedics found a two-and-a-half-year-old girl who was not breathing, had no pulse, and appeared to be dead. After the child was officially pronounced dead, an autopsy revealed that she had several internal injuries, including a subdural hematoma, a healing tear of the liver, hemorrhage in the region of the pancreas, bleeding in the colon (near the appendix), and a large amount of fluid in the abdomen. She had numerous circular bruises on her abdomen and a bruise across the bridge of her nose. The injuries were of varying ages, from less than half a dozen hours up to five to seven days old. The cause of death was multiple blunt force injuries. Defendant had been the victim's sole care provider the week before her death while her mother was at work.

The prosecution called three witnesses to testify to defendant's physically abusive behavior towards them, some of it similar in terms of the specific injuries caused. The trial court ruled that the evidence was relevant to show who inflicted the injuries on the child and the intent with which they were done. The defendant offered "accident" as an explanation for several of the child's injuries. The evidence presented at the evidentiary hearing and at trial supported the trial court's conclusion that there was a common plan, scheme, or system in the defendant's assaults on the women and on the child. Thus, the trial

court did not abuse its discretion in determining that the assaults by the defendant on his former girlfriends and the charged offenses regarding the child victim shared sufficient common features to permit the inference of a plan, scheme, or system.

Like *Martzke* and *Hine*, lack of accident was the theory of admission in *People v Magyar*, a felony murder by child abuse case. In *Magyar*, the defendant's ex-wife testified that he had been previously charged with abusing her daughter. She testified regarding the abusive acts and defendant urging delay in treating the child's injuries. The Court of Appeals found the other acts evidence relevant to show that the child's injury was not the result of an accident. Because one could infer from these common features that the defendant had a common scheme to assault the female children of his girlfriends, the testimony was relevant and offered for a proper purpose.

The *Magyar* Court cited our Supreme Court's quoting of *Imwinkelried*, where a defendant's intent is an issue, "the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently." As our Supreme Court has observed, the man who wins the lottery once is envied; the one who wins it twice is investigated.

In *Katt*, the overall defense strategy was to paint the children's mother as a vengeful person who was attempting to frame defendant by persuading her son and daughter to lie about sexual abuse. Initially, the trial court in *Katt*, denied the prosecutor's motion to admit other acts evidence concerning an alleged sexual assault on another child. However, after the defendant testified, "it's not in my nature to go around and have sex with children," the trial court granted the prosecutor's renewed motion to introduce other acts evidence. The trial court observed that the evidence was proper rebuttal, and it read a cautionary instruction to the jury concerning the limited use of the evidence.

In *People v Milstead*, the evidence of other bad acts was admissible because it was connected with the crimes charged, and it was relevant to the defendant's theory of the case. The defendant was charged with conspiracy to commit murder, and a witness used by the police testified to the events. A videotape of a meeting was made, and during that meeting defendant, whom the witness was to pay to murder another witness, made statements of having committed past violence. The defense did not object. Defense counsel, as a matter of trial strategy, freely admitted defendant made fanciful claims about a violent past and characterized those comments as mere bravado, intended to obtain money by trickery. The Court of Appeals affirmed.

Finally, in *People v Kuhlman*, the Court of Appeals looked at the need for admission of other acts evidence to overcome a credibility problem. An Alger County Circuit Court jury convicted defendant of third-degree criminal sexual conduct. The victim was fourteen-years-old, and

defendant was twenty-three-years-old and employed by the City of Munising as a police officer.

The prosecutor gave notice before trial of the intent to use Rule 404(b) evidence that defendant engaged in flirtation and sexual innuendo in conversations with various teenage girls working with the victim at the local Dairy Queen. Defendant also engaged in sexual intercourse with one of the victim's co-workers around the same time as the alleged act with the victim, and he had sexual contact with other girls. In affirming the trial court's admission of Rule 404(b) evidence, the Court of Appeals wrote:

[W]e agree with the prosecutor that this evidence was properly admitted to establish the credibility of the victim and her claims. That is, by itself, a claim that defendant, an adult police officer, would engage in improper sexual contact with a fourteen year old, first by kissing her and feeling her breasts while they were golfing and later by engaging in sexual intercourse, would seem incredible. The credibility problem for the prosecutor is further exacerbated by the fact that the victim had a juvenile adjudication for making a false report of there being a bomb at her school.

However, the incident with the victim is placed in context by the evidence that defendant not only flirted with her, but with her co-workers at the Dairy Queen, including sexual innuendos involving an ice cream cone and references to his gun which were suggestive of his penis. Further, his act of inviting the victim into his house, offering her alcohol and then engaging in sexual intercourse was consistent with his conduct with the sixteen-year-old, and similar to activities with other girls which did not result in sexual intercourse.

While the *Kuhlman* decision is not precedentially binding under the rule of *stare decisis*, a court is free to find the reasoning of an unpublished case persuasive.

These recent court decisions involving Rule 404(b) evidence are representative of Michigan's approach to other acts evidence. Though inadmissible for one reason, a piece of evidence may nevertheless be admissible under other theories. These cases, and their predecessors, provide the framework for admission of other acts evidence.

*William M. Worden works in Charlotte, Michigan as a Senior Assistant Prosecuting Attorney for Eaton County. He specializes in appellate advocacy. Previously, Mr. Worden worked in the private practice of law, and as a Circuit Court law clerk in Lapeer County. He graduated from Wayne State University (B.A.), and the Detroit College of Law (J.D.). Mr. Worden has served as a faculty member at conferences for appellate prosecutors in Michigan. He has also taught appellate advocacy at the National Advocacy Center in Columbia, South Carolina.*

# The Source of Law: Where Do Principles of Criminal Law and Procedure Come From?

By Timothy A. Baughman, Chief, Research Training and Appeals, Wayne County Prosecutor's Office

## Introduction

It is a good thing whenever a court, pressed to create a particular rule or pass on a particular question, begins its inquiry by asking itself the source of its authority, if any, to do so. After all, the source of all political power and authority in this country is quickly established in the preamble to the Constitution: “We *the people* of the United States...do ordain and establish this Constitution for the United States of America.” Sovereignty in the United States is located not in the government, but in the People, who stand above the government, the Constitution being a durable expression of their will as the Supreme Law of the Land, both enabling and limiting government as their servant.<sup>1</sup> So also with state government; the Preamble to the 1963 Constitution ordains and establishes the Constitution in the name of “the people of the State of Michigan,” and Article 1, § 1 provides that “All political power is inherent in the people.” The judicial branch, then, is not to exercise political power, but must certainly exercise that power — the judicial power — that it does have, fully and fairly.

## The Judicial Power and Substantive Criminal Law

The Michigan Constitution of 1963 provides in Article 6, § 1 that “The *judicial power* of the state is vested exclusively in one court of justice....” The constitution also provide that one department of government shall not exercise the powers of another.<sup>2</sup> Guidance concerning the reach of the judicial power can be found in the very case establishing judicial review of statutes with regard to their constitutionality — *Marbury v Madison*.<sup>3</sup> Chief Justice Marshall observed that the “whole judicial power of the United States” is vested in the Supreme Court and in those inferior courts that Congress sees fit to establish. If, held the Court, an act of the legislature is repugnant to the constitution it is void, and if it is void, it cannot bind the courts and oblige them to give it effect, for “It is emphatically the province and duty of the judicial department to say what the law *is*.”<sup>4</sup> The province of the judicial department, then, is to “say what the law *is*”; the “judicial power” does not encompass *law-making*. The creation of substantive law is not within the rightful authority of the judiciary. Michigan has always been very clear on the point that the powers of the departments of government are separate, and that no department or branch shall exercise power granted to another. While separation of powers is a structural concept implicit in the federal constitution, it is *explicit* in the Michigan constitution. An exercise of legislative authority by the judicial branch is

thus beyond the scope of the judicial power, and at once a violation of the principle of separation of powers.

The understanding of the proper role of the judiciary has deep roots in our jurisprudence. In 1859 one of the greats of Michigan jurisprudence, Justice Campbell, stated that “By the judicial power of courts is generally understood the power to *hear and determine controversies between adverse parties, and questions in litigation*.”<sup>5</sup> The court has also said that “the exercise of judicial power in its legal sense can be conferred only upon courts named in the Constitution. The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them.”<sup>6</sup> Some seven decades later the Court reiterated that “The power given to a court is judicial power.... ‘to declare what the law is and to determine the rights of parties conformably thereto’.... ‘to hear and decide controversies, and to make binding orders and judgments respecting them.’”<sup>7</sup>

The preeminent figure in Michigan jurisprudence, Justice Cooley, made the same observations. Quoting Chief Justice Marshall from *Wayman v Southard*,<sup>8</sup> Justice Cooley observed that “‘The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.’” Further, “to adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to *construe and apply the laws*, is the peculiar province of the judicial department.” Distinguishing the construction of positive law from its creation, Justice Cooley wrote that

...those inquiries, deliberations, orders, and decrees, which are peculiar to such a department (the judicial department), must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employment of judicial and legislative tribunals. The former *decide upon the legality of claims and conduct*, and the latter *make rules* upon which, in connection with the constitution, *those decisions should be found*. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore, --to compare the claims of parties with the law of the land before established, --is

in its nature a judicial act. But to do the last--to pass new rules for the regulation of new controversies--is in itself a legislative act....<sup>9</sup>

The task, then, of the judiciary with regard to substantive criminal law is not one of creation, but *discovery* and elucidation. This is so because the power to define crimes and ordain punishments is a legislative function — a clear exercise of political authority — and all crimes in Michigan are statutory.<sup>10</sup> As Justice Campbell stated long ago, “[w]hatever elasticity there may be in civil matters, it is a safe and necessary rule that criminal law should not be tampered with except by legislation.”<sup>11</sup> It is not surprising that quite often penal legislation employs terminology with a common-law meaning<sup>12</sup> without elaboration or further definition, and when this occurs it confers to creative authority on the judiciary, for it has always been the law that where the legislature employs a term with an established common-law meaning, then the “legislature intended no alteration or innovation of the common law not specifically expressed.”<sup>13</sup> In this circumstance, once the common-law definition of a term has been determined, then where “the legislature [shows] no disposition to depart from the common-law definition,... it remains,”<sup>14</sup> for the use of a common-law term without alteration is as much an enactment of the meaning of that term into statutory law as if the legislature had spelled out the common-law meaning chapter and verse in the statute.<sup>15</sup> Indeed, if the legislature were to enact a statute defining a crime as “whatever the term meant at the common law, and however the judiciary decides to alter that common-law meaning in the future” the statute would be unconstitutional, as an improper delegation of legislative power to the judiciary. And yet this is precisely what some litigants and some commentators urge on the court, asking it to modify statutes by rejecting the common-law understanding of the term at the time the statute was enacted.<sup>16</sup> Our present Michigan Supreme Court rejects entreaties to alter the meaning of penal statutes, understanding that its role is one of discovery, not creation; the recent case of *People v Riddle*,<sup>17</sup> where the court took great pains to determine the common-law understanding of the reach of the “no retreat within the dwelling” self-defense rule, enacted into the murder statute by the legislature by use of the common-law term “murder” without alteration.<sup>18</sup>

### **The Judicial Power and Criminal Procedure**

It cannot seriously be argued that the role of the judiciary with regard to criminal procedure is any different than that with regard to criminal law; that is, that with regard to criminal procedure the judiciary has the authority to “invent” it apart from discovering meaning in either statutes or the constitution concerning criminal procedure. For ex-

ample, the preliminary examination is a creature of statute, not required by the constitution. If the legislature determined to abolish it, could an argument that the judiciary could simply impose it possibly pass the laugh test? While it may be that constitutional provisions and protections are more difficult to construe than most statutes, the court is still engaged in a process of construction not amendment; to do otherwise is to place the court above the People, who are sovereign in our system of government. The judiciary has no authority to impose its view of the best policy or moral philosophy upon the citizenry. As Professor Ely famously put it while questioning the reliance of some courts and commentators on theories of moral philosophy in identifying rights that “ought” to be protected, and therefore found somehow, somewhere, in the constitution: “The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?”<sup>19</sup> The Supreme Court in our state also possesses authority over “practice and procedure,” but of *courts*, not the other units of government. The constitutional convention history makes clear that it was the intent of the drafters, that “practice and procedure” include an authority in the Michigan Supreme Court to promulgate “procedural” or “adjudicative” rules, with the power to promulgate “substantive” rules to remain with the legislature.<sup>20</sup> Where the line is close, of course, the court must settle on which side of the line a statute or rule falls.

### **Conclusion**

When that great American, Benjamin Franklin, emerged from the Constitutional Convention after approval of the Constitution by the delegates, he remarked that the drafters had given the Nation “a republic, if you can keep it.”<sup>21</sup> In a constitutional democracy, with the People sovereign, the judiciary is not to exercise political power, imposing its will on questions of public policy rather than its judgment on cases brought before it. Sometimes questions are close, but when a court undertakes the enterprise of judging a particular matter with one eye on its authority to act, we are more likely to keep the republic we brought into being over 200 years ago than when the court believes that its authority is limited only by its own sense of what is good and just and best.

*Timothy A. Baughman received his B.A. from Albion College and his J.D. from Wayne State University Law School. Mr. Baughman is the Chief of Research, Training, and Appeals for the Wayne County Prosecutor’s Office. He has appeared four times in the United States Supreme Court, over 50 times in the Michigan Supreme Court, and is the author of two books and various articles on criminal law and criminal procedure. He has lectured for the Michigan*

*Judicial Institute, the State Bar of Michigan, the National College of District Attorneys, and for prosecuting attorneys associations of various states throughout the country.*

## Endnotes

- 1 Repeatedly during the ratification debate on the Constitution the image of the People as the “fountain of all power” was employed. See e.g. In letter by Timothy Pickering of December 24, 1787 to Charles Tillinghast, refuting the pamphlet “Letters From the Federal Farmer,” observed that under the Constitution both Congress and the state legislatures would be the servants of the people, because the people are the “*fountain of all power.*” Bernard Bailyn, I *The Debate On The Constitution*, p. 301
- 2 Const 1963, Article 3, § 2.
- 3 *Marbury v Madison*, 1 Cranch 137, 2 L Ed 60 (1803).
- 4 2 L Ed at 73. See also *American Trucking Assns v Smith*, 496 US 167, 110 L Ed 2d 148, 110 S Ct 2323 (1990), separate concurring opinion of Justice Scalia, and dissenting opinion of Justice Stevens; and *James Beam Distilling Co v Georgia*, 501 US 529, 111 S Ct 2439, 115 L Ed 2d 481 (1991), separate concurring opinion of Justice Blackmun, joined by Justices Marshall and Scalia, and separate concurring opinion of Justice Scalia, joined by Justices Blackmun and Marshall.
- 5 *Daniels v People*, 2 Mich 380, 388 (1859) (emphasis added), citing *Story on the Constitution*, sec. 1640. Justice Campbell said much the same thing several years later in *Underwood v McDuffee*, 15 Mich 361 (1867).
- 6 *Risser v Hoyt*, 53 Mich 185,193 (1884)
- 7 *Johnson v Kramer Freight Lines*, 357 Mich 254, 258 (1959) (emphasis supplied).
- 8 *Wayman v Southard*, 10 Wheat 46 (1824).
- 9 Cooley, p. 91-92 (emphasis added, final two instances of emphasis in the original).
- 10 As stated by Justice Campbell in *In re Lamphere*, 61 Mich 105, 108 (1886): “While we have kept in our statute-books a general statute resorting to the common law for all nonenumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible, by statute. *There is no crime whatever punishable by our laws except by virtue of a statutory provision*” ( emphasis added).
- 11 61 Mich at 109-110. For a discussion of this entire area see Baughman, “Michigan’s ‘Uncommon Law’ of Homicide,” 7 Cooley L Rev 1 (1990).
- 12 Such as murder, or manslaughter.
- 13 *Wales v Lyon*, 2 Mich 276, 283 (1851).
- 14 *People v Schmitt*, 275 Mich 575 (1936). See also *People v Utter*, 217 Mich 74 (1921); *People v Potter*, 5 Mich 1 (1858); *Pitcher v People*, 16 Mich 42 (1867).
- 15 See also *People v Couch*, 436 Mich 414 (1990), where the Court noted that in enacting the murder statute with no alteration of the common-law definition the legislature had “adopt(ed) and “embrace(d)” the common-law definition, making it at least “debatable whether this Court still has the authority to change those definitions.” 436 Mich at 420.
- 16 And the Michigan Supreme Court has been seduced by these entreaties from time to time. In *People v Aaron*, 409 Mich 672 (1980) the court recognized that a common-law felony-murder rule existed, and simply abrogated it, thereby modifying the murder statute, and in *People v Stevenson*, 416 Mich 383 (1982) the court recognized the existence of a common-law year-and-a-day rule for homicide, and abrogated that rule, also modifying the murder statute. There is no reason to overrule these decisions, and one might reasonably applaud the result of both, but there is no reason to perpetuate the error of the court in failing to understand the limits of its authority in those cases.
- 17 *People v Riddle*, 467 Mich 116 (2002).
- 18 What might be termed “defenses” to homicide charges are encompassed within the definition of murder because of the complex meaning of the term malice, including not only alternative states of mind (intend to kill, or do great bodily harm, or wanton and wilful disregard), but also, where present in the case, the lack of justification or excuse.
- 19 See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 58 (Harv. U. Press 1980).
- 20 See Convention Record, 1289-1292.
- 21 See 11 Am Hist Rev 618 (1906)(recorded in the diary of James McHenry).

# Our Supreme Court's Abdication of Law Making Authority over Criminal Procedure and Substantive Criminal Law

By Alan Saltzman

## Introduction

The Michigan Constitution contains three provisions that can be read to grant law-making power to the Supreme Court. Article 6, §1, provides: "The judicial power of the state is vested in one court of justice." Article. 6, § 5 provides: "The Supreme Court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." And article 3, § 7, provides that "the common law . . . shall remain in force until . . . changed . . . ."

At one time the Michigan Supreme Court read these to grant it wide authority to develop the criminal law, both as to procedure and substance. In *People v Glass* (2001) it greatly narrowed its responsibility to develop the law of criminal procedure. In *People v Riddle*, 467 Mich. 116 (2002), it seems to have denied itself power to develop substantive criminal law.

## The Michigan Supreme Court's Authority over Criminal Procedure

The court has found broader rights in the Michigan Constitution than what is required by the U.S. Constitution. For example, a criminal jury verdict must be unanimous although not required by the Sixth Amendment<sup>1</sup>, the ban on double jeopardy is broader than the Fifth Amendment<sup>2</sup>, and some confessions not banned by *Miranda* are inadmissible under Michigan law.<sup>3</sup>

An early exercise of the Supreme Court's power was *People v Marxhausen*, 204 Mich. 559 (1919). Five years after *Weeks v U.S.*<sup>4</sup> imposed the 4<sup>th</sup> Amendment exclusionary rule on the federal courts, *Marxhausen* held that Michigan law contained the same rule. In 1990, our Supreme Court found a sobriety checkpoint to be an unreasonable seizure under the Michigan Constitution after the U.S. Supreme Court found it not to violate the U.S. Constitution.<sup>5</sup>

Pursuant to its constitutional power to make rules of practice and procedure it has promulgated a comprehensive set of rules to govern criminal procedure, including protections not found in the U.S. Constitution.<sup>6</sup>

It has also used case law in exercising its power to make rules of procedure. Thus, it held that evidence of a line-up in the absence of counsel is inadmissible, even if it occurred before the defendant's U.S. 6<sup>th</sup> Amendment right to counsel had attached. The court did not base that decision on the right to counsel under the Michigan Constitution, instead saying it was done "in the exercise of our con-

stitutional power to establish rules of evidence . . . and to preserve best evidence eyewitness testimony . . . ."<sup>7</sup>

More recently however, our court gave an amazingly broad meaning to the inevitable discovery doctrine, thereby narrowing the reach of the exclusionary rule.<sup>8</sup> Furthermore, it has taken the position that the Michigan Constitution is linked to whatever the current U.S. Supreme Court interpretation of the Fourth Amendment happens to be, in the absence of a compelling reason to depart from that view.<sup>9</sup>

In 1972, *People v Duncan*, 388 Mich 489, using, "the inherent power of this court to deal with the situation as a matter of criminal procedure," held that a defendant indicted by a grand jury had a right to a preliminary examination before being required to stand trial. In, *People v Glass*, 464 Mich 266 (2001) however, the court declared: "The establishment of the right to a preliminary examination is more than a matter of procedure." It said that to do so was, "beyond the powers vested in the Court by Const. 1963, art. 6, § 5." Accordingly, it overruled *Duncan* and found invalid. MCR 6.112(B), a rule it had promulgated.

The court did not say why the right to a preliminary examination "is more than a matter of procedure." Clearly, it would have been free to say that it was a matter of procedure, but that requiring a preliminary examination following a grand jury indictment is unnecessary and not a good idea. For that reason it might have overrule its previous decision. Instead, it chose to deny that it ever had the power to require it.

It seems strange to me, where the state constitution specifically gives the court authority over practice and procedure, that the court would shrink the boundaries of that authority. I would say it was ignoring its obligation. I would also say that linking Michigan's constitutional search and seizure provisions to what the U.S. Supreme Court says the U.S. Constitution means, is an abandonment of its responsibility to interpret the Michigan Constitution.

No less strange and no less wrong is what the Michigan Supreme Court has done with its authority over substantive criminal law.

## The Michigan Supreme Court's Authority over Substantive Criminal Law

Our Supreme Court has construed Michigan's constitutional ban on cruel or unusual punishment to bar a sentence that the Eighth Amendment did not.<sup>10</sup> Otherwise however, it has said little about Constitutional limits on criminal punishment.

There is no question that aside from U.S. and Michigan Constitutions, the Court is entirely subordinate to the Legislature in defining what constitutes an offense. However, because of the sketchy way in which many offenses are defined, the Legislature has left huge areas for the court to fill in defining offenses. As to defenses, there is only the insanity defense statute, first enacted in 1974. No other statute speaks to what defenses there might be once the prosecution has proved each element in the definition of the offense.<sup>11</sup>

### Definitions of Offenses

Many statutes do not fully define the crime they create. Until recently, the Michigan Supreme Court considered itself free to exercise its own judgment as to what rule it is wise to adopt, both in expanding and in contracting criminal statutory categories.

The murder statutes make any “murder” that is not first degree, second degree murder. They also make any “murder” together with one of three sets of requirements, first degree murder. But there is *no statutory definition of “murder.”*

*Maher v. People*, 10 Mich 210 (1862), rejected the traditional position that a spouse’s infidelity could be a sufficient provocation (that might reduce murder to manslaughter) only if the defendant personally witnessed the act. Speaking through Justice Christiancy, the court took a much broader, and very modern position.<sup>12</sup> It held that an adequate or reasonable provocation was, “anything” that had the natural tendency to obscure reason to an extent that would render an ordinary person liable to act rashly and from passion rather than judgment.

*People v. Aaron*, 409 Mich. 672 (1980) completely eliminated one category of murder — a killing in the perpetration of a felony (the “felony murder rule”). That case entirely “abrogated” that rule on the ground that it was contrary to the fundamental principle that “criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.”

As to its power to do so, the *Aaron* court stated, “In Michigan, the general rule is that the common law prevails except as abrogated by the Constitution, the Legislature or this Court,”<sup>13</sup> adding that “it is for this Court to decide whether a common law rule shall be retained unless the Legislature states a rule that is inconsistent with or precludes a change in the common law rule.”

Two years later, *People v. Stevenson*<sup>14</sup> expanded a category of crime beyond that authorized by the common law, stating, “We hold, in the exercise of our Constitutional authority to shape and advance the common law, that the year and a day rule has outlived its usefulness and is therefore abolished.”<sup>15</sup>

The same year the court was asked to develop an intelligible replacement for the rule that voluntary intoxication is a “defense” to “specific intent crimes” and not “general intent crimes.” It considered itself free to promulgate a new

rule, and found the old rule unsatisfactory<sup>16</sup>, but declined to develop a new rule the nature of the issue made it “more appropriate for the Legislature to fashion reform in this area....”<sup>17</sup>

In 1994, *People v. Kevorkian*, 447 Mich 43, held that assisting a suicide was not murder unless the death, “was the direct and natural result of a defendant’s act.” It held that murder requires that the defendant would have to do something more than knowingly supplying the means of suicide, overruling *People v. Roberts*, 211 Mich 187 (1920) which held that simply supplying the means was sufficient.

### Defenses

The only statute that creates any general defense is MCL 768.21a, Legal Insanity, a statute first enacted in 1975. Until then, the legislature had not spoken at all as to what might constitute a defense. Thus the courts assumed the responsibility for developing defenses.

Insanity is one example. Our courts followed the *M’Naghten* rule (announced by the English House of Lords in 1843, which focuses solely on whether defendant had a mental disease that prevented him from knowing right from wrong. However, *People v. Durfee*, 62 Mich. 487, 29 N.W. 109 (1886) added a volitional component. It held there is also a defense when defendant’s mental disease prevented him from controlling his actions. This second component is commonly referred to as the “irresistible impulse” test. As noted, the Legislature subsequently enacted MCL 768.21a which replace this case law.

Another example is entrapment. The common law did not recognize any entrapment defense, but in 1878 our Supreme Court decided what some say is the first case anywhere recognizing the defense.<sup>18</sup> The current defense of entrapment was developed by case law over a number of years.<sup>19</sup>

*People v. Couch*, 436 Mich 414 (1990), presented the issue: can deadly force be used by a citizen to apprehend a fleeing felon? There, an opinion expressing the views of three justices stated:

[W]e decline the opportunity to change the common-law fleeing felon rule with respect to criminal liability. . . . Not only does this Court . . . arguably lack the authority to do so . . . [but] given the Legislature’s adoption of and acquiescence in that rule, we must resist the temptation to do so.<sup>20</sup>

Two other Justices were “persuaded that this Court should decline, as a matter of judicial restraint, to exercise whatever authority it may have to modify the criminal law.”<sup>21</sup> The two remaining Justices would have changed the common law rule prospectively. They explained the court’s authority to do so as follows: “We would merely amend the common law, as the Court is authorized to do by the Michigan Constitution.”<sup>22</sup>

## **People v Riddle, 467 Mich. 116 (2002).**

*Riddle* dealt with the right to stand one's ground and not retreat, even when a safe retreat was available, and even though retreating would avoid the need for deadly force. It recognized that right to apply within the dwelling and its outbuildings, but held it did not apply in the open spaces within the curtilage.

That holding is not necessarily remarkable. It may make good sense to say that if you are in your side yard and you can avoid a threat to yourself of deadly force by either retreating or by using deadly force against another person, that you *should* retreat. The facts of *Riddle* also make the result no surprise, sine defendant shot the victim in the legs eleven times. (Also, at trial he withdrew his request for an instruction that he had no duty to retreat.)

The remarkable thing is the "Generally Applicable Rule" which the court announced as the basis for its conclusion:

Because Michigan's homicide statutes proscribe "murder" without providing a particularized definition of the elements of that offense or its recognized defenses, we are required to look to the common law at the time of codification for guidance. See Const. 1963, art. 3, § 7; *People v Couch*, \* \* \* . Where a statute employs the general terms of the common law to describe an offense, courts will construe the statutory crime by looking to common-law definitions. See *Couch, supra* at 419 \* \* \* .

The criminal law, as defined at common law and codified by legislation, "should not be tampered with except by legislation," and this rule applies with equal force to common-law terms encompassed in the defenses to common-law crimes. *In Re Lamphere*, 61 Mich. 105, 109, 27 N.W. 882 (1886). **Therefore, because our Legislature has not acted to change the law of self-defense since it enacted the first Penal Code in 1846, we are proscribed from expanding or contracting the defense as it existed at common law.** \* \* \* (Emphasis added.)

*Riddle* seems to be a severe change in Michigan substantive criminal law. For example, *Stevenson*, *Aaron*, and *Maher* all developed the law of homicide, changing the common law of Michigan. Apparently they should no longer be followed.

But that is just the beginning. For example, *People v Joeseype Johnson*<sup>23</sup> held the definition of assault in the criminal law should include both an attempted battery (the common law crime of assault) and intentionally putting another in immediate apprehension of a battery (the common law tort of assault). Presumably this ruling will now be an unauthorized expansion of criminal liability.

And there are many more issues regarding the definitions of offenses and the definitions of defenses that can be added to the list— at least once we figure out what the common law was in 1846 on each point.

## **Conclusion**

As with the right to a preliminary examination following indictment, why should the court want to retreat from the tradition of its decisions that attempt to develop Michigan law by case law? Why not decide the questions on the merits?

*Aaron* said it was abrogating the felony murder rule because it violated a basic principle that if the punishment was for causing a death, there should be some culpable mental state in respect to that result. *Maher* held that provocation that might reduce murder to manslaughter should not turn on fixed categories. The *Stevenson* court thought that barring homicide liability for deaths that occurred more than a year and a day after defendant's acts did not make sense in light of current medicine. *Kevorkian* decided that supplying the means for a suicide should not be murder.

Some readers may think that some of these changes were not good policy. But *Riddle* says the Court lacks the authority to decide these issues on the merits — the common law decided them long ago and that is the end of the matter; the rest is up to the Legislature.

But all our Legislature has ever done is create new crimes. It never helps in defining the old ones. And, aside from insanity, it has not defined any defenses. This year it did add an anti -voluntary intoxication defense statute and what it means is not at all clear.<sup>24</sup>

The Legislature may have the authority to define crimes and defenses, but it has never done it alone (or well). I submit, it is the court's job to continue developing the boundaries of offenses and defenses.

*Professor of Law, University of Detroit Mercy. Professor Saltzman is co-author of Michigan Court Rules Practice, Volume 5A, Rules of Criminal Procedure (West 2002) (with Sheila Robertson Deming) and the author of Michigan Criminal Law: Definitions of Offenses (2nd Ed, Lexis, 2001).*

## **Endnotes**

- 1 *People v Burden*, 395 Mich 462 (1970).
- 2 *People v White*, 390 Mich. 245, 255-258, (1973) adopted the "same transaction" in contrast to the U.S. Constitution. *People v Cooper*, 398 Mich. 450 (1976) rejected the "separate sovereignty" doctrine followed under the U.S. Constitution.
- 3 *People v Bender*. 452 Mich 594 (1996).
- 4 323 U.S. 383 (1914).
- 5 *Sitz v Dep't of State Police*, 443 Mich 744 (1993), decided after *Michigan v Sitz*, 496 U.S. 444 (1990) had rejected the same claim under the 4th Amendment.

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# The Legal Insanity Defense in Michigan after *People v Carpenter*, 464 Mich 223 (2001)

By Kimberley Reed Thompson

The diminished capacity defense allows a defendant although legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime. There is a wide divergence of views among the states concerning the admissibility of evidence of mental illness short of insanity.

Michigan recently joined those jurisdictions that have performed the last rites for this defense by holding in *People v Carpenter*,<sup>1</sup> that the use of *any* evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent is precluded.

## The Diminished Capacity Approach

Our Court of Appeals introduced the diminished capacity defense to Michigan in *People v Lynch*.<sup>2</sup> The defendant in *Lynch* was charged with having murdered her baby by starvation. As part of her defense, the defendant sought to have admitted into evidence testimony from two psychiatrists supporting her claim that she did not possess the requisite intent to be convicted of first-degree murder, MCL section 750.316. The trial court refused to admit the evidence on the ground that the defendant had never raised an insanity defense and did not give the required statutory notice.

In reversing the defendant's jury conviction, the court of appeals rejected the prosecution's argument that allowing evidence of mental illness less than insanity as bearing on the defendant's capacity to form the intent required to commit a particular crime would "sanction a subterfuge" avoiding the standards of the insanity defense enunciated by this court in *People v Durfee*.<sup>3</sup>

Before the Legislature's enactment of 1975 PA 180, the test for determining legal insanity was controlled by *Durfee*. Featured in the 1959 movie, *Anatomy of a Murder*, the *Durfee* test—based in part on the *M'Naughten* rule—contained two elements: 1) whether defendant knew what he was doing was right or wrong; and 2) if he did, did he have the power, the will power, to resist doing the wrongful act?"

The *Lynch* court also disagreed that recognizing a diminished capacity defense separate from legal insanity "would permit the defense to in effect sneak in the insanity defense without labeling it as such and without the necessity of complying with the notice statute as to the insanity defense."<sup>4</sup>

While it acknowledged that some states viewed mental capacity as an "all or nothing matter and that only insanity ... negates criminal intent," the Court of Appeals concluded

that proof of diminished capacity is admissible as "bearing on intent generally or at least on those special states of the state of mind by definition determines the degree of offense as here."<sup>5</sup>

In *People v Mangiapane*,<sup>6</sup> the court of appeals addressed the diminished capacity defense under the current statutory framework for the insanity defense. In *Mangiapane*, the defendant sought to introduce psychiatric testimony on the issue of his capacity to form the specific intent to commit murder in violation of MCL section 750.83. The trial court denied the request on the ground that the defendant did not raise the defense and give the prosecution notice under MCL section 768.20a.

The Court of Appeals affirmed, explaining that, by enacting 1975 PA 180, the legislature intended "to bring under one procedural blanket all defenses to criminal charges that rest upon legal insanity as defined in the statute, and that "the defense known as diminished capacity comes within th[e] codified definition of legal insanity."<sup>7</sup>

The Court thus held that before introducing evidence that the defendant—though not legally insane—lacked mental capacity to form specific intent, one must fully comply with the statutory defense provisions.<sup>8</sup>

The Court of Appeals decision in *Mangiapane* was followed by a series of decisions continuing to address "diminished capacity" as a form of the statutory insanity defense. See, e.g., *People v Denton*<sup>9</sup> and *People v Anderson*.<sup>10</sup>

Through this line of cases the Michigan Court of Appeals held that a defendant seeking to present a diminished capacity defense bears the burden of establishing the defense through a preponderance of the evidence under MCL section 768.21(a)(3). The Court continually affirmed the diminished capacity defense and set forth procedural guidelines for its use.

Ironically, the prosecutorial line of reasoning, which the court of appeals rejected in *Lynch* 1973 to allow the use of the diminished capacity defense, was adopted by the Michigan Supreme Court in *Carpenter* 2001 to prohibit its use.

## *People v Carpenter*

In *Carpenter*, the defendant was the former boyfriend of a female complainant, Ms. Thomas, with whom he had a child. He visited her home in the early morning hours, and after threats that included firing two shots, entered her home and assaulted Ms. Thomas and a male friend. After police were summoned by neighbors, he staged a stand-off in Thomas's home.

When police made contact by phone, Carpenter asked for some heart medication that was in his truck and an officer lured him to a window by offering to give it to him. When the officer tried to grab the defendant through the open window, he got free and slammed the window on the officer's finger. Carpenter eventually allowed the officers to enter the home and was placed under arrest.

At his bench trial, defendant presented an unsuccessful diminished capacity defense. The trial court found that although he had a history of organic brain damage and delusions, his actions when committing the crimes charged were goal oriented indicating his ability to form the requisite specific intent.

Carpenter was convicted of home invasion, felon in possession of a firearm, felony firearm, resisting and obstructing a police officer, and felonious assault.

The court of appeals rejected the defendant's argument that the trial court erred in shifting the burden to defendant to prove his claim of diminished capacity by a preponderance of the evidence and affirmed his conviction.

The Michigan Supreme Court granted review of the question of law regarding the proper application of MCL section 768.21a, noting that since 1975 Michigan's insanity defense has been governed by statute 1975 PA 180.

It further opined in order to prevail under the affirmative defense of legal insanity, the defendant must prove that as a result of mental illness or being mentally retarded as defined in the mental health code, he/she lacks "the substantial capacity either to appreciate the nature and quality of the wrongfulness of his or her conduct or the ability to conform his or conduct to the requirements of the law."<sup>11</sup> In addition the court found it highly significant that "the defendant has the burden of proving the defense of insanity by a preponderance of the evidence."<sup>12</sup>

The Supreme Court stated that although it had several times in passing acknowledged the concept of the diminished capacity defense "[it had] never specifically authorized its use in Michigan courts."<sup>13</sup>

Agreeing with the defendant that there is no indication that the legislature intended to make diminished capacity a defense, the court explained that the statutory scheme of defenses based upon mental illness or mental retardation precludes the use of "any evidence" of lack of mental capacity short of legal insanity to reduce criminal responsibility by negating specific intent.

The court refuted the defendant's argument that "diminished capacity" is a viable defense holding the United States Supreme Court's decision in *Fisher v United States*,<sup>14</sup> controlling. In *Fisher* the refusal of the trial court to give an instruction in a District of Columbia murder trial that would have permitted the jury "to weigh evidence of his mental deficiencies," which were short of legal insanity, in determining his capacity for premeditation and deliberation was upheld.<sup>15</sup>

The US Supreme Court noted that a radical departure, such as requiring evidence of [diminished capacity] to be admitted in criminal trials, was more properly the subject for exercise of legislative power or for the discretion of the courts because it would involve a fundamental change in the common law theory of responsibility.<sup>16</sup>

Affirming Carpenter's conviction, the Court also cited *Muench v Israel*,<sup>17</sup> a Seventh Circuit court of appeals case which relied on *Fisher* to reach the decision that: "[A state is not constitutionally compelled to recognize the doctrine of diminished capacity and hence a state may exclude expert testimony offered for the purpose of establishing that a criminal defendant lacked the capacity to form a specific intent."<sup>18</sup>

The Michigan Supreme Court added that our legislature had addressed situations involving persons who are mentally ill or mentally retarded, yet not legally insane. These persons may be found "guilty but mentally ill" and must be sentenced in the same manner as any other defendant committing the same offense and subject to psychiatric evaluation and treatment.<sup>19</sup>

Furthermore, the majority opined that through this statutory provision the legislature demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent.

Finally, the Court held that the insanity defense as established by the legislature is the sole standard for determining criminal responsibility as it relates to mental illness or retardation, as such through this framework, insanity is an "all or nothing defense."

### **The Carpenter aftermath**

The *Carpenter* decision has laid the diminished capacity defense to rest in Michigan. This presents an insurmountable hurdle for criminal defense counsel to overcome. If a defendant does not meet the statutory requirements for legal insanity, how can his claim that he suffers from a mental abnormality, which would negate specific intent be presented at trial?

The dissenting justices in *Carpenter* present some possible arguments supporting the admission of diminished capacity evidence. They opine that while *Fisher* has never been explicitly overruled, when interpreted by subsequent Supreme Court cases beginning with *In re Winship*<sup>20</sup> and ending with *Martin v Ohio*,<sup>21</sup> an inference is created that the rule of *Fisher* has implicitly been overruled.

They note that nearly every federal circuit has concluded that the insanity defense reform act does not bar evidence of mental abnormality to negate mens rea.<sup>22</sup> In addition they point out that neither Michigan's insanity statute nor its guilty but mentally ill statute mention the use of mental abnormality to negate specific intent and thus the

majority has engaged in erroneous statutory interpretation.

Citing *United States v Pohlott*,<sup>23</sup> the dissent makes the point that this clearly contrasts with the introduction of diminished capacity evidence. A defendant claiming diminished capacity denies the prosecution's prima facie case by challenging its claim that he possessed the requisite mens rea at the time of the crime and thus is not asserting an affirmative defense.<sup>24</sup>

The dissenting justices conclude that evidence of mental abnormality or illness should be admissible to negate specific intent and thereby afford the defendant the right to present a meaningful defense, the requirement that the state prove beyond a reasonable doubt each and every element of a charged offense, and the presumption of innocence.

Perhaps the presentation of these significant arguments, which focus upon the basic concepts of fairness and due process in our system of jurisprudence will resurrect diminished capacity as a viable defense in the state of Michigan.

*Kimberley Reed Thompson was appointed as the Deputy Chief Legal Counsel for the Criminal Division of the Wayne County Circuit Court in 1992. For the previous ten years she was felony trial attorney with LADA. She is a graduate of Kentucky State University, Howard Law School, and received her LLM from Wayne State Law School. She is an elected member of the Criminal Law Section.*

## Endnotes

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- 2 47 Mich app 8, 208, 208 NW2d 656 (1973.)
- 3 62 Mich 487, 29 NW (1886).
- 4 47 Mich App at 20.
- 5 Id.
- 6 85 Mich App 379, 271 NW2d 240 (1978).
- 7 Id. at 394-395.
- 8 Id. at 395-396.
- 9 138 Mich App 568, 360 N.W. 2d 245 (1984).
- 10 421 N.W.2d 200 (1988).
- 11 MCL 786.21a (1).
- 12 MCL 768.21a(3).
- 13 464 Mich at 223.
- 14 328 U.S. 463, 66 SCt 1318, 90 Led 1382 (1946).
- 15 328 US 463, at 470.
- 16 Id. at 476.
- 17 715 F2d 1124, 1144-1145 (C.A. 7, 1983).
- 18 Id.
- 19 MCL 768.36 (3).
- 20 397 US 358, 363-364, 90 SCT 1068, 25 LEd2d 368 (1970).
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- 22 18 USC 17.
23. 827 F2d 889, 900-901 (CA 3, 1987).
24. See, Morse, *Undiminished confusion in diminished capacity*, 75 J Crim L & Criminology 1, 6 (1984).

# 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,”<sup>1</sup>

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.”<sup>2</sup> 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.<sup>3</sup> The bill allows enhanced sharing of information, such as wiretap information, among federal law enforcement, intelligence, immigration, national security and national defense personnel.<sup>4</sup> 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)<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

The Michigan Anti-Terrorism Act<sup>8</sup> 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).<sup>9</sup> 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.<sup>10</sup>
- 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.<sup>11</sup>
- 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.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup>

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 statewide 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.*



*Continued on page 49*

# Changes in Drunk Driving Laws

By John Reiser, Assistant Prosecuting Attorney for Washtenaw County

During the 2002 calendar year, Michigan's appellate courts published five OUIL-related opinions addressing:

- whether allowing a deputized officer from a religious college to arrest a suspected drunk driver on non-school property violates the Establishment Clause? (No, it doesn't).
- whether a misdemeanor arrest by a police officer outside his jurisdiction requires exclusion of the evidence, or dismissal of the charges? (No, it doesn't).
- whether a man who pleads guilty to OUIL 3<sup>rd</sup> can later collaterally attack the previous convictions as having been made without an attorney? (No, he can't).
- whether Texas' DWI statute "substantially corresponds" to Michigan's OUIL statute? (Yes, it does).
- whether a man sleeping in his idled pickup truck located in a parking lot can be convicted of attempted OUIL and attempted DWLS ?(No, he can't).

On January 22, 2002, in *People v. Van Tubbergen*, 249 Mich App 354 (2002), the Court of Appeals addressed the issue of whether the county sheriff's appointment of Hope College police officers as deputy sheriffs, with full arrest powers that extended to violations of state law on public streets, was impermissible under state law, or violative of the Michigan or US Constitutions' establishment clauses. Two Hope College police officers, previously deputized by the Ottawa County Sheriff, were traveling on a public road from one college-owned location to another when they stopped and arrested the defendant for OUIL. Defendant argued that the officers should not have been deputized because Hope College, a private institution associated with the Reformed Church of America, paid their salaries; therefore, the deputization was an improper delegation of sheriff's powers to a private non-governmental agency. The Court of Appeals rejected that claim, as they did the assertion that Hope College police officers' law enforcement powers are limited to the private interests of their employer.

The Court then chose to apply the three-part *Lemon* test from *Lemon v. Kurtzman*, 403 US 602 (1971), to determine whether the officers' appointments and conduct violated the United States Constitution, First Amendment, Establishment of Religion Clause, or Michigan's equivalent, Article 1 § 4. (First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; third, the statute must not foster an excessive governmental entangle-

ment with religion). The first prong was met because MCL 51.70, which allows the deputization of law enforcement officers, has a secular purpose. The second prong was met because the principal or primary effect of the challenged state action neither advanced nor inhibited religion. The third prong, lack of an excessive entanglement between church and state, was met because religious indoctrination is not a substantial purpose or activity of Hope College, the aid the officers provide in patrolling public streets is merely incidental to their primary purpose of patrolling on campus, and the little aid the deputized officers provide the county is provided on a nonideological basis.

On January 23, 2002, in *People v. Hamilton*, 465 Mich 526 (2002), the Michigan Supreme Court, in a 5-2 decision that reversed the Court of Appeals, held that the remedy for an arrest made without statutory authority differs from that of a constitutionally invalid arrest and reinstated both the evidence, and the charges, for an arrest made by an off-duty officer traveling outside his jurisdiction. A Howell police officer was driving in an adjacent township in the early morning hours when he noticed the defendant's vehicle, which was without operating tail lights, briefly leave the pavement. The officer stopped the vehicle, conducted field sobriety tests, and arrested the defendant for OUIL. Because he had two prior convictions, the defendant was charged with OUIL 3<sup>rd</sup>, a felony. The trial court dismissed the case, and the Court of Appeals agreed, holding that suppression of the evidence and dismissal of the case were required because the arrest was statutorily defective.

The People had conceded that the police officer was outside his jurisdiction and not acting in conjunction with a local law enforcement agency. The officer was not in hot pursuit, and had not observed what he thought was a felony. Thus, his arrest powers were relegated to that of a private citizen, and MCL 764.16 limits arrests by private citizens to felonies, shopkeepers aside. The Supreme Court stated, however, that a statutory violation, like the violation in this case, does not necessarily require application of an exclusionary rule. The Fourth Amendment's exclusionary rule only applies to constitutionally invalid arrests. The Court found that the Legislature did not intend to impose the drastic sanction of evidence suppression when officers act outside their jurisdiction. The statute that limits police officers from exercising authority and powers outside their jurisdictions, except when working with the Michigan State Police or a host jurisdiction (MCL 764.2a), was intended to protect the local governments' rights and autonomy, rather than to create a new right of criminal defendants to exclude evidence.

On April 9, 2002, in *People v. Roseberry*, 465 Mich 713 (2002), the Michigan Supreme Court addressed the issue of whether a defendant, after pleading guilty to a crime, such as OUIL 3<sup>rd</sup>, that is based on one or more prior convictions, may collaterally attack a prior conviction on the ground that it was improperly obtained because of a denial of the right to counsel. Noting that the defendant had not sought relief from the trial court to set aside his prior convictions before his plea, and that nothing indicated that the prosecution should have known about any alleged deficiency in the prior convictions, the Court held that he was precluded from collaterally attacking them after his guilty plea.

On May 10, 2002, in *People v. Wolfe*, No. 234940, 251 Mich App \_\_\_ (2002), the Court of Appeals held that Texas' drunk driving statute substantially corresponds to Michigan's. The defendant was charged with Child Endangerment 2<sup>nd</sup> (OWI, OUIL, or UBAL, with a person 16 years old or younger in the vehicle) which is a five-year felony. (First offense child endangerment is only a one-year misdemeanor, hence the significance of the defendant's prior Texas DWI conviction.) The Texas DWI statute defines intoxication as, "not having the normal use of mental faculties by reason of the introduction of alcohol..." whereas Michigan's statute, MCL 257.625, proscribes against the operation of a motor vehicle by one whose "ability to operate the vehicle is visibly impaired..." Although both states also include the .10 blood alcohol level in their definitions of intoxication, the Texas law refers to the normal use of mental faculties, while Michigan's looks at the ability to drive a car without visible impairment.

In determining whether the two statutes substantially correspond with one another, the Court resorted to Random House and Miriam Webster dictionaries to shed light on the phrases, "substantial" and "corresponding" and found that both Michigan and Texas use similar subjective criteria to prohibit similar conduct pertaining to the same essence, namely, drunk driving. The Court also cited the fact that both states set forth identical blood alcohol thresholds, measured in identical ways, in its determination that the statutes substantially correspond to one other.

On July 5, 2002, in *People v. Burton*, No. 226530, the Court of Appeals overturned the defendant's convictions for attempted OUIL 3<sup>rd</sup> and attempted DWLS 2<sup>nd</sup>. The defendant was found sleeping in his pickup truck, with the engine running, while in a golf course parking lot at 1:30 a.m. After unsuccessful attempts by the groundskeeper to wake the defendant, a deputy sheriff was called and, after an investigation into how he got there and his sobriety, the defendant was arrested. The defendant told the deputy that he had been stranded after his two friends left him there,

that he drove his car from one side of the parking lot to the other, and that he fell asleep. Defendant's two trial convictions arose from attempted violations of the motor vehicle code, MCL 257, rather than from Michigan's general attempt statute, MCL 750.92, contained in the penal code.

The Court held that the defendant should have been charged under the general attempt statute, reasoning that Michigan's OUIL statute makes no proscription against attempting to operate a vehicle under the influence. While MCL 257.204b requires one convicted of an attempted violation of the law to be punished as if the offense had been completed, the Court noted that the punishment phase of a criminal proceeding is distinctively and qualitatively different from the culpability phase. Had the Legislature intended to include attempted OUIL, or attempted DWLS, as distinct crimes, it would have added the requisite language.

The Court then held insufficient evidence was adduced at trial to support the two convictions because an attempted crime has a specific intent element. The prosecution failed to establish that the defendant intended to drive drunk, or with a suspended license. The arresting deputy had conceded that the pickup truck could have been used as a shelter. In addressing what it means to "operate" a vehicle—for OUIL purposes—the opinion cited *People v. Wood*, 450 Mich 399 (1995): "*Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk.*" Because the defendant's truck was not in gear, and parked next to a storage building in a parking lot, it did not pose a significant risk of causing a collision.

In overturning the defendant's DWLS conviction, the Court followed the *Wood* analysis in defining "operating" in terms of the danger the DWLS statute seeks to avoid: preventing a person whose past driving record is so deficient that his license was suspended, from driving because of the danger he poses on the highway or other area open to the general public. The Court found that the defendant was not attempting to violate the statute when he was arrested, and did not believe that the moving of his pickup truck from one side of the parking lot to the other was the type of action the DWLS statute was designed to prevent.

*John Reiser is a 1995 cum laude graduated of the Detroit College of Law and is an Assistant Prosecuting Attorney for Washtenaw County. He is a member of the State Bar's Criminal Law Section and a Board Member of the Washtenaw County Bar Association.*

# When the Cop Becomes the Suspect: A Primer on *Garrity*

*“If a man be interrogated by the Sovereign, or his Authority, concerning a crime done by himself, he is not bound (without assurance of pardon) to confess it; because no man...can be obliged by Covenant to accuse himself.”*

Thomas Hobbes, *Leviathan*, Part II, Chap 21 (1651)

Mark A. Porter, Labor Counsel,  
Michigan State Police Troopers Association

The covenant cited by Thomas Hobbes was between the populace and its sovereign; yet it also foretold the basic premise of *Garrity v New Jersey*.<sup>1</sup> The Sovereign, through its Executives, must occasionally investigate its own Authorities—its police officers. But when it does, the Sovereign must abide by its own rules—in this case, the 5<sup>th</sup> Amendment of the U.S. Constitution.

Since *Garrity* and its companion cases were issued in the late 1960s, it’s become something of a Holy Grail to police officers—and a Gordian knot to its detractors. I’m struck by conversation and by research that **everyone** in law enforcement claims to have the true understanding of *Garrity*. Yet, as evidenced by this primer, such is far from the case.

Likewise, many legal practitioners—even those who specialize in criminal law—voice assumptions that are often inaccurate. Most troubling, the courts have on occasion created legal fictions which turn the examination of “voluntary statements” upside down in order to side-step *Garrity*. These fictions trouble me for two reasons.

First the efforts to dilute or totally abandon *Garrity* usually come about in extremely high profile cases alleging police misconduct.<sup>2</sup> Yet I wonder—were not the Constitutional amendments created specifically to withstand such pressure?

There is a second reason why these legal fictions are so troubling. Since *Garrity* was released by the U.S. Supreme Court in 1967 (when Michigan’s Public Employment Relations Act [“PERA”] was only 2-years old),<sup>3</sup> *Garrity* has undergone an amazing transformation in its importance to police departments and their officers. In the last 35 years numerous Michigan police departments have acquired contractually-negotiated provisions instilling *Garrity* as an express guideline for both Management and Officers’ Rights. *Garrity* has evolved from a criminal law case sounding in the 5<sup>th</sup> Amendment to a cornerstone of police labor relations.

As police departments have moved away from the informal and undocumented screening of citizen complaints, internal investigations have mushroomed into a myriad of inquiries that often involve areas of the officers’ on-duty **and** off-duty lives—based upon the perception of public trust. Officers are routinely ordered to answer allegations of domestic abuse related to divorce and child custody proceedings; off-duty vehicle accidents; and the “traditional” inquiries such as the force used to subdue unruly persons. One local metro Detroit police department recently disciplined off-duty officers who were alleged to have been fighting with one another following a union meeting.<sup>4</sup>

Regardless of whether these investigations involve on-duty or off-duty incidents, all of these examples, in theory, could be elevated to a level of criminal investigation. In a vast majority of cases, Departments have learned to rely upon *Garrity* to investigate allegations; determine culpability (if any); and if required, issue discipline in a timely manner apart and aside from the criminal justice system.

In addition, police executives are concerned about the public release of many of these investigational files under the Freedom of Information Act. The Act currently provides an exemption for police departments to withhold certain files relating to personnel matters—and those files often include *Garrity* investigations.<sup>5</sup> The concern of hyper-ventilated publicity surrounding *Garrity* issues is not new, nor is it unfounded—as acknowledged by our State Supreme Court:

Respondent’s application came here almost simultaneously with [the] advent of a critical onslaught....stimulated if not prodded by a sensation-bent. Detroit daily newspaper.<sup>6</sup>

Fortunately, *Garrity* is not a frequent visitor in the State’s courts. A vast majority of internal investigations remain—“internal.” For the sake of brevity and clarity, this article will address only allegations of **on-duty**, job-related allegations which may **or may not** be criminal in nature.

Complaints alleging excessive force during arrests, mishandling of property coming into a department's possession; or on-duty vehicular accidents during pursuits all invoke debates over the use and limits of *Garrity*. Considering that police work is a "hands on" occupation, for instance, when do "routine" citizen allegations of excessive force to affect a lawful arrest become criminal in nature? Who determines which way an internal investigation should proceed?

*Garrity* is premised upon an aleatory promise by the command structure of a police department. In response to a direct order, given under the **clear and direct** threat of discipline, an officer can be compelled to give a statement related to official conduct and duty. The goal of the statement is to ascertain if departmental rules and regulations have been broken by the officer, and if that officer should be taken out of service; disciplined, or both. The police supervisors know, however, that some statements may disclose parallel violations of criminal law that may have been committed by the officer. There is also no doubt that the order deliberately breaches the protections of the 5<sup>th</sup> Amendment.<sup>7</sup>

The *aleatory* promise by the command officer giving the order is this: because the 5<sup>th</sup> Amendment has been deliberately breached, any statement made by the officer cannot, and **will not** be subsequently used against that officer if criminal charges are brought by the Prosecutor, Attorney General, or Federal District Attorney. They may only be used for internal discipline. Think of *Garrity* as a *Miranda*<sup>8</sup> warning in reverse.

It is an *aleatory* promise in that: if no criminal charges are forthcoming and any discipline remains internal, the promise remains unexecuted by the police department command. This article questions whether police departments are seeing the power to uphold the aleatory promise erode; and if, due to the vigorous attempts by some prosecutors and courts, the "promise" has become illusory.

The actual facts of *Garrity* seem straight from Hollywood scripts. In the late 1950s, Chief Edward Garrity presided over the New Jersey borough of Bellmawr. And Lo, it came to pass that Garrity did send Officer Edward Virtue out into the land to issue great numbers of moving traffic tickets to all who traveled Bellmawr's streets. Trouble was: the tickets were being routinely "reduced" by Chief Garrity to non-moving citations, and the fines actually collected were not showing up in the borough's books. In due course the state sent out an Assistant Attorney General, by name of Rigg, to adduce Garrity and his Virtue.

Rigg had a direct manner of obtaining the facts: he informed Chief Garrity and Officer Virtue that, although their statements must be "free and voluntary," New Jersey statutes imposed a penalty of discharge, should they refuse to answer any and all of his questions. Garrity and Virtue thereupon answered; were charged; and convicted of ob-

struction of justice. They appealed, claiming that their interrogations were—well—"rigged." But they got short shrifted at the New Jersey Supreme Court, which opined that there are "situations" where a public official's right to office "may properly depend upon a willingness to forego a constitutional right." Besides:

Surely, a police officer who refuses to cooperate in a proper investigation of his official conduct is acting inconsistently with his police duties.

He is therefore properly subject to subsequent dismissal proceedings.<sup>9</sup>

*Garrity* appealed to the U.S. Supreme Court, which paraphrased our mentor, Thomas Hobbes: an officer interrogated during an internal investigation should not be placed in a "Hobson's choice" of being "between the rock and the whirlpool." The Court declared:

We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.<sup>10</sup>

The New Jersey Supreme Court was not impressed. When a case similar to *Garrity* next landed on its doorstep in 1972, it stated: "We thought the 5<sup>th</sup> Amendment left the option to the officer to talk or to quit."<sup>11</sup>

Given that the U.S. Supreme Court at that time was known as "the Warren Court" after Chief Justice Earl Warren—and that it was intensely disliked by large numbers of the nation's police officers because of the Court's decisions in cases such as *Escobedo* and *Miranda*,<sup>12</sup> it's ironic that *Garrity* and its progeny have become bulwarks in police department labor relations.

What police command staffs and their officers now refer to as "Garrity Rights" are actually comprised of an amalgam of U.S. Supreme Court decisions from the late 1960s. Of specific note is *Gardner v Broderick*, which defined the parameters of the administrative questioning which could be pursued by command officers. The Court declared that an officer could be legitimately ordered under pain of discipline:

to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers of the fruits thereof in a criminal prosecution of himself....<sup>13</sup>

Many police labor contracts in Michigan now paraphrase this language when addressing contractual management and due process rights. It should be noted that Michigan police departments, in a vast number of cases where "criminal" allegations may be contemplated, wait until **after** a warrant review by the local prosecutor to obtain *Garrity*

interviews. Nonetheless, *Garrity* still has importance in those occasions when “closed” files are “reopened,” or are turned over to federal agencies, as detailed below.

Though *Garrity* came about because of a criminal investigation by New Jersey’s Attorney General, the U.S. Supreme Court has used language that reserves its immediate use to police command staff and executives. Once administered, *Garrity* cannot be used by officers defending against departmental discipline; they must testify at departmental hearings, if ordered to do to.<sup>14</sup>

In that light, the U.S. Supreme Court has referred to *Garrity* cases as “penalty” cases, since the Employer uses its right as Management to order the Employee to divulge information upon pain of economic punishment. In *Minnesota –v- Murphy* it wrote:

the Court [has] held that an individual threatened with discharge from employment for exercising the [5<sup>th</sup> Amendment] privilege had not waived it by responding to questions rather than standing on his right to remain silent.

The Court also noted that a **threat of punishment** distinguishes *Garrity* cases from other types of 5<sup>th</sup> Amendment challenges. Whether the threat is a certain reality is irrelevant.<sup>15</sup>

It is also apparent from this analysis that **only the employing** police agency can administer *Garrity* and its aleatory promise to its own officers. An outside police agency, which does not have “the power of the paycheck,” obviously cannot give the *Garrity* promise to any officer—in fact, such a claim would be duplicitous.

The Michigan Supreme Court and the newly-created Court of Appeals quickly received a flurry of appeals following the release of *Garrity* in 1967. A lawyer appealed his disbarment, and a restaurant owner claimed that *Garrity* insulated his grand jury testimony—because the state had issued a liquor license to his business. Even school teachers who went on strike claimed that *Garrity* rendered the predecessor statute to PERA unconstitutional.<sup>16</sup> For awhile it began to look like “**Everybody** wanted to get in to da act!” But the Courts rejected all of these claims.

Then in 1968, the Michigan Court Appeals addressed *Garrity* head-on in a case involving Detroit Police Officers who were ordered to testify before a Wayne County judge acting as a “1-man grand jury.” Officer Danial Allen, among others, was to testify under pain of **suspension**, not **discharge**. Following their testimony in 1966 (before *Garrity* was released) they were arrested for perjury and were bound over for trial despite defense protests of 5<sup>th</sup> and 14<sup>th</sup> amendment violations.

The release of *Garrity* in January, 1967, changed the course of events for Officer Allen and his cohorts. The Appeals Court issued a ringing endorsement of *Garrity*.<sup>17</sup>

The prosecution attempted to claim that *Garrity* didn’t apply because the Officers allegedly perjured themselves in

their statements—statements which were given under threats of discipline. The Court responded that a perjury charge would require the coerced statements to be admitted at trial, and remove all presumptions of innocence.

The prosecution then claimed that *Garrity* didn’t apply because the **substantive** charges—those of police corruption—were not laid against the police officers. But, the Court countered:

Under our system the prosecuting authority is not authorized to nullify a constitutional right by drawing such a gossamer [flimsy] distinction.

Finally, and most important for any *Garrity* inquiry, the Court declared that “...one cannot justify a violation or invasion of a constitutional right by what the invasion reveals.”<sup>18</sup>

The Court stated that *Garrity* was based upon the law of waiver: when can a person waive the 5<sup>th</sup> Amendment right against self-incrimination? Its answer—never under coercion.

Police officers in the late 1960s and 1970s thought that the Courts’ decisions of *Garrity* and *Allen* had settled the conflict between discipline and criminal charges. And indeed, some Federal decisions, such as one written by then-Justice Kenneth Starr on the District of Columbia Circuit, strongly endorsed *Garrity* and the “penalty” cases.<sup>19</sup> But in other Federal Circuits, it has proven an illusory promise. Various federal circuits, with some states in tow, have set about to remove *Garrity* through legal fictions.

In the highly-publicized Federal trial of Los Angeles police officers involved in the arrest of Rodney King, the 9<sup>th</sup> Circuit ruled that if a prosecution witness possessed “independent” knowledge of the information contained in an officer’s *Garrity* statement, that witness could testify—even if the witness had examined the *Garrity* statement. The Court also opined that police officials using *Garrity* “do not necessarily act with the care and precision of a prosecutor,” and that police officials “may” circulate *Garrity* statements to taint the testimony of other officers and thereby “protect one’s colleagues.” No grounding was provided for these speculations.<sup>20</sup>

A recent federal case from the 11<sup>th</sup> Circuit broke apart *Garrity* in order that the Federal prosecutors could charge several Miami, Florida police officers with perjury. The “perjury,” however consisted of statements that were obtained by the officers’ own department supervisors after *Garrity* warnings. The Miami Police Department, without the consent of the officers, then turned the statements over to the FBI, which in turn prosecuted the officers for “false and misleading information” to the **federal** officers. As was the *Koon* case, *Veal* involved high-profile allegations against the officers that they had murdered a drug informant.<sup>21</sup>

The Federal case most often cited as leading the way in the dilution of *Garrity* is *US v Indorato*.<sup>22</sup> The FBI and Massachusetts State Police had suspected that State Police

Lieutenant Mario Indorato, was diverting and stealing loaded semi trailers along the Massachusetts Turnpike. During a series of criminal, non-custodial interrogations at the Weston Barracks, an MSP Captain demanded information “this minute.” The Lieutenant answered, and was subsequently charged and convicted of interstate theft.

But the facts as described by the Appeals Court show that Lt. Indorato never truly was given *Garrity* warnings—though an order may **imply** penalty, as is the case in all so-called “semi-military” organizations. Nonetheless, the Court went much farther in its opinion. Rather than simply stating that a true *Garrity* warning had not been given, the 1<sup>st</sup> Circuit opined that a **statutorily mandated firing** must accompany the order to talk. No “subjective fears” of the defendant for any discipline **less** than statutory discharge qualified for *Garrity*. The Court serenely concluded:

Defendant here was not, as in *Garrity*, put “between the rock and whirlpool.”

He was standing safely on the bank of the shore.<sup>23</sup>

Various Federal Circuits and State Courts have jumped on the *Indorato* fictional bandwagon in the last 20-years. And a recent Michigan Court of Appeals case, *People v Coutu*, attempted to adopt *Indorato*, while carefully side-stepping *Allen*.<sup>24</sup>

The facts of the officers’ interviews *Coutu* are vague in description by the Court—it merely states that the defendant sheriff deputies “voluntarily made statements.” And it says that when one defendant wished to stop talking, the interview was terminated.

Nonetheless, the Court again asserted that unless Departmental rules and regulations **automatically** terminated officers for failing to answer, *Garrity* did not apply, and the statement was deemed “voluntary.”

Let’s stop for a minute and contrast labor relations with criminal procedure: labor relations practitioners (both management and labor) fully understand that termination is “economic capital punishment.” They also understand that police department regulations, by their very nature, must give **discretion** to command officers to question, evaluate, and impose discipline as may be deemed appropriate. In addition, regardless of the penalty, all discipline—even in those few departments with no labor agreements—is subject to appeal and reversal. The *Indorato* and *Coutu* Courts, to a labor relations practitioner, are translated thusly:

We can’t penalize your silence with economic execution, because *Garrity* won’t allow it. But we **can** break your economic legs for a few months, and if that compels you to talk, then your statement is “voluntary.”

Either we have a 5<sup>th</sup> Amendment—or we don’t. The *Garrity* statements sought after by prosecutors would not exist “but for” the direct orders by police supervisors to breach the 5<sup>th</sup> Amendment upon penalty of discipline. Our Federal 6<sup>th</sup> Circuit Court has noted that the coercion that

vitiates a confession can be mental, as well as physical. Subtle pressures may be as telling as coarse and vulgar ones.<sup>25</sup>

We in the labor relations field are not interested in “distinctions without a difference.” The Constitutions of the United States and Michigan do not exclude any person or occupation from their protections. And a police officer does not “hang up” the 5<sup>th</sup> Amendment at the door of the police department. As noted by our Federal 6<sup>th</sup> Circuit in a *Garrity* case, “fairness and simple justice need not always be measured by a constitutional yardstick.”<sup>26</sup>

In the view of many labor practitioners, therefore, some prosecutors, criminal defense attorneys, and courts are “giving us a lot of help that we don’t need.” Let me explain why, from both a management and labor organization perspective.

First, from *Management*: *Garrity* clearly and unambiguously gives police department command officers the exclusive prerogative to use its power—after all, the Employer is the only entity which can truly exact a penalty of the paycheck.

But decisions such as *Indorato* and *Coutu* make the Employer’s order, at best, a second tier consideration. Bear in mind, we talk about **any** investigation which theoretically **could** result in criminal charges—not just those “sensation-bent,” high-publicity cases referenced by the *Block* court.

Police work is a “hands on” occupation, resulting in a multitude of complaints each year across the state. The Police Chief or Sheriff must receive timely, accurate information from the officers in the department. But if the officers are fully aware that the *Garrity* promise is meaningless without **automatic** termination, will answers be forthcoming? The stark question becomes: “Should I risk being tried by 12, or fired by 1?” Who holds the higher penalty?

In addition, the right of departments to withhold certain documents from the Freedom of Information requests is nugatory once the files are turned over to an outside agency. The Courts, in sum, strip the police executives of critical and essential control of their internal investigations.

Now, from the *Labor Organization*: The police labor counsel—and most often the sworn police officers who are stewards and elected officials—are the practitioners who use and depend upon *Garrity* in the workday world. A police supervisor, a union steward, and an officer to be questioned are sitting in a small room during the wee hours of the night. The internal investigation interview then begins with a specific warning and an order to give a statement—that is “classic *Garrity*.”

But *Garrity* is **not** a mere question of “Hey, what happened on that arrest last night?” Nor does it usually apply to routine questions about entries on reports submitted in the normal course of business, such as police activity logs.<sup>27</sup> Nor does *Garrity* apply when officers refuse to answer

strictly internal investigations, and are suspended.<sup>28</sup> Questions routinely asked through a chain of command are clearly not accompanied by an explicit threat to remove officer from service. If the officer answers, without more, the statement is voluntary.

Criminal attorneys try the *Garrity* defense on cases such as *Indorato*, *Jobson*, and *Coutu*, as a “Hail Mary” attempt to keep an incriminating statement from the jury. But bad cases make disastrous law. The result, in the workday world, is that labor practitioners see the *Garrity* covenant being attacked and weakened to the point where it may become meaningless. The task of representation becomes just as daunting as is the quest for information by the police supervisors.

Ironically, the second area of law where *Garrity* has been applied by the Michigan Courts is in the State’s prison system: when prisoners go through parole board and disciplinary hearings, and are faced with the possibility of self-incrimination.

Here a recent Michigan Supreme Court decision shows that hope remains for the *Garrity* covenant. In *People v Wyngaard*,<sup>29</sup> the Court examined a written agreement that corrections officials had given to a prisoner, promising that his compelled statement would not be used in criminal proceedings. He was later charged with possession of controlled substances, and the statement used against him.

Our State Supreme Court adopted the U.S. Supreme Court case of *Minnesota v Murphy*, cited above, and restated that the “penalty” cases involve “a compulsion repugnant to the Constitution;” and that *Garrity* is not only termination, but rather a “substantial penalty” for the exercise of the 5<sup>th</sup> Amendment.<sup>30</sup>

And the Court, perhaps, gave a guidepost for future cases involving police officers. The question addressed by the Court in *Wyngaard* was:

What remedy must be afforded under due process principles when a defendant surrenders a constitutional right in reliance on an authorized agreement?

It would seem logical that if police officers must face increasing numbers of criminal—as opposed to internal—investigations, they should at least have the same due process protections as do the State’s convicted prisoners. *Garrity* created the aleatory promise for the discretion and use of the police departments—so that they may investigate complaints in a timely way and protect the integrity of the profession. The Supreme Court, I suggest, has reconciled *Garrity* with the covenant of Thomas Hobbes.

*Mark Porter served as a peace officer in Michigan for 28 years, and has been involved in police union work since 1974. He has a bachelor’s degree in Law Enforcement and a master’s degree in Industrial Relations. He earned his J.D. from the University of Detroit in 1988. Mr. Porter retired from police work in January 2000, and since that time has served as Labor Counsel for the Michigan State Police Trooper’s Association.*

## Endnotes

- 1 385 US 493; 87 S Ct 1616; 17 L Ed 2d (1967)
- 2 See, for instance: *U S –v- Koon*, 34 F3d 1416, 1431 (9th Circ 1994); *U S –v- Veal et al.*, 153 F3d 1233, 1240 (11th Circ 1998)
- 3 MCL 423.301 *et seq*
- 4 Detroit News article, June 25, 2002, “Sterling Heights Disciplines 12 Officers”
- 5 FOIA MCL 15.243(1)(t)
- 6 *State Bar of Michigan –v- Block*, 383 Mich 384, 387; 175 NW2d 769 (1970)
- 7 The researched cases show that *Garrity* has remained a Federal rule, through the 5th Amendment, via the 14th Amendment of the U.S. Constitution. To date, States have not addressed similar issues through their respective State Constitutions.
- 8 *Miranda –v- Arizona*, 384 US 486; 86 S Ct 1602; 16 L Ed 2d 694 (1966)
- 9 *State v Naglee*, 44 NJ 200; A2d 680, 697, 695 (1965)
- 10 *Garrity, supra*, at 385 US at 498, 500
- 11 *State –v- Falco*, 60 NJ 570; 202 A2d 13 (1972)
- 12 *Escobedo –v- Illinois*, 378 US 478; 84 S Ct 1758; 12 L Ed 2d 997 (1964); *Miranda –v- Arizona*, 384 US 486; 86 S Ct 1602; 16 L Ed 2d 694 (1966)
- 13 392 US 273, 278; 88 S Ct 1913; 20 L Ed2d 1082 (1968)w
- 14 *Spolnick –v- Detroit Police Dept.*, 49 Mich App 162; 211 NW2d 674 (1973); also *National Union of Police Officers, Local 502-M –v- Lucas*, 79 Mich App 445; 263 NW2d 7 (1978)w
- 15 465 US 420, 435; 104 S Ct 1136; 79 L Ed 2d 409 (1984)
- 16 *State Bar of Michigan –v- Block*, 383 Mich 384; 175 NW2d 769 (1970); *In re Colacisides*, 6 Mich App 298; 148 NW2d 898 (1967); *School District for the City of Holland et al –v- Holland Education Ass’n*, 380 Mich 314; 157 NW2d 206 (1968).
- 17 *People –v- Allen*, 15 Mich App 387; 166 NW2d 664 (1968)
- 18 *Id*, at 393
- 19 *US –v- Friedrick*, 842 F2d 382, 395 (DC Circ 1988)
- 20 *US –v- Koon*, 34 F3d 1416, 1433-1435 (9th Circ 1994)
- 21 18 USC §1512(b)(3), *US –v- Veal et al*, 153 F3d 1233 (11th Circ 1998)
- 22 628 F2d 711 (1st Circ 1980)
- 23 *Id*, at 717 (citation omitted)
- 24 235 Mich App 695; 599 NW2d 556 (1998)
- 25 *Townsend –v- Henderson*, 405 F2d 324, 328 (1968)
- 26 *US –v- Calhoun*, 544 F2d 291, 297 (6th Circ 1976)
- 27 *People –v- Jobson*, 205 Mich 708; 518 NW2d 526 (1994)
- 28 *Buckner –v- Highland Park*, 901 F2d 491 (6th Circ 1990)
- 29 462 Mich 659; 614 NW2d 143 (2000)
- 30 *Id*, at 673

# Does a Politically Appointed Parole Board Cost Michigan Citizens Hundreds of Millions of Dollars?

By Daniel E. Manville

## Introduction

In 1991, Michigan prison population was 36,293 and at the end of 1999 that population was 46,617, an increase of 28 percent.<sup>1</sup> During this same period, Michigan's overall population growth was 6.9 percent.<sup>2</sup> In 1990, MDOC's budget was 730 million dollars. By 1999, the budget had increased to 1.6 billion dollars.<sup>3</sup> In ten years, the MDOC's budget more than doubled. This tremendous increase in the MDOC's budget has taken funds from other state agencies.<sup>4</sup>

This article will discuss how a politically appointed Parole Board negatively impacted parole releases; how sex offenders are being denied parole even though MDOC's own statistics demonstrate that these offenders have very low parole failures and recidivism rates; and how the parole guideline scores created by the Legislature have been subverted by the Parole Board to deny parole to those who are presumed parolable.

## Percentage of Paroles and Denials During 1990-1999

Prior to addressing how the present Parole Board has contributed significantly to the increase in the prison population and MDOC's budget in the 1990s, the number of paroles granted and denied will be examined.

In 1990, 10,748 paroles were ordered and 5,004 were denied.<sup>5</sup> Between 1990 and 1999, the prison population increased to 46,617, which is an increase of 12,408 inmates.<sup>6</sup> Based upon this increase in the prison population, it would be expected that the number of paroles ordered would increase by at least 2,500. However, a review of MDOC's statistical data shows that only 10,777 paroles were ordered in 1999, an increase of 29 paroles over the 10,748 paroled in 1990, or less than 1 percent increase in paroles.<sup>7</sup> Between 1990 and 1999, the number of inmates denied parole increased from 5,004 to 10,154, an increase of over 200 percent.<sup>8</sup>

## Politically Appointed Parole Board

In 1992, the Legislature changed the make-up of the Parole Board as a result of inmate Leslie Williams being paroled and then going on a spree of kidnapping, raping and murdering young girls.<sup>9</sup> The Legislature changed the makeup of the Parole Board from appointed civil service employees, i.e., corrections professionals, to a Parole Board consisting of political appointees. The new Parole Board members have none of the protection of the civil service corrections professionals and can be removed by the Director.<sup>10</sup>

Most of these political appointees are former law enforcement officers, assistant prosecutors or victim rights advocates. They brought to the Parole Board their background in law enforcement and a focus on paroles that differed substantially from the approach taken by corrections professionals. Corrections professionals considered the crime and past record, if any, but placed more emphasis on the treatment received by the inmate and changes that inmate had made while confined. The politically appointed Parole Board generally focused on the past and present crime(s) of the inmate before it in deciding whether to parole.<sup>11</sup>

A review of MDOC's data for the years 1992-1998 shows that only in 1993 did the Parole Board increase the number of inmates paroled as the number of inmates confined increased.<sup>12</sup> Starting in 1994, the number of inmates granted parole did not keep pace with the number of inmates being confined. During this time frame, the only additional criteria for granting parole imposed upon the Parole Board was the mandated use of parole guidelines. Because the parole guidelines were instituted to bring greater equity to the parole process, more paroles should have been granted with its implementation, not less as occurred under the new Parole Board.<sup>13</sup> (The guidelines are discussed *infra*.)

MDOC's statistics show that these political appointees have impacted on the parole rates negatively.<sup>14</sup> MDOC spokesperson Matt Davis agrees. In an interview in 2001, Mr. Davis stated:

If our parole approval rates were at the same level now [as] they were in the 1980s, I think we would be at near zero growth.<sup>15</sup>

## Sex Offenders Are Good Risks for Parole<sup>16</sup>

A review of the Parole Board's own data since the political appointees assumed control shows that these members have gone after one group of inmates with a vengeance. This group of inmates is the sex offenders.<sup>17</sup> In 1990, 46.5 percent of sex offenders were granted parole,<sup>18</sup> whereas in 1999 only 17.3 percent were granted parole. This is a 63 percent decrease in the granting of parole to sex offenders since 1990 to 1999. No other category of offenders has suffered such a decrease.

If sex offenders had either a high parole failure or high recidivism rate, there would be no question that the Parole Board would be doing their job of protecting society. However, MDOC's statistics show that sex offenders have the

second to the highest successful completion of parole of twenty categories of offenders.<sup>19</sup> These statistics also show that sex offenders have the second lowest failure while on parole. Finally, these statistics show that sex offenders have a recidivism rate of 3.4 percent, which is the fourth lowest.<sup>20</sup> Despite the MDOC's own statistics showing that sex offenders are one of the best group of inmates to be paroled, the Parole Board, instead, has seriously decreased the number of sex offenders paroled.<sup>21</sup>

In most cases, a sex offender is required to participate in group sex offender therapy (SOT) while confined.<sup>22</sup> It is believed by both the prison SOT psychologists and inmates that failure to complete SOT will guarantee numerous years of denial of parole. As part of SOT, an inmate is required to accept responsibility for the crime, to discuss prior sex offenses, to take an active part in the group by questioning or confronting other groups members, and to prepare a "relapse prevention" plan. At the end of the group, a termination report is written by the psychologist as to the progress of the inmate in group and the suitability of the inmate's "relapse prevention" plan. This termination report is placed in the inmate's file and is available to the Parole Board.<sup>23</sup>

The MDOC's SOT program is modeled after the National Model.<sup>24</sup> Even though "[t]herapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism,"<sup>25</sup> the Parole Board refuses to acknowledge that SOT can have a positive impact on sex offenders. One former chair of the Parole Board stated to the author that there have been no studies showing that therapy for sex offenders positively influence their deviancy. That statement is contrary to a Federal study by the U.S. Department of Justice, which found that sex offenders who receive treatment have around a 15 percent recidivism rate.

[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15 percent, [whereas] the rate of recidivism of untreated offenders has been estimated to be as high as 80 percent. Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals.<sup>26</sup>

As demonstrated above, the Parole Board has acted contrary to MDOC's statistics and a 1988 study that sex offender therapy significantly lowers recidivism by denying parole. If the denial of parole was for one year only, one could possibly find justification for such a policy. However, parole denial for sex offenders usually involves two, three or even four continuances of one year each. The costs of incarcerating these sex offenders who have been rehabilitated adds up to hundreds of millions of dollars.

## Subverting Parole Guidelines

The Parole Board has also subverted the parole guidelines that were established by the Legislature to correct a parole process that seemed more bent on denying than granting meritorious paroles. Starting in 1994, the Legislature required that the Parole Board use objective criteria in making its decisions to grant or deny parole by implementing parole guidelines scores.<sup>27</sup> These guidelines were "intended to inject more objectivity and uniformity into the [parole decision] process in order to minimize recidivism and decisions based on improper considerations...."<sup>28</sup>

The Parole Board created three levels within the Legislative designed guideline system. The first level consists of those inmates with a high probability of parole scores who are to be released on parole unless "substantial and compelling" reasons are stated in writing to deny parole.<sup>29</sup> The second level consists of those inmates with an average probability of parole in which the guidelines do not restrict the decision of the Parole Board whether to grant or deny parole.<sup>30</sup> The third level consists of those inmates with a low probability of parole, which usually means a denial of parole unless "substantial and compelling reasons" are stated in writing to justify that release.<sup>31</sup>

In requiring the use of these guidelines, the Legislature did not take away all of the discretion of the Parole Board.<sup>32</sup> As indicated above, the Parole Board can deny parole to inmates with high probability scores if it states "substantial and compelling" reasons in writing.<sup>33</sup> However, the Legislature did not define "substantial and compelling" when enacting the parole guideline statute,<sup>34</sup> but it did use this phrase in its earlier enactment of the controlled substances act<sup>35</sup> and in determining departures from sentencing guidelines.<sup>36</sup> Therefore, in determining what "substantial and compelling" reasons means in the parole context, the standard used in drugs offenses and sentencing guidelines should be followed.

In *Fields*, the court stated that since the Legislature chose to use this phrase after it had been interpreted by the Supreme Court, and did not provide a different definition, this is evidence that it intended a similar interpretation of the phrase in that case.<sup>37</sup> The *Fields* Court recognized that "the words 'substantial and compelling' constitute strong language," and found it "reasonable to conclude that the Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases."<sup>38</sup> The Court also found that it is not enough for a factor to be merely substantial; it must be both substantial and compelling before departure from the guidelines is permitted, and that the Legislature is presumed to "have consciously elevated the burden of proof" by its choice of the term "compelling."<sup>39</sup>

The Parole Board denies parole to a significant number of sex offenders who have high probability of parole guideline scores. The reasons used by the Parole Board for finding substantial and compelling reasons for departures from the guidelines don't meet the criteria used by courts in drug

and sentencing guideline cases. The *Fields* Court stated that substantial and compelling reasons for departures should be the exception. In the cases of sex offenders, departures from the guidelines is not the exception but is the norm. In finding substantial and compelling reasons, generally, the Parole Board will use one or more of the same factors that were used in the original scoring of the parole guidelines or used by judges in imposing sentence.

An example of a factor frequently used by the Parole Board in finding “substantial and compelling” reasons to deny parole to an inmate with a high probability of parole score is the failure of the inmate to admit remorse as to the crime or as to the victim.<sup>40</sup> Courts have held that remorse is not to be considered in determining “substantial and compelling” reasons to depart from a sentence.<sup>41</sup> Based upon these decisions, a denial of a parole to someone who has a high probability of parole because no remorse is shown would be contrary to law.

Another factor used by the Parole Board in finding substantial and compelling reason to depart from a grant of parole is that the inmate does not show insight into his sexually deviant behavior. In most cases where this is listed by the Parole Board to justify departure from a grant of parole, a review of the termination report prepared by the psychologist for the sex offender group does not support that reason. Usually the termination report will state that the inmate has gained insight into his deviant behavior.

The Parole Board has also sought to make it more difficult for sex offenders to obtain a score of high probability of parole by imposing a “-5” points under the “Mental Health Variable.”<sup>42</sup> According to MDOC’s parole guidelines, an inmate is then given only a “+1” point for successfully completing sex offender therapy. It is absurd that sex offenders are not given at least a “+4” for successful completion of sex offender therapy since it has been determined that treatment significantly reduces recidivism. The reason the Parole Board does not give more than “+1” point for successful completion of SOT is directed at keeping low the number of sex offenders achieving a rating of high probability of parole and thus requiring the Parole Board to then artificially create substantial and compelling reasons for not granting the presumptive parole.

Recently the Parole Board amended Ad.R.791.7716 apparently because it was granting too many paroles.<sup>43</sup> Before this amendment, an inmate’s “prior criminal record” was one of numerous factors used to determine the overall parole guideline scores. Now, the Parole Board not only still uses the “prior criminal record” to obtain the overall score, but then uses this same factor to reduce a high probability of parole to an average probability. The Parole Board’s Rule now states that if an inmate’s “prior criminal record points is greater than 06”<sup>44</sup> and the inmate also has an overall score of +4 or more (which is high probability), that inmate’s score is to be automatically reduced to a +3 (average probability).

What this means is that the parole board can then deny parole without stating “substantial and compelling reasons.”

## Conclusion

What public need is served by continuing to confine those who have successfully completed sex offender therapy and their minimum sentence? There is none! As the Lansing State Journal put it recently:

And the longer we hold people in prisons without substantial rehabilitation, the more likely they will struggle—or revert to crime—once they are released. Is the state prepared to slam the door permanently on tens of thousands of its citizens; forswearing any chance for them to contribute to society, while guaranteeing they will drain resources from the rest of us for decades to come?<sup>45</sup>

Based upon the above, some obvious questions are raised. First, does the politically appointed Parole Board know and understand sex offender therapy, and its potential impact on recidivism for offenders? Second, is the politically appointed Parole Board overly biased towards confinement due to its background? Third is the politically appointed Parole Board acting on behalf of the MDOC in keeping the number of those confined at a high level to ensure a high budget? Fourth, is the protection of the public best served by confining those who are least likely to violate parole or to be recidivists? These questions cannot be answered in this article but it is hoped that others will look more closely at what the politically appointed Parole Board is doing and determine whether its present policies are best serving the people of the State of Michigan.

*Mr. Manville graduated from Jackson Prison in 1976 and went on to obtain a Master’s Degree in Criminal Justice from MSU, and a JD from Antioch School of Law. Since his release from prison in 1976, he has engaged primarily in litigation against the inequities in the prison system. He has also authored a number of self-help manuals for those who are confined.*

## Endnotes

- 1 See Michigan Department of Corrections (hereafter MDOC) 1999 Statistical Report, Table B1c, “Total Prison Population, Prison Commitments, and Michigan Census: 1940-1999”, at 52.
- 2 U.S. Census figures released in 2001.
- 3 MDOC’s 1999 Annual Report, at 111. For the year 1999, the average costs of incarcerating an inmate at a Level II prison was \$18,575, at 112.
- 4 *Id.*, at 111 (“Corrections now receives 14.7 percent of state general revenue funding, up from just 3 percent in 1980.”).
- 5 *Supra* Note 1, Table D1, “Parole Board Activity, 1985-1999,” at 171.
- 6 *Supra* Note 5.
- 7 *Supra* Note 5.
- 8 MDOC spokesperson Matt Davis stated, “Between 1990 and 2000, there was a sea [of] change in the way paroles were

- granted. We have more people in prison because many fewer are leaving.” \* \* \* “Fewer paroles mean more prisoners: ‘90s growth was 7 times that of state population’, ” Detroit Free Press, August 1, 2001, by Dawson Bell.
- 9 MCLA 791.231(a). This new constituted Parole Board took over on November 15, 1992. MCLA 791.231(a)(5).
- 10 MCLA 791.231a (“The director may remove a member of the parole board for incompetency, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office.”).
- 11 When a defendant is sentenced pursuant to Michigan’s Sentencing Guidelines, the court factors in the past and present crimes to determine an appropriate sentence. This Parole Board has decided that it will determine the minimum sentence of a sex offender and not follow what was imposed by the duly elected circuit court judge.
- 12 This was the first full year of the political appointed Parole Board.
- 13 See MCLA 791.233e. Starting in 1994, the Parole Board was required to consider the proposed parole guidelines in making its decisions and once the rules were adopted they were mandated to use them. As discussed infra, the parole guidelines were enacted by the Legislature to correct inequities in the parole process. However, based upon MDOC’s statistics, instead of correcting inequities, the Parole Board found ways to get around what was mandated by law.
- 14 Supra Note 5, see Tables B1c and D1.
- 15 Supra Note 8.
- 16 The term “sex offender” is a catch all phrase for anyone convicted under numerous criminal statutes of Michigan. A 17-year old is a “sex offender” when convicted of having consensual sex with his 15-year old girl friend, as well as the serial rapists, such as Leslie Williams.
- 17 See “Parole Approval Rates,” chart below. This chart can be found at [www.michigan.gov/corrections](http://www.michigan.gov/corrections), click on “Probation, Parole and Boot Camp.” MDOC spokesperson Matt Davis agreed that the 1990s Parole Board reforms resulted in dramatic changes in the number of sex offenders being denied parole compared to other criminal categories. Supra note 8.
- 18 1991 is the last full year that the Parole Board consisted of civil service employees. In 1992, the political appointees took over the Parole Board on November 15.
- 19 Supra Note 5, Table D2, “Parole Outcomes of Offenders Who Paroled in 1995 by Offense Group,” at 173.
- 20 Supra Note 5.
- 21 MDOC 1994 Annual Report stated that for sex offender paroled in 1990 had a parole success rate of 81 percent. It went on to state that the majority of parole failures for sex offenders “were for technical violations, not new offenses.” Only 12 of 485 paroled sex offenders committed another sex offense. At 117-118.
- 22 Probably 90 per cent of sex offenders will be recommended for sex offender therapy.
- 23 Once paroled, almost 100 percent of the parolees are required to attend sex offender therapy in the community and also are required to submit to a polygraph on demand to test whether they have been having deviant sexual thoughts. A positive result on the polygraph will usually result in the parolee being sent back to prison.
- 24 See U.S. Dept. of Justice, National Institute of Corrections, “A Practitioner’s Guide to Treating the Incarcerated Male Sex Offender” (1988);
- 25 *McKune v. Lile*, 536 U.S. —, 122 S.Ct. 2017, 2024 (2002) (citing to U.S. Dept. of Justice, Nat. Institute of Corrections, “A Practitioner’s Guide to Treating the Incarcerated Male Sex Offender” (1988)).
- 26 Supra Note 24, at xiii; see also, R. Karl Hanson, et al., “First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders,” *Sexual Abuse: A Journal of Research and Treatment*, 169-94 (April 2002).
- 27 MCLA 791.233e; *Killebrew v. Dep’t of Corrections*, 237 Mich.App 650, 655; 604 NW2d 696 (1999).
- 28 *Id.* at 653.
- 29 MCLA 791.233e(6); see also *Scholtz v. Michigan Parole Bd.*, 231 Mich.App. 104, 585 N.W.2d 352 (1998) (substantial and compelling reasons not stated by parole board in denial of parole to inmate with high probability of parole guideline score).
- 30 *Killebrew v. Dep’t of Corrections*, supra 237 Mich.App at 656 (“the Parole Board may grant or deny parole to average probability prisoners for legitimate reasons that are neither compelling nor substantial”).
- 31 *In re Parole of Johnson*, 219 Mich.App. 595, 596, 556 N.W.2d 899 (1997), the court found that grant of parole to inmate with low probability of parole was not supported by “substantial and compelling” reasons.
- 32 *Id.* at 654 (“The guidelines do not hamper [the parole board]’s discretion absolutely.”).
- 33 MCLA 791.233e(6).
- 34 See, e.g., *In re Parole of Johnson*, supra; *In re Parole of Scholtz*, supra.
- 35 MCLA 333.7401(4) (“The court may depart from the minimum term of imprisonment ... if the court finds on the record that there are substantial and compelling reasons to do so.”).
- 36 *People v. Fields*, 448 Mich. 58, 528 N.W.2d 176 (1995) (Legislature, in an effort to deter drug-related crime, intended that only in exceptional cases should sentencing judges deviate from the minimum prison terms mandated by statute).
- 37 The same is true when the Legislature enacted MCL 791.233e. No definition of “substantial and compelling” was contained in the Public Act. Courts have held that the Legislature is aware of prior law when passing a new law and, thus, the definition of “substantial and compelling” contained in case law is what was intended by the Legislature.
- 38 *Fields*, supra at 67-68. See also *People v. Hegwood*, 465 Mich. 432, 636 N.W.2d 127, 132 (2001) (courts may depart from sentencing guidelines, see MCLA 769.34(3), for “substantial and compelling” reasons).
- 39 *Id.* at 83 (Boyle, J., concurring).
- 40 This is different than an inmates refusing to acknowledge that he committed the crime even after being convicted. In *Hicks v. Parole Bd.*, 2001 WL 792153, \*4 (Mich. App. 1/9/01), the court affirmed use of failure to admit guilty as substantial and compelling reason to deny parole to inmate with high probability of parole. In support of its holding, the court found that inmate was properly denied admission into therapy since admission of guilty was a prerequisite for SOT. See also *Russell v. Eaves*, 722 F Supp 558, 559-561 (E.D. Mo., 1989) (prisoner set forth a legally frivolous argument when he contended that requiring him to admit guilt in order to participate in rehabilitative therapy violated his right against self-incrimination, even though therapy was a prerequisite for parole).
- 41 See *People v. Daniel*, 462 Mich. 1, 7 and note 9, 609 N.W.2d 557 (2002) (“We expressly disapproved, however, considering a defendant’s expression of remorse in determining whether to depart from the minimum sentence required by statute.” at 7).
- 42 Ad.R.791.7716(3)(g)(ii). The Parole Board’s guidelines also imposes a “-1” point under “Offense Variables” for serving for a sex offense, Ad.R.791.7716(3)(a)(v), along with the “-5” under the “Mental Health Variable.”
- 43 R791.7716 lists factors to be scored in determining the parole guideline score.
- 44 In an article written for the *Prisons and Corrections Forum*, Barbara Levine describes how inmates without a violent criminal past can receive a score of 6 points or more. See “Revising Parole Guidelines: Prediction or Politics?”, at 9 n. 1.
- 45 Lansing State Journal, October 16, 2002 Editorial, “Prisons: Commutations put light on costly parole backlog.” See also Detroit Free Press, September 30, 2002, “Parole policy carries harsh price for prisoners, taxpayers,” by Jeff Gerritt.

# Innovative Use of Investigative Subpoena Laws By Kalamazoo County and Michigan Law Enforcement Agencies to Solve Cold-Cases

By Stuart L. Fenton, Assistant Kalamazoo County Prosecuting Attorney

Prior to January 1, 1996, there was no easy way for law enforcement authorities to force or compel an uncooperative or reluctant witness to a crime to share the information that they have with the police. Such a witness could pretty much thumb his or her nose at the criminal justice system with impunity, and there was virtually nothing that could be done about it.

I say virtually, because, Michigan does have some archaic grand jury statutes still on the books-statutes which are rarely utilized because they are cumbersome, expensive and require extensive judicial involvement.

However, in 1995, the Michigan Legislature passes the Investigational Subpoena law that became effective on January 1, 1996. This law has given prosecutors and police a tremendous new ability to solve some of the most difficult crimes, by expanding their pre-charging powers, while retaining many of the protections of the old grand jury laws, insuring both judicial scrutiny, and individual rights.

To fully appreciate the beauty of the investigative subpoena law, it is first necessary to discuss how criminal charges are filed in Michigan, and to understand a little background on the grand jury system in general, and in Michigan, specifically. The overwhelming majority of cases in Michigan are charged directly by the prosecutor's office on a complaint and warrant upon submission of a charging request from police and a police report. In essence, the prosecutor reviews the police report, and if they find the existence of probable cause, they will charge the defendant with a crime. Grand juries are not commonly utilized in Michigan. More on why this is in a moment.

The problem with this simple complaint and warrant system is often times the police are stifled in their investigation because crucial witnesses refuse to talk. This can be due to loyalty to the offender, fear of retaliation, or just general dislike of the police. For whatever reason, the inability to obtain critical witness information is a major stumbling block to solving serious crime. So, many cases are just not solved, and no warrant requests are submitted. In 1997, just prior to Kalamazoo County's creation of its "Cold-Case Homicide Team" approximately thirty-nine homicide cases remained unsolved, countywide. Other Michigan counties have many times more that number.

In contrast, several other states and the federal system utilize a grand jury system, which acts as an effective method of getting around this problem of uncooperative witnesses. Grand juries have the power to subpoena witnesses before them to testify under oath prior to any charges being filed. If the witness refuses to respond to the subpoena, or answer questions at the hearing (and has no valid privilege) they are subject to the contempt powers of the court. If they lie under oath, they are subject to the penalties of perjury. At the conclusion of the investigation, the prosecutor seeks a formal indictment from the grand jury.

In addition to the obvious benefits here with uncooperative witnesses, the advantage of this system is that the lawyers know precisely what the witnesses will later say in court because they are "locked in" to a statement under oath during the grand jury. The other main attraction of this system is that rather than one official making the crucial charging decision, it is thought that a decision made by an entire panel of citizens would be more representative of the community at-large.

Unfortunately, Michigan is not a "Grand Jury state"-that is, our statutes do not provide for a standing grand jury system that is to be routinely used in the investigation and charging of crimes. Although we do have two very specific "Grand Jury" statutes, they are unique creatures of the law, and only utilized rarely, in very special circumstances. *MCL 767.3, et seq.* authorizes the use of a "one-man grand jury"-that being a judge. Witnesses can be summoned before a judge to answer questions under oath regarding a particular crime. At the end of the investigation, the judge decides whether to return an indictment. The proceedings are held in secret, and any violation of secrecy can result in criminal punishment being imposed against the violator. This type of grand jury is typically utilized to investigate public corruption cases.

*MCL 767.7b et. seq.* also authorizes a "Multi-County Grand Jury" to be convened solely for the purpose of investigating crimes crossing two county borders. The attorney general, or each participating county prosecutor, must file a motion seeking permission in the Michigan Court of Appeals to convene such a multi-county grand jury. Its membership must consist of not less than 13 nor more than

17 members. Secrecy provisions also govern the multi-county grand jury. These grand juries are most commonly used to investigate drug-dealing organizations, which generally operate in several counties.

These statutory provisions are the only ones authorizing a grand jury in the state of Michigan. There are no provisions for a regular, standing grand jury by which normal crimes are to be routinely investigated and reviewed for charging and indictment. The problems with these limited provisions are numerous: judicial unavailability for lengthy investigations, costs and expenses related to a full-blown grand jury, and the simple fact that most serious crimes do not cross county lines.

Back to the original problem-absent a grand jury system, how do the police get reluctant or uncooperative witnesses to divulge critical facts that could break a serious case, such as murder, criminal sexual conduct, etc. when the witnesses are predisposed to withholding that crucial information instead?

Prior to 1996, there was no legal way to do so. Hence, to address this problem, and in recognition of the fact that current grand jury statutes were inadequate, the legislature passed what perhaps can fairly be characterized as one of the most significant investigative tools ever given to law enforcement in this state: the investigative subpoena law.

In essence, the investigative subpoena law gives prosecutors the ability to subpoena witnesses during the investigative phase of a case, prior to any charges being filed, examine them under oath, subject to the powers of contempt and perjury for failure to comply or lying under oath, all without having to convene a grand jury, and all while preserving the important constitutional rights and statutory privileges of individuals.

The investigative subpoena law is found at MCL 767A1-767A9. Prosecutors are allowed to petition any District or Circuit judge in the county where the prosecutor maintains an office or where the crime was committed for authority to subpoena certain named witnesses to investigate the commission of a specific felony. Note: the crime must be a felony, and the desired witnesses must be named in the petition (prosecutors cannot just subpoena willy-nilly whoever they want). Reasonable cause must be shown that a felony has been committed, and that the named witnesses have information about the crime. If these basic requirements are met, the judge will authorize the prosecutor to subpoena the named witnesses.

Protections for the named witnesses include a 7-day notice requirement, the right to object to the subpoena (which notice must be specified on the subpoena itself), and the right to have a lawyer present throughout the proceeding. Additionally, witnesses must be informed of the right against self-incrimination. "Use Immunity" can also be obtained for witnesses with valid 5<sup>th</sup> Amendment concerns.

One issue from the defense perspective has been that no provision exists for court-appointed attorneys. However, this is consistent with the grand jury statutes currently on the books, and also with case law, which has held that witnesses appearing before a grand jury are not deemed "in custody" for *Miranda* and court-appointed attorney purposes. The environment is not considered inherently coercive or tantamount to a police interrogation. *People v Hoffman*, 205 Mich App 1 (1994); *People v Blachura*, 59 Mich App 664 (1975).

Another concern raised by prosecutors is that the statute does not have any secrecy protections like the grand jury statutes. Grand jury secrecy was deemed critical to its success. Anyone caught disclosing grand jury information could be prosecuted for violation of the secrecy provisions. With investigative subpoenas, anyone associated with the investigation (attorneys, police, and more importantly witnesses) are hypothetically free to discuss the case with anyone they want, without consequences. Secrecy was thought paramount in grand jury investigations not only to protect the integrity of the investigation, but also to protect against name and reputation of the potential target being besmirched in the event that charges did not ultimately result from the inquiry.

Instead, the elaborate secrecy provisions associated with the grand jury laws, the only things that are confidential with investigative subpoena laws are the petition itself, petitions for immunity, and transcripts of witnesses who have been interviewed under oath. Such does not make for an ideal investigative environment, but ultimately, the advantages for having such a statute at all far outweigh some of its shortcomings.

As far as procedure, normally the petition and pleadings are filed with the District or Circuit court clerk's office, and are kept in a non-public, administrative file. They are not subject to public inspection. Normally, the interviews take place in a room in the prosecutor's office, or other professional, yet, private setting. The witness is administered the oath and the prosecutor asks questions after some preliminary admonitions are given. If the witness fails to appear or refuses to answer questions without having a valid right or privilege, the prosecutor files a motion to compel, and if the witness still refuses, they can be arrested, and/or held in contempt. The penalty for contempt is up to one year in jail and a \$10,000 fine. The witness can purge himself or herself of contempt at any time simply by complying with the subpoena. Perjury is punishable by up to 15 years in prison on a non-capital crime, and up to life on a capital case.

If a subject is ultimately charged, they are ultimately entitled to the transcript of witnesses who will testify against them at trial, any co-defendant's testimony, any exculpatory testimony, and their testimony if they gave the same.

Normally, this occurs within certain deadlines in circuit court, as provided by the statute. However, *People v Pruitt*, 229 Mich App 82 (1998) held that a district court judge has the authority to order discovery of investigative subpoena prior to the preliminary examination of: (1) the defendant's own statement; (2) accomplice's statements, and; (3) any exculpatory testimony.

The Michigan Attorney General's office has put together an indispensable manual on investigative subpoenas which discusses the law in detail, has sample forms for all the various pleadings, and also makes many good suggestions on procedures. Be sure to obtain a copy and study it thoroughly before proceeding with any investigation.

Kalamazoo County has been in the forefront of investigative subpoena utilization. In 1995, a Priority Crimes Task Force was formed, which developed a screening mechanism to decide which cases were suitable for the use of investigative subpoenas. I was fortunate enough to fill the position of the newly created Investigative Subpoena attorney for six years. In 1999, a county-wide "Cold Case Homicide Team" was created. Investigative subpoenas have been instrumental in solving and successfully prosecuting eight of the previously unsolved homicide cases and bringing important closure to the families of these victims. The oldest case solved dated back to 1975 and was twenty-five years old at the time of the long-

overdue conviction after a two-week jury trial in 2000. To date, approximately 16 cases have been investigated in Kalamazoo County with the investigative subpoena tool. Virtually all of them have resulted in subsequent charges being filed, and ultimately convictions being obtained, proving the effectiveness of the procedure.

In sum, investigative subpoenas have filled the void of ineffective, cumbersome, and costly grand jury statutes in Michigan. Given the right circumstances, they are an indispensable tool for law enforcement. The law strikes the right balance by protecting the rights of the defendants and witnesses, while providing prosecutors and police the legitimate ability to deal appropriately with the people who have valuable information about serious crimes, but would rather keep the information to themselves (usually resulting in the offender avoiding any prosecution and avoiding any responsibility for the crime).

*Stuart L. Fenton, is an assistant Kalamazoo County Prosecutor, assigned to handle investigative subpoenas from 1996-2001. He has been a prosecutor since 1987, serving in Muskegon County until 1991. Fenton is a 1987 graduate of Wayne State University Law School, and has served as an instructor and lecturer for the Prosecuting Attorney's Association of Michigan, and numerous law enforcement agencies across the state.*

## The Legislative Sentencing Guidelines ...

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*People v Sutton*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2001 (Docket No. 225189) (properly scored based on unchallenged evidence of uncharged assault).

*People v Sifuentes*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2002 (Docket No. 23286) (defense counsel not ineffective in failing to object to ten points for bodily injury requiring medical attention where victim complained of bite marks and sore jaw and shoulder and treated and examined at hospital).

*People v Sabandith*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2002 (Docket No. 226567, 226568) (evidence sufficient to show permanent incapacitating injury where victim may have nerve damage of foot and possible muscle paralysis and used cane at trial).

### Offense Variable 4

*People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328) (no error where victim appeared deeply distraught and in need of psychological help).

*People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2001 (Docket No. 220902) (no error where victim sought counseling).

*People v Vance*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2001 (Docket No. 226826) (10 points proper where victim was crying and trembling after offense, continued to feel afraid and vulnerable and she stated offense would affect the rest of her life).

*People v Pace*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2002 (Docket No. 230888) (properly scored where victim shot and may never walk again; guidelines only require serious psychological injury that “may” require treatment).

### Offense Variable 5

*People v Ales*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2002 (Docket No. 230447) (fact that family had yet to seek treatment not dispositive).

*People v Hauser*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2002 (Docket No. 239688) (properly scored where victim’s daughter had trouble sleeping and sought counseling, even if loss of mother was not a debilitating loss).

### Offense Variable 6

*People v Villarreal*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket

No.228527) (sufficient evidence of premeditation where victim in defensive kicking posture at time of shooting and victim intended to break up with defendant).

*People v Betzer*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2002 (Docket No. 227647) (sufficient evidence of intent to injure based on injuries to child’s skull).

### Offense Variable 7

*People v Hornsby*, 251 Mich App 462; 650 NW2d 700 (2002) (50 points proper where defendant held gun to victim’s head, made threats to kill her and others in store and victim heard gun click).

*People v Villarreal*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket No.228527) (sufficient scoring where victim in defensive posture when defendant placed gun in vagina and pulled trigger).

*People v White*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2002 (Docket No. 233926) (sufficient evidence of terrorism where defendant used physical force and threats, threatened to produce knife and showed his display of guns).

*People v Cicero*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket No. 229483) (sufficient evidence where defendant repeatedly beat elderly woman in head and elbow with pan).

*People v Bradford*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2001 (Docket No. 224790) (properly scored based on extended nature of domestic attack and manner in which attack achieved).

*People v Farris*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2001 (Docket No. 222175) (properly scored for terrorism where defendant kicked down door at 3 am, threatened bodily injury to prospective male acquaintances of homeowner and defendant racked weapon in front of victim and her children).

*People v Minner*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 227956) (sufficient fear and anxiety for 50 points where defendant held gun to victim’s head and threatened several times to kill her).

### Offense Variable 8

*People v Spanke*, \_\_\_ Mich App \_\_\_ (Docket No. 232089, released January 3, 2003) (movement of victims for purposes of 15 point assessment need not be forcible as long as it is not merely incidental to committing an underlying felony).

*People v Phillips*, 251 Mich App 100; 649 NW2d 407 (2002) (sufficient evidence where 14 year old victim taken in car to two-track road in isolated area near river).

*People v Minner*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 227956) (acquitted conduct showing kidnapping may be considered).

*People v Palmer*, unpublished opinion per curiam of the Court of Appeals, issued April 9, 2002 (Docket No. 228080) (15 points proper where victim moved from sales counter into back room, placing her in situation of greater danger).

*People v Henry*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2002 (Docket No. 233862) (enticing victim into enclosed storage shed sufficient).

### **Offense Variable 9**

*People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002) (10 points proper where victim's fiancé and child were in car with victim when defendant shot victim through windshield).

*People v Hayes*, unpublished opinion per curiam of the Court of Appeals, issued February 22, 2002 (Docket No. 227641) (scoring for multiple victims permissible even where separate convictions for each victim where acts occurred at same time).

*People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2001 (Docket No. 225659) (other persons present in restaurant at time of robbery, although unaware of robbery, can be counted as victims for purposes of OV 9).

*People v Hansen*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 224328) (penetrations relating to uncharged victims not to be scored).

### **Offense Variable 10**

*People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002) (15 points proper for predatory conduct where defendant and cohorts drove around looking for car to steal and then following victim home to steal car).

*People v Phillips*, 251 Mich App 100; 649 NW2d 407 (2002) (sufficient evidence where victim 14 and defendant 67, even if no manipulation of victim).

*People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001) (10 points proper where defendant lured teenaged girls with fame and fortune to pose for lewd and lascivious photographs).

*People v Banks*, unpublished opinion per curiam of the Court of Appeals, issued August 20, 2002 (Docket No. 232254) (domestic relationship shown).

*People v Ledesma*, unpublished opinion per curiam of

the Court of Appeals, issued September 13, 2002 (Docket No. 232328) (sufficient evidence where defendant exploited father-daughter relationship and victim's youth).

*People v Beauford*, unpublished memorandum opinion of the Court of Appeals, issued November 6, 2001 (Docket No. 226733) (fact that vulnerability also reflected in conviction offense not improper; sufficient evidence based on age difference and defendant supplied apartment to 14 year old girl for truancy, drug usage and sex with defendant).

*People v Holbrook*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 2002 (Docket No. 228693) (predatory conduct where defendant pretended to be home buyer than violently assaulted pregnant victim).

*People v Betzer*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2002 (Docket No. 227647) (difference in size and strength sufficient).

*People v Ales*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2002 (Docket No. 230447) (youth and familial relationship sufficient, noting that abuse of authority status still requires fear or deference).

*People v Almond*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2002 (Docket No. 228027) (properly scored where victims were children staying in defendant's household).

*People v Villarreal*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket No. 228527) (size, strength and sleeping victim).

*People v Vance*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2001 (Docket No. 226826) (10 points proper where victims treated like daughter, lived with defendant at one point and defendant agreed to lend her money).

*People v Sifuentes*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2002 (Docket No. 232286) (no error in scoring predatory conduct where defendant encouraged young women to drink alcohol at his apartment and then sexually assaulted them).

*People v Austin*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2002 (Docket No. 234432) (15 points for predatory conduct appropriate where defendant promoted friendship between two victims so he could drive them to each other's house, defendant drove one victim to video store and defendant chose to live in cramped mobile home of one victim).

*People v Sabandith*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2002 (Docket No. 226567, 226568) (sufficient evidence of predatory conduct where defendant took gun to apartment complex to check things out, he and co-defendant arrived late at night and began sneaking around, and defendants intended to retaliate against members of different gang).

*Continued on next page*

## Offense Variable 11

*People v Mutchie*, 251 Mich App 273; 650 NW2d 733 (2002), approved for publication May 10, 2002) (interpreting “arising out of the sentencing offense” to include multiple counts of first-degree CSC, even where those counts led to separate convictions, where the acts were perpetrated against the victim in the same place, under the same set of circumstances, and during the same course of conduct).

*People v White*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2002 (Docket No. 233926) (follows *Mutchie*).

*People v Hansen*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 224328) (conduct leading to acquittal may be scored).

*People v Harris*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2001 (Docket No. 222177) (sufficient evidence of multiple penetrations although jury acquitted of penetration offenses).

*People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328) (no error where defendant and victim engaged in three acts of sex before victim advised of defendant’s HIV status).

## Offense Variable 12

*People v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2002 (Docket No. 237349) (two contemporaneous acts of receiving and concealing and possession of firearm by felon - in addition to conviction offense of home invasion).

*People v Minner*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 227956) (acquitted conduct showing additional penetrations beyond charged offense can be considered).

## Offense Variable 13

*People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001) (defendant’s four concurrent convictions for making child sexually abusive material establishes pattern of three or more crimes against a person).

*People v Ledesma*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 232328) (properly scored where evidence of two prior instances of second-degree criminal sexual conduct).

*People v Hansen*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 224328) (uncharged acts within five years including sentencing offense).

*People v Estrada*, unpublished opinion per curiam of the Court of Appeals, issued December 8, 2000 (Docket No. 225960) (error to consider convictions outside 5 year

period, but harmless where three felony offenses within five years).

*People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2001 (Docket No. 220902) (sentencing offense may be considered in pattern).

*People v Vance*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2001 (Docket No. 226826) (no error where trial court found proof of two prior assaults).

*People v Minner*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 227956) (acquitted conduct showing pattern of felonious activity can be considered).

*People v Hendricks*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2002 (Docket No. 233303) (properly scored based on testimony of pattern of sexual assaults on one victim plus assault on second victim).

*People v Sifuentes*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2002 (Docket No. 232286) (no error in scoring twenty-five points where defendant convicted of one count of third-degree CSC and other witness testified to three counts of CSC against her).

## Offense Variable 14

*People v Nottingham*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2001 (Docket No. 222021) (defendant’s own testimony supported scoring as leader).

*People v Walker*, unpublished opinion per curiam of the Court of Appeals, issued July 5, 2002 (Docket No. 230570) (no error in scoring OV 14 where evidence in presentence report supported conclusion that defendant acted as leader of crime).

## Offense Variable 16

*People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002) (variable inapplicable to second degree murder case).

*People v Leversee*, 243 Mich App 337; 622 NW2d 325 (2000) (variable includes property obtained, damaged, lost or destroyed, even before amendment to correct wording).

## Offense Variable 19

*People v Deline*, \_\_\_ Mich App \_\_\_ (Docket No. 237307, released December 27, 2002) (error to score ten points where defendant attempted to avoid charges by switching seats with passenger in car and also refusing preliminary blood alcohol content test; interference with justice must be construed same as obstruction of justice).

*People v Cook*, \_\_\_ Mich App \_\_\_ (Docket No. 230317, 237510, released January 3, 2003) (no error in scoring 10

points where counsel conceded conduct of fleeing and eluding fell within terms of statute and court concludes same conduct could be scored under guidelines for separate but contemporaneous offense of assault with intent to do great bodily harm).

**Prior Record Variable 5**

*People v Bryan*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2002 (Docket No. 227578); (prior misdemeanor conviction for allowing fire to escape could be considered crime against property even if similar felony offense would be classified as public safety crime).

*People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328) (no error where resisting and obstructing offense was scorable misdemeanor, even if driving with suspended license was not).

**Prior Record Variable 7**

*People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001) (20 points proper for 2 or more concurrent convictions).

## Our Supreme Court's Abdication ...

Continued from page 25

- 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.<sup>16</sup>
- 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?

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## 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

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The 2002 Annual Program in Grand Rapids included Immigration Law and the Federal and Michigan Anti-Terrorism Statutes. Immigration issues were addressed by Judge Elizabeth Hacker, INS Administrative Law Judge, Marsha K. Nettles, District Counsel for INS, and Marshall Hyman, INS Defense Counsel. Assistant Chief US. Attorney Alan Gershel, and Wayne County Assistant Prosecu-

tor Karen Woodside addressed Federal and State Anti-terrorism laws.

My sincere gratitude to the many people that helped in any way to make the 2001-2002 year so successful. It has truly been an excellent year for the section and for the practice of criminal law in the state of Michigan!

*Karen Dunne Woodside, Chairperson*

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