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CRIMINAL PROCEDURE

I. THE FOURTH AMENDMENT

A. Arrests and stops

People v Jenkins, __Mich__ (No. 125141, 2-1-2005) involved a consensual encounter requiring no level of cause that turned into a forcible stop requiring reasonable suspicion. Officers responded to a complaint regarding a loud party, and one officer engaged the defendant, who was sitting on stairs leading to one of the housing units, in conversation. While this was occurring a woman emerged from that unit and in a profane manner asked defendant who he was and why he was there. On hearing this, the officer asked defendant if he lived in the complex; when he received a negative answer, the officer asked to see some identification, which the defendant provided. When the officer began to place a call to the LEIN, the defendant became nervous, made furtive gestures toward a large pocket on the side of his pants, and finally began to walk away though the officer still retained defendant's identification and was talking to him. Though defendant did not live in the complex, several people invited him to come in as refuge from the police. The officer and his partner walked alongside the defendant encouraging him to stay until the LEIN inquiry was finished, but when defendant did not stop the officer placed a hand on defendant's shoulder and told him he was not free to go. The LEIN revealed an outstanding warrant, and a gun was discovered as defendant was being handcuffed.

The trial court found that defendant was "seized" when he was asked for identification; the officer testified that in his own mind he believed defendant was not free to leave at that point (he would not have let him go). The Court of Appeals majority agreed. The Supreme Court reversed. When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized. No seizure occurred here before the officer laid hands on the defendant and told him he could not go (in fact, defendant until that time had decided to go and was in the process leaving). The officer's subjective beliefs unless objectively manifested are not relevant. As the United States Supreme Court has said on a number of occasions, see e.g. *Hiibel v Nevada*, 542 US __; 124 S Ct 2451; 159 L Ed 2d 292 (2004), "In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment." 542 US __; 124 S Ct 2458; 159 L Ed 2d 302. By the time the officers seized defendant, held the court, his conduct gave rise to reasonable suspicion.

A so-called "knock and talk" resulted in a coerced statement, the court held in *People v Bolduc*, 263 Mich App 430 (2004). The question was whether it is a violation of the 4th

Amendment for the police to prolong a so-called "knock and talk" encounter at a home after the resident who is the focus of the investigation has *refused* to grant permission to search *and has directed the police to leave*. The district court found that the police behavior was coercive, and suppressed defendant's statements and the marijuana he turned over, and the Court of Appeals did not find that decision clearly erroneous. Critical to the decision of the majority was that the police stayed in defendant's home and continued to ask him questions after he had told them to leave.

In *People v Dunbar*, 264 Mich App 240 (2004) the stop was based on information from a confidential informant, not an anonymous tip. When an investigatory stop is based, at least in part, on information from an informant, the critical inquiry remains whether the officer's suspicion was reasonable when considered in light of the totality of circumstances. In *People v Tooks*, 403 Mich 568, 575-576 (1978) the court noted three pertinent factors: "(1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors." Here, the officer testified that the confidential informant was known to him and previously had been involved with at least three successful drug buys. Based on the informant's information that defendant had cocaine, the police went to the area where the informant stated defendant would be and observed defendant meet with the informant. The officer was familiar with defendant and recognized him as the person the informant stated had cocaine. The informant and defendant then went behind a building for a short period of time. The Court of Appeals concluded that "[B]ased on these facts, we find that the trial court did not clearly err in concluding that there was sufficient indicia of reliability to provide the police with reasonable suspicion that defendant had just been involved in criminal activity, which justified the forcible stop."

The United States Supreme Court in *Devenpeck v Alford*, __US__ , 125 S Ct 588 (2004) considered a holding by the 9th Circuit that an arrest is not valid under the Fourth Amendment when the criminal offense for which there is probable cause to arrest under the facts known to the officers is not "closely related" to the offense *stated* by the arresting officer at the time of arrest. A unanimous Supreme Court reversed: "The rule that the offense establishing probable cause must be "closely related" to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent" with the principle that it is the objective facts and not the subjective state of mind of the officer that controls. "Such a rule makes the lawfulness of an arrest turn upon the motivation of the arresting officer, eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest, and offenses that are not closely related to that subjective reason....This means that the constitutionality of an arrest under a given set of known facts will vary from place to place and from time to time,... depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists. An arrest made by a

knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection."

The United States Supreme Court has upheld a statute making refusal to identify after a stop based on Terry circumstances a crime, finding neither a Fourth Amendment nor a Fifth Amendment problem with the statute, though in different circumstances a Fifth Amendment issue could be presented, resolution of which the Court found unnecessary here: "Answering a request to disclose a name is likely to be so insignificant as to be incriminating only in unusual circumstances....If a case arises where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense, the court can then consider whether the Fifth Amendment privilege applies, whether it has been violated, and what remedy must follow. Those questions need not be resolved here." *Hibel v 6th Judicial Court of Nevada*, __US__, 124 S Ct 2342, 159 L Ed 2d 292 (2004).

Returning to *People v Dunbar*, 264 Mich App 240 (2004), after the justifiable forcible stop in this case, based on suspicion of drug activity, defendant was holding two clear plastic baggies in his left hand when he removed his hand from his pocket. The officer suspected the bags contained drugs because of the multiple individual packages within the bags. As he approached defendant, the officer noticed that the bags contained a green and a white substance that, based on his experience, he believed to be marijuana and cocaine. "Based on these facts, the trial court did not clearly err in finding that probable cause existed to arrest defendant based on the officer's reasonable belief that defendant was in possession of narcotics."

B. Warrantless Searches

(1) Arrest; scope of search

A decision that should change Michigan law is the United States Supreme Court decision in *Thornton v United States*, __US__, 124 S Ct 2127, 158 L Ed 2d 905 (2004). The Court held that the Belton rule—allowing search of the passenger compartment and all containers in the passenger compartment incident arrest of an occupant—is not limited to situations where the officers' first contact with the arrestee occurs while he or she is still in the vehicle; rather, if the individual is observed to depart the vehicle, then, so long as close in time and geography to that departure, an arrest of the individual will allow the Belton search of the vehicle (the Court observing that the police may well, as a matter of safety, prefer to allow the defendant to get out of the car before approaching to make an arrest). *People v Fernengel*, 216 Mich App 420 (1996), where the arrest was made with 25 feet of the car immediately after defendant arrived and alighted from it, appears effectively overruled.

(2) Border Inspections

The Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. *United States v Flores-Montano*, __US__, 124 S Ct 1582, 158 L Ed 2d 311 (2004).

(3) Expectations of Privacy

The United States Supreme Court in *Illinois v Caballes*, __US__ (1-24-2005) held that use of a trained dog to sniff the *exterior* of a motor vehicle that has been lawfully stopped for a traffic violation does not violate the Fourth Amendment, and no level of cause is needed for use of the dog, where the use of the dog does not prolong the stop (the duration of the stop in this case "*was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop*").

The defendant in *People v Fletcher*, 260 Mich App 531 (2004) agreed that the police were lawfully in his home office and that they lawfully opened the brown expandable envelope and looked inside, but argued that it should then have been apparent that the contents did not fall within the items named in the search warrant, so that the envelope should simply have been closed. Relying on *People v Custer*, the panel said that that decision permits the police to move a lawfully seized object to look at its outer surface or exterior: looking inside the envelope "is analogous to when the police officer in *Custer* removed the objects from the defendant's pocket and saw from their back that they were photographs and not a blotter acid card. Just as the *Custer* defendant's privacy interest in the photos became sufficiently diminished to allow the officer to examine them by turning the photos over, defendant's privacy interest in the contents of the expandable envelope became sufficiently diminished to allow Sergeant Cleyman to make a cursory review of the items contained in the envelope. Sergeant Cleyman testified that he immediately recognized the women in the photograph as district court Judge Chrzanowski and the romantic letters contained within the envelope were on Chrzanowski's office stationary. Thus, the incriminating nature of the contents of the expandable envelope was readily apparent and in plain view once the contents of the expandable envelope were exposed. The expandable envelope was lawfully seized, it was lawfully opened, and its content was lawfully exposed."

C. Exclusionary rule

Michigan now follows the good-faith exception to the exclusionary rule for warranted searches in the same manner as applied in the federal system. *People v Goldston*, 470 Mich 523 (2004). Searches conducted pursuant to search warrant where the judge has made an error on the probable cause determination will not result in the suppression of evidence henceforth in Michigan. The opinion was applied in *People v Hellstrom*, 264 Mich App 184 (2004).

Without appearing to actually hold the warrant deficient, the majority applied *Goldston* to find that suppression was not appropriate, as the magistrate's determination of probable cause could not be said to be wholly unreasonable.

II. CONFESSIONS/FIFTH AMENDMENT

A. Counsel

People v McRae, 469 Mich 704 (2004) is an involved and rather odd case. Defendant had been charged with 1st-degree murder after the victim's remains were found on the property of defendant's former residence. The right to counsel had attached (defendant had been charged and arraigned), and defendant was in the county jail. Defendant asked to speak to a friend he hadn't seen in 10 years, not knowing this friend was now a reserve officer, and that the friend had been part of the team present when the body of the victim was recovered. This friend came to see defendant after his shift as a reserve officer, in full uniform, and at a time when the general public would not have been admitted. The friend testified to this discussion:

Well, first we just started talkin', talkin' about – shook hands and everything, you know, like I hadn't seen him in a long, long time. . . . I asked him about his boy, Marty, 'cuz his boy Marty is the same age as my son. . . . I told him, I said, "Well, Marty's in here from what I understand, too." And then he showed me pictures of Marty's wife and his baby, and we carried on a conversation, like you or I would. And then I said – I asked John – I said, "John, did you do what you're charged with here?" And he didn't answer me. So we just went talkin' again about, well, more or less about Marty again. And I said, "Well, you know, they think Marty had something to do with that, you know, with Randy." And he says, "Well, if they try to pin it on Marty, I'll let 'em fry my ass." And that was his words. I said, "John, did you do it?" And he just hung his head down and said, "Dean, it was bad. It was bad." That's – we didn't discuss it any more.

The Supreme Court found a violation of the right to counsel on the following analysis:

- Ž The friend/reserve officer was a governmental official, and was purporting to act as such at the time of the "interview," in that he was in full uniform, talking to defendant at a time when the public would not be allowed in, and brought up the subject of the murder twice himself;

Ž The defendant, by asking to speak to a friend he did not know was a reserve officer, did not initiate the discussion; citing a four-justice plurality in *Oregon v Bradshaw* that stated that communications were “initiated” for purposes of the *Edwards/Jackson* rule by conversation that “represent[s] a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation,” the court found no such desire in the conversation here.

B. Miranda Issues

The United States Supreme Court dealt with the so-called “cat’s out of the bag” theory on several occasions this term. In *Missouri v Seibert*, __US__, 124 S Ct 2601, 159 L Ed 2d 643 (2004) it issued a fractured opinion regarding the circumstance where a “two-stage” interrogation occurs and the police intentionally omit Miranda warnings at the first interrogation. Under *Oregon v Elstad*, 470 US 298, 105 S Ct 1285, 84 L Ed 2d 222 (1985) a Miranda violation does not preclude admission of a later statement taken after proper warnings. Here, there was a plurality opinion, and since Justice Kennedy’s opinion supplied the fifth vote, and four justices dissented, Justice Kennedy’s test is actually the law. He found that

the plurality’s test –that whenever a two-stage interview occurs, the postwarning statement’s admissibility depends on whether the midstream warnings could have been effective enough to accomplish their object given the case’s specific facts– cuts too broadly. The admissibility of postwarning statements should continue to be governed by *Elstad*’s principles unless the deliberate two-step strategy is employed. Then, the postwarning statements must be excluded unless curative measures are taken before they were made. Such measures should be designed to ensure that a reasonable person in the suspect’s situation would understand the import and effect of the *Miranda* warning and waiver. For example, a substantial break in time and circumstances between the prewarning statement and the warning may suffice in most instances, as may an additional warning explaining the likely inadmissibility of the prewarning statement. Because no curative steps were taken in this case, the postwarning statements are inadmissible and the conviction cannot stand.

The “cat’s out of the bag” theory arose in a different manner in *Fellers v United States*, 540 US 519, 124 S Ct 1019, 157 L Ed 2d 1016 (2004). Police officers went to the

defendant's home after he had been indicted, and questioned him without Miranda warnings, the defendant making inculpatory statements which he repeated at the station after Miranda warnings. The federal court held the unwarned statements at home were inadmissible, but the later statements were admissible under *Oregon v Elstad*. The Supreme Court held that the first statement was not the result of a Miranda violation, but rather a 6th Amendment violation, as defendant had been indicted and was interrogated without a lawyer and without initiating the contact. Whether the later statement was suppressible as poison fruit the Court left to the 8th Circuit on remand, that question being a different one than the *Elstad* Miranda-violation question.

The interrogation in *People v Harris*, 261 Mich App 44 (2004) took place after an assertion of rights but after defendant had been released from custody following that assertion when he was not identified at a lineup, but later arrested when the victim identified him. This time defendant waived his rights, never asking for an attorney, and confessed. He alleged his assertion of the Miranda right to counsel at his first questioning barred the second interrogation. The Court of Appeals disagreed, relying on *Kyger v Carlton*, 146 F3d 374, 380 (CA 6, 1998). That court found that *Edwards* does not apply to suspects who, like Kyger, are not in continuous custody or had received a break in custody. The second interrogation occurred eleven days after the first interrogation and there was no dispute that defendant was not in custody during this time period. *Edwards* thus did not preclude a subsequent valid waiver of the right to counsel.

C. Procedure

The Court of Appeals in *People v Geno*, 261 Mich App 624 (2004) said once again that there is no constitutional requirement that an interrogation be electronically recorded in some manner.

III. COUNSEL AND SELF-REPRESENTATION

A. Right to Counsel

The Michigan Supreme Court has held that the constitution does not require appointment of counsel for a defendant who pleads guilty and wishes to file an application for leave to appeal (*People v Bulger*), but the sixth circuit en banc in *Tesmer v Granholm*, 333 F3d 683 (CA 6, 2003) enjoined certain Saginaw county judges from following the Michigan statute in this regard, finding the statute unconstitutional. This leaves the matter in a very odd situation; these judges are enjoined, but the judges in the rest of the state must follow the ruling of the Michigan Supreme Court (even on matters of federal constitutional law, state courts are not inferior to federal courts, save one—the United States Supreme Court). The United States Supreme Court, which had denied certiorari to the defense in *Bulger*, granted certiorari in this case, and reversed the 6th Circuit, but without reaching the merits. *Kowalski*

v Tesmer, __US__, 125 S.Ct. 564, 567-8 (2004). The Court has now granted certiorari in a case without the standing issue in order to reach the merits of the issue.

The court in *People v Hickman*, 470 Mich 602 (2004) held that counsel is not required at an on-the-scene identification procedure. "We must determine when the right to counsel attaches to corporeal identifications. We adopt the analysis of *Moore v Illinois*, 434 US 220; 98 S Ct 458; 54 L Ed 2d 424 (1977), and hold that *the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings*. To the extent that *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), goes beyond the constitutional text and extends the right to counsel to a time before the initiation of adversarial criminal proceedings, it is overruled." Note: the court observed also that "Because the instant case involves a corporeal identification conducted *prior* to the initiation of adversarial judicial proceedings, we do not, contrary to the dissent's contention, address whether a defendant has a right to an attorney *after* the initiation of adversarial judicial proceedings during a photographic showup."

B. Self-Representation

At the beginning of trial, the defendant in *People v Russell*, 471 Mich 182 (2004) informed the trial court that he wanted his trial counsel removed and new trial counsel appointed. The trial judge refused (an act within his discretion under the circumstances). Defendant continued to indicate that he did not "feel comfortable" with his appointed attorney's representation, and the trial court reminded defendant of the options it had explained before—defendant could retain counsel or he could represent himself. The court said "...if you want to try your case yourself, by goodness, that's what we're going to do" and defendant responded "Well, that's what you keep insisting that I do, *and I'm telling you that I need competent counsel . . .*" On these facts the majority determined that the defendant had not, as the trial court held (affirmed by the Court of Appeals), waived his right to counsel by his conduct. The majority emphasized that "although the right to counsel and the right of self-representation are both fundamental constitutional rights, representation by counsel, as guarantor of a fair trial, is the standard, not the exception, in the absence of a proper waiver." Because defendant consistently denied that *his* choice was self-representation, the trial judge should have continued with appointed counsel, even though defendant wanted a substitution, as courts *must* indulge every reasonable presumption against the waiver of the right to counsel, and resolve any ambiguity in favor of representation. The majority concluded that "it does not logically follow that a defendant affirmatively waives a fundamental constitutional right simply because he insists on a favorable ruling on something to which he is not entitled." The dissent requested the United States Supreme Court to grant certiorari, citing federal circuits that hold that an unreasonable insistence on the appointment of a new attorney operates as a waiver of the right to counsel, a view the majority rejected. Certiorari has, however, been denied.

But in *People v Williams*, 470 Mich 634 (2004) acceptance of defendant's assertion of his right of self-representation was found proper. During the prosecutor's case-in-chief, defendant became unhappy with his attorney's cross-examination of two prosecution witnesses, and informed the court that he wished to represent himself:

"I do not wish to adjourn the proceeding, because I know this has been going on all along. But I would like to represent myself, in proper person. . . .

* * *

[O]nly if this Court would agree orally, and a written consent, please, that [two prosecution witnesses] may be brought back to court, and allow me to recross-examine [them].

The trial court explained to defendant the risks he faced in defending himself, including defendant's lack of familiarity with the Michigan rules of criminal procedure. Defendant answered that he understood the risks involved. He stated that he wished to "confront [his accusers] and question them" as was his "right by the United States Constitution." The trial court again asked defendant whether he wished to represent himself; again, defendant answered, "Yes, ma'am." The trial court advised defendant that he would not later be permitted to appeal a conviction on the basis of his own ineffective assistance of counsel.

Defendant answered, "Yes I read that." The trial court then asked defendant, "Are you making this request knowingly, intelligently, and voluntarily?" Defendant answered, "Yes, ma'am." The trial court informed defendant that he would not be permitted to disrupt the courtroom, and that if he did, his attorney would be brought back to represent defendant. Defendant answered, "Yes ma'am. The trial court then advised defendant of the sentence he would face if convicted. Defendant said that he understood. Defendant again stated that he wished to reexamine two excused prosecution witnesses: "*The Defendant*: Ma'am, is it also on the record, and it will probably be written down, that I will have an opportunity to recross-examine the prosecution's first two witnesses" *The Court*: No, we're not bringing in those other witnesses, we're continuing with the trial. It's the Court's opinion that you had proper representation. . . . You can still have [your court-appointed attorney] if you want, or you can continue and represent yourself, but you are taking serious risks. . . . Do you understand that?" Defendant's court-appointed attorney remained as standby counsel.

The Michigan Supreme Court held that the standard of review for a waiver of counsel/assertion of self-representation is:

Although engaging in a de novo review of the entire record . . . , this Court does not disturb a trial court's factual findings regarding a knowing and intelligent waiver of [Sixth Amendment] rights "unless that ruling is found to be clearly erroneous."

Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment." Although we review for clear error the trial court's factual findings regarding a defendant's knowing and intelligent waiver of [Sixth Amendment] rights, . . . the meaning of "knowing and intelligent" is a question of law. We review questions of law de novo. Thus, the reviewing court is not free to simply substitute its view for that of the trial court, but must be careful to respect the trial court's role in determining factual issues and issues of credibility.

The court concluded the waiver was unequivocal, knowing, and voluntary, and though defendant "appeared to condition his initial waiver of counsel on the trial court's agreement to allow him to recall and cross-examine two excused witnesses, he subsequently made an intelligent, knowing, and voluntary waiver of his right to counsel after the trial court rejected defendant's request to recall and cross-examine the witnesses."

The United States Supreme Court considered waiver of counsel at a guilty plea in *Iowa v Tovar*, __US__ , 124 S Ct 1379, 158 L Ed 2d 209 (2004). The trial judge at a misdemeanor OUIL plea conducted the colloquy as required by the state court rules. The court explained that if defendant pleaded not guilty he would be entitled to a speedy and public jury trial, where he would have the right to counsel who could help him select a jury, question and cross-examine witnesses, present evidence, and make arguments on his behalf. By pleading guilty, the court cautioned, Tovar would give up his right to a trial and his rights at that trial to be represented by counsel, to remain silent, to the presumption of innocence, and to subpoena witnesses and compel their testimony. The court then informed him of the maximum and minimum penalties for an OWI conviction, and explained that, before accepting a guilty plea, the court had to assure itself that Tovar was in fact guilty of the charged offense. The Iowa Supreme Court, relying on a 9th Circuit Court of Appeals decision (something which should have raised a red flag for the court), held that when waiving counsel at a plea the defendant must be advised specifically that waiving counsel's assistance in deciding whether to plead guilty (1) entails the risk that a viable defense will be overlooked and (2) deprives him of the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. The United States Supreme Court held these warnings are not required. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.

C. Ineffective Assistance

Defense counsel in *Florida v Nixon*, __US__ (12-13-2004), faced with a strong case for the prosecution, decided that the best strategy would be to concede his client's guilt at trial, and in this way preserve credibility for the penalty phase. Counsel tried several times to explain this strategy to Nixon, but Nixon remained unresponsive, never verbally approving or protesting the proposed strategy. Counsel acknowledged Nixon's guilt during open statement and urged the jury to focus on the penalty phase. He did the same in his closing. The Florida Supreme Court reversed, holding that a defense attorney's concession that his client committed murder, made without the defendant's *express* consent, automatically ranks as prejudicial ineffective assistance of counsel necessitating a new trial under *United States v. Cronin*. The Supreme Court held that the Florida Supreme Court erred in requiring Nixon's affirmative, explicit acceptance of his attorney's strategy. His client's unresponsiveness each time information was conveyed to him did not suffice to render unreasonable the decision to concede guilt and to home in on the life or death penalty issue. Importantly, the Court held that counsel's effectiveness should not have been evaluated under *Cronin*, but under the standard prescribed in *Strickland v. Washington*: Did counsel's representation fall below an objective standard of reasonableness? Although, said the Court, "a concession of guilt in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies: Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared." Counsel was thus not ineffective.

Most ineffective assistance cases are very fact-specific, and *People v Grant*, 470 Mich 477 (2004) is no exception. In this excruciatingly fact-specific case, the plurality found ineffective assistance of counsel for counsel's "failure to investigate and substantiate defendant's primary defense," a point regarding which the dissenting justices vigorously disagreed (the Chief Justice noting that "this fact-specific case has no majority opinion and therefore lacks any jurisprudential significance....") .

Reversal was also found required in *People v Dixon*, 263 Mich App 393 (2004). Because the case was close, and credibility important, the court found counsel ineffective both for failing to lay the proper foundation for admission of a 911 call where the caller's voice was important, and for failing to file the required rape-shield notice so as to gain admission of the victim's prior consensual sexual conduct with the defendant (the defense to the CSC count was consent).

IV. DISCOVERY

The defendant in *Illinois v Fisher*, 540 US 544, 124 S Ct 1200, 157 L Ed 2d 1060 (2004) capiased on bond and was not arrested for 10 years. A discovery request had been made while the case was active, but eventually the evidence –drugs– was destroyed pursuant to routine policy. When the case again became active the state courts found a due process violation despite the absence of bad faith. The United States Supreme Court reversed. "We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of police. Indeed, the result reached in this case demonstrates why such a *per se* rule would negate the very reason we adopted the bad-faith requirement in the first place: to 'limi[t] the extent of the police obligation to preserve evidence to reasonable grounds and confin[e] it to that class of cases where the interests of justice most clearly require it."

V. DOUBLE JEOPARDY

Michigan's "same transaction" test for double jeopardy was overruled in *People v Nutt*, 469 Mich 585 (2004). It was overruled in favor of the "same elements" test has used in the federal system. Offenses are not the "same" if each requires proof of an element the other does not, no matter what the overlap of elements or proofs (Note: collateral estoppel issues will still arise if offenses in the same transaction are not tried together and the first prosecution results in an acquittal).

The jeopardy issue when multiple convictions are obtained at one proceeding (as opposed to the successive-prosecution jeopardy issue of *Nutt*) is whether the legislature intended multiple convictions. In *People v Ford*, 262 Mich App 443 (2004) the court found that convictions for armed robbery and safe robbery for essentially the same conduct are permissible.

Whether conviction for both felony-murder and the underlying felony is now permissible is before the Michigan Supreme Court in *People v Curvan*, 688 NW2d 509 (2004) (order granting leave; not yet argued). The situation was slightly different in *People v Williams*, __Mich App__ (No. 246706, 1-27, 2005), as the defendant was convicted of *both* felony-murder and premeditated murder, as the larceny underlying the felony-murder charge. As required by *People v Bigelow*, 229 Mich App 218 (1998) the trial judge merged the felony-murder and premeditated murder theories of first-degree murder into one conviction. The dissenting judge, a member of the *Bigelow* panel, took the view that the court there had not thought the issue out clearly where there is also a premeditated murder conviction, and would have affirmed the larceny. Though essentially in agreement, the majority felt it could not disregard *Bigelow*, though that case had not been concerned with this precise point.

VI. IDENTIFICATION

The court in *People v Hickman*, 470 Mich 602 (2004) held that counsel is not required at an on-the-scene identification procedure. "We must determine when the right to counsel attaches to corporeal identifications. We adopt the analysis of *Moore v Illinois*, 434 US 220; 98 S Ct 458; 54 L Ed 2d 424 (1977), and hold that *the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings*. To the extent that *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), goes beyond the constitutional text and extends the right to counsel to a time before the initiation of adversarial criminal proceedings, it is overruled." Note: the court observed also that "Because the instant case involves a corporeal identification conducted *prior* to the initiation of adversarial judicial proceedings, we do not, contrary to the dissent's contention, address whether a defendant has a right to an attorney *after* the initiation of adversarial judicial proceedings during a photographic showup."

The issue was one of suggestiveness of an identification procedure in *People v Harris*, 261 Mich App 44 (2004). The victim viewed a lineup of suspects in which defendant appeared as suspect number six. Though she recognized number six as the perpetrator she stated "I don't know," and defendant was released. Later she called the police to say she in fact could recognize the defendant. The prosecutor met with her and asked if she could identify the perpetrator, and she said it had been number six, the defendant. Because the victim's identification was based on her memory of the incident *and* because the prosecutor never made an improper suggestion, implication or assertion to the victim defendant had committed the crime or that the case would not proceed without her positively identifying defendant, there was no suggestiveness.

VII. SENTENCING

A. Credit

A conflict-resolution panel was convened in *People v Seiders*, 262 Mich App 702 (2004) to resolve a sentence-credit issue. When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and, said the court, he is not entitled to credit for time served in jail on the sentence for the new offense. A parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the *parole* was granted. A parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense. The question is what to do if the defendant was on parole to another state. A defendant is only entitled to a sentencing credit

under MCL 769.11b if he has been “*denied or unable to furnish bond.*” MCL 769.11b. Bond is neither set nor denied when a defendant is held in jail on a parole detainer. The Court concluded that “a defendant who is on parole from a foreign jurisdiction and held in jail on a parole detainer, is not entitled to credit on his Michigan sentence for time served in jail before sentencing under MCL 769.11b.” *People v Johnson*, 205 Mich App 144 (1994) was thus overruled.

B. Guidelines issues

A question of great practical importance was decided by the Court of Appeals in *People v Hendrick*, 261 Mich App 673 (2004)(lv grted). The panel held that the sentence guidelines *do* apply to sentences on probation revocation. Principally because MCL 771.4 provides that “If a probation order is revoked, the court may sentence the probationer *in the same manner and to the same penalty* as the court might have done if the probation order had never been made,” the panel found the guidelines applicable. The question remains whether trial judge may cite the violation as an objective and verifiable substantial and compelling reason to depart from the guidelines (the panel itself said that “when resentencing a defendant after revoking his probation, the trial court may consider the seriousness and severity of the circumstances surrounding the probation violation in determining whether there is a substantial and compelling reason to depart from the guidelines”). This question was included in the grant of leave.

Hugely important federally and in some other jurisdictions, but not as yet, in Michigan, is the United States Supreme Court decision in *Blakely v Washington*, __US__, 124 S Ct 2531, 159 L Ed 2d 403 (2004). The Washington State sentencing scheme is one of determinate sentencing, with no parole. By application of guidelines, a tight range for the determinate sentence is reached—here, it was 49-53 months. Thus, by statute the maximum sentence the judge could impose, based solely on the verdict and the facts contained in the verdict (or admitted by a defendant at a plea) was 53 months. By “judicial factfinding” the sentencing court had authority to enhance the maximum by a finding of substantial or compelling reasons. The judge did so, sentencing the defendant to 90 months. The Supreme Court held that a sentencing scheme that allows enhancement of the statutory *maximum* based on judicial factfinding (other than the fact of prior convictions for habitual purposes) is unconstitutional—facts which enhance the statutory maximum must be found by the jury (or judge at a bench trial) beyond a reasonable doubt.

Blakely is of no impact as yet in Michigan because the Michigan Supreme Court in *People v Claypool*, 470 Mich 715 (2004) held that it does not apply to Michigan’s indeterminate-sentencing scheme. As to the remainder of the opinion, it is somewhat difficult to discern a rule of law from the various opinions. Justice Taylor, joined by Justice Markman, stated the question as “whether it is permissible for Michigan trial judges, sentencing under the

legislative sentencing guidelines pursuant to MCL 769.34, to consider, for the purpose of a downward departure from the guidelines range, police conduct that is described as sentencing manipulation, sentencing entrapment, or sentencing escalation. These doctrines are based on police misconduct, which, alone, is not an appropriate factor to consider at sentencing. Rather, we hold that, pursuant to *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), if it can be objectively and verifiably shown that police conduct or some other precipitating cause *altered a defendant's intent*, that altered intent can be considered by the sentencing judge as a ground for a downward sentence departure." (NOTE: why police attempts to see how much someone is willing to sell, or why multiple escalating buys, where the sellers often wish to engage in smaller sales before making larger ones, should be called "police misconduct" of any sort is mystifying). They held remand required because the trial judge appeared to depart not because the defendant's intent was "altered," but because of dissatisfaction with the conduct of the police. The Chief Justice and Justice Young wrote concurring/dissenting opinions agreeing with remand because the reasons given for departure were not substantial and compelling but disagreeing totally with the "sentencing escalation/entrapment" doctrine (Justice Young in particular took apart in devastating fashion the examples given in the Taylor/Markman opinion):

The examples proffered by the majority aptly illustrate the inconsistency of its holding. Consider the first example, in which there is evidence that a defendant sells more of an illegal substance than he was initially prone to sell because the buyer has pleaded for more. It is entirely beyond me how such evidence demonstrates that the defendant's intent was "altered" by external factors. Rather, the defendant, at the time he committed the offense, *intended* to sell whatever amount of the illegal substance he, in fact, sold; the buyer's pleas simply provided a *motivation* for the defendant's decision to commit the crime of selling a larger amount. Under the majority's view, the defendant's presentation of a videotape depicting him reluctantly pulling the trigger of a gun and killing a victim in response to an accomplice's urgings would presumably support a downward departure from a mandatory sentence or from the sentencing guidelines range. I cannot subscribe to such an extreme view.

In the second example proffered by the majority there is evidence that the defendant, after assaulting the victim, secures medical assistance. I am at a loss to understand how this evidence of the defendant's *post-crime* behavior demonstrates that his intent in committing the crime was altered. Again, as in the prior example, the defendant intended to do precisely what he did at the time he committed the crime. Rather, this example seems to approve of

sentencing consideration of *remorse*, a factor that the *Fields* Court specifically held lacked objectivity. ...Moreover, the fact that a defendant dials 911 after slashing a victim's throat would certainly not "keenly" or "irresistibly" grab this writer's attention.

Justice Cavanagh would have affirmed; though agreeing generally with the Taylor opinion, he wrote that there is a difference between sentence manipulation and sentencing entrapment, and appears would jettison substantial and compelling review entirely ("I agree with the majority's conclusion that a sentencing judge may consider *whatever individualized factors the judge believes are relevant*"). Justice Weaver also would have affirmed, saying "I would consider all relevant factors, including police conduct, when determining whether there is a substantial and compelling reason to depart from the sentencing guidelines ranges, and I would not limit how the factor of police conduct may be considered." Justice Kelly wrote that she agreed with Justice Cavanagh.

The manner of preservation of guidelines-scoring issues required by statute was considered in *People v Kimble*, 470 Mich 305 (2004). OV 16 should not have been scored for defendant, but was. He did not raise the issue in any way before the trial court, by way of motion for resentencing or motion to remand, but simply raised it in the Court of Appeals, which considered the issue under the unpreserved plain-error standard and granted relief. The statute, MCL 769.34(10), provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. *A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.*

The majority held that a party may raise the issue nonetheless where, if the party is correct, the sentence is therefore *outside* the appropriate guidelines range. The majority found that because the "first sentence of § 34(10) provides that a sentence that is within the appropriate guidelines sentence range is not appealable unless there was a scoring error or inaccurate information was relied upon....[T]he necessary corollary of this statement is that a sentence that is *outside* the appropriate guidelines sentence range *is* appealable. The second sentence of § 34(10) provides that, even though a sentence that is within the appropriate guidelines

sentence range can be appealed if there was a scoring error or inaccurate information was relied upon, it can only be appealed if the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. In other words, the second sentence simply describes *how* a party must preserve a challenge to a sentence that is within the appropriate guidelines sentence range; it says nothing about a challenge to a sentence that is outside the appropriate guidelines sentence range.”

The validity of departure reasons was considered in *People v Geno*, 261 Mich App 624 (2004). In this case involving a CSC on a 2-year-old child, the "trial court's reasons for the upward departure included the fact that : the guidelines did not give sufficient weight to the danger defendant posed to young children; this conviction was defendant's fourth CSC conviction involving young children (and his second one involving a two-year-old child); that defendant was an adult and, despite the fact that a substantial amount of time had passed since his previous convictions, nothing had changed because he was now committing the same offense again; and that an upward departure was necessary for 'future protection of small children.'" The departure was upheld.

People v Hendrix, 263 Mich App 18 (2004) is a rather complex departure-issue case. MCL 769.34(2)(a) states:

If the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section.

The Michigan Vehicle Code, at MCL 257.625(8)(c) states:

- (c) If the [OUIL] violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony and shall be sentenced to pay a fine of not less than \$500.00 or more than \$5,000.00 and to *either* of the following:
 - (i) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.
 - (ii) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours

of the imprisonment imposed under this subparagraph shall be served consecutively.

Thus, MCL 257.625(8)(c)(i) mandates that, for any person imprisoned under the jurisdiction of the Department of Corrections, the minimum term is one year. But as further provided in MCL 769.34(2), the statute also “authorizes the sentencing judge to impose a sentence that is less than that minimum sentence,” i.e., the probation, county jail imprisonment, and community service penalties of MCL 257.625(8)(c)(ii). The trial court exercised its discretion to choose the other option afforded by the statute and sentenced defendant to one year county jail probation under MCL 257.625(8)(c)(ii). This sentence was permissible under the statute, and not a departure from the guidelines range of 11 months, given the options provided by statute. The Supreme Court, however, issued an order on application holding that “we MODIFY in part the judgment of the Court of Appeals. Former MCL 257.625(8)(c) [now MCL 257.625(9)(c)] provides two alternate mandatory minimum sentences, either of which may be imposed. The provisions of MCL 769.34, including MCL 769.34(2), apply to a sentence imposed under MCL 257.625(9)(c). The Court of Appeals erred to the extent it concluded otherwise.”

Unlike the judicial guidelines, the legislative guidelines apply to habitual offender sentences. In *People v Houston*, 261 Mich App 463 (2004) defendant's scoring error claims would have changed the guidelines from 180 to 375 months or life (III-B) to 162 to 337 months (II-B). He was sentenced to life, and argued that because a life sentence is not listed as an alternative sentence in the II-B box of the “M2” sentence guidelines grid, the life sentence the trial court imposed exceeded the appropriate guidelines range. The panel disagreed, finding the sentence to be within the guidelines, and therefore affirmance mandatory.

The Legislature has provided that second-degree murder “shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.” ...The sentence guidelines grid that applies here is MCL 777.61; and it permits the imposition of a life sentence in an appropriate case. If we accept defendant's proposed guidelines scoring as correct, the appropriate sentencing guidelines range in this case is prior record variable level “B” and offense variable level “II.” Defendant argues that when MCL 777.21(3)(a) is applied because of his status a second felony offender, the II-B range changes from a recommended minimum sentence of 162 to 270 months to a range of 162 to 337 months and the trial court does not have the option to impose a life sentence without articulating a substantial and compelling reason for departing from the

guideline's range. MCL 769.34(3). The second-degree murder habitual sentence guidelines grid found in the Sentencing Guidelines Manual, March 1, 2003, p 86, supports defendant's position. But the Sentencing Guidelines Manual explicitly acknowledges that it has no force of law...[and] the Legislature has not provided separate guidelines grids in situations where the habitual offender act applies. Rather, the Legislature has only directed that the upper level of the appropriate recommended minimum sentence range for an indeterminate sentence be increased in proportion to whether the convicted offender has one (25%), two (50%), or three (100%) prior felony or attempted felony convictions. MCL 777.21(3). Nevertheless, the Legislature has provided clear guidance as to when it is appropriate to impose a life sentence within the guidelines range. Without adjustment under MCL 777.21(3), each of the possible sentence guidelines loci (12 of 18) where the upper range of the recommended minimum sentence is 300 months or more permits a life sentence as an alternative sentence. MCL 777.61. We conclude that whether a life sentence is within guidelines is therefore a function of the upper limit of the recommended minimum sentence range for an indeterminate sentence. Where the upper range is 300 months (25 years) or more, a life sentence is an appropriate alternative sentence within the guidelines recommendation....

In sum, we hold a life sentence for second-degree murder is outside the guidelines where the appropriate guidelines locus is II-B, and MCL 777.21(3) does not apply. But, where MCL 777.21(3)(a) applies to increase the upper limit of locus II-B to 337 months, then a life sentence is within the appropriate guidelines range.

Several opinions considered the scoring of particular variables. The panel in *People v Cathey*, 261 Mich App 506 (2004) held that pregnancy as a result of a sexual assault may constitute physical injury under OV 3. The scoring of OV 19, which is scored if the defendant "interfered with or attempted to interfere with the administration of justice," was before the court in *People v Barbee*, 470 Mich 283 (2004). The court found that "It is certainly interference with the administration of justice to provide law enforcement officers with a false name. The investigation of crime is critical to the administration of justice. Providing a false name to the police constitutes interference with the administration of justice, and OV 19 may

be scored, when applicable, for this conduct." *People v. Deline*, 254 Mich App 595 (2002) was disapproved.

The defendant in *People v Brown*, ___Mich App___ (No. 250016, 1-27-2005) was convicted of driving with license suspended causing death, and was scored 100 points for OV 3. This was error, as 100 points are scored only "if death results from the commission of a crime and *homicide is not the sentencing offense.*" MCL 777.33(1)(a) and (2)(b). "The proper score for OV 3 in cases where a victim is killed, but the sentencing offense is homicide not falling under MCL 777.33(2)(c), is zero points."

People v Morson, 471 Mich 248 (2004) is a complex case involving the scoring of OVs 1, 3, and 9. Part of the difficulty in this case, which fractured the court, is caused by the language of the guidelines themselves, which are confusing if not contradictory here. Defendant admitted to the police that she and a confederate saw a lady walking with her purse and discussed robbing her. The confederate got out of the car while defendant drove to a gas station; defendant supplied her with a gun. The companion completed the robbery, and shot a man who attempted to aid the victim. Defendant picked up her confederate and they tried unsuccessfully to use the victim's credit car. Defendant was convicted of armed robbery, conspiracy to commit armed robbery, and two counts of felony-firearm. The confederate was sentenced first, and received fifteen points on OV 1 and zero points on OV 3. Defendant at her sentencing argued she should receive the same scoring as the confederate, but the court assessed defendant twenty-five points on OV 1 and twenty-five points on OV 3 when scoring defendant's armed robbery conviction. OV 1 assesses points for the aggravated use of a weapon, MCL 777.31, and OV 3 assesses points for physical injury to a victim. The first question was scoring of these variables when multiple offenders are involved.

MCL 777.31 provides in part:

(1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by *assigning the number of points attributable to the one that has the highest number of points:*

(a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon.....25 points

+* * *

(c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon.....15 points

- (d) The victim was touched by any other type of weapon.....10 points
- (e) A weapon was displayed or implied.....5 points
- (f) No aggravated use of a weapon occurred.....0 points

(2) All of the following apply to scoring offense variable 1:

- (a) Count each person who was placed in danger of injury or loss of life as a victim.
- (b) In multiple offender cases, *if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.*
- (c) Score 5 points if an offender used an object to suggest the presence of a weapon.

- (e) Do not score 5 points if the conviction offense is a violation of . . . MCL 750.82 and

MCL 777.33 provides in part:

(1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and *by assigning the number of points attributable to the one that has the highest number of points:*

- (a) A victim was killed.....100 points
- (b) A victim was killed.....50 points
- (c) Life threatening or permanent incapacitating injury occurred to a victim.....25 points
- (d) Bodily injury requiring medical treatment occurred to a victim.....10 points
- (e) Bodily injury not requiring medical treatment occurred to victim.....5 points
- (f) No physical injury occurred to a victim.....5 points

(2) All of the following apply to scoring offense variable 3:

- (a) In multiple offender cases, *if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.*

For scoring the defendant's armed robbery conviction the court assessed defendant twenty-five points on OV 1 for the shooting of the one victim, though having scored the actual shooter at

fifteen points. And for OV 3 defendant was assessed twenty-five points for the shooting, while her confederate, the shooter, received zero points.

The prosecution argued that the scoring was valid because the statute requires the court to assess the "highest number of points" and should not be bound by an inaccurate scoring for a codefendant who was sentenced first. The majority held that the "plain language of subsection 2 requires that defendant, when scored on the armed robbery conviction, be assessed the same scores on OV 1 and OV 3 that [the codefendant] was previously assessed on those variables...." Complicating matters even further is that the majority agreed that the "sentencing court should not be bound to apply an erroneous score in the multiple offender context," but observed that "the prosecution does not characterize [the codefendant's] scores on OV 1 and OV 3 of her armed robbery conviction as inaccurate or erroneous. In fact, the prosecution acknowledged in its brief that [these scores] were not disputed by the prosecution at sentencing....Consequently, in the absence of any clear argument that the scores assessed to [the codefendant] under OV 1 and OV 3 were incorrect, the sentencing court should have assessed defendant the same number of points that were assessed to [the codefendant] for OV 1 and OV 3 when her armed robbery conviction was scored...."

With regard to OV 9, that variable assesses points based on the number of victims under MCL 777.39. Defendant was assessed ten points by the sentencing court for two victims, the armed robbery victim and the man who was shot. The Court of Appeals reversed this scoring, but the Supreme Court found it to be correct. "Pursuant to the plain language of the statute, the sentencing court is to count 'each person who was placed in danger of injury or loss of life' as a victim. The bystander who heeded the robbery victim's call for help and responded, to be shot by the codefendant, was also "placed in danger of injury or loss of life" by the armed robbery" so that the scoring was correct.

A defendant is to receive ten points for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). But in *People v Drohan*, 264 Mich App 77 (2004) the court observed that points are to be scored if treatment is "required," even if not sought: "*the fact that treatment has not been sought is not conclusive.*" MCL 777.34(2) (emphasis added). The court found the scoring supported where the victim told the presentence investigator that her life had been "terrible since the incidents. She states that she has a lot of nightmares, problems in her marriage, problems at work, and in just about every other facet of her life. She states that this whole situation has been a nightmare, and again has [a]ffected every area of her life. She indicates that she has not sought treatment as of this writing date, however, she plans to do so in the future." Also, defendant received fifteen points for OV 10, which is so scored if "[p]redatory conduct was involved." MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The trial court noted that:

Vulnerability, clearly this victim, anyone who observed her demeanor on the stand would assess or attest to her vulnerability. She was what I would classify as readily susceptibility [sic] of a victim. To persuasion, to psychological injury based on her past. Accordingly, if I believe the defendant's story, she consistently went to the defendant with complaints about her marriage, the fact that she couldn't handle it. All these factors are not conclusive but in this court's mind and based on all the testimony hear[d] in this trial, considering the 404-B conduct, this is an extremely appropriate scoring. Predatory conduct is exactly how I would describe the defendant in this case.

The Court of Appeals found no abuse of discretion.

VIII. POSTCONVICTION REMEDIES

The defendant in *People v Boyd*, 470 Mich 363 (2004) answered a number of questions during interrogation, but when asked "When you last saw her [the victim], how many times did you have sex with her?" said "I am taking the fifth on that one." The officer immediately ended the interrogation. Defendant moved in limine to exclude that portion of his statement in which he asserted his *Miranda* right to remain silent, and the trial judge denied the motion. But the prosecutor did not put it into evidence, and defendant did not testify. He claimed, without any record support, that he stayed off the stand for fear of impeachment with his assertion of the Fifth Amendment. The Supreme Court, applying the rule of *People v Finley*, 431 Mich 506 (1988), held that in order to preserve the issue (remember that the prosecutor did not put the evidence in in the case-in-chief) with regard to impeachment use of this evidence, the defendant must take the stand and actually be impeached, for otherwise the entire issue is speculative (indeed, in some circumstances, the use of the evidence would be proper; for example, if the defendant testified that he tried to tell the police "everything" but wasn't allowed to, his exercise of the Fifth Amendment would then be admissible).

In *People v Fett (On Remand)*, 261 Mich App_638 (2004) the defendant was convicted of driving while visibly impaired. The prosecutor cross-examined the defense expert on the results of a preliminary breath test (PBT). But MCL 257.625a(2)(b) provides that evidence of PBT results is admissible "if offered by the prosecution to rebut *testimony elicited on cross-examination of a prosecution witness* that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test was administered" But the court found the error harmless. The prosecutor presented results of two Data-Master tests.. The defense disputed the accuracy of both Datamaster and the PBT test, and the court found that "there is little reason to believe that the jury would have chosen to believe the

defense expert's testimony that the Data-Master was inaccurate while disbelieving his testimony that PBT's are completely unreliable. Indeed, it is obvious that the jury discounted both the Data-Master and PBT results because defendant was not convicted of operating with an unlawful alcohol level," but rather of the lesser offense of impaired driving.

The Court of Appeals in *People v Hawthorne*, __Mich App__ (No. 250144, 1-27-2005) felt precluded from applying the harmless error standard of *People v Lukity*, 460 Mich 484 (1999) by case law reversing in a similar situation, but before *Lukity* was decided. Defendant was charged with murder, and claimed the trigger-pull was accidental, so that, under the circumstances, he was guilty of involuntary manslaughter but not murder. The trial judge instructed on involuntary manslaughter, but did not give a specific accident instruction (not as exculpating entirely, but here mitigating or reducing). The jury convicted of murder. Were it not for earlier cases (see *People v Lester*, 406 Mich 252, 254-255 (1979)), the panel would have affirmed under *Lukity*, but felt it could not apply *Lukity* under these circumstances, though inviting the Supreme Court to revisit the question.

CRIMINAL LAW

I. OFFENSES AGAINST CHILDREN/SEXUAL OFFENSES

A sexual encounter occurred between a 12-year old and a 13-year old at school. The school administrator and principal reported the event to the State Police and the parents, but not to the Family Independence Agency (FIA). They were charged with a violation of MCL 722.623, which requires certain individuals to report child abuse or neglect to the FIA if reasonable cause to suspect abuse or neglect exists. The panel in *People v Wojcik*, 263 Mich App 408 (2004) concluded that under MCL 722.622(e) the definition of "child abuse" means that "mandated reporters are only required to report child abuse – which includes nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment – “when the suspected perpetrator is a parent, legal guardian, teacher, teacher’s aide, or other person responsible for the child’s health and welfare.” No duty to report exists where the suspected perpetrator is another child.

The question in *People v Tombs*, 260 Mich App 201 (2003)(lv granted) was whether defendant could be found to have *distributed* child sexually abusive material in violation of MCL 750.145c(3) simply by returning to his employer a laptop computer that contained within it child sexually abusive material. The panel held that under the statute this conduct did not constitute distribution. Leave has been granted in this case.

People v Maynor, 470 Mich 289 (2004) concerns the intent required for first-degree child abuse, with the court reaching a somewhat peculiar conclusion. The court held that "first-degree child abuse requires the prosecution to establish, and the jury to be instructed that to convict it must find, not only that defendant intended to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by her act." But *no specific intent instruction should be given*: "The recommended standard jury instruction for first-degree child abuse, CJI2d 17.18, correctly focuses the jury by directing it to this method of analysis. We find it is unnecessary for the jury to be given further instruction on 'specific intent,' such as that found in CJI2d 3.9. The need to draw the common-law distinction between 'specific' and 'general' intent is not required under the plain language of the statute, as long as the jury is instructed that it must find that defendant either knowingly or intentionally caused the harm."

Two questions concerning assault with intent to commit CSC involving penetration (there is no such crime as "assault with intent to commit CSC 1") were answered in *People v Nickens*, 470 Mich 622 (2004). First, the CJI and current caselaw on assault with intent to commit CSC involving penetration are *wrong*. There are only 2 elements: an assault, and an intent to commit penetration. Neither an "aggravating circumstance" nor a "sexual purpose" are

to be instructed on. Second, CSC 1 is different than most offenses in that it has alternative elements. That is, the offense is aggravated to CSC 1 in a number of different ways. The Michigan Supreme Court held here that where CSC 1 is charged as having occurred through force or coercion, assault with intent to commit CSC involving penetration is a *Cornell*-included offense, so that an instruction is appropriate when a rational factfinder could find the lesser (i.e. penetration didn't occur) rather than the greater, based on the evidence.

In *People v Matuszak*, 263 Mich App 42 (2004) defendant was charged with one count of CSC I (count I) and one count of CSC III (count II), each count predicated on one act of penetration, but charged on different theories (the CSC I was force or coercion, the CSC III that the victim was between 13 and 16). Before trial, defendant pleaded guilty to count II, admitting that the victim was between 13 and 16 years old and that he had engaged in one act of sexual penetration with her on the trunk of his car. The plea was not the result of negotiations, and the prosecution requested that the trial court take the plea under advisement because it intended to proceed to trial on count I, but the trial court denied the prosecution's request and accepted defendant's plea on count II. Defendant went to trial without objection, was convicted, and alleged on appeal that the conviction by plea for the CSC III should have barred the trial. The panel concluded that [T]he rule against successive prosecutions does not apply where a defendant requests separate trials on related offenses...because defendant pleaded guilty on count II and stated no objection to proceeding to trial on count I, *his guilty plea should be treated as a request for separate proceedings on the two charges.*" Moreover, though at the exam the victim testified to only one penetration, at trial the victim testified to being sexually penetrated multiple times by the defendant. "Thus, because the Legislature intended to punish separately each criminal sexual penetration, had the defendant proceeded to trial on both the CSC I and CSC III charges and not pleaded guilty to CSC III, the prosecution would not have been required to submit the case to the jury on only one count with alternative theories....The fact that the victim testified to only one sexual penetration at the preliminary examination is irrelevant, since the fact that the evidence adduced at the preliminary examination may have been insufficient to warrant a bindover on two separate CSC counts is not a ground for vacating or reversing a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error." Helpful was the fact that "the case was presented to the jury for decision without a special verdict form from which we can determine which of the alleged sexual penetrations led the jury to return a verdict of guilty, (and) defendant presents no evidentiary support for the contention that his convictions for CSC I and CSC III were based on the same sexual penetration. As such, no double jeopardy violation has occurred and there was no plain error."

II. CONTROLLED SUBSTANCES

The defendant in *People v Thomas*, 260 Mich App 450 (2004) claimed that he should have been resentenced under the amended sentence provisions of MCL 791.234 and MCL

333.7401(2)(a)(iii), which was amended after his offense and his sentencing. The court held that *People v Schultz*, 435 Mich 517 (1990) does not mandate this result. When amending the statute the legislature also amended MCL 791.234 by adding paragraph (12), which states:

An individual convicted of violating or conspiring to violate section 7401(2)(a)(iii) or 7403(2)(a)(iii) of the public health code . . . before the effective date of the amendatory act that added this subsection *is eligible for parole* after serving the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less.

Because MCL 791.234 specifically provides that individuals *previously convicted* under MCL 333.7401(2)(a)(iii) may become eligible for parole “after serving the minimum sentence of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less, it is clear that the legislature has provided the form of relief it desires for those convicted before the amendment of the penalty scheme.

And in *People v Doxey*, 263 Mich App 115 (2004) the panel noted that on March 1, 2003, 2002 PA 665 became effective and amended the sentencing provision of MCL 333.7401. The *old* language of MCL 333.7401(3) stated as follows in relevant part: “[a] term of imprisonment imposed under subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony.” The amended language changes the “shall” to “may.” The panel reviewed *People v Shultz*, where the Supreme Court found that ameliorative amendments to the sentencing provisions of the act that went into effect after the offense and conviction were to be applied not only to acts committed before that time, but to sentences imposed before that time, if the case was pending on appeal. The panel found *Shultz* distinguishable, for 2002 PA 665 not only amelioratively amended the sentencing provision of the statute, but “also changed the breakdown of the prohibited conduct contained in the statute, including the addition of a new crime of delivery of over 100 grams, 2002 PA 665(2)(a)(i), a new crime of delivery of 450 to 1000 grams, 2002 PA 665(2)(a)(ii), a new crime of delivery of 50 to 450 grams 2002 PA 665(2)(a)(iii), and a new crime of delivery of less than 50 grams, 2002 PA 665(2)(a)(iv). Plainly, unlike *Shultz* and *Scarborough*, the amended statutes do not proscribe the same conduct as does the former drug law.” The court began with the proposition that “[a]mendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent,” and found nothing to overcome this presumption--“a fair and practical interpretation of the companion legislation, namely 2002 PA 665, 2002 PA 666, and 2002 PA 670 requires us to interpret that 2002 PA 665 be applied prospectively only, and *only to offenses committed on and after the effective date of the legislation, March 1, 2003.*”

Finally, in *People v Cardenas*, 260 Mich App 801 (2004) a conflict-resolution panel convened and overruled *People v Matelic*, 249 Mich App 1 (2001). These cases involve the interpretation and application of MCL 791.234(10), which expedites by 2½ years parole board eligibility for an offender convicted and sentenced to life imprisonment under MCL 333.7401(2)(a)(i), when the sentencing court determines on the record that the offender “has cooperated with law enforcement.” The conflict-resolution panel found that, contrary to the *Matelic* panel’s opinion, a trial court is not required to conduct an evidentiary hearing to determine compliance with MCL 791.234(10) upon a defendant’s mere representation that he is *willing* to cooperate with law enforcement. Rather, MCL 791.234(10) requires a defendant to establish cooperation with law enforcement *before* filing a motion for judicial determination of cooperation. A defendant’s mere representation that he is willing to cooperate with law enforcement officials does not entitle a defendant to an evidentiary hearing to determine whether he could provide law enforcement with relevant and useful information. The panel said that:

Giving the phrases “has cooperated” and “have cooperated” their plain meaning, then, it is clear that the Legislature intended that the prisoner’s cooperation must have occurred at some time prior to the prisoner’s application for parole release under subsection 10. Similarly, the phrase “had no relevant or useful information to provide,” when given its plain meaning and considered in relation to the present perfect tense clause “have cooperated[”,] expresses the Legislature’s intent that the prisoner must have lacked information prior to the prisoner’s application for treatment under subsection 10, in order to be found as a matter of law to have cooperated.

Under the statute, then, the offer of “stale” information in an attempt to qualify for subsection 10 treatment would fail if the evidence established that the prisoner possessed the information and could have offered it to law enforcement when it was not stale, i.e. relevant and useful, but did not do so. Such a determination must be made in the first instance by the lower court....

By the plain terms of the statute, a defendant’s cooperation may not occur after the filing of a motion for a judicial determination of cooperation. Cooperation may be established by showing that a defendant provided information relating to his unlawful activity that was relevant and useful to law enforcement officials. Cooperation may also be established by demonstrating that the

defendant never possessed information relating to his unlawful activity that was relevant and useful to law enforcement. But a defendant has not cooperated with law enforcement and, as a matter of law is not entitled to early parole under MCL 791.234(10), if the defendant possesses information that was once relevant and useful to law enforcement, but is now stale and irrelevant.

III. HOME INVASION

The constitutionality of the statute was challenged in *People v Sands*, 261 Mich App158 (2004). The claim was that the home invasion fails clearly to define that conduct that will elevate an offense from third-degree home invasion to first-degree home invasion. Home invasion in the first-degree is defined in the statute:

(2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault, is guilty of home invasion in the first degree *if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:*

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling.

For home invasion in the third-degree:

(4) A person is guilty of home invasion in the third degree if the person does either of the following:

- (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling without permission and at any time while he or she is entering, present, or exiting the dwelling, commits a misdemeanor. [MCL 750.110a]

The claim was that if the underlying act is a misdemeanor assault, then it is unclear whether the offense is first or third-degree home invasion. The court held that it is not unclear; by the plain text of the statute any assault is an underlying crime that elevates a home invasion to first-degree home invasion under MCL 750.110a(2), including a misdemeanor assault, where the person is either armed with a dangerous weapon or someone is at home.

IV. HOMICIDE

Insufficiency of the evidence was the claim in *People v Bulls*, 262 Mich App 618 (2004). Defendant claimed that he aided only in the underlying felony but not the murder. The panel disagreed. "A jury may infer that the defendant aided and abetted the killing by participating in the underlying offense. ... Here, the evidence demonstrated that defendant and D-Mack forcefully entered the victim's home while D-Mack held the gun to the victim's head and that defendant and D-Mack walked the victim around the house at gunpoint while searching his home for valuables. The jury could infer that by performing these actions, defendant assisted D-Mack in perpetrating the murder. The prosecution, therefore, presented sufficient evidence to satisfy the first *Riley* element. Likewise, we conclude that the prosecution presented sufficient evidence to establish malice...A defendant's malice, sometimes described as acting in wanton and wilful disregard of the possibility that death or great bodily harm would result, ... can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.... Here, defendant instigated the criminal transaction by going to D-Mack's house, inviting him to participate in the robbery, and encouraging D-Mack to use a dangerous weapon during the robbery, as discussed below. The jury could conclude that this series of events, set in force by defendant, was likely to cause death or great bodily harm." Further, malice may be inferred from use of a deadly weapon, and though defendant did not handle the firearm, he knew it was being employed, and this is sufficient.

The odd decision of the Court of Appeals was reversed in *People v Holtschlag*, 471 Mich 1 (2004). The Court of Appeals here held that manslaughter is committed either by the doing of a *lawful* act in a grossly negligent manner, or the doing of some unlawful act not amounting to a felony, causing death, but cannot be proven by proof of an unlawful act amounting to a felony, done in a grossly negligent manner. Thankfully, the Supreme Court reversed this oxymoronic holding that manslaughter cannot be proven on the ground that there is "too much" evidence.

In this case several young women's drinks were spiked with GHB, causing the death of one of them. Because the poisoning of the drink was unlawful, and also a felony, the panel held that act could not be manslaughter. The Supreme Court, in a thorough historical analysis, reversed, holding that manslaughter is the "catch-all" of homicide, and is "the unlawful and

felonious killing of another without malice, either express or implied.” Thus, “the relevant question in determining whether a homicide is murder or involuntary manslaughter is whether it occurred with malice, and not whether it occurred during the commission of an unlawful act—felony or not.” As to involuntary manslaughter, “it is possible to determine, on the basis of the specific facts at issue, that the act committed by the defendant that resulted in death was, for instance, not only unlawful, but also committed with a mens rea of gross negligence.”

V. NONSUPPORT

Several important felony-nonsupport cases were decided this year. In *People v Monaco*, 262 Mich App 596 (2004) the court held that the failure to pay is a continuing event, and thus though the responsibility to pay accrued outside of the limitations period, the crime of failing to pay continues each day the amount owed is not paid. As amended 750.165 no longer contains language that the defendant must be shown to have left the state and that he “he refused or neglected to pay child support.” The defendant in *People v Westman*, 262 Mich App 184 (2004) claimed that since arrearage accrued before the amendment of the statute, application of the amendment to him violated ex post facto principles. But the court observed that the failure to pay is a continuing event—the defendant failed to pay both before *and* after the amendment, and thus the amended statute applied to his failure to pay after that time.

The prosecution in *People v Adams*, 262 Mich App 89 (2004) wished to exclude evidence of inability to pay on the part of the defendant in this felony-nonsupport case. The trial judge refused, but the Court of Appeals reversed. The court held that the amended statute, MCL 750.165, has no mens rea element, but penalizes a failure to pay as ordered (the court noted post-conviction procedures afforded under subpart 3 of the statute as amended—“once the defendant is convicted, subsection (3) of § 165 authorizes the court to suspend the sentence if the defendant files a bond conditioned on compliance. If the defendant fails to comply with the bond, it then gives the defendant additional opportunities to show cause why he has still not complied with the support order or other condition on the bond. Given these post-conviction chances for redemption before punishment is imposed, the Legislature prudently decided that no additional culpable mental intent need to be shown before a conviction could be entered”).

VI. OUIL

That circumstantial evidence may prove the “operating” element for OUIL was demonstrated in *People v Stephen*, 262 Mich App 213 (2004). Defendant was found asleep in his truck at the county fairgrounds. The truck was wedged on a parking log, with the tires barely touching the ground. Defendant was in the passenger seat covered by a sleeping bag, his

head leaning over onto the passenger seat. The truck's engine was not running, the automatic transmission was in park, and the keys to the truck were inside defendant's pocket. The police officer awakened defendant, and observed that he smelled strongly of intoxicants, and was confused and unaware of his surroundings. Defendant explained that he had been at a bar earlier that evening, had too much to drink, and drove to the fairgrounds to sleep because he was too intoxicated to drive home. The Court of Appeals reversed dismissal of the OUIL charge. Under a change in the statutory scheme, a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe a misdemeanor punishable by more than ninety-two days' imprisonment occurred, and reasonable cause to believe the person committed it. MCL 764.15(1)(d) (effective August 21, 2000). An arrest for OUIL is a misdemeanor that can result in imprisonment for ninety-three days, one day more than the ninety-two day requirement imposed by the Legislature in MCL 764.15(1)(d). Further, an officer does not have to observe a defendant operating a vehicle for the defendant to be arrested and prosecuted for OUIL under this exception. In the instant case, the police officer had reasonable cause to arrest defendant. Defendant then admitted to the police officer that he drove on public roadways to the fairgrounds where he was arrested, to sleep off the effects of having too much to drink.

VII. PERJURY

MCL 750.423 is a definitional provision for perjury:

Any person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law, who shall wilfully swear falsely, *in regard to any matter or thing*, respecting which such oath is authorized or required, shall be guilty of perjury, a felony, punishable by imprisonment in the state prison not more than 15 years. [Emphasis added.]

Because of this language, the Michigan Supreme Court in *People v Lively*, 470 Mich 248 (2004) held that materiality is not an element of a perjury charge, as the statute defines perjury as "a willfully false statement regarding *any* matter or thing, if an oath is authorized or required. Noticeably absent from this definition is any reference to materiality." The court noted that there are false-statement statutes that do require materiality, so that the term appears when the legislature wishes the prosecution to be required to prove it. See MCL 28.422a, 32.1131, 168.729, 257.254, 324.5531(2), 380.1003, 500.2014, 500.4509, 600.8813, 764.1e(2), and 765.25.5.

VIII. RESISTING AND OBSTRUCTING/FLEEING AND ELUDING

Under MCL 750.479, the right to resist an unlawful arrest is, in essence, a defense to the charge of resisting arrest, because the legality of the arrest is an element of the charged offense. **But on** May 9, 2002, MCL 750.81d was enacted:

(1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.

In *People v Ventura*, 262 Mich App 370 (2004) the Court of Appeals held that under this statute "A person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal when charged pursuant to MCL 750.81d."

MCL 750.81d provides that one cannot resist or obstruct someone "who the individual knows or has reason to know is performing his or her duties...." The panel in *People v Nichols*,

262 Mich App 408 (held that this portion of the statute ("knows or has reason to know") is not unconstitutionally vague.

In *People v Thomas*, 260 Mich App 450 (2004) the defendant was stopped for a traffic violation, and attempted to start his vehicle and leave. The officer reached into the truck with his right arm to prevent defendant's escape and became entangled in the steering wheel as defendant drove the truck away. As the truck appeared to be headed for a tree, the officer extricated himself, and slid across the pavement, striking his head against a curb. In addition to various scrapes, bruises, and abrasions, the officer's left knee was sprained and a spinal vertebral bone in his neck was broken. The sprain to the left leg was described by the officer's treating physician as "severe." The officer was unable to walk without crutches for several weeks and missed approximately two and a half months of work. The bone that was broken in the officer's neck did not involve any nerve components and thus the extreme injuries that could have occurred (paralysis or death) did not result. But the treating physician testified that there was a fifty-fifty possibility that future problems could develop as a result of the broken vertebral bone.

MCL 750.81d(3) provides that "An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties *causing a serious impairment of a body function* of that person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$10,000, or both." The Court of Appeals, construing the meaning of "serious impairment of a body function," rejected use of the no-fault act, noting that the statute provides its own definition of a "serious impairment of a body function" by reference to MCL 257.58c, which provides:

"Serious impairment of a body function" includes, but is not limited to, 1 or more of the following:

- (a) Loss of a limb or loss of use of a limb.
- (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger or thumb.
- (c) Loss of an eye or ear or loss of use of an eye or ear.
- (d) Loss or substantial impairment of a bodily function.
- (e) Serious visible disfigurement.
- (f) A comatose state that lasts for more than 3 days.
- (g) Measurable brain or mental impairment.
- (h) A skull fracture or other serious bone fracture.
- (i) Subdural hemorrhage or subdural hematoma.
- (j) Loss of an organ.

Finding that an injury need not be long lasting to be considered a serious impairment, the court concluded that the loss of the use of the officer's left leg for several weeks, and to a more limited extent for several months, was sufficient under the statute, which does not specify a time period. While "[T]his impairment was certainly less extreme than what would have been the case had the officer been rendered comatose... it was far more long lasting than the three days that would have been sufficient had a comatose state resulted. We conclude that this lesser impairment, itself within the statutory list, suffered for a much greater time than required for a more serious injury within the list, is properly considered as falling within the 'serious impairment' category." Regarding the broken neck bone, the court observed that the statute lists "a skull fracture or other serious bone fracture," as well as hemorrhages or hematomas that are "subdural." A subdural injury is one that is "located or occurring beneath the dura mater" which is, in turn, defined as the membrane "that covers the brain and the spinal cord." "Thus, the statutory listing considers any hemorrhage or hematoma that involves the spinal cord to be a 'serious impairment.' We conclude that this same special status should be afforded bone fractures if they involve the spinal cord; any vertebral bone fracture is properly considered a 'serious impairment of a body function' under the statute."

The fleeing and eluding statute was considered in *People v Green*, 260 Mich App 710 (2004). Here an officer on foot approached defendant's vehicle and told defendant to stop. Defendant tried to place his vehicle in gear to leave the scene, but the car kept stalling. Realizing that defendant was trying to leave, the officer "ran right up along his car, as he was backing away, and told him repeatedly, 'Stop, Police.'" Defendant placed the vehicle in gear and drove right in front of the officer's patrol car. The officer pursued defendant on foot, then entered his patrol car and stopped defendant approximately six or seven blocks away. The court held that the in response to a visual or audible signal which may occur by hand, voice, emergency light or siren, one must stop their vehicle. The signal need not be given from *within* a police vehicle. Where it is from within a vehicle, that vehicle must be marked as described in the statute, but one must obey the order from a uniformed officer who is outside of the vehicle as well.

IX. ROBBERY AND CARJACKING

A fractured Michigan Supreme Court in *People v Randolph*, 466 Mich 532 (2002) rejected a "transactional" approach to the crime of robbery, holding that force must be employed at the time of the taking, and not to prevent the victim from retaking the property, or in aid of escape. That decision has been "legislatively overruled" by amendment of the statute this year. MCL 750.530 as amended provides:

- (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses

force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

(2) As used in this section, “in the course of committing a larceny” includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

X. WEAPONS

In a felon-in-possession case, the Court of Appeals in *People v Perkins*, 262 Mich App 267 (2004)(lv grtd) held that "The prosecutor must prove that the defendant's right to possess a firearm has not been restored only if the defendant produces some evidence that his right has been restored. MCL 776.203; see also *People v Pegenau*, 447 Mich 278, 290-292; 523 NW2d 325 (1994), and *People v Henderson*, 391 Mich 612, 616; 218 NW2d 2 (1974) (the prosecution is not required to prove that the defendant has no license to carry a concealed weapon until the accused puts on some evidence to the contrary). Here, defendant produced no evidence that his right to possess a firearm had been restored; therefore, the prosecution was not required to prove the contrary beyond a reasonable doubt." (also, the court held that larceny from the person is a specified felony).

Another felon-in-possession issue was considered in *People v Sessions*, 262 Mich App 80 (2004). The issue here was whether, for purposes of the felon in possession statute, a defendant can “*successfully* complete all conditions of probation” imposed for a conviction despite pleading guilty to probation violation." The panel held not—the statute does not refer simply to the termination or completion of probation, but the successful completion of all conditions of probation, and where one has violated a condition, one, even if probation is later closed, has not successfully completed all conditions.

The Michigan Supreme Court in *People v Harris and Moore*, 470 Mich 56 (2004) overruled *People v Johnson*, 411 Mich 50 (1981), which held that in order to aid and abet a felony-firearm one has to aid and abet in the obtaining or retention of the weapon. The court held simply that "ordinary" aiding and abetting principles apply. While it is not enough simply to aid and abet in the predicate felony, one can aid and abet a felony-firearm if he or she "performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave

aid and encouragement." Encouraging the principal to shoot someone is sufficient to show aiding and abetting felony-firearm.

In *People v Bulls*, 262 Mich App 618 (2004), applying this new decision, the panel found sufficient aiding and abetting for felony-firearm. "Defendant ...went to D-Mack's house, proposed that they rob the victim, and asked D-Mack whether he had any heat. This evidence establishes counseling of another person in the carrying or possession of a firearm during the commission or the attempted commission of the robbery sufficient to find defendant guilty as an aider and abetter."

The Supreme Court rendered a per curium (in lieu of granting leave) decision in *People v Laney*, 470 Mich 267 (2004). An undercover deputy and a minor went to defendant's gun store. The minor perused some weapons. The defendant said he could not sell to a minor. After a gun was selected, the minor tried to give the money to the defendant, who said, "no, the money has to come from him," pointing to the undercover deputy. The minor gave the money to the deputy who gave it to the defendant. Defendant filled out a required form saying that he had sold the gun to an eligible licensee (the deputy). The Court of Appeals, on the People's appeal, held that a question of fact was presented on these facts as to whether the gun was sold to the minor or the qualified individual. The Supreme Court reversed, finding that because the deputy was an eligible purchaser, and he handed the money to the defendant, the statute was not violated (this would clearly apply also to sales of alcohol or tobacco products through an adult to a minor who, in the presence of the clerk, supplies the money for the purchase). The court rejected the "straw-man" doctrine, which simply posits that on these facts there is a question of fact regarding to whom the sale was made.

XI. OTHER

In *People v Jackson*, 262 Mich App 669 (2004) the Michigan Supreme Court directed the Court of Appeals to consider whether "the obstruction by disguise statute, MCL 750.217[,] applies only to physical disguise and whether providing a false or fictitious name to a police officer is conduct that comes within the purview of the statute." The panel concluded that giving a police officer a false name when stopped for a traffic violation is not "obstruction by disguise," the plain meaning and ordinary usage of "disguise" including the element of physical concealment. This does not mean defendant's conduct was not unlawful: MCL 257.324(1)(h) provides that it is unlawful to "[f]urnish to a peace officer false, forged, fictitious, or misleading verbal or written information identifying the person as another person, if the person is detained for a violation of this act or of a local ordinance substantially corresponding to a provision of this act. [MCL 257.324(1)(h)]."

XII. EVIDENCE

A. Hearsay

In a seminal hearsay/confrontation clause decision, the United States Supreme Court held in *Crawford v Washington*, 541 US ___, 124 S Ct 1354, 158 L Ed.2d 177 (2004) that “testimonial” statements of an unavailable declarant are not admissible unless they have been subjected to cross-examination. Though declining to provide a definition of “testimonial,” the Court gave examples indicating that these are formal and solemn statements given in anticipation of litigation. A declaration against penal interest—requiring an unavailable declarant—made to the police as part of formal interrogation, is "testimonial" in its nature (the circumstances of its making), and no inquiry into reliability is permitted by the Confrontation Clause. These statements are not admissible against the accused. NOTE: this does not preclude declarations against penal interest made to *other* than the police, or statements made to the police that do not fall into this category of "testimonial" statements—e.g. excited utterances, dying declarations, and other established hearsay exceptions. This is where the future battles will be and are being fought.

For example, in *People v Deshazo*, 469 Mich 1036 (2004) the Michigan Supreme Court, in lieu of granting leave to appeal, reversed an order granting a motion to suppress a declaration against penal interest by a codefendant not made to a law-enforcement officer. The court said: “The expected testimony, that a non-testifying co-defendant told the witness that defendants hired him to kill the victim, is admissible as a statement against penal interest under MRE 804(b)(3). The co-defendant's statement bears adequate indicia of reliability, in that it was voluntarily given to a friend or confederate, and was uttered spontaneously without prompting or inquiry. The statement was not made to law enforcement officers. Although the circuit court found that the statement was not reliable because the co-defendant minimized his role in failing to pay the witness for helping dispose of evidence and because co-defendant had a motive to lie about this in order to avoid paying the witness, these considerations are irrelevant to the question whether the co-defendant was probably speaking the truth when he allegedly confessed to the witness that he participated in a murder. *People v. Poole*, ...; *People v. Washington*, Moreover, the hearsay in question is not "testimonial" and so is not barred by *Crawford v. Washington*, --- U.S. ----, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).”

Crawford was found inapplicable in *People v Geno*, 261 Mich App 624 (2004). A two-year old child who appeared to have possibly been molested was interviewed by the Children’s Assessment Center. At the interview, the victim asked the interviewer to accompany her to the bathroom, and the interviewer noticed blood in the child’s pull-up and asked the child if she “had an owie?” The child answered, “yes, Dale [defendant] hurts me here,” pointing to her vaginal area. Defendant claimed that his confrontation clause rights were violated by admission of this statement under MRE 803(24), the "catch-all" exception, citing *Crawford*.

But the Court of Appeals held that the child's statement was not "testimonial" as described in *Crawford*—the statement was not made to a government employee, and the child's answer to the question of whether she had an "owie" was not a statement in the nature of "*ex parte* in-court testimony or its functional equivalent." Where "nontestimonial" statements are at issue, "it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." With regard to the foundational requirements of the hearsay exception itself, the court held them met.

Application of *Crawford* was rejected in *People v McPherson*, 263 Mich App 124 (2004) for a different reason. Defendant implicated his co-perpetrator as the shooter. The prosecutor on cross asked:

Q. And you had known that before you gave your statement to Investigator Fisher on November twenty-fourth [sic] at 3:30 in the afternoon that day, you already knew that Mr. King had ratted you out, isn't that true?

A. He ended up telling me that he said that I did it

Defendant's claim of a violation of his right to confrontation under *Crawford v Washington* was rejected, as the use of the co-perpetrator's confession was not testimonial. The statement was not introduced for its substance, but instead was introduced to show that defendant was *aware* of King's statement in light of defendant's testimony that King was the shooter and as part of the prosecutor's theory that defendant changed his story several times and could not be believed. Because the statement was not offered for the truth of what it contained, *Crawford* was not implicated at all.

But in *People v Bell*, 264 Mich App 48 (2004) reversal was compelled by *Crawford* where the nontestifying codefendant's confession employed as substantive evidence.

In *People v Shepherd*, 263 Mich App 665 (2004) in a fleeing and eluding case defendant testified in a manner indicating that her boyfriend could not have been driving. The boyfriend was convicted, and also pled guilty to subornation of perjury. The plea transcript was admitted in defendant's perjury trial, and is admissible under no hearsay exception theory. The majority found this error not harmless beyond a reasonable doubt; the dissenting judge would have found it harmless given the other evidence of perjury, finding it clear that without the error a rational jury would still have convicted.

On the other hand, statements made by the boyfriend to friends visiting at jail and overheard by jail guards, where he admitted being the driver, were properly admissible as declarations against penal interest, and not testimonial under Crawford.

Witnesses in *People v Moorer*, 262 Mich App 64 (2004) were allowed to testify that the murder victim, Armour, told them the defendant had threatened him. The court held that statements that Armour had a confrontation with defendant; that defendant wanted to kill Armour; that defendant had threatened to kill Armour; that defendant said he had a bullet for Armour; and that defendant was looking for Armour with a gun did not fall within MRE 803(3). The error, however, was held harmless given other evidence.

B. Relevance

In *People v Houston*, 261 Mich App 463 (2004) the court held that evidence that the defendant possessed a weapon similar to that used in a crime before (or after) the crime is relevant, and is not MRE 404(b) evidence requiring notice: "Defendant's argument regarding MRE 404(b) also fails. Analysis under MRE 404(b) is inapposite because the evidence that defendant possessed a .380-caliber pistol three days before the crime did not operate through an intermediate inference."

C. Uncharged Misconduct/Similar Acts

The panel in *People v Drohan*, 264 Mich App 77 (2004) quoted from *People v Sabin* that:

[E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.

Under the facts of this case, the court upheld prior sexual assaults on this theory of admissibility.

XIII. GUILTY PLEAS

The Iowa Supreme Court had held that when waiving counsel at a plea the defendant must be advised specifically that waiving counsel's assistance in deciding whether to plead

guilty (1) entails the risk that a viable defense will be overlooked and (2) deprives him of the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. The United States Supreme Court held these warnings are not required. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea. *Iowa v Tovar*, __US__, 124 S Ct 1379, 158 L Ed 2d 209 (2004).

The defendant in *People v Patmore*, 264 Mich App 139 (2004) pled nolo, then moved to withdraw the plea before sentencing, after the alleged victim of the assault essentially recanted her preliminary examination testimony, which constituted a substantial portion of the factual basis for defendant's plea. The court observed that the applicable standard is MCR 6.310(B):

On the defendant's motion or with the defendant's consent, the court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by MCR 6.311(B).

The trial court granted the motion to withdraw. The Court of Appeals reversed. The trial court did not apply the correct legal standard in ruling on defendant's motion, as rather than placing the burden on the defendant of establishing a fair and just reason the court indicated that withdrawal of the plea was appropriate if there was "any question" about the veracity of the plea. The court concluded that for recanted testimony, which provided a substantial part of the factual basis underlying a defendant's no-contest plea, to constitute a fair and just reason for allowing the defendant to withdraw his plea, "at a minimum, the defendant must prove by a preponderance of credible evidence that the original testimony was indeed untruthful. If the defendant meets this burden, the trial court must then determine whether other evidence is sufficient to support the factual basis of the defendant's plea. If the defendant fails to meet this burden or if other evidence is sufficient to support the plea, then the defendant has not presented a fair and just reason to warrant withdrawal of his no-contest plea. Even if the defendant presents such a fair and just reason, prejudice to the prosecution must still be considered by the trial court." The court found that the defendant had failed to meet this standard here, adopting the notion from motions for new trial that recantations are viewed with suspicion.

XIV. INSTRUCTIONS

The defendant in *People v Apgar*, __Mich App__ (No. 247554, 11-9-2004) was originally charged with one count of first-degree CSC (CSC I), MCL750.520b(1)(e) (person armed with a weapon or an object that the victim believes is a weapon), and one count of CSC I, MCL 750.520b(1)(d) (person is aided or abetted by one or more other persons and uses force or coercion to accomplish the sexual penetration). After the jury was selected, the prosecutor orally moved to amend the felony information to include a charge of CSC III, MCL 750.520d(1)(a) (person at least thirteen years of age and under sixteen years of age). The trial judge denied the request, but gave the instruction on theory of it being an included offense. The Court of Appeals found this theory incorrect, finding, under *Cornell*, that CSC 3 is not included within CSC 1, at least on the theories charged here, but the majority found no harm: "We conclude that defendant's due process rights are not implicated by the CSC III jury instruction because all elements were proven, and such evidence was admitted without objection. In this respect, we distinguish *Cornell* because of the unique facts presented. CSC III, MCL 750.520d(1)(a), is a strict liability offense, and defendant has not been denied the opportunity to defend against the accusations. One judge concurred, asking the Supreme Court to revisit *Cornell*, while another dissented. Note: but *Cornell* is a rule of statutory construction for determining when an offense is, in the terms of the statute, "inferior" to another offense, *when the legislature has not explicitly so said*. Where one offense is explicitly a degree of an offense inferior to another (the crime is CSC, and CSC 3 is an inferior degree of that offense to CSC 1) *Cornell* arguably should have no applicability, and the statute itself puts the defendant on appropriate notice).

XV. JURY

Several issues regarding jury-selection procedures were considered during the year. In *People v Fletcher*, 260 Mich App 531 (2004) defendant argued that the jury-selection procedure was not random because a computer-generated list of potential jurors had pre-selected numerical designations from which the court seated the prospective jurors assigned to replace jurors dismissed in the selection process, arguing that this violated *People v Green (On Remand)*, 241 Mich App 40 (2000), where the court had disapproved of a similar procedure. But in that case the court also said that under MCR 2.511(A), a deviation from the standard jury selection practice may constitute a "fair and impartial" means of selecting a jury. The problem in *Green* was *predictability* of the next juror to be called to the box because the parties had access to the list. Here, the attorneys did not have access to this information, so the process could not be manipulated. Thus, "the mere fact the random selection took place before the parties were assembled in the courtroom did not impinge on defendant's right to a fair trial and fair jury selection. The selection process here did not constitute a 'struck jury method' or impede defendant's right to peremptory challenges. Instead, it provided defendant a fair and impartial means of picking a jury, as directed by MCR 2.511(A)(4)."

The trial judge in *People v Bell* (On reconsideration), 259 Mich App 583 (2003)(leave granted) precluded defense counsel from exercising two peremptory challenges on the ground they were racially motivated, but did not give counsel an opportunity to provide a neutral reason that the judge could then assess as to whether it was genuine or pretextual, collapsing the three-step *Batson* inquiry into one step. The panel found this to be error, requiring no showing of prejudice for reversal; two members of the panel urged the Supreme Court to grant leave, their view being where the jury chosen is impartial no prejudicial error occurs, but feeling bound by prior precedent. The Supreme Court obliged, and the case is waiting decision.

The prosecutor in *People v Eccles*, 260 Mich App 379 (2004) successfully challenged the seating of four members of the jury array under MCR 2.511(D)(11), which provides that it is grounds for a challenge for cause that a person "is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution," because each had been prosecuted for a misdemeanor by the very office trying the case. The Court of Appeals agreed that the challenges were appropriate under the rule.

People v Fletcher, 260 Mich App 531 (2004) also concerned a jury "experiment." According to a TV broadcast, the "hold-out juror" in this case became convinced of the defendant's guilt after the jury used the gun that killed the victim to engage in several "reenactments" of the events about which testimony was offered. Defendant claimed this was juror misconduct. The Court of Appeals held that this is not "extrinsic evidence" that can be used to impeach the verdict: "The reenactment was closely intertwined with the deliberative process and was not premised on anything other than the jurors' collective account of the evidence presented in open court. The jurors were free to consider and discuss any matter they believed important to the resolution of this case, including a discussion on where the gun should have landed if Leann shot herself. That one juror apparently simulated a fall off of a table in the jury room and dropped the gun during this simulation is simply an outgrowth of such mental hypothesizing....Where, as here, the jury bases its deliberation on their collective recall of the testimony presented at trial, the jury's verdict will not be set aside for alleged misconduct simply because the jury's interpretation of the evidence resulted in questionable or arguably faulty assumptions."

XVI. TRIAL

The question was venue in *People v Webbs*, 263 Mich App 531 (2004). Defendant was charged in Grand Traverse County with larceny of \$1,000 or more by false pretenses. It was alleged that the defendant, identifying himself as James Hardy, applied for and received a loan in the amount of \$5,200 from Beneficial Consumer Finance (Household Bank) in Wayne County. James Hardy is a resident of Grand Traverse County. The complaint identified Grand

Traverse County as the location where the offense occurred. There was no evidence that any act done in perpetration of the offense occurred in Grand Traverse County; the prosecutor conceded that he did not "have proof of the Defendant committing some act that has some direct nexus to Grand Traverse County." Relying on MCL 762.8, which provides that "Whenever a felony consists or is the culmination of two or more acts done in the perpetration thereof, the felony may be prosecuted in any county in which any one of the acts was committed," the prosecutor argued that venue was proper in Grand Traverse County because there were "effects" there on the victim of the acts committed in perpetration of the felony. The panel rejected this argument, noting that "The Legislature did not draft MCL 762.8 to provide for venue in the county where the 'effects' of the acts done in perpetration of a felony were committed," but only where an "act" in the perpetration of the crime occurs. The court distinguished two cases, *People v Fisher*, 220 Mich App 133 (1996) and *People v Flaherty*, 165 Mich App 113 (1987), but also took the position that the reasoning in these cases does "not comport with the plain language of MCL 762.8."