

**OFFICE OF THE PROSECUTING ATTORNEY
COUNTY OF WAYNE**

**THE END OF THE 2000-2001 TERM, AND
THE BEGINNING OF THE 2001-2002 TERM**

**Criminal Law Section
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CRIMINAL PROCEDURE

I. THE FOURTH AMENDMENT

A. Arrests and Stops

The United States Supreme Court reversed the 9th Circuit on a stop question in *United States v Arvizu*, __US__, 122 S Ct 744 (2002). Examining each “reasonable suspicion factor” relied on by the district court, the 9th Circuit found that many of the factors were capable of an alternative, innocent explanation, and thus were entitled to no weight. The Supreme Court disagreed with this method of analysis, and found the stop and search proper. The process of examining the “totality of the circumstances,” said the Court, “allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’” Further, “A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct.” In short, the Court found inappropriate what it called the “divide-and-conquer analysis” of the 9th Circuit.

A stop was upheld in a very fact-intensive case in *People v Oliver*, __Mich__ (No. 112341, 6-12-2001). Here the police received word that an armed robber had been committed at a bank, and that two black males were the perpetrators and had left the bank on foot. A deputy sheriff, with 16 years experience, heard the radio dispatch, including that the defendants had last been seen heading northbound on foot from the bank. He began to look for them, and testified that he didn't limit his search to two individuals, because in his experience in a bank robbery there is almost always "a getaway car...and if there's a getaway car, there's at least one more person with it." He checked an apartment complex that he believed would have been a good place for someone on foot to meet a stashed getaway vehicle. As he turned in, he saw a greed Mercedes with four black male occupants heading out of the driveway. He testified that when people see a marked police car they always look at it, but the occupants of the vehicle studiously avoided looking at him. The vehicle appeared to be taking a circuitous route, and the deputy stopped it. One of the occupants was in possession of a large amount of money, including a bundle with a bank wrapper on it. A bag containing money and a pistol were found when the vehicle was later searched. The issue was the propriety of the stop of the vehicle. Detailing the reasons for its finding, the Supreme Court found that the stop was justified by reasonable suspicion. The court emphasized that the possibility of innocent hypotheses consistent with the actions of the individual stopped does not negate reasonable suspicion; and that indeed given the threshold for reasonable suspicion brief detentions of

innocent people will undoubtedly occur, and are reasonable under the Fourth Amendment, the reasonable suspicion standard requiring less than a preponderance.

The permissible duration of a traffic stop was the issue in *People v Davis*, __Mich App__ (No. 220087, 12-11-2001). The Court of Appeals found defendant's claim of a pretextual stop waived, and without merit in any event; defendant also claimed, for the first time on appeal, that the stop was unconstitutionally extended. His claim was because he was stopped for a traffic violation, and immediately provided all the requested documents (license, registration, proof of insurance), the stop should only have lasted as long as necessary to write a citation, and should not have been "extended" for the length of time it took to run a record check on the computer from the patrol car, which revealed outstanding warrants on defendant. The court found that the running LEIN checks on stopped drivers is a "routine and accepted practice." The court noted that at least two circuits of the United States Court of Appeals have also so held.

An "authority" question was litigated in *People v Vantubbergen*, __Mich App__ (No. 226082, 1-22-2002). The Court of Appeals found no constitutional violation of any sort in the appointment by the county sheriff of employees of a religiously affiliated college to act as deputy sheriffs with full arrest powers extending to violations of state law on public streets.

The United States Supreme Court held this term in *Atwater v City of Lago Vista*, __US__ , 121 S Ct 1536, 149 L Ed 2d 549 (2001) that where the state-law offense is a "fine only" offense, but is criminal—that is, not a civil infraction—probable cause to believe the offense has occurred permits a custodial arrest (and thus a search incident that arrest).

In *Arkansas v Sullivan*, __US__ , 121 S Ct. 1876, 149 L Ed 2d 994 (2001) the Arkansas Supreme Court found that an arrest for a "fine only" traffic offense was a pretext to allow the search of the vehicle of the defendant, and that it could construe the United States Constitution more broadly than has the United States Supreme Court. The United States Supreme Court held that it is the objective facts, not the subjective intent of the officer, that governs—as it has previously held in *Whren*—and that a state court may not construe the United States Constitution more broadly than has the United States Supreme Court.

In *People v Hamilton*, __Mich__ (No. 118615, 1-23-2002) the Michigan Supreme Court held that where an arrest is otherwise lawful—premised on probable cause—a statutory violation for acting outside the officer's "bailiwick" without working in conjunction with the local police or the state police does not trigger the exclusionary rule.

B. Warrantless Searches

(1) Consent

The scope of a consent search is that of objective reasonableness; what would a typical person have understood from the exchange between the officer and the individual?

In *United States v Osage*, 235 F3d 518 (CA 10, 2000) the court held that a consent to search a suitcase for drugs did not permit an officer to destroy or render completely useless for its intended purpose any container in the suitcase, so that cutting a sealed can open was outside the scope of the consent granted.

A different kind of consent issue was presented by *People v Frohriep*, __Mich App__ (No. 223755, 10-12-2001). The police engaged in what they called "knock and talk," which is simply to knock on the door of a suspected drug-dealer and attempt to obtain a voluntary consent. The court held that this is perfectly permissible, and no level of cause is needed for voluntary encounters. The question of consent, of course, raises Fourth Amendment issues, and whether or not consent was voluntary is determined just as in any other case.

(2) Expectations of Privacy

In *Kyllo v United States*, __US__, 121 S Ct 2038, 150 L Ed 2d 94 (2001) a thermal imaging device was employed to reveal that heat lost from defendant's home was likely the result of high-intensity lamps used to grow marijuana indoors, and that information was included in a search warrant. The question was whether use of the device is a search of the home without probable cause or a warrant. Lower courts had held not, because this is "waste heat," and does not reveal "intimate details" inside the home. The Court, through Justice Scalia, disagreed. Clearly the "house" was involved, but did a search occur? The Court concluded that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area'...constitutes a search."

The case was remanded to determine whether probable cause existed in the warrant without the information from the thermal-imaging device.

On remand from the Michigan Supreme Court after its resolution of another issue, the panel in *People v Custer (On Remand)*, __Mich App__ (No. 218817, 12/5/2001) considered the search of defendant's house. First, a detective looked into defendant's home through the front window without a search warrant. The detective did so to insure it was the same residence depicted in the photos. The court held that no expectation of privacy was violated when the detective, from defendant's front porch, shined a flashlight through a window unblocked by any shades, blinds, or curtains. The court also found probable cause

supported the warrant obtained to search the house. The photographs taken from defendant showed bags of marijuana in the dwelling, and the observations of the detective through the window showed similar objects.

The search issue was rather unusual in *Ferguson v City of Charleston*, __US__, 121 S Ct 1281, 149 L Ed 2d 205 (2001). The state hospital had a practice of testing pregnant women who showed signs of drug addiction for cocaine use, and turning positive results over to state law-enforcement authorities. A group of women sued, claiming the practice is an improper search under the Fourth Amendment. The Fourth Circuit held otherwise. The court found that the governmental interest in the testing itself is great. The Supreme Court, however, reversed, the majority finding that the practice is not permissible under the Fourth Amendment.

(3) Exigent Circumstances

In *Illinois v McArthur*, 531 US 326, 121 S Ct 946, 148 L Ed 2d 838 (2001) the police, rather than enter premises without a warrant to prevent the destruction of evidence, kept the defendant out of his residence until they obtained a warrant. Defendant's wife told the police that the defendant had "dope" in the house. Defendant came out on the porch, and was told he could not re-enter without accompaniment of a police officer, while a search warrant was obtained. At a hearing defendant candidly admitted that if permitted to enter the residence unaccompanied he would have destroyed the marijuana. The United States Supreme Court held that the restriction on defendant's freedom of movement was reasonable in that the police:

- had probable cause to believe his home contained evidence of a crime and unlawful drugs;
- had good reason to fear that, unless restrained, he would destroy the drugs before they could return with a warrant;
- made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy by avoiding a warrantless entry or arrest and preventing the defendant only from entering his home unaccompanied, and
- imposed the restraint for a limited period, which was no longer than reasonably necessary for them, acting with diligence, to obtain the warrant.

Under these circumstances, a sort of “impoundment of the dwelling” was thus constitutional.

The court discussed both the exigent circumstances and emergency circumstances rules in *People v Beuschlein*, __Mich App__ (No. 222317, 5-11-2001). The facts of the entry were these:

Officer Dubois testified that he was dispatched in response to an “open 9-1-1 call,” in which the caller failed to hang up. According to the dispatch, there was a domestic incident in progress, possibly involving guns and knives. When Officer Dubois arrived with his partner, Officer Noble, he went to the front door of defendant’s mobile home and identified himself as a police officer. He knocked on the door but no one answered. He then attempted to gain entry into the house, but the door was locked. He explained that he could hear “wrestling or moving around, a lot of shuffling around ” inside the house. Approximately one or two minutes after Officer Dubois’ arrival, a woman he identified as “Ms. Collier” answered the door. Officer Dubois ordered her to lay on the floor, and he and Officer Noble entered the home with their guns drawn. The officers spotted defendant in the back bedroom of the mobile home and ordered him to come out and lay on the hallway floor. Officer Dubois testified that he handcuffed defendant “for our safety and everybody’s safety in the home,” because at that point he still did not know how many people were in the house. The drugs were discovered “after everything started settling down.” Officer Dubois testified that both powder and crack cocaine were discovered “in plain view” on the kitchen floor, front room, hallway, and on a tray in the bedroom. Significantly, Officer Dubois testified that although there was no immediate indication that Ms. Collier was injured when she answered the door, he entered the home because he believed, on the basis of the 911 open call, that “there was an obvious problem there that -- that people’s lives could be in jeopardy or in trouble” and that he believed there was “danger . . . inside the home.” When he entered the residence, he “had no idea if they were injured or not.” He also opined that, in the context of a 911 domestic violence call involving weapons, he and his partner were putting themselves at risk. Dubois testified that he did not know there was cocaine in defendant’s home before entering

and had no reason to believe that evidence was being destroyed or that a suspect would escape.

The Court of Appeals held the entry proper under exigent circumstances, which requires probable cause, given the 911 call and the information it conveyed, along with the other circumstances. And even if probable cause was lacking, a less demanding standard of cause is required for emergency circumstances, to go the aid of a possible victim, and the court found the entry justifiable on this ground as well.

(4) **“Plain Touch”**

People v Custer, __Mich__ (No. 117390, 7-30-2001) is a complex case.

Two police officers were dispatched to a residence in Bay City to investigate a possible trespass. When they arrived at the location, the officers observed a parked vehicle occupied by Billy Holder and defendant. One of the officers approached Holder, the driver of the vehicle, and asked him to get out of the vehicle. Because the officer believed that Holder was intoxicated, the officer advised Holder that he could not drive, and thus his vehicle would have to be towed at his own expense. When the officer asked Holder to demonstrate that he had enough money to pay for the towing, Holder removed approximately \$500, mostly in ten and twenty dollar bills, from his pants pocket, along with a plastic baggie that contained marijuana. The officer arrested Holder and placed him in the patrol car. Once Holder was placed in the patrol car, Holder yelled to defendant, “don’t tell them a f—— thing.” The officer then asked defendant to step out of the vehicle, and conducted a patdown search of defendant. At this point, the officer anticipated finding weapons and drugs on defendant. During the patdown, the officer felt what he believed to be a two-by-three-inch card of blotter acid in defendant’s front pants pocket. The officer’s belief was based on his knowledge that blotter acid is often contained on sheets of cardboard. The object was actually three Polaroid photographs that showed Holder posed with large quantities of marijuana in the living room of defendant’s house. The officer removed the photographs from defendant’s pocket and placed them on the roof of Holder’s vehicle face down. It was only after finishing the patdown of defendant moments later, that the officer picked the photographs up and turned them over to examine their fronts.

The court upheld the detention and the patdown; the biggest point of contention was examination of the photographs by turning them over and looking at them after it was clear they were not contraband. The majority held that:

when the officer turned the lawfully seized photographs over to examine their fronts, this was not a constitutional “search” for purposes of the Fourth Amendment. *At this point*, defendant’s reasonable expectation of privacy in the outer surfaces of the photographs had already been significantly diminished, at least sufficiently to justify the officer’s turning over and looking at the photographs. The photographs were already lawfully seized by the officer. Once an object is lawfully seized, a cursory examination of the exterior of that object, like that which occurred here, is not, in our judgment, a constitutional “search” for purposes of the Fourth Amendment. See *Arizona v Hicks*, 480 US 321, 325-326; 107 S Ct 1149; 94 L Ed 2d 347 (1987). This is true because a cursory examination of the exterior of an object that has already been lawfully seized by the police will produce no *additional* invasion of the individual’s privacy interest.

There were vigorous dissents, especially on this point.

(5) **Probationers**

Searches of parolees and probationers, or their dwellings or effects, present different expectation of privacy questions than searches of ordinary citizens. In *United States v Knights*, __US__, (00-1260, 12-10-2001) defendant was sentenced to parole, and one condition of his parole was that he submit to a search at any time, without a warrant or reasonable cause, by any probation officer or law enforcement officer, during the term or his probation. A police officer, suspecting Knights in an arson, and aware of the probation condition, searched his apartment without a warrant, but with a level of cause—reasonable suspicion. Evidence was found connecting Knights to the crime.

The 9th Circuit Court of Appeals held that searches of probationers without warrant, based on a condition of probation that the probationer submit at any time, must nonetheless be for a “probation” related purpose, and not an investigatory purpose, in order to satisfy the Fourth Amendment. The United States Supreme Court disagreed. The Court first observed that it had previously held that a state regulation permitting a probation officer to search a probationer’s home without a warrant based on reasonable grounds to believe contraband was present was permissible under the Fourth Amendment

because of the State's "special need" for the "exercise of supervision to assure that [probation] restrictions are in fact observed." Though declining to decide whether acceptance of probation with a search condition attached renders these searches reasonable based on a theory of consent, the Court found them reasonable nonetheless, based on the totality of the circumstances, considering Knights' reduced expectation of privacy and the State's need for supervision.

Balancing Knights' reduced expectation of privacy with the governmental interest, the Court found that the Fourth Amendment requires no more than reasonable suspicion for a search of a probationer's house where a condition allowing a search at any time without any cause is a part of the order of probation: "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." Further, held the Court, "The same circumstances that lead us to conclude that reasonable suspicion is constitutionally sufficient also render a warrant requirement unnecessary."

The consent theory—which would require no level of cause whatsoever, even for "investigatory" searches, remains an open question.

3. Search Warrants

The scope of a permissible search under warrant was raised in *People v Jones*, __Mich App__ (No. 232449, 1-8-2002). The court held that where an automobile is found on premises being searched under a warrant describing the place to be searched as the entire premises, that warrant permits the search of the automobile.

D. Exclusionary Rule

MCL 780.654 requires that a search warrant "state the grounds or the probable or reasonable cause for its issuance" or in the alternative "a copy of the affidavit may be attached thereto." The warrant must be served when executed. In *People v Sobczak-Obetts*, __Mich__ (No. 115890, 5-1-2001) the Michigan Supreme Court, though agreeing that this service does require inclusion in one form or another of the basis for issuance, held that a violation of *MCL 780.655* does not justify application of an exclusionary sanction, and thus evidence seized under a valid warrant will not be suppressed.

In *People v Hamilton*, __Mich__ (No. 118615, 1-23-2002) the Michigan Supreme Court held that where an arrest is otherwise lawful--premised on probable cause--a statutory

violation for acting outside the officer's "bailiwick" without working in conjunction with the local police or the state police does not trigger the exclusionary rule.

II. CONFESSIONS/FIFTH AMENDMENT

The issues in *People v Adams*, 245 Mich App 226 (2001) went to whether defendant had during questioning ever unequivocally asserted his Miranda rights to counsel or silence. Defendant confessed to the murder, and the confession was videotaped. He claimed on appeal that he had asserted his right to counsel and to silence so that interrogation should have stopped and not recommenced. When asked a particular question defendant said "I'm not going to answer that question" and "I'm not going to answer that question 'till I have a lawyer present." To another question he also declined to answer that question. He never, however, said he did not want to talk at all, or that he wanted a lawyer other than before he answered a specific question. The panel held that defendant had not unequivocally requested counsel or asserted his right against compulsory self-incrimination. Also, during Miranda warnings he asked "would I be able to talk to a lawyer if I asked for a lawyer?" and was told "we'll stop the interview right now." He asked for five minutes to think about it, and the officer said he could, but he wanted him to remember this was his "one shot" to tell what had happened: "this is your one shot to help yourself. After this, and if you want a lawyer, that's full within your [rights, and I'm not going to impede that, slow that down, stop that or sway you one way or another. . . ." The defendant indicated he would answer questions, but still wanted a lawyer "later on." Again, the panel found that there was no an unequivocal request for counsel.

People v Coomer, 245 Mich App 206 (2001) is a companion case to *Adams*. The defendant argued that her oral statement made in her apartment should have been suppressed because no Miranda warnings were given (her written statement, made immediately after the oral statement, was suppressed by the trial judge). The officer, talking to the defendant in her own apartment, told her that he and the other officer present were there to talk with her, that she was not under arrest, and that if she wanted them to leave, they would go. The officer stated that he told defendant several times during their discussion that she was not under arrest. They all sat at the kitchen table and the officer told defendant he wanted to speak about the victim. Defendant became very shaken, nervous, concerned, and started to cry. Defendant then began to scream hysterically. She testified that she believed that she was under arrest and was not free to leave because there were two police officers in her apartment and other police. Defendant took about one-half hour to tell her story, and the police asked only a few questions. According to defendant, she had calmed down by the time she began to tell the officers what happened, although she cried off and on during her statement. She conceded that the oral statement was voluntary, and not compelled or coerced. The Court of Appeals agreed with the trial court that Miranda warnings were not required for the oral statement, as defendant was not in custody at the time.

The "public safety" exception to the requirement to give Miranda warnings was considered by the Michigan Supreme Court in *People v Attebury*, 463 Mich 662 (2001). The court held that Michigan will follow the "public safety" exception rule to Miranda warnings, and that "public safety" includes the safety of police officers. Here, defendant approached his estranged wife in a shopping center parking lot and threatened to shoot her. After explaining that he had a gun, defendant ordered his wife into the driver's seat of her car. He then displayed a handgun he had tucked into his pants. Fearing for her life, defendant's wife fled on foot to a nearby video store and promptly called the police. When the police arrived minutes later, defendant had left the area. Defendant's wife filed a complaint and the police obtained a warrant. Two days later the warrant was executed at defendant's apartment; the police also knew that defendant had a history of mental instability. Defendant was in the shower. He was allowed to get dressed, but first the police asked him if there were weapons on the premises, and the defendant answered no, he had taken the gun to his brother's. The question was asked without Miranda warnings, and the Court held that the public safety exception applied.

Unlike assertion of the Miranda right to counsel, the 6th Amendment is "offense specific," so that if there has been no assertion of the Miranda counsel right, but an assertion of the right to counsel under the 6th Amendment at arraignment, the police may talk to the defendant about other offenses without counsel being notified, following ordinary Miranda principles (warnings/waiver). What about "related" offenses, such as those arising out of the same transaction? The United States Supreme Court in *Texas v Cobb*, __US__, 149 L Ed 2d 321, 121 S Ct 1335 (2001) held that offenses are only the "same offense" for these purposes, held the Court, if, applying federal double jeopardy principles they are the same. This is the "Blockburger" test—looking to the elements, does each offense require proof of an element the other does not, no matter what the overlap of proofs or elements? If so, the second offense is a different offense and the 6th Amendment is not made applicable to it by the charge on the first offense and the assertion of the counsel right there.

In *In re SLL, A Minor*, __Mich App__, No. 237119, 5-25-2001) an officer interviewed the 13-year-old suspect, who was not under arrest, after first requesting of his mother that he be allowed to interview the defendant alone, to which the mother consented. The defendant was told he could leave at any time, and his mother remained in the reception area. Miranda warnings were not given, because the defendant was not under arrest. Though not finding warnings required, the trial judge found the statement involuntary because of the absence of warnings and because defendant was interviewed

alone. The Court of Appeals reversed, finding that the circumstances did not warrant a finding of involuntariness.

The panel in *People v Hall*, __Mich App__ (No. 223182, 1-18-2002) confirmed that a statement taken from a juvenile during a period of detention when the juvenile was not taken immediately to the Youth Home (for a non-life offense) results in suppression only if the confession is involuntary.

The United States Supreme Court in *Ohio v Reiner*, __US__ , 121 S Ct 1252, 149 L Ed 2d 1583 (2001) held that the privilege against self-incrimination applies where a witness's answers "could reasonably 'furnish a link in the chain of evidence' " against him, even though he or she denies all culpability in the episode in question. That inquiry is for the court; the witness's assertion does not by itself establish the risk of incrimination. In fact, a danger of "imaginary and unsubstantial character" will not suffice. But, said the Court, "we have never held, as the Supreme Court of Ohio did, that the privilege is unavailable to those who claim innocence."

III. COUNSEL AND SELF-REPRESENTATION

The Michigan Supreme Court rejected an ineffective assistance claim in *People v Carbin*, 463 Mich 590 (2001). In this fact-specific case, the Court found no ineffective assistance in the failure to call certain witnesses who allegedly would have demonstrated that defendant was locked in an institution at the time of the offense, when those witnesses could not provide that evidence conclusively.

A claim of ineffective assistance was also rejected in *People v Garza*, __Mich App__ (No. 222516, 6-1-2001). In this CSC, where defendant contended the acts were consensual, he claimed that defense counsel should have called a witness regarding the behavior of the victim with the defendant earlier in the evening. Counsel's decision not to call the witness because the witness was too drunk during the course of the events to remember anything of significance was not error.

On the other hand, counsel in *People v Bass*, __Mich App__ (No. 219934, 9-7-2001) was found to be ineffective for failure to call important witnesses corroborative of defendant's defense, of which she was aware, for no strategic reason that could be justified.

The Michigan Supreme Court in *People v Walters*, 463 Mich 717 (2001) held that there can be no inquiry into the performance of counsel on a motion for relief from judgment in terms of the defendant's right to effective assistance of counsel because there

is no right to counsel on a motion for relief from judgment in the first place, that right obtaining only on the appeal of right.

In *People v Kevorkian*, __Mich App__ (No. 221758, 11-20-2001) defendant represented himself, with "stand-by counsel" to assist, and claimed on appeal that stand-by counsel's representation both before defendant asserted his right of self-representation, and after, denied him the effective assistance of counsel. The court rejected the claim with regard to the assistance prior to defendant's self-representation; after that time the court held that defendant could make no claim at all regarding the "assistance" provided in terms of its adequacy.

IV. DISCOVERY

The scope of MCR 6.201 was considered in *People v Phillips*, __Mich App__ (No. 230811, 5-25-2001). The court held that the court rule only requires the turning over of expert reports, and does not require a party to have his expert *make* a report; neither, said the panel, does the trial judge have the authority to compel a party to have his or her expert make a report to turn over to the other side.

MCL 257.625a(8) requires that the prosecution furnish the *results* of any chemical test in an OUIL at least 2 days prior to trial. The defendant in *People v Lounsbury*, __Mich App__ (No. 230005, 6-19-2001) was given notice before that time of the results, but the actual report was not turned over until the day of trial. The court held that this did not violate the statute, as the statute does not require the turning over of any report, but the furnishing of the results of the test, which had occurred (as the court pointed out, however, this does not mean the report itself is not discoverable through ordinary discovery process).

V. DOUBLE JEOPARDY

The case of *People v Herron*, __Mich__ (No. 114558, 7-3-2001) presents an unusual factual situation. The prosecution charged murder two and OUIL causing death in separate counts. The jury was instructed on the lesser included offenses of manslaughter and negligent homicide on the murder count, and negligent homicide (at least arguably not a lesser included offense of OUIL causing death) on the OUIL causing death count. The jury convicted of negligent homicide on the second count, but hung on *all* counts on the murder count. The defendant was retried on the murder count and convicted of manslaughter. The Court of Appeals held the retrial should have been barred by the conviction of negligent

homicide on the second count. But there was no "implied acquittal" of manslaughter or murder two by that verdict, as the jury hung on those charges in count I. The Supreme Court reversed and reinstated the manslaughter conviction, directing that the negligent homicide sentence and conviction then be set aside.

Another unusual—almost bizarre—situation occurred in *People v McGee*, __Mich App__ (No. 215576, 8-31-2001). The jury returned a verdict of guilty, but during the polling, and before it was completed, the judge realized that there were 13 jurors in the box. The alternate had not left after being excused, and was present during deliberations. The trial judge declared a mistrial, and excused the jury. The next day the trial judge determined that this had been a mistake, that the presence of the juror did not necessarily mandate a mistrial, and recalled the jury to complete the polling. The court held that the judge, though he had authority to set aside the mistrial order, had no authority to recall the jury once it had been discharged. The verdict was thus set aside, but the court found that defendant could be retried under these circumstances, jeopardy not barring a retrial.

VI. GUILTY PLEAS

The issue in *People v Saffold*, __Mich__ (No. 166710, 7-30-2001) was a failure to follow the court rule precisely in advising of rights at a guilty plea.

Here, the trial court did not inform defendant of the presumption of innocence during the guilty plea hearing. However, earlier in the day defendant was present while the same judge instructed the jury that convened for defendant's trial—on the charge to which he subsequently pleaded guilty—that the defendant was presumed innocent until proven guilty beyond a reasonable doubt. In light of the *Guilty Plea Cases*, 395 Mich 96; 235 NW2d 132 (1975), the question is whether there was *substantial*, not strict, compliance with the requirements of MCR 6.302.

Noting that the right is not one of the so-called "Boykin-Jaworski" rights that have been held required by the constitution, the court found substantial compliance (and a concurring opinion by Justice Young took the position that informing the defendant that the prosecution had to prove him guilty beyond a reasonable doubt *is* informing him of the presumption of innocence, as the presumption of innocence is essentially a short-hand expression of who has the burden of going forward and the burden of persuasion).

The plea was to open murder in *People v Watkins*, __Mich App__ (No. 225572, 7-24-2001). Under *MCL 750.318* a hearing was held to determine the degree of the offense. The trial court called defendant as a witness at that hearing (without objection). Considering an issue of first impression, the court held that the trial judge may not call the defendant at the degree hearing, but found the error harmless here (the trial judge found the degree to be first-degree felony-murder).

A change in the procedure to be employed when a judge decides he or she cannot sentence according to a previous “Cobbs” evaluation was made by the Michigan Supreme Court in *People v Williams*, __Mich__ (No. 116535, 6-1-2001). If a judge determines at sentencing following a guilty plea that he or she cannot follow the initial “Cobbs” evaluation, the judge must offer the defendant the opportunity to withdraw the plea. But, the court here held, the trial judge is not to announce the sentence he or she has decided upon as an alternative to the Cobbs evaluation, as “to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process.” The judge must allow the defendant to withdraw the plea if he or she desires, and the defendant's alternative is to confirm the plea and accept whatever sentence the judge imposes.

VII. PROSECUTOR

A. Argument

The prosecutor in *People v Watson*, __Mich App__ (No. 218218, 5-4-2001) argued in rebuttal that “there were a lot of things that Defense Counsel addressed that I have got to respond to. Because the fact of the matter is, members of the jury, apparently the defense in this case is to distract you, make you look over here. Don’t pay any attention to the evidence, just look over here, and don’t pay any attention to the truth. You’ve heard the term “red herrings in the school of blue fish.”” When the school of blue fish is going beside — behind you or beside you, you’re going to be attracted to the red herring. You just had the whole boatload of red herrings thrown at you, and it didn’t change the truth. Create an issue by asking the question, I believe is this defense.”

The court held that while the prosecutor may not attack defense counsel personally as trying to hide the truth, the prosecutor's argument must be read in context with defense counsel's; the court held that “defense counsel suggested that the prosecutor was not concerned about the truth of the events but simply wanted the jury to pick any story and convict defendant simply because the crimes alleged were terrible,” justifying the prosecutor's response.

In the same case the prosecutor commented: "Members of the jury, in that darkness that Defendant attacked his stepdaughter . . . and he did something to her that no one should do to any other human being. He treated her in a way that no animal should be treated . . ."

On objection, the trial judge said the comment was perhaps "a little bit inflamed" and asked the prosecutor to steer clear of that sort of language. The court found no improper appeal to sympathy, and that instructions of the court cured any possible error in any event.

Error occurred in *People v Dennis*, __Mich__ (No. 116852, 7-3-2001), but was not found reversible. The prosecutor asked the police detective about his investigation of the incident involved, and that detective answered that he had attempted to interview the defendant but "was refused," the defendant wishing to "speak to an attorney" before answering any questions. Defendant was in-custody at this time, and had been given Miranda rights. This is error. The trial judge gave a curative instruction that this is a right every one has, and was not to be held against the defendant in any way, denying defendant's motion for mistrial. Because the prosecution attempted no use of defendant's assertion of a Miranda right, either as substantive or impeaching evidence, the Michigan Supreme Court found that the error was not prejudicial.

2. Charging

The trial judge dismissed when the victim, who had been subpoenaed, failed to appear. The trial judge held the offense was a "private crime" and if the victim did not wish to prosecute the case should be dismissed, denying a continuance and a request to use the victim's examination testimony.

The Court of Appeals reversed, saying "This case presents yet another instance where a trial court usurped the prosecutor's exclusive authority to decide whom to prosecute. In so doing, the trial court committed a violation of the constitutional separation of powers," citing *People v Morrow*, 214 Mich App 158(1995). The court also remarked that "In the present case, for the trial court to characterize the offense as a private crime and to suggest that the victim has a legal right of any kind to decide whether defendant is prosecuted is clearly inconsistent with the concept of public prosecutions of criminal offenses." *People v Williams*, 244 Mich App 249 (2001)

VIII. SENTENCING

That the statutory guidelines are mandatory was made clear by the Michigan Supreme Court in *People v Hegwood*, __Mich__ (No. 118373, 12/4/2001). The trial judge departed from the guidelines, stating that it was his authority to impose sentence, and not that of the legislature, and that he "could care less" what the legislature had enacted. The Michigan Supreme Court held that the guidelines were within the authority of the legislature, and

that a trial judge must follow them, departing only, as the statute provides, for substantial and compelling reasons, articulated on the record.

The Court of Appeals considered guidelines scoring issues in *People v Harmon*, __Mich__ (No. 226089, 12/5/2001). Defendant took nude photos of two 15-year-old girls, and was convicted of four counts of child sexually abusive material. OV 10 is to be scored at 10 points for exploitation of a victim's youth. Exploit means to manipulate for selfish or unethical purposes. Because defendant paid the victims, and took advantage of their aspirations to become models, the Court of Appeals found no error. OV 13 is to be scored at 25 points if the offense was part of a pattern involving 3 or more crimes against a person. All crimes within a 5-year period, including the sentencing offense, are to be counted. Because of defendant's 4 concurrent convictions, this guideline variable was properly scored. PRV 7 is to be scored at 20 points if the offender has 2 or more subsequent or concurrent convictions. Because defendant had 4 concurrent convictions, the guideline variable was properly scored.

In the "judicial guidelines" case of *People v Moorer*, __Mich App__ (No. 221855, 7-18-2001) defendant was convicted of second degree murder, and given a sentence of 40-85 years. This was a departure from the guidelines, where the top end for the minimum was 25 years. The court affirmed, noting that a prior relationship between the victim and the offender can be a "very aggravating circumstance," and that here the victim was defendant's 21-month-old son, who was suffocated. The court also took into account that the defendant burned the child's body and discarded it in a plastic bag in a vacant house.

In another departure case involving the legislative guidelines, the court in *People v Izarraras-Placante*, __Mich App__ (No. 222707, 6-19-2001) held that scoring of the guidelines for a drug offense with a mandatory minimum cannot itself constitute substantial and compelling reasons for departure from the mandatory minimum.

A departure above the guidelines range was upheld as based on substantial and compelling reasons in *People v Armstrong*, __Mich App__ (No. 230304, 9-14-2001). The top end of the guidelines minimum range was 2 years, and the defendant received 8-15 years. The court found that the sentence was justified:

Defendant has a sexual attraction toward little boys which he shows an inability to control, apparently as a result of his history of sexual abuse. The trial court did not err in finding that this is a factor not adequately considered by the guidelines. ...The trial court also did not err in finding that the need to protect other children by the sentence imposed is another factor not

adequately considered by the guidelines....Further, the guidelines take into account psychological injury to the victim requiring therapy, MCL 777.34, but do not take into account the violation of the victim's parents' trust in defendant, the effect on the family occasioned by the victim's loss of trust in all men including his own father, or the effect on the victim and his sister from having to learn about sexual matters at such a young age. We also note that the prosecutor's decision, in exchange for defendant's guilty plea, to dismiss a charge of first-degree CSC, which carries a potential life sentence, and the fact that defendant was not charged with attempted CSC for trying to have the victim perform oral sex on him are additional factors which the court can consider when deciding whether departure is warranted.

A departure was also upheld in *People v Armstrong*, __Mich App__ (No. 230304, 9-14-2001). The trial judge in this sexual assault on a child case went 4 times higher than the maximum guideline range for the minimum. The Court of Appeals agreed with the trial court that factors that 1)defendant had an uncontrollable sexual attraction to little boys, 2)that there was a need to protect other children, 3)that there was a violation of the victim's parents' trust, 4)the effect on the family caused by the victim's loss of trust in men, including his own father, and the effect on the victim and his sister of having to learn about sexual matters at such a young age and in such a manner, all were not adequately taken account of by the guidelines and justified the departure.

The amendments to the drug sentences were considered in *People v Matelic*, __Mich App__ (No. 220221, 12/21/2001). The drug sentences were amended to allow earlier parole consideration if a court finds the offender "has cooperated with law enforcement," and if the court finds that defendant would have cooperated but for the fact he had no information, this counts as cooperation. The question here was whether this new provision may be taken advantage of those convicted previously, so that a defendant convicted in 1987 can now seek a declaration of "cooperation," which may be based on a finding that he has no information which is helpful. The panel majority answered in the affirmative. See also *People v Tomasovich*, __Mich App__ (No. 222820, 1-18-2002).

A restitution issue was raised in *People v Crigler*, 244 Mich App 240 (2001). Defendant was ordered to make restitution of the "buy" money used during the investigation of his drug transactions. Under the statute, a government agency can be a "victim," and the court found the buy money was a loss sustained as a resulted of the defendant's criminal activity.

IX. SPEEDY TRIAL

The high court considered the detainer act in *Alabama v Bozeman*, __US__ , 121 S Ct 2079, 150 L Ed 2d 188 (2001). The IAD requires that when a jurisdiction receives a defendant under the act, charges on the detainer must be disposed of before return. Defendant was arraigned and had counsel appointed, and was then returned to federal prison. He was then brought back a month later for trial. The state argued the violation was not prejudicial. The Court held that this was an argument better addressed to the legislature, the statute requiring dismissal for any case where the prisoner is returned to the sending jurisdiction before trial was had in the receiving jurisdiction.

The statutory speedy-trial “180-day rule” for incarcerated inmates was considered in *People v Falk*, 244 Mich App 718 (2001). Defendant had pleaded guilty to two counts of delivery of cocaine, and had a charge of possession with intent to deliver outstanding. That case was pending for more than 180 days after the defendant's plea and sentence in the delivery cases. A conviction on the possession with intent to delivery charge required either a sentence of at least 1-20, or lifetime probation, and *MCL 333.7401(3)* required any term of imprisonment be consecutive to the delivery convictions. Because of the possibility of lifetime probation, the trial judge held that consecutive sentencing was thus not necessarily mandatory, and so the 180 day rule applied. But the statute, *MCL 780.131(1)*, provides that the 180 day rule applies to any charge pending "for which a prison sentence might be imposed upon conviction." The Court of Appeals held that the only prison sentence the defendant could have received if convicted on the pending charge was a mandatory consecutive prison sentence, to which the 180 day rule does not apply, and that the 180 day rule does not apply at all to a probationary sentence. Thus, the case should not have been dismissed.

The 180-day rule was also considered in *People v Sinclair*, __Mich App__ (No. 222458, 10-5-2001). Defendant was brought to trial on the 181st day, the 180th day being a Sunday. The court held that the trial was within the statute, for if the last day falls on a Sunday it is not counted under *MCR 1.108(1)*.

X. POSTCONVICTION REMEDIES

A. Right to Appeal

The court in *People v Kaczmarek*, __Mich__ (No. 114580, 7-3-2001) that where the crime occurred prior to the amendment of the constitution, a guilty plea to a probation

violation occurring after the amendment, resulting in incarceration on the original offense, is appealable by right.

B. Preservation and Harmless Error

The trial judge admitted evidence under MRE 404(b) of a prior delivery in this possession with intent to deliver case. The Court of Appeals found this error, and reversed. But the Supreme Court found that the defense had not met its burden of showing that the error undermined the reliability of the verdict, particularly given strong evidence of defendant's guilt. *People v Whittaker*, __Mich__ (No. 115917, 11-27-2001)

The importance of providing the appropriate record was emphasized in *People v Davis*, __Mich App__ (No. 220087, 12-11-2001). Defendant alleged his stop was pretextual, but provided only excerpts of testimony from the hearing, and did not include the trial court's factual findings or legal conclusions. The court found the issue waived (and without merit in any event).

Waiver rather than forfeiture was applied in *People v Riley*, __Mich__ (No. 117837, 12-7-2001). The defense called as a witness the mother of a prospective codefendant, who was at large at the time of trial. She had given statements to the police concerning her son's incriminating statements made to her, which did not include the defendant's involvement in the killing. But on the stand her testimony of her son's remarks to her included details concerning the defendant's active participation in the crime. All this was hearsay as to the defendant. Defense counsel told the court that he had advised the defendant that there was a "down side" of calling the witness to the stand, and that she might incriminate him if she testified. Defendant told him he understood, and was willing to take the risk, and wanted the witness to testify. The Court of Appeals reversed, finding the testimony hearsay, and the evidence on first degree murder insufficient without it. The Supreme Court held that the proper approach was issue waiver, as defense counsel called the witness, not the prosecutor, so that there was no "error" to review.

C. Motions for Relief from Judgment

The Michigan Supreme Court has laid to rest the canard that federal habeas cases preclude application of MCR 6.500's "cause and prejudice" requirements where the direct appeal was concluded before the promulgation of that chapter. Those federal cases say only that Michigan decisions applying cause and prejudice in this situation will not be treated as defaulted claims in federal court, requiring cause and prejudice there. They do not limit the state's application of modified collateral attack rules to prospective application. *People v Jackson*, __Mich__ (No. 117594, 9-25-2001).

D. Federal Habeas Corpus

Enforcement of a state rule as a procedural bar was considered by the United States Supreme Court in a rather odd circumstance in *Lee v Kemna*, __US__, __L Ed 2d__ (1-22-2002). A state court enforcement of a procedural-default rule may be held not to be an independent and adequate ground if the defendant met the purpose of the state rule (as in making a reasonable oral motion for continuance because of a contingency that had just arisen, when state law required it to be in writing, and the state enforced the rule to find a procedural default in the state appeal).

Tolling was considered by the United States Supreme Court in *Duncan v Walker*, __US__, 121 S Ct 2120, 2001 WL 672270 (2001). The time for filing a habeas petition is tolled by a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment" and the time it is pending is not counted. Defendant alleged that the word "State" before post-conviction did not also modify "other collateral review," so that a federal habeas petition itself tolled the time (the initial petition was dismissed on exhaustion grounds; now he would also have trouble on successive petition grounds). The Supreme Court disagreed—the statute refers to other "collateral review" available in the state court system only.

The United States Supreme Court has previously held that a defendant cannot, at sentencing, collaterally attack the validity of prior convictions, with the sole exception being whether he or she was denied counsel on a previous conviction. The Court has now also held that the defendant may not then attack the sentence on collateral attack on the same grounds. *Daniels v United States*, __US__ , 121 S Ct 1578, 149 L Ed 2d 590 (2001). In the same vein, in *Lackawanna County District Attorney v Cross*, __US__, 121 S Ct 1567, 149 L Ed 2d 608 (2001). The Court applied its ruling to habeas corpus review of state sentences; a prisoner may not challenge a current sentence on the ground that it was enhanced by use of an invalid conviction for which he or she is no longer in custody.

The Sixth Circuit held in *Simpson v Jones*, 238 F3d 399 (CA 6, 2001) that a decision of the Michigan Supreme Court denying leave to appeal by citation of MCR 6.508(D) is a decision based on state law applying a procedural bar, so that procedural default rules apply on habeas corpus.

When a state postconviction petition is not proper filed it does not toll the time period; where it is properly filed it tolls the time period even if subject to mandatory dismissal on the merits; if the petitioner seeks appellate review from denial of the state postconviction proceeding tolling continues if the appeal is timely filed, but is not tolled during any period where the petition is not timely filed. *Artuz v Bennett*, __US__ , 121 S Ct 361, 148 L Ed 2d

213 (2000); *Hurley v Moore*, 233 F3d 1295 (CA 11, 2000); *Gibson v Klinger*, 232 F3d 799 (CA 10, 2000).

CRIMINAL LAW

I. ASSAULT and ROBBERY

After thoroughly reviewing the law in this area, the panel in *People v Taylor*, 245 Mich App 293 (2001) held that "Here, because the defendant placed his hand under his clothing, the victim observed a bulge under the clothing and defendant announced a robbery ("this is a stick up"), all of which led the victim to reasonably believe defendant was armed, we find that the prosecutor met his burden by introducing a sufficient quantum of evidence to prove the "armed" element of armed robbery."

II. OFFENSES AGAINST CHILDREN/SEXUAL OFFENSES

The court in *People v Sherman-Huffman*, 241 Mich App 245 (2000) found that third degree child abuse is a specific intent crime, relying in part on *People v Gould*, 225 Mich App 79 (1977), which concluded that first degree child abuse is a specific intent crime, turning on interpretation of the phrase "knowingly or intentionally." NOTE: the specific intent holding in *Gould* was declared to be dicta by the Michigan Supreme Court. 459 Mich 955 (1999). The Supreme Court granted leave to appeal in this case, and directed the parties to brief the "specific intent/general intent" distinction, including the applicability, if any, of Model Penal Code definitions.

In *People v Harmon*, __Mich__ (No. 226089, 12/5/2001) defendant took nude photos of two 15-year-old girls. At trial, the prosecution introduced four photographs, two of each girl, taken on a specific date. Defendant received 4 convictions, one for each of the photographs. Defendant argued he should only receive two convictions, one for each victim, since the photos were taken at one session. Distinguishing *People v Hack*, 219 Mich App 299 (1996), the panel disagreed, finding convictions proper for each photograph.

The force or coercion issue was as to coercion flowing from a "position of authority" in *People v Knapp*, 244 Mich App 361 (2001). Defendant was a self-described "master reiki teacher and practitioner." Reiki practitioners use various hand positions to activate internal healing powers in their patients. The hand positions used by reiki therapists may involve, but do not require, physical contact with the person undergoing reiki therapy.

Defendant conducted classes at the victim's mother's home. During the class, defendant demonstrated the various reiki hand positions and introduced one "kundalini"[1] hand position. According to trial testimony, kundalini involves the use of genital hand positions

to open energy points and to gain enlightenment through sexual energy. After seeing positive changes in his mother, complainant became interested in learning reiki himself, and defendant became the victim's teacher. Touching of the genitals occurred during a session. CSC 2 was charged, the "force or coercion" theory being that the defendant was in a position of authority over the victim. The panel held that the test is that a defendant's conduct constitutes coercion vulnerable victim by subjugation to submit to sexual contact, and found that test met.

The defendant in *People v Pasquera*, 244 Mich App 305 (2001) was charged with the sexual assault of five children, ranging from four to six years old. Prior to trial, the prosecution moved that the children be permitted to give videotaped depositions in lieu of live testimony in open court. Over defendant's objection, the trial court granted the prosecution's motion. On the first day of trial, the children's testimony was videotaped. The children testified in the courtroom with the judge, prosecutor, and defense counsel present. The jury was not present. Defendant watched the proceedings live via closed circuit television. Defendant was allowed to consult with his counsel between direct and cross-examination of the children. The videotaped testimony was played for the jury on the second day of trial after counsels' opening statements. MCL 600.2163a(13) and (14) allow this procedure, on a finding by the trial court that the witness is unable psychologically or emotionally to testify in open court. The court found this predicate met, and that the statute does not deny confrontation because defendant is in the room when the witness testifies, and is cross-examined.

The defendant in *People v Drake*, __Mich App__ (No. 224393, 7-6-2001) invited minor girls to participate in a "contest" with a promised \$5000 prize, involving disgusting behavior the girls were to engage in with him, none of it involving any sexual touching. Looking to *People v Lino*, 447 Mich 567 (1994) and other cases, the court concluded that "behavior can be considered sexual activity within the context of the gross indecency statute even if it does not involve" overt sexual activity. Rather, the acts must be overt in the sense of being open and perceivable, and the motivation for the behavior can be inferred from the totality of the circumstances (and special care is involved when minors are involved). The court found that there was sufficient circumstantial evidence that the defendant's motive for the behavior was sexual in nature.

In another gross indecency case, the court in *People v Bono*, __Mich App__ (No. 227278, 1-4-2002) discussed the remaining ambiguities in construction of the statute, and held that public masturbation can constitute gross indecency, and that CJI2d 20.31 is in error in requiring some sort of "penetration, fellatio, or cunnilingus."

A question of statutory construction was involved in *People v Rahilly*, __Mich App__ (No. 227682, 7-31-2001). The question was whether a plea and placement on HYTA status requires registration with the SORA, given that the case is dismissed upon successful completion of the HYTA "probation." The HYTA Act, at *MCL* 762.14(3), specifically provides that "An individual assigned to youthful trainee status for a listed offense...of the sex offenders registration act is required to comply with the requirements of that act." Given this language, compliance with SORA is required.

III. CONTROLLED SUBSTANCES

In *People v Schultz*, __Mich App__ (No. 216299, 7-20-2001) the question was whether the defendant could be convicted of delivery of heroin where she and the deceased purchased it together, but she injected it into defendant; because the evidence showed, contrary to defendant's version of events, that she may instead have shared heroin she already possessed, the court upheld the conviction.

Two questions were answered in *People v Mass*, __Mich__ (No. 115820, 7-5-2001). The majority determined that knowledge of the amount delivered is not an element of the offense of delivery of a certain amount of drugs, but *is* an element of conspiracy to deliver.

IV. HOMICIDE

The panel in *People v Moore*, __Mich App__ (No. 220596, 5-22-2001) held that the trial judge erred in deciding not to allow the defense to present evidence of the victim's failure to wear a seat belt, stating that "a victim's contributory negligence is a factor to consider in determining whether the defendant's negligence caused the victim's death."

The statutory provision that a murder of a corrections officer in the performance of his or her duty is murder in the first degree is constitutional, said the court in *People v Herndon*, __Mich App__ (No. 216239, 6-15-2001).

The Michigan Supreme Court several decades ago abolished the "year-and-a-day" causation rule for homicide, making its decision entirely prospective so as to avoid "fair notice" constitutional issues. In *Rogers v Tennessee*, __US__ , 121 S Ct 1693, 149 L Ed 2d 697 (2001) the Tennessee Supreme Court abolished its "year-and-a-day" causation rule for homicide, and applied its ruling to the defendant in that case. The United States Supreme Court majority held this did not violate due process (the ex post facto clause

applies only to legislatures). Because the change was not "unexpected or indefensible," it could apply to the defendant. There was a vigorous and lucid dissent by Justice Scalia.

V. ROBBERY

The method of counting victims was before the panel in *People v Rodgers*, __Mich App__ (No. 223130, 12/14/2001). Defendant robbed a business place, taking money from one victim, and from the cash box in the presence of two others. He received three convictions, and argued on appeal that on the manager was an appropriate victim, as he had superior rights to the cash box when compared to the other two employees, so that only he was robbed, not the other victims. The panel rejected this method of analysis, which turns on which victim has the superior right of possession of the property taken when considered among the various victims; rather, the question is which victims had a superior right to possession of the property when compared to the defendant. Because the answer was "all of them," three counts were proper.

VI. OTHER

A. Abortion

On its face the statute, *MCL* 750.14, which purports to criminalize all abortions performed at any time during pregnancy, except when necessary to preserve the life of the mother, appears unconstitutional. But, as observed in *People v Higuera*, 244 Mich App 429 (2001), it is only unconstitutional insofar as it prohibits abortions the United States Supreme Court has said are constitutionally protected. An abortion at 28 weeks is not constitutionally protected; the majority of the panel rejected a claim that the "fluid" nature of constitutional law with regard to abortions renders the statute unconstitutionally vague.

B. OUIL

The defendant in *People v Fosnaugh*, __Mich App__ (No. 2555, 11-27-2001) was given a breathalyzer. On the second confirming test the machine read out "invalid sample" because of the presence of mouth alcohol. No additional test was given. The court, reversing an order of suppression, held that R 325.2655(1)(f), requiring a second test on request "unless...a substance is found in the person's mouth subsequent to the first test that could interfere with the test result," was satisfied where the machine read out "invalid sample" because of mouth alcohol. The receipt of this message on the 2nd test was the same as forgoing a second test for a good reason. Further, no third test was required, because under the regulation a third test is only required on a certain variation between the first and second tests, and an "invalid sample" reading is not a "variation" from the first test.

C. Resisting and Obstructing

In *People v Vasquez*, 240 Mich App 239 (2000) the defendant when being booked gave a false age and the name of a different person. He was charged with resisting and obstructing under *MCL 750.479*, the language of which includes any one who shall "obstruct, resist, or oppose...." Citing *People v Philabaun*, 461 Mich 255 (1999) ("Philabaun II"), the Court of Appeals held that the action taking by the defendant was clearly willfully done to hinder law enforcement in taking action against him, the court noting that this view is supported by cases from other jurisdictions. See 66 ALR5th 397, 466-477. The court also held that so construed the statute is not vague. The Michigan Supreme Court, however, did not agree.

...passive conduct may sometimes be sufficient to constitute obstruction under the "resisting and obstructing" statute. Passive conduct, if it rises to the level of *threatened* physical interference, constitutes "obstruction" within the meaning of the statute. For example, in *Philabaun II*, the defendant's refusal to comply with the search warrant, although passive conduct, rose to the level of threatened physical interference because the officers were placed in a situation in which, in order to get a sample of the defendant's blood, they would have had to physically constrain him and take his blood against his will. When the defendant refused to cooperate, the next likely sequence of events very well could have been the possible injury of a police officer attempting to enforce the search warrant. We also agree with *Philabaun II* that *actual* physical interference is unnecessary to support a charge under the "resisting and obstructing" statute. Rather, conduct that rises to the level of *threatened* physical interference is sufficient to support a charge under the statute. Additionally, we agree that an *expressed* threat of physical interference is unnecessary to support a charge under the statute. Rather, *any* conduct that rises to the level of threatened physical interference, whether it is expressed or not, is sufficient to support a charge under the statute. For example, in *Philabaun II*, the defendant's refusal to comply with the search warrant, although not an express threat of physical interference, was sufficient to support a charge under the statute because by refusing to cooperate, defendant was, in effect, physically interfering with the police officers; his refusal left the

officers with no other choice than to use physical force to execute the search warrant.

D. Weapons

The Court of Appeals in *People v Dillard*, __Mich App__ (No. 227148, 5-22-2001) held that felon-in-possession of a firearm can be the predicate felony for a felony-firearm charge; the legislature knows how to exclude offenses from operation of the statute—it has done so—and all offenses not excluded are included.

Another felon in possession issue was decided in *People v Brown*, __Mich App__ (No. 231354, 1-22-2002). There the court held that a temporarily inoperable firearm is still a firearm covered by the felon in possession of a firearm statute.

Defendant's felony-firearm conviction in *People v Watson*, __Mich App__ (No. 218218, 5-4-2001) was not supported by sufficient evidence because the count to which it was tied was not supported by sufficient evidence. Indeed, the information on the substantive count had been amended to avoid this problem, but there was a failure to amend the FFA count in the same manner. The panel disavowed as contrary to Michigan Supreme Court and United States Supreme Court authority several cases that remanded for resentencing on a lesser or retrial at the prosecutor's option, as jeopardy bars retrial where the evidence is insufficient. But, said the court, actually what had occurred here was a reversal based in essence on a defect in the information, and so jeopardy did not bar a retrial on FFA charging the correct underlying felony. See *Parker v Norris*, 64 F3d 1178 (CA 8, 1995).

E. Miscellaneous

A form of escape was considered in *People v Lawrence*, __Mich App__ (No. 220598, 6-5-2001). After arrest, defendant escaped from the police car, but was captured by the officers. The statute, *MCL 750.197a*, prohibits any escape "from lawful custody under any criminal process." Defendant was not in custody under any criminal process, and thus the statute is inapplicable in this situation (resisting and obstructing would be an appropriate charge).

The defendant in *People v Pfaffle*, __Mich App__ (No. 218480, 6-5-2001), a mentally disturbed, self-described Satanist, tried to convince a 15-year-old to help him find young children to rape and kill by giving him alcohol, cigarettes, and money. He was convicted of inducing a minor to commit a felony, and argued that the minor had to

actually commit the felony for the statute to apply. Because the statute includes "*recruits, induces, solicits, or coerces*" the court disagreed.

In *Scaley v Jones*, 239 F3d 769 (CA 6, 2001) a district court holding that the state stalking statute is unconstitutional was reversed.

In *People v Aguwa*, 245 Mich App 1 (2001) defendants used stolen credit cards and false identification to purchase gift certificates, then purchased items using the gift certificates. When they attempted to return the items for a cash refund, they were arrested. They claimed the gift certificates were not forged, so they could not be guilty of uttering and publishing. The statute, *MCL 750.249*, provides:

Any person who shall utter and publish as true, any false, forged, altered or counterfeit record, deed, instrument or other writing mentioned in the preceding section, knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud as aforesaid, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 14 years.

In *People v Hogan*, 225 Mich App 431 it was held that an instrument need not be forged to be deemed a false instrument within; defendant there opened a credit union account using a fictitious name, knowingly presented a worthless check drawn on the account in an attempt to purchase goods, and endorsed the check using the fictitious name, and the court held that, although the fraudulent act was not accomplished by forgery, the defendant's conduct constituted the utterance and publication of a false instrument. Though factually somewhat different the court held the case governed by this analysis—defendant's appropriation of gift certificates using another person's identity, stolen credit card, and falsified identification rendered the gift certificates false instruments.

The defendant engaged in a fraud scheme in *People v Mason*, ___Mich App___ (No. 219630, 7-27-2001). The case is five consolidated cases, where defendant took money as down payment for the sale of mobile homes, put the money in his personal bank account rather than his business account, and did nothing to procure the mobile homes as promises. The court held that the intention of the parties was that the victims retained title to the down payment money, though not possession, until the delivery of their mobile homes, so that the offense of larceny by conversion was made out, reversing a dismissal.

Finally, *MCL 750.539c* provides that "Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids,

employs, or procures another person to do the same in violation of this section, is guilty of a felony....” “Eavesdrop” is defined as “to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse.” *MCL 750.539a(2)*. An individual willfully recorded the cordless telephone conversations of the victim at the defendant's behest. The claim was that the conversations, because on a cordless telephone, which can be picked up, were not private. The Michigan Supreme Court unanimously disagreed. *People v Stone*, 463 Mich 558 (2001).

VII. DEFENSES

A. Impossibility

In *People v Thousand*, 241 Mich App 122 (2000) the defendant entered into Internet chat rooms, "chatting" with a sheriff's deputy posing as a fourteen-year-old girl. Defendant sent the deputy lewd pictures, and arranged a meeting for the purposes of sexual activity. At the meeting place he was arrested. He was charged with child sexually abusive activity, solicitation to commit third-degree CSC, and attempted distribution of indecent material to a minor. The trial judge quashed on the ground of the defense of impossibility, since the "minor" was actually an adult. The Court of Appeals agreed that impossibility was a defense to solicitation and to attempt distribution of indecent material to a minor. But with regard to the child sexually abusive activity charge, because the statute includes language "a person who attempts or prepares or conspires to arrange for any child sexually abusive activity," impossibility was not a defense. After granting leave to appeal, the Michigan Supreme Court in *People v Thousand*, __Mich__ (No. 116967, 7-27-2001) held that there is no such defense as "legal impossibility" to an attempt crime.

B. Insanity/Diminished Capacity

The panel in *People v Jackson*, 245 Mich App 17 (2001) held that the “unable to conform his conduct to the requirements of the law” component of the insanity test cannot be substituted for with an analysis of whether the defendant would have acted as he or she did with a “policeman at his elbow.” But this does not mean this test is irrelevant. “If it is approached as being one of many avenues of inquiry, the hypothetical is directly probative of one dimension of a defendant's capacity to control his conduct as required by law. Certainly, if credible testimony offered by a defendant establishes that he could not refrain from acting even if faced with immediate capture and punishment, then the defendant would have gone a long way toward establishing that he lacked the requisite substantial capacity to conform to requirements of the law. The converse, however, is not true. A defendant who

could resist until the threat posed by a policeman had passed does not necessarily possess the capacity to conform. Nonetheless, if it so chooses, the prosecution must be allowed to explore the depths of defendant's alleged incapacity by posing the 'policeman at the elbow' hypothetical, in as much as the question is probative of a defendant's ability to conform to the requirements of the law under the most extreme circumstance of immediate capture and punishment.”

Because diminished capacity is a form of insanity defense, and because the legislature has placed the burden of persuasion on insanity on the defendant, the burden of diminished capacity is also on the defendant. The panel in *People v Matte*, 243 Mich App 218 (2000) held that this does not shift the burden of proof on the element of specific intent. But this opinion was soon mooted in any event by the Michigan Supreme Court’s decision in *People v Carpenter*, __Mich__ (No. 115617, 6-12-2001). The court agreed with the prosecution argument that the legislature, in enacting a comprehensive statutory framework on the insanity defense that did not include diminished capacity, had determined the parameters of a mental incapacity defense. Diminished capacity, based on mental illness or retardation, then, no longer exists, and expert testimony on that question is not admissible.

3. Self-Defense

The porch of a home is part of the "dwelling," so that retreat inside of the structure is not required under principles of self-defense. *People v Canales*, 243 Mich App 571 (2000).

VIII. EVIDENCE

A. Hearsay

In *People v Compeau*, 244 Mich App 595 (2001) evidence of a planned jail escape was admitted to show consciousness of guilt. The Court of Appeals held this plainly admissible.

The “catch-all” exception was considered in *People v Kant*, __Mich App__ (No. 225632, 11-13-2001). The trial judge allowed statements made by the victim to a child protective services specialists regarding sexually assaults by the defendant. The initial statement was spontaneous, and then questions were asked as to what the child-victim meant. The statements were not admissible under MRE 803A, because not the first corroborative statement concerning the abuse. The prosecutor offered the statements under the "catch-all"

of MRE 803(24), requiring that if a statement is to be admitted under the exception as not covered by a "standard" exception, it have equivalent guarantees of trustworthiness, be offered on a material fact, be more probative on the point than other evidence the proponent can procure through reasonable efforts, and the interests of justice are served by admission. Defendant argued that "not specifically covered" by one of the traditional exceptions precludes admission of a statement on a "near -miss theory" with regard to a traditional exception. Citing federal cases, the court disagreed with this narrow interpretation, and also found the foundational requirements of the statements met in this case.

In *People v Ortiz*, __Mich App__ (No. 224331, 1-18-2002) the defendant was convicted of the murder of his ex-wife. The prosecution was allowed to admit statements by the victim, including that she was afraid of the defendant, thought he was stalking her, that he had threatened to kill her in a manner so that no one would find out he did it, that he was changing her will, that she was going to try to enforce the child-support order against him, that she did not want to get back together with him, , that defendant had broken into her house so that she changed the locks, and that she was going away on the July 4th weekend so she wouldn't be around when the defendant came to her home to get his automobile. The court found that evidence of the victim's statement mind and her plans, which demonstrated motive (the ending of the marriage and the tension between the victim and the defendant), and evidence of her fear, were relevant to numerous issues, such as deliberation and premeditation, and whether the victim would have engaged in consensual sexual relations with defendant, as he argued, a week before her death.

B. Impeachment

Both the United States Supreme Court and Michigan Supreme Court have held that the defendant must actually testify to preserve the issue of impeachment with prior convictions; the United States Supreme Court has also held that if the defendant brings out the convictions the issue is waived. *Ohler v United States*, 529 US 753, 120 S Ct 1851, 146 L Ed 2d 826 (2000). The Michigan Court of Appeals followed this holding in *People v Rodgers*, __Mich App__ (No. 223130, 12/14/2001).

The court in *People v McCray*, __Mich App__ (No. 204701, 5-8-2001) rejected defendant's claim that he could only be impeached with an alibi notice inconsistent with the testimony he gave at trial where his trial testimony was also alibi testimony, though inconsistent with the notice, so that if he instead testified to say, self-defense, impeachment with the notice was not permitted. If the testimony is inconsistent with the notice, the notice may be used for impeachment.

Impeachment with bias or interest was the issue in *People v Lather*, __Mich__ (No. 116315, 7-17-2001), in an rather unusual context. Defendant was convicted of CSC charges involving his minor niece. A defense investigator, who talked to the victim, became the central defense witness, and the prosecution wished to bring out that the investigator had been charged and acquitted of CSC on a person under the age of 13, arguing that it went to bias--that the investigator, feeling himself wrongly accused, might wish to "help" someone else so charged, particularly a friend (defendant). The trial judge allowed it, and the Supreme Court agreed. Finding evidence of bias or interest almost always relevant, and that the probative value of the evidence was not outweighed by prejudicial effect, the court held that because the prior arrest was not being used to attack credibility simply as an arrest, but, because of the nature of the crime and the acquittal, as evidence of bias, the rule prohibiting impeaching with "arrests" was not violated here.

C. Privileges

In *People v Compeau*, 244 Mich App 595 (2001) a court officer, acting as bailiff, heard defendant make remarks to his attorney that the bailiff then testified to. The court held that while of course communications between client and attorney are privileged, they must be made in a manner so as to protect confidentiality. Where the defendant made his remarks in a manner so as to be overheard by a uniformed bailiff in his usual position in the courtroom, his presence obvious to all persons in the room, the remark simply was not confidential and therefore was not privileged.

D. Uncharged Misconduct/Similar Acts

In *People v Izarraras-Placante*, __Mich App__ (No. 222707, 6-19-2001) evidence of defendant's prior drug sales was admissible in a drug conspiracy case to show the defendant had the specific intent to combine to deliver the amount of drugs in question; nor was the probative value substantially outweighed by prejudice.

The prosecution did not give notice as required by 404(b) in *People v Hawkins*, 245 Mich App 439 (2001). The court found that this was plain error, but not sufficiently prejudicial under the facts to cause reversal. The case was an uttering and publishing regarding a large cashiers check, that defendant claimed a friend asked him to cash (the check was made out by hand, indicating defendant as the payee). The check was in blank as to payee and his friend asked him to use his name rather than the friend's because the friend did not have sufficient ID to cash the check. Evidence was admitted that the check had been stolen from the bank in question, and thus could not have been other than altered. The investigation also showed other checks were stolen and passed, and the court held that it would have been difficult to separate out this check from the entire investigation.

Moreover, "evidence of the 'underlying . . . fraud' in which a defendant participates is 'material and sufficiently probative of whether defendant had the requisite knowledge and fraudulent intent required for conviction on the charge of uttering and publication.'" Also, this was a bench trial, and the panel saw no evidence of misuse of the evidence in the factfinding by the trial judge.

The nature of the defense presented rendered the evidence admissible in *People v Kant*, __Mich App__ (No. 225632, 11-13-2001). The prosecution sought to admit evidence of defendant's sexual assaults of another child, and the trial judge declined. Though the court found the evidence relevant for the proper purpose of scheme and plan, it found the probative value was not substantial. But after the defendant testified on direct to an alleged motive for the defendant to have made up the charge, and testified "its not my nature to go around and have sex with children," the prosecutor renewed the motion for admission, and the trial judge admitted it, because its probative value had increased given defendant's testimony. The Court of Appeals agreed.

5. Other

In *People v Leshan*, __Mich App__ (No. 223746, 1-29-2002) the victim--a mentally challenged neighbor of the defendant--testified that she vehemently opposed defendant's sexual advances because of her religious beliefs, including so stating to him during the events. This testimony was essentially volunteered, but the prosecutor used the statements in closing to support the credibility of the witness; that is, that because of her religious beliefs she would not have consented as alleged by the defendant. The court found this reversible error.

IX. INSTRUCTIONS

A change in the law was worked in *People v Bearss*, 463 Mich 623 (2001). Defendant was convicted of false pretenses, and instructed on cognate offenses of insufficient fund checks. The Court of Appeals reversed the false pretenses on sufficiency grounds, and remanded for entry of conviction and sentencing on the cognate offenses. Cognate offenses include elements not included in the "greater" offense, and the jury had not found those elements by its verdict, unlike a necessarily included offense. The Court found the practice should not continue: "We hold that, if an appellate court determines that insufficient evidence was presented to support a conviction, it may not direct a conviction on a cognate offense on remand unless (1) there was sufficient evidence to support a conviction of the lesser offense and (2) the appellate court can unequivocally state that the jury's verdict must have included a specific finding of every element necessary to support a conviction of the cognate offense."

A change in the law was urged in *People v Hall*, __Mich App__ (No. 223182, 1-18-2002). There the Court of Appeals has urged the Supreme Court to reconsider the rule that murder two must be given without request--indeed, over objection of the defense--in any first degree murder case.

The defendant in *People v Reese*, 242 Mich App 626 (2000) did not claim that the perpetrator of an armed robbery was not armed, but that he was not the perpetrator. The trial judge refused to instruct on unarmed robbery, a necessarily included offense, instruction on which must be given on request. Under these facts, the panel found the failure to instruct harmless, while questioning the Michigan rule. Leave has been granted on the question of when necessarily included offense instructions should be given.

X. JURY

In *People v Johnson*, 245 Mich App 243 (2001) the defendant was charged with first-degree criminal sexual conduct felonious assault, two counts of kidnaping, and domestic violence. The jury acquitted him of the CSC I and felonious assault charges, but convicted him of both counts of kidnaping and domestic violence. The trial court sentenced defendant as a second habitual offender. Defendant contended that he was entitled to a new trial because one of the members of the jury did not reveal until after trial that she had been a complainant in a domestic violence prosecution. The trial court asked the jury, "Now that you have heard all of the charges in this case do you know of any reason why you should not serve as a juror in this case?" None of the jurors responded. When the trial court then asked; "Are there any among you who have been previously a victim of a crime," a juror responded, "I have been assaulted." The juror stated that she could be fair. The juror was a complainant in a domestic violence case and that the same special unit in Oakland County was prosecuting that case. The majority of the panel held that the juror did not "conceal" any information, and that defense could have discovered more information by asking more questions. The vigorous dissent took the view that the juror had "concealed" information about the domestic violence complaint, so that reversal should have occurred. The majority also held that "under the facts of this case, the juror's promise to keep the matters of her personal life separate from defendant's case was sufficient to protect defendant's right to a fair trial."

The problem in *People v Tate*, 244 Mich App 553 (2001) has now been cured by an amendment to the court rule that permits the calling back of an alternate juror if a deliberating juror cannot continue or is discharged. But in *Tate* the rule had not been amended yet (the amendment is effective 9-1-2001), and when the trial judge sent the jury to deliberate and discharged the alternate (there was only one) he asked that person to leave

a name and number where they could be reached in the event the alternate was needed. This eventuality occurred, and the alternate was recalled, and the jurors instructed to "share with the other juror how you have been deliberating." No objection was made to this procedure, and the juror was sworn and said she had not discussed the case with anyone since she had been dismissed, and that she could be fair. MCR 6.411 provides that the alternates—whose identity is determined by blind draw before deliberations—are to be "discharged." The Court of Appeals agreed that the recall of the juror was error under this rule, but found that the error was not of constitutional dimension and that the defendant, whose counsel had agreed to the procedure, had not shown prejudice. The court also found error in the trial court's instructions to the newly constituted jury that it did not have to "go back to square one," as it should have been told to begin deliberations anew, but again found no prejudice.

In *People v McGee*, __Mich App__ (No. 215576, 8-31-2001) after the jury returned with a verdict and the foreperson read the verdict in court, defense counsel asked that the jury be polled. During the polling, the trial court realized that there were thirteen jurors present and, upon questioning, discovered that the juror who was excused had been in the jury room during deliberations. When asked why she entered the jury room, the excused juror replied "I was not instructed to do anything different." The court did not further question the juror, dismissed the jury, and declared a mistrial. Later the trial judge informed the parties that he believed that, based on its research, a mistrial was not necessary where there is an extra juror and that it should either recall the jurors to complete the polling and reinstate the verdict, or proceed to a retrial. Defendant argued that reinstating the verdict was not possible because the declaration of a mistrial rendered nugatory all trial proceedings. The court stated that "[t]he verdict was rendered when (a) we have a marked verdict sheet and (b) when the . . . foreman indicates that that is the verdict of the jury. The polling is simply a verification." Defendant also moved for a dismissal of the charges, arguing that retrial after a mistrial is only possible where the mistrial was a manifest necessity, and no such manifest necessity existed in this case, but the court found that defendant acquiesced in the mistrial and, even if no manifest necessity existed, double jeopardy would not be a problem here where no retrial would take place.

The Court of Appeals held that the discovery of a thirteenth juror without a specific showing of prejudice to defendant did not constitute manifest necessity sufficient to justify a mistrial, so that the initial decision to declare a mistrial was error. But the trial court properly exercised its discretion to correct this error when it vacated its declaration of mistrial; because no judgment had been entered in the case, the trial court was within its discretion to rescind the erroneous ruling. MCR 6.435(B). Reinstating the verdict, however, was improper, because the verdict had not been taken in that the polling was incomplete, and the court held that recalling the jury to complete the polling was improper.

Finally, the court found that the recalling of the jury for continued polling created a manifest necessity so that the appellate court itself could declare a mistrial and send the case back for retrial, jeopardy thus not barring retrial.

Another very odd situation was presented in *People v Henry*, __Mich App__ (No. 230353, 11-16-2001). The court clerk asked the jury only how it found on the charged offense, and the foreperson replied "not guilty." The jury was never asked how it found on the lesser-included offense, and the verdict slip indicated the jury had found the defendant guilty. Jurors also called wondering why they hadn't completed their verdict. The Court of Appeals held that the jury could not be recalled after having been discharged for the purpose of completing their verdict, nor could the defendant be retried on the lesser offense on which no verdict was reported at all.

XI. JUVENILES

A waiver question under the "traditional" juvenile waiver process was considered in *People v Williams*, 245 Mich App 427 (2001). Defendant was charged with two counts of armed robbery and two counts of possessing a firearm during the commission of a felony. The prosecutor moved to waive the family court's jurisdiction pursuant to the "traditional waiver" process because the sixteen-year-old defendant was at least fourteen years old and robbery, if committed by an adult, would be a felony and because he had been previously tried and convicted of a felony in circuit court. The family court found probable cause to believe that a robbery had been committed, that it would be a felony if committed by an adult, and that defendant committed the offense, but refused to hold a second hearing at which it would determine whether defendant's best interests and the public's best interests required continuing family court jurisdiction or a trial in the court of general jurisdiction. Rather, because defendant had been tried for a previous offense as an adult in a circuit court, the family court simply waived jurisdiction to the circuit court. Defendant pled guilty to unarmed robbery, and received an adult sentence of 6-15, without a hearing determining whether an adult sentence was in his best interests or the best interests of the public. The panel held that subsection (5) of the traditional waiver statute separately provides that the family court "shall waive jurisdiction of the juvenile if the court finds that the juvenile has previously been subject to the jurisdiction of the circuit court" due to criminal conduct. This mandatory waiver language makes the best interests determination conducted in a phase two hearing irrelevant to a family court's decision to waive jurisdiction over a juvenile to the circuit court. Further, MCR 6.901(B) makes clear that a hearing to determine best interests before sentencing leaving open the possibility of an adult or juvenile sentence does not apply in cases in which the circuit court acquires jurisdiction pursuant to a traditional waiver process. The adult sentence, then, was proper.

XII. PRELIMINARY EXAMINATION

But that requirement—that a preliminary examination follow an indictment—exists no more. In *People v Glass*, __Mich__ (No. 114795, 6-12-2001) the court held that it had exceeded its authority in *People v Duncan*, 388 Mich 489 (1972) in creating a right to preliminary examination for those indicted by a grand jury; no longer will there be an examination in these cases.

When a visiting district judge in *People v Dunbar*, 463 Mich 606 (2001) held that the defense could closely examine an officer as to the time he received information from a confidential informant, the prosecution dismissed for fear of disclosing the identity of the informant. The case was reissued, and on examination before a different judge the cross-examination was only allowed on a broader time-frame. After bind-over, the trial judge dismissed because the exam was held before another judge, finding forum-shopping by the prosecution. The Supreme Court disagreed. MCR 6.110(F) does not govern where the case is dismissed without any determination by the district judge; or did the Court find that the actions of the prosecutor amounted to "forum shopping," but rather the prosecutor acted to protect the informant.

XIII. WITNESSES

In *People v Long*, __Mich App__ (No. 219691, 7-3-2001) the court observed that under statute, *MCL 767.40a*, the prosecution must provide assistance for the production of defense witnesses where needed. The defense sought assistance in production of the deceased victim's girlfriend to testify to his character, including for violence (allegedly this is what she might have testified to). After she gave a statement, the girlfriend—Keneatha Howard—made a statement. The detective informed her she needed to appear in court after the defense requested her. Later she called the court and said she would not appear. The detective had her pager number, but she did not respond. An officer went to her last known address and received no answer. Her last known place of employment was checked, and she no longer worked there. Further messages were left, but none returned. The prosecution fulfilled its duty of providing "reasonable assistance" to the defense under the statute, there being no "due diligence" requirement, though the trial court found that met as well.

The court in *People v Banks*, __Mich App__ (No. 225052, 1-15-2002) held that the same principles apply to shackling a defense witness as do to shackling the defendant; shackling detracts from the credibility of the witness, and should only be used when necessary for security and there is no less intrusive alternative.