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CRIMINAL LAW AND PROCEDURE UPDATE: 2008 DECISIONS

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CRIMINAL PROCEDURE

I. THE FOURTH AMENDMENT

A. Arrest/Seizures of the Person

An important question was decided in *Virginia v. Moore*, ___US___, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008). The Virginia Supreme Court held that an arrest that is unlawful under state law, though made on probable cause, is necessarily unreasonable under the Fourth Amendment and thus unconstitutional (defendant was arrested for a criminal offense—a traffic offense—when under the circumstances a summons should have issued). If upheld by the United States Supreme Court Michigan’s rule that a probable-cause based but improper misdemeanor arrest (because the offense was not committed in the presence of the officer as required by statute, see e.g. *People v Hamilton*, 465 Mich 526 (2002); *People v Hawkins*, 468 Mich 488 (2003); *People v Lyon*, 227 Mich App 599 (1998)) does not require suppression, the error being a statutory and not a constitutional one, would have been overturned. But the United States Supreme Court held that an arrest on probable cause that violates state law is not unconstitutional, nor is the search incident that arrest. The *constitutionality* of the arrest will *not* vary depending on local law.

BONUS CASE: January 2009 decision in Arizona v Johnson

While patrolling near a Tucson neighborhood associated with the Crips gang, police officers serving on Arizona’s gang task force stopped an automobile for a vehicular infraction warranting a citation. At the time of the stop, the officers had no reason to suspect the car’s occupants of criminal activity. Officer Trevizo attended to Johnson, the back-seat passenger, whose behavior and clothing caused Trevizo to question him. After learning that Johnson was from a town with a Crips gang and had been in prison, Trevizo asked him get out of the car in order to question him further, out of the hearing of the front-seat passenger, about his gang affiliation. Because she suspected that he was armed, she patted him down for safety when he exited the car. During the patdown, she felt the butt of a gun. At that point, Johnson began to struggle, and Trevizo handcuffed him. The Arizona Court of Appeals reversed. While recognizing that Johnson was lawfully seized, the court found that, prior to the frisk, the detention had evolved into a consensual conversation about his gang affiliation. Trevizo, the court therefore concluded, had no right to pat Johnson down *even if* she had reason to suspect he was armed and dangerous.

The Supreme Court held the frisk proper.

“‘[M]ost traffic stops,’ this Court has observed, ‘resemble, in duration and atmosphere, the kind of brief detention authorized in Terry.’ Furthermore, the Court has recognized that traffic stops are ‘especially fraught with danger to police officers.’ ‘The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized,’ we have stressed, ‘if the officers routinely exercise unquestioned command of the situation.’

The Court noted that a lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. “An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.”

“Nothing occurred in this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended or that he was otherwise free ‘to depart without police permission.’ *Officer Trevizo surely was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her.*

B. Warrantless Searches

An unusual consent issue was presented by the facts in *People v Brown*, 279 Mich App 116 (2008). The defendant did not own the computer involved nor the residence in which it was located. Though he was permitted to use the computer, there was no evidence that he had any "right" to do so, or that he controlled the access of others; in fact, the evidence was to the contrary. And the computer owner expressly consented to its search (defendant was handcuffed in his residence when the owner of the computer consented to its search while in his separate residence). The consent was found valid. Defendant also argued that the search was nonetheless improper because his e-mail account was password protected. The e-mails were accessed after the police removed the hard drive, and then used "EnCase" forensic software to make a copy of the hard drive, which allows reproduction of all files that have not been overwritten, including Internet files. In this way, incriminating e-mails were found. Here, said the court, "there is no dispute that Graves had control, if not exclusive control, over the computer. Accordingly, the officers were under no obligation to ask whether defendant’s files were password protected," and the consent-search doctrine controlled.

The issue concerned an automobile search in *People v Mungo*, 277 Mich App 577 (2008). The defendant’s vehicle was lawfully stopped, and a passenger was found to be wanted on outstanding warrants. He was arrested, the passenger compartment searched, and

a gun found, leading to charges against the defendant. The trial judge suppressed, relying on a Missouri case. The Court of Appeals reversed, properly rejecting the Missouri decision, and holding that the *Belton* rule applies to the arrest of any occupant of the vehicle (that is, that a search of the passenger compartment and containers within it may be searched incident arrest). Note: some years ago in *United States v Hensley*, 469 U.S. 221, 235-236, 105 S.Ct. 675,684, 83 L Ed 2d 604 (1985):

Having stopped Hensley, the Covington police were entitled to seize evidence revealed in plain view in the course of the lawful stop, to arrest Hensley's passenger when evidence discovered in plain view gave probable cause to believe the passenger had committed a crime. . . , and subsequently to search the passenger compartment of the car. . . .

Note: the case of *Arizona v Gant*, No. 07-542, was argued October 7, 2008, and remains pending in the United States Supreme Court. The question presented was

In *New York v. Belton*, 453 U.S. 454 (1981), this Court held that the risks to officer safety and to the preservation of evidence inherent in the arrest of a vehicle's recent occupant justify a contemporaneous warrantless search of the automobile's passenger compartment incident to the arrest. The question presented is: Did the Arizona Supreme Court effectively "overrule" this Court's bright-line rule in *Belton* by requiring in each case that the State prove after-the-fact that those inherent dangers actually existed at the time of the search?

The trial judge in *People v Jones*, 279 Mich App 86 (2008) chose to follow a Florida case on the issue of dog sniffs. Anyone may go up to the door of a house, perhaps to knock or ring the bell. The police did so, and took with them a trained narcotics-sniffing dog, who alerted. That alert was included in an affidavit for a search warrant (and necessary to probable cause). The trial judge held this was not really a dog sniff, which is not a search, but because of the location of the sniff more akin to use of a thermal imaging device. The Court of Appeals disagreed (as have other courts, save the Florida court). The application for leave by defendant remains pending.

C. Searches Made Pursuant to Warrant

A *Franks v Delaware* challenge was brought in *People v Mullen*, __ Mich App __ (No. 281202, 12-23-2008). A search warrant was obtained for BAC. The circuit court found that the affiant officer had "recklessly" omitted information that defendant had paper in his mouth less than 15 minutes before the administration of the PBT. Further, found the circuit court,

the affiant had "recklessly stated in the affidavit only that Nystagmus was present without informing the magistrate that he had administered the HGN test in a non-standardized way and explaining the manner in which the test was administered, intentionally or recklessly misrepresented that defendant's speech was slurred (based on the circuit court's review of the videotape), intentionally or recklessly misrepresented that defendant stopped counting at an inappropriate time during the one-legged stand test, and intentionally or recklessly misrepresented that defendant was unable to touch his index fingertips to the tip of his nose." The circuit court found that without this information the affidavit failed to show probable cause. The Court of Appeals upheld the factual findings of the circuit court except with respect to the administration of the PBT. As to this information, the panel concluded that "the omission by Shuler (the fact that defendant had paper in his mouth less than 15 minutes before the PBT was conducted) was not material, because Defendant presented insufficient evidence in the hearing below that the presence of paper in his mouth, three minutes before administration of the PBT, would significantly call into question the accuracy of the PBT result so as to preclude a finding of probable cause." With this and the remaining facts, the Court of Appeals disagreed with the circuit court as to whether the affidavit, reformed to eliminate those facts the circuit court found recklessly included, or omitted, showed probable cause: "Absent the stricken statements, and after adding the material information that was improperly omitted, the affidavit would have asserted that Officer Shuler detected the 'strong' odor of alcohol and noticed that defendant had 'watery eyes,' that defendant drove his vehicle through a red light at 2:00 a.m., and that while defendant had paper in his mouth three minutes before the test was administered, defendant's PBT result was 0.15." This was sufficient for probable cause, held the court.

D. Application of Exclusionary Sanction

The defendant in *People v Reese*, 281 Mich App 290 (2008) was arrested without probable cause for a misdemeanor. The police discovered an outstanding warrant, and indicated to him he was also under arrest for the warrant. A search of his vehicle revealed cocaine. The trial court suppressed and dismissed because of the initial improper arrest. The Court of Appeals found that the existing warrant was an intervening fact that rendered exclusion inappropriate. The court cited *United States v Green*, 111 F 3d 515 (CA 7, 1997), where the 7th circuit said that "the proper question is whether the evidence came to light through exploitation of the illegal conduct or by means sufficiently distinguishable to be purged of the taint from the illegal conduct." Further, "[e]vidence may be 'sufficiently distinguishable to be purged of the primary taint' if 'the causal connection between [the] illegal police conduct and the procurement of [the] evidence is 'so attenuated as to dissipate the taint' of the illegal action.'" The panel agreed that "It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen

Free." See also *McBath v Alaska*, 108 P 3d 241 (Ala, 2005), cited by the panel, where the court concluded that "The following rule emerges from these cases: If, during a non-flagrant but illegal stop, the police learn the defendant's name, and the disclosure of that name leads to the discovery of an outstanding warrant for the defendant's arrest, and the execution of that warrant leads to the discovery of evidence, the existence of the arrest warrant will be deemed an independent intervening circumstance that dissipates the taint of the initial illegal stop vis-à-vis the evidence discovered as a consequence of a search incident to the execution of the arrest warrant." See also in this regard *People v Lambert*, 174 Mich App 610, 617 (1989).

BONUS CASE: January 2009 decision in *Herring v United States*

Here, an officer in one county asked the warrant clerk in his county to contact the warrant clerk in a nearby county to see if there were any warrants out for the defendant's arrest. The answer was yes, Herring was arrested, and drugs and a gun found.

The neighboring clerk—a police employee, not a court employee—had checked their database. But when the clerk checked the files for the actual warrant, it was not there, and it was discovered that the warrant had been recalled, but this had not been entered in the database. The clerk informed the county requesting the information, and only 10-15 minutes had passed, but Herring had been arrested by this time, and guns and drugs found.

The Supreme Court held that the exclusionary rule did not bar the evidence in this situation, following up on *Arizona v Evans*, 514 U S 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995). where exclusion had been found inappropriate where a similar error was made by a court clerk. The Court said that the question of exclusion "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." While the error in this case might be termed "negligent" it was not "reckless or deliberate," The Court said that "the extent to which the exclusionary rule is justified by ...deterrence principles varies with the culpability of the law enforcement conduct," and that "to trigger the exclusionary rule, the police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system....the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."

II. CONFESSIONS/FIFTH AMENDMENT

In *People v McBride*, 273 Mich App 238 (2006), after first holding that an express waiver of the Miranda rights is not required, the signing of the advice of rights form here being sufficient, the court found that the record supported the trial judge's findings that the showing that the suspect understood the rights as signed was inadequate, and that the rights themselves as given were not adequate (the court also rejected a claim, however, that saying "shouldn't I have a lawyer?" was an assertion of the right to counsel, which must be unequivocal). But the Michigan Supreme Court reversed the order of suppression, finding that "The trial court erred in determining that the prosecutor failed to prove by a preponderance of the evidence that defendant made a knowing and intelligent waiver of her *Miranda* rights." *People v. McBride*, 480 Mich. 1047, 1048 (2008).

III. COUNSEL/SELF-REPRESENTATION

When the right to counsel attaches was before the United States Supreme Court in *Rothgery v Gillespie County*, __US__, 128 S Ct 2578, 171 L Ed 2d 366 (2008). Under Texas law, a person arrested may be presented to a magistrate and bail set before a prosecutor is even involved in charging. No counsel is appointed at this time, until an indictment is issued. The Court held that this hearing marked the point of attachment of the right to counsel, with the consequent state obligation to appoint counsel within a reasonable time once a request for assistance is made (but not that counsel had to be appointed for the hearing itself).

Retroactivity and the right to counsel were at issue in *People v Maxson*, __Mich__ (No. 129693, 12-22-2008). The court held that *Halbert v Michigan*, 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005) (right to counsel on applications for leave to appeal from guilty-plea convictions) is not retroactive to cases final on appeal when that case was decided (to the same effect see the en banc decision in *Simmons v Kapture*, 516 F3d 450, 451 (CA 6, 2008)).

An interesting self-representation case was decided by the United States Supreme Court in *Indiana v Edwards*, __US__, 128 S Ct 2379, 171 L Ed 2d 345 (2008), the question being "May a criminal defendant who, despite being legally competent, is schizophrenic, delusional, and mentally decompensatory in the course of a simple conversation, be denied the right to represent himself at trial when the trial court reasonably concludes that permitting self-representation would deny the defendant a fair trial?" The Court held that the Constitution permits a State to limit a defendant's self-representation right by insisting upon trial counsel when the defendant lacks the mental competency to conduct his trial defense unless represented, but rejected the State's proposed standard that counsel may be required if

the defendant "cannot communicate coherently with the court or a jury," because the Court was "uncertain as to how that standard would work in practice." Application of the decision remains rather murky.

The defendant in *People v Davis*, 277 Mich App 676 (2008)(rev'd other grounds, 755 NW2d 586 (2008)) was not represented at sentencing by trial counsel but by another lawyer from the same firm. A defendant does not have "an absolute right to be represented at sentencing by the lawyer who represented him at trial." And at defendant's sentencing, the "substitute" counsel was introduced as defendant's attorney without any objection from him, and the attorney elaborated that she was standing in on the trial attorney's behalf. "She demonstrated a familiarity with defendant Davis, his file, and the sentencing issues he faced, and when defendant Davis was provided with an opportunity to speak, he only expressed a desire to apologize to the victim. Without any indication that defendant opposed the representation at the time of sentencing and absent any other facts that would suggest that manifest injustice arose from the substitution of counsel, adopting defendant's argument would be tantamount to recognizing an absolute right to representation by trial counsel at sentencing. We have already rejected this proposition."

People v Dendel, 481 Mich 114 (2008) is highly fact specific, turning on whether defense counsel was ineffective in not calling an expert to counter the prosecution expert in this murder-by-poison case. In the end the court found that, in this bench-trial conviction, defendant "was not prejudiced by Filip's failure to produce an expert witness because there is no indication that the trial court would have accepted the testimony of defendant's expert over that of the prosecution's experts and there was other strong circumstantial evidence to support defendant's guilt."

The issue was also ineffective assistance in *People v Davenport*, 280 Mich App 801 (2008), involving also a question of conflict of interest by the prosecutor's office. Defendant's counsel accepted employment in the prosecutor's office after the preliminary examination. The office had only two assistant prosecuting attorneys. Trial counsel failed to raise any issue regarding this possible conflict. The trial court found that the first prong of ineffective assistance was shown, but that there had been no showing of any "outcome-determinative" mistake. The Court of Appeals remanded for a further hearing, noting that clearly a conflict of interest arose, and trial counsel should have raised it. While there had been no showing of any prejudice, there had been no inquiry into whether the the prosecutor's office employed appropriate safeguards to prevent defendant's former counsel from sharing information about defendant's with his new colleague. The matter was thus remanded for that inquiry to be made.

IV. DOUBLE JEOPARDY

Last term in *People v Smith*, 478 Mich 292 (2007) the defendant was convicted of felony-murder with larceny as the underlying offense, and also two counts of robbery armed. He claimed that the convictions for felony-murder and robbery armed violated double jeopardy under *People v Robideau*, 419 Mich 458 (1984). The Supreme Court here overruled that decision, agreeing with the United States Supreme Court that the test for multiple punishments is the same as for multiple prosecutions—offenses are not the "same offense" if "each requires proof of an element that the other does not." Because robbery requires proof of elements that felony-murder/larceny does not, and because murder requires proof of an element that robbery does not, multiple punishments are permitted.

This decision was applied in *People v Chambers*, 277 Mich App 1 (2007). Defendant was convicted of both RA and FA, where he took the victim's money at an ATM machine at gunpoint, then struck the victim in the head (arguably two separate assaults in any event), and also repeatedly kicked her. The court concluded: "double jeopardy issues are not implicated when a defendant is convicted and sentenced for both armed robbery and felonious assault, because they are not the 'same offense' given that, under the 'same elements' test that is now applicable to the 'multiple punishments' strand of double jeopardy under *Smith*, each offense has an element that is not required for the other."

And in *People v McGee*, 280 Mich App 680 (2008) the court held that "it is clear that the Legislature intended to separately punish a defendant convicted both of carjacking and assault with the intent to rob while armed, even if the defendant committed the offenses in the same criminal transaction."

The Supreme Court in *People v Ream*, 481 Mich 223 (2008) decided the question of whether to overrule its rule that the predicate felony in a felony-murder cannot stand if the defendant is convicted of both offenses, the third time being the charm. The court held that double jeopardy does not bar conviction for both felony murder and the predicate crime.

V. INFORMATION

Application of MCR 6.112(H) to motions to amend the information was explicated in *People v Castro*, __Mich App__ (No. 279272, 12-9-2008)(*no longer a published opinion* after reconsideration granted and a new opinion issued). Defendant contended that the trial court did not have the authority to amend the information to include a new charge—a violation of MCL 257.625(8). But the panel disagreed that a new charge was added; rather, "a change in the factual predicate underlying the charge is not the functional equivalent of bringing a new charge." But even if the court were to conclude that the amendment added a new charge, the court held that MCR 6.112(H) clearly provided the trial court

with the authority to do just that: "The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." "The court rule does not limit the trial court's ability to amend the information based on the nature of the amendment. Instead, the court rule limits the trial court's ability to amend the information based on the consequences that would follow from the amendment. Hence, under this court rule, a trial court may amend the information to include a new charge. See *McGee, supra* at 688-693. Consequently, whether framed as an amendment to the factual predicate underlying the first element of the charged offense, or as the addition of a new charge, the relevant inquiry is whether the amendment unfairly surprised or prejudiced defendant. MCR 6.112(H). On appeal, defendant asserts that he was prejudiced by the trial court's decision to permit the amendment of the information, but fails to actually state how the amendment prejudiced him." Consequently, there was no error.

VI. SENTENCING

A. Credit

In a creative effort, the defendant in *People v Grazhidani*, 277 Mich App 592 (2008) was placed on probation with a county-jail sentence as a part of sentence. He was released early because of overcrowding, subsequently violated probation, and was sentenced. Counsel convinced the trial judge to give him credit for the time in the county jail *not* served because of the early release. The Court of Appeals reversed.

The court in *People v Filip*, 278 Mich App 635 (2008), quoting from *People v Sieders*, 262 Mich App 702 (2004), rejected the trial court's attempt to overrule the case: "When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense." ... Instead, a parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence from which parole was granted. Credit is not available to a parole detainee for time spent in jail attendant to a new offense because "bond is neither set nor denied when a defendant is held in jail on a parole detainer."

B. Guidelines Scoring Issues

The question in *People v Sargent*, 481 Mich 346 (2008) was whether OV 9 can be scored using uncharged acts that did not occur during the same criminal transaction as the sentencing offenses. The defendant was convicted of first-degree criminal sexual conduct and second-degree criminal sexual conduct as a result of his sexual abuse of the 13-year-old

complainant. At defendant's trial, the complainant's older sister testified that defendant had also sexually abused her when she was 15 years old. The trial court assessed 10 points for OV 9 on the basis that there were two victims. At the time of the offense MCL 777.39(2)(a) stated that "each person who was placed in danger of injury or loss of life" must be counted as a victim under OV 9.1 Ten points are to be assessed when there were two to nine victims. MCL 777.39(1)(c). MCL 777.21 provides that in scoring the court is to "[f]ind the offense category for *the offense* . . . [and] determine the offense variables to be scored for that offense category" MCL 777.21(2) provides that the court is "score *each offense*" if "the defendant was convicted of multiple offenses" The court concluded that the offense variables are generally offense specific. "The sentencing offense determines which offense variables are to be scored in the first place, and then the appropriate offense variables are generally to be scored on the basis of the sentencing offense. The primary focus of the offense variables is the nature of the offense." From the context of the guidelines scheme, the court found it clear that "offense characteristics" includes the "characteristics that are taken into consideration under the offense variables." Here, "the jury convicted defendant only of sexually abusing the 13-year-old complainant. It did not convict him of sexually abusing the complainant's sister. Furthermore, the abuse of the complainant's sister did not arise out of the same transaction as the abuse of the complainant. For these reasons, zero points should have been assessed for OV 9." NOTE: MCL 777.39(2)(a) has since been amended to provide: "Count each person who was placed in danger of physical injury or loss of life or property as a victim."

The Supreme Court considered OV 10 in *People v Cannon*, 481 Mich 152 (2008). MCL 777.40 is entitled "Exploitation of a vulnerable victim." Paragraph (1) begins, "Offense variable 10 is exploitation of a vulnerable victim." There follows three subsections of paragraph (1) describing conduct that is awarded points, on a descending scale, for the sort of exploitation of a vulnerable victim involved, with the 4th subsection stating that zero points are to be awarded if the defendant did "not exploit the victim's vulnerability." While neither (1)(a) nor the definition of predatory conduct in (3)(a) use the term "vulnerable victim," the fact remains that (a) through (d) are subsections of (1), all of which describe conduct that is "scoreable" on the guidelines for exploitation of a vulnerable victim, as vulnerable victims are what the statute is about And "vulnerability" is defined in (3)(c), which would make no sense if vulnerability did not refer to the conduct described in 1(a) through (c). In short, "predatory conduct" here is not a freestanding concept, but applies only to that sort of conduct directed toward "vulnerable victims," as defined by the statute. The opinion in *People v Davis*, 277 Mich App 676 (2008) was vacated on this point in light of this opinion.

Cannon was applied in *People v Russell*, __Mich App__ (No. 264597, 12-11-2008); the panel concluded that OV 10 could not be scored; "here was, in fact, no vulnerable

victim to be jeopardized. The person with whom defendant communicated was not a vulnerable 14-year-old girl named 'Kelly'; he was, instead, an adult special agent."

In *People v Underwood*, 278 Mich App 334 (2008) the trial court held that OV 19, MCL 777.49 should be scored at 0 rather than 10 points in a perjury prosecution because scoring for "interfering with the administration of justice" is inappropriate when the conviction is for perjury, which is inherent in a conviction for perjury. The Court of Appeals found this inconsistent with the statute, and that the points should thus be scored.

Scoring of OV 20 was before the Michigan Supreme Court in *People v Osantowski*, 481 Mich 103 (2008). A score of 100 points is appropriate for OV 20 when a defendant threatens to cause harm using certain substances or devices but his threats, themselves, do not constitute *acts* of terrorism as defined by MCL 750.543b(a). The court concluded that "scoring 100 points pursuant to MCL 777.49a(1)(a) is inappropriate under these circumstances because that statute plainly requires the offender to have '*committed an act of terrorism by using or threatening to use*' one of the enumerated substances or devices." Not all threats are acts of terrorism, even if they qualify as violent felonies. "To constitute an act of terrorism, a threat must be a violent felony and *also* must itself be 'a willful and deliberate act' that the offender 'knows or has reason to know is dangerous to human life' and 'that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.'" MCL 750.543b(a). In other words, there is a distinction between "bare threats of terrorism and threats that constitute acts of terrorism."

C. Departures from the Guidelines

In *People v Smith*, 482 Mich 292 (2008) the defendant sexually abused a child for years, telling her if she told he would evict both she and her mother from their home. Defendant was convicted of 3 counts of CSC 1, and the top end of the guidelines was 15 years. The experienced trial judge (Hon. Timothy Kenny) gave a minimum of 30, doubling the top end of the guidelines, stating that the guidelines were inadequate in that they did not take account of 1)the gynecological exam the child was forced to endure; 2)that defendant exploited a position of authority and trust, abusing the child for 15 months; and 3)that the defendant threatened the loss of the child and her mother's home if she revealed the assaults. The Supreme Court agreed that these were objective and verifiable factors which were substantial and compelling so as to support "a" departure, but found that the trial judge did not sufficiently articulate why those factors justified the particular *degree* of departure. The court suggested ways this could be done (placing the facts on the "sentencing grid" and seeing where they come out, for example). The court also disclaimed that it was suggesting that "trial courts must sentence defendants with mathematical certainty. . . .Nor are any

precise words necessary for them to justify a particular departure," saying that "appellate courts examine the reasons articulated for departure" which must "be sufficiently detailed to facilitate appellate review. . . . This includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." The case was remanded to allow the trial judge to provide more specific justification for the particular departure.

Also involving departure was *People v Horn*, 279 Mich App 31 (2008). The recommended minimum sentence range here was 14 years and three months to 29 years and 8 months and the trial judge sentenced defendant to 40 to 60 years in prison for each offense, his wife being the victim. The trial judge that defendant's repeated perpetration of vicious acts against his wife within a short time period was a "particularly aggravating," "particularly compelling," and "staggering" factor. Even defendant's incarceration for assault did not dissuade him from continuing his course of merciless aggression against his wife, because he tried to solicit her murder. The court agreed that "Defendant's determined course to terrorize and abuse his wife, clearly evident from the recurring and escalating acts of violence, is an objective and verifiable reason that is based on occurrences external to the trial court's mind, and capable of being confirmed....Furthermore, the factor of repetitive acts of escalating violence against a specific victim is not adequately considered by the guidelines."

The Supreme Court made clear in *People v Muttscheler*, 481 Mich 372 (2008) that where the guidelines are scored at the intermediate-sanction cell level, even if the *length* of the sentence does not exceed the statute's 12-month maximum, the sentence is an upward departure if the defendant is required to serve it in prison, rather than in jail. The trial court cannot impose a prison sentence unless it identifies substantial and compelling reasons for the departure.

D. SORA Issues

The defendant in *People v Althoff*, 280 Mich App 524 (2008) was charged with possession of child sexually abusive material, MCL 750.145c(4), and pled to the reduced charge of possession with intent to disseminate obscene material, MCL 752.365. The latter is not a "listed offense" for SORA, and defendant argued that there was no evidence that this case involved an offense against a minor. The case was remanded on this point, and the trial court and an experienced detective who had viewed the computer discs involved testified that the females shown in them appeared to be well under the age of 18. The trial judge so found.

Among the questions the Supreme Court ordered the Court of Appeals to consider was "(1) whether MCL 28.722(e)(xi) requires registration of an offender based solely on the legal elements of the offense for which he stands convicted, or whether the facts of the particular offense are to be considered in determining if the offense 'by its nature constitutes a sexual

offense against an individual who is less than 18 years of age." Looking to two previous Court of Appeals provisions, the panel observed that MCL 28.722(e)(xi) of the sentence guidelines provides that the sentencing court "shall determine if the offense is a violation if a law of this state or a local ordinance of a municipality of this state that by its nature constitutes a sexual offense against an individual who is less than 18 years of age," and if so, "include the basis for that determination on the record and include the determination in the judgment of sentence." See MCL 769.1(13). The panel agreed with prior decisions that "[i]f the sentencing court's 'determination' could be made as a matter of law only from the language of the criminal statute at issue, there would be little reason for including the requirement that the sentencing court 'include the basis for that determination on the record,'" and, therefore, that the Legislature must have intended "sentencing courts to make findings of fact regarding the underlying conduct in individual cases to support the determination that the offense 'by its nature constitutes a sexual offense against an individual who is less than 18 years of age.'" The panel thus concluded that "the particular facts of a violation are to be considered in determining whether the violation 'by its nature constitutes a sexual offense against an individual who is less than 18 years of age' under MCL 28.722(e)(xi).

The Supreme Court also directed the panel to consider "whether the possession of pornographic photographs constitutes an offense 'against' an individual who is less than 18 years of age," for purposes of MCL 28.722(e)(xi)." The panel noted that "According to MCL 28.721a, SORA was enacted to assist law enforcement officers and the people of Michigan in preventing 'future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by [SORA] poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state.'" SORA's registration requirements are intended to provide "an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." MCL 28.721a. Though the term "against" is not defined in the statute, " it is generally defined as 'in opposition or hostility to.' *Merriam-Webster's Collegiate Dictionary* (2007). . . .Defendant simply asserts that the phrase 'offense against an individual' in MCL 28.722(e)(xi) is 'less inclusive' than the phrase 'if a victim is an individual' in the other listed offenses. We disagree. . . .We find the term 'against' to be no less inclusive than the term 'victim,' which is defined as a 'person harmed by a crime' in Black's Law Dictionary (8th ed). . . ." Thus, the child depicted in child pornography is a victim of the offense.

The panel was also directed to determine "what evidentiary standards apply to a hearing held to determine if a defendant must register under [SORA.]" It concluded "a sentencing court may consider all record evidence in determining if a defendant must register under SORA, so long as the defendant has the opportunity to challenge relevant factual assertions and any challenged facts are substantiated by a preponderance of the evidence.

The court may order the presentment of additional proofs if the evidence of record is insufficient to reach a determination. Pursuant to MRE 1101(b)(3), the rules of evidence would not apply to a hearing held to determine if a defendant must register under SORA." And the panel concluded the evidence was sufficient on the point here.

The defendant in *People v Hesche*, 278 Mich App 188 (2008) had in 1998 pleaded no contest to one count of CSC II, with a victim under 13 years of age. Under MCL 28.728c a trial judge has no discretion to remove the requirement under MCL 28.723 that a defendant register as a sex offender when the reviewing court concludes that the defendant's offense was accomplished through force or coercion.

E. Other

The court in *People v Uphaus*, 278 Mich App 174 (2008) held that while a defendant must be given a reasonable opportunity to contest information at sentencing, there is not right of confrontation at sentencing, and the rules of evidence do not apply.

The Michigan Supreme Court in *People v Gardner*, 482 Mich 41 (2008) overruled *People v Preuss/Stoudemire* in terms of the holding that convictions arising out of one transaction count only as one conviction when the defendant is later again convicted. MCL 769.11 provides that "*If a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows*" The language that if a person "has been convicted of any combination of 2 or more felonies" and "commits a subsequent felony" simply cannot be read to mean "has been convicted of any combination of 2 or more felonies arising out of different transactions."

The court considered MCL 769.1k, which became effective on January 1, 2006, and provides in pertinent part:

(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:

(a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.

(b) The court may impose any or all of the following:

- (i) Any fine.
- (ii) Any cost in addition to the minimum state cost set forth in subdivision (a)
- (iii) The expenses of providing legal assistance to the defendant.
- (iv) Any assessment authorized by law.
- (v) Reimbursement under section 1f of this chapter.

In *People v Trapp*, 280 Mich App 598 (2008) the court held that "This statute does not eliminate the requirement, set forth in *Dunbar*. . . , that the trial court consider a defendant's ability to pay prior to ordering reimbursement of appointed counsel costs."

In *People v Cross*, __Mich App__ (No. 280652, 12-18-2008) the court held that income loss and lost profits may be the subject of an order of restitution.

VII. POSTCONVICTION REMEDIES

People v Blackmon, 280 Mich App 253 (2008) has a tortured procedural history, which is unlikely to have ended. The Court of Appeals affirmed, finding error, but harmless; the Michigan Supreme Court denied leave; the federal district court granted habeas relief; the 6th Circuit reversed on exhaustion (failure to present fairly as a federal constitutional claim); the trial court denied a motion for relief from judgment "federalizing" the prior issues (same ones raised previously and rejected as harmless error, but now raised in "federal terms"); the Court of Appeals denied leave; and the Supreme Court remanded for consideration on leave granted. The panel here found that the errors it had previously identified were nonconstitutional errors, and that in any event any argument that they were constitutional errors was waived by the express statement on the appeal of right by the defendant that they were nonconstitutional errors (gang-affiliation evidence, and several evidentiary/impeachment issues).

People v Blackston, 481 Mich 451 (2008) is a highly fact-specific case. Two witnesses who had testified at the first trial of the case essentially wrote out their testimony for the second trial, which recanted their original trial testimony, and then refused to testify. The prior-recorded testimony was admitted, but the trial judge refused to admit the written recantations as impeachment, which defense counsel had moved for, though without citing any authority. The trial judge found the statements inadmissible under MRE 613 because the statements were not "prior" and the judge viewed the entire process as manipulative. At a motion for new trial defendant argued that the statements were admissible for impeachment under MRE 806, allowing impeachment of unavailable declarants. The trial judge agreed that the statements were admissible on this basis, but that if the ground had been raised he would have

excluded the statements under MRE 403 (finding the statements highly suspect). The Supreme Court declined to decide whether the issue was preserved properly, finding that the trial court did not abuse its discretion in applying Rule 403, and that in any event under whatever standard was employed any error was harmless.

In *People v Murphy*, 481 Mich 919 (2008) defense counsel did not answer a prosecution interlocutory appeal regarding admission of certain evidence; the Court of Appeals ordered the evidence to be admitted. On direct appeal the Court of Appeals found this to be structural error (the failure of counsel to answer)—without regard to whether its own ruling on interlocutory appeal was correct—but the Supreme Court found that the proper remedy is simply to allow the issue to be raised on direct appeal without the bar of the law-of-the-case doctrine. It is to be hoped that procedures in place in the Court of Appeals to ensure an answer from defense counsel will moot the problem for the future.

In *Hedgpeth v Pulido*, __US__ (12-2-2008) the error was held not to be structural. A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one. But the error is not "structural error," disposing of any inquiry into prejudice, and principles of harmless error are to be applied.

In *Danforth v. Minnesota*, __US__ , 128 S Ct 1029, 169 L Ed 2d 859 (2008) the United States Supreme Court held that state courts are not bound by *Teague v. Lane*, 489 U.S. 288 (1989) to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, but may apply them more broadly if they so choose.

Though the dissenting justices urged that the Michigan Supreme Court *should* "go its own way" on retroactivity in *People v Maxson*, __Mich__ (No. 129693, 12-22-2008), the court held that *Halbert* (right to counsel on applications for leave to appeal from guilty-plea convictions) is not retroactive to cases final on appeal when that case was decided (to the same effect see the en banc decision in *Simmons v Kapture*, 516 F3d 450, 451 (CA 6, 2008)).

In *People v Barrerra*, 278 Mich App 730 (2008) the prosecutor opposed the testing of items, arguing that although defendant met all of the conditions of the statute, MCL 770.16(3)(b), defendant could not make a prima facie showing that the evidence sought to be tested was "material to the issue of his identity" as the perpetrator of the crime under MCL 770.16(3)(a). The trial court agreed, but the Court of Appeals reversed the standard adopted by the trial court, that the standard for MCL 770.16(3)(a) materiality is "whether the biological evidence requested would provide a reasonable probability of a

different result.” Rejection of this standard, said the Court of Appeals, does not mean the evidence will always be material, as the prosecution feared. “By way of example, if semen found on panties was material because the victim wore the panties at the time of the rape, MCL 770.16(3)(a) would be satisfied, but if defendant had claimed at trial that he had consensual sex with the victim, identity would not be at issue. If identity is not at issue, then MCL 770.16(3)(b)(iii) is not satisfied, and DNA testing would not be ordered. Similarly, when a defendant’s theory of the case is self-defense or where the biological evidence has already excluded a defendant, identity is not an issue.” Further, any “balancing” was premature, said the court. “MCL 770.16(3)(a) does not in any way direct, or even allow, a trial court to engage in a balancing inquiry of the identifying evidence presented. A trial court’s only responsibility under MCL 770.16(3)(a) is to determine if a defendant has presented “prima facie proof that the evidence sought to be tested is material to the issue of . . . identity[.]” It is MCL 770.16 that provides for balancing, which occurs “only *after* the biological evidence has been tested. Pursuant to MCL 770.16(6), if the DNA results are inconclusive or implicate defendant, no new trial must be held. Under MCL 770.16(7)(a)-(c), if the testing shows that defendant was not the source of the biological evidence, the trial court ‘shall . . . hold a hearing to determine by clear and convincing evidence’ that only the perpetrator could be the source of the genetic material, that the sample is not degraded or contaminated, and ‘[t]hat the defendant’s purported exclusion as the source of the identified biological material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial.’”

In *Medellin v Texas*, __US__ , 128 S Ct 1346, 170 L Ed 2d 190 (2008) the International Court of Justice found that the United States had violated Article 36(1)(b) of the Vienna Convention on Consular Relations by failing to inform 51 named Mexican nationals, including petitioner Medellín, of their Vienna Convention rights. The ICJ found that those named individuals were entitled to review and reconsideration of their U. S. state-court convictions and sentences regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions. In *Sanchez-Llamas v. Oregon*, 548 U. S. 331—issued after *Avena* but involving individuals who were not named in the *Avena* judgment—the Supreme Court held, contrary to the ICJ’s determination, that the Convention did not preclude the application of state default rules. The President then issued a memorandum (President’s Memorandum or Memorandum) stating that the United States would “discharge its international obligations” under *Avena* “by having State courts give effect to the decision.” Relying on *Avena* and the President’s Memorandum, Medellín filed a second Texas state-court habeas application challenging his state capital murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention rights. The Texas Court of Criminal Appeals dismissed Medellín’s application as an abuse of the writ, concluding that neither *Avena* nor the President’s Memorandum was binding federal law that could displace the State’s limitations on filing successive habeas applications. The

Supreme Court held that neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions.

CRIMINAL LAW

I. ASSAULT; CRIMINAL SEXUAL CONDUCT

The defendant in *People v Davis*, 277 Mich App 676 (2008)(rev'd other grounds, 755 NW2d 586 (2008)) argued that there was no evidence the store owner ever believed that he was actually armed with a firearm, and also did not subjectively believe defendant could carry out his death threat ("Give me the money or I'll kill you"). The court first said that "Assuming, arguendo, that defendant correctly asserts that fear is a necessary element to the apprehension type of criminal assault, the prosecutor still presented sufficient evidence to justify conviction on the assault charge. The store owner testified that she thought defendant was armed with a gun, and her fiance did not physically challenge defendant until after he had retrieved a weapon that might equalize a physical contest between him and an armed man." Further, "Under the provisions of MCLA § 750.89 . . . , it is not necessary that the victim of an assault with intent to rob being armed be put in fear." An assault is made out on a showing of "some form of threatening conduct *designed* to put another in apprehension of an immediate battery."

In *People v Bayer*, 279 Mich App 49 (2008) the defendant, a psychiatrist, engaged in a sexual relationship with a patient. MCL 750.520b(1)(f)(iv) defines force or coercion as including circumstances when "the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable." The trial judge held that because testimony from those in the field was necessary to determine whether the conduct was "medically recognized as unethical or unacceptable," the statute was unconstitutional as a delegation of legislative power. The Court of Appeals disagreed and reversed the dismissal. But that portion of the opinion "recognizing" that expert opinion testimony is required was overruled by the Michigan Supreme Court. Reversing an unpublished decision which had reversed on this basis, the court in *People v Baisen*, __Mich__ (No. 136321, 9-26-2008) also overruled several contrary Court of Appeals opinions:

. . . it is common knowledge that penile penetration constitutes an unethical and unacceptable method of "medical treatment." Therefore, we overrule *People v Capriccioso*, 207 Mich App 100, 105 (1994), and *People v Thangavelu*, 96 Mich App 442, 450 (1980), to the extent that they state or hold that medical testimony is required in all prosecutions under MCL 750.520b(1)(f)(iv). We further overrule those cases to the extent that they limit the application of the statute to situations in which the medical

examination or treatment is used as a pretext to secure a patient's consent to sexual conduct. That limited interpretation does not comport with the plain language of the statute. The statute also applies to situations where nonconsensual sexual conduct is perpetrated during or in the context of medical treatment or examination. In a separate order, we are vacating the portion of the judgment of the Court of Appeals in *People v Bayer*, 279 Mich App 49 (2008), that states that medical testimony is required in all prosecutions under MCL 750.52b(1)(f)(iv).

II. HOME INVASION

Consideration of those structures that can constitute "dwellings" was involved in *People v Powell*, 278 Mich App 318 (2008). Defendant argued that the house that he broke into was not a "dwelling" because it had been damaged by fire, had been condemned, and was not habitable at the time of the offense. The Court of Appeals disagreed. MCL 750.110a(1)(a) defines a dwelling as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." The court held that "The fact that the structure here was temporarily vacant because it had been damaged by fire did not preclude it from being a dwelling.... we conclude that the intent of the inhabitant to use a structure as a place of abode is the primary factor in determining whether it constitutes a dwelling for purposes of MCL 750.110a(3). The owner's temporary absence, the duration of any absence, or a structure's habitability will not automatically preclude a structure from being considered a dwelling for purposes of the home-invasion statute."

III. HOMICIDE

The issue was factually and legally complex in *People v Plunkett*, __ Mich App __ (No. 284943, 12-16-2008), involving the offense of delivery of a controlled substance causing death. Defendant and one Corson traveled to Detroit in defendant's vehicle and purchased drugs; defendant gave Corson the money to purchase the drugs, she made the purchase, and the two used drugs on the way back. A friend of Corson's, the victim, Gregory, had been introduced to drug use by her. That same night Gregory called Corson asking for drugs and reminding Corson that she owed Gregory \$20. Corson invited Gregory to defendant's apartment. Corson, Gregory, defendant, and his friend, Veronica, smoked crack cocaine in the living room. Afterward, Gregory and Corson went into a bedroom and injected themselves with heroin. Gregory lost consciousness and Corson called for help and also hid the drugs and paraphernalia. By the time EMS arrived Gregory was dead. She died of "multiple drug intoxication," including morphine that had metabolized from heroin.

At the exam defendant argued for dismissal on the ground that there was no evidence he had ever possessed the heroin or transferred the heroin to anyone. He maintained that at most the prosecutor had shown that defendant funded Corson's purchase. He also argued that a purchaser of heroin could not be convicted of aiding and abetting delivery of heroin. On the other hand, the prosecutor argued that defendant provided the transportation to Detroit and the money used to purchase heroin—the district court agreed that there was probable cause to bind over because defendant drove Corson to buy drugs on a regular basis, that he gave her money to purchase the drugs, and that the heroin purchased on June 15 caused Gregory's death. On a motion to quash, the circuit court held that defendant's actions did not constitute delivery of heroin to Corson.

The majority of the Court of Appeals panel agreed, rejecting prosecution arguments that defendant could be found guilty of delivering heroin to Corson on two theories: that defendant constructively delivered the heroin to Corson, or that defendant aided and abetted the delivery of the heroin to Corson, finding that "The record does not support the finding of either an actual or attempted transfer of heroin from defendant to Corson," and that the actions of the defendant did not constitute aiding and abetting the delivery of the drugs.

IV. OTHER CRIMES

In *People v Edenstrom*, 280 Mich App 75 (2008) a patient was injured when he went to a designated smoking area, the aide turned off his oxygen, and lit his cigarette for him, causing remaining oxygen in the tubing to ignite. The administrator did not report this. Under MCL 333.21771, a nursing home administrator is required to report to state authorities any physical, mental, or emotional abuse, mistreatment, or harmful neglect of a patient. The panel majority held that this incident did not fall within the statute, finding it not to be the result of "harmful neglect."

People v Perkins, 280 Mich App 244 (2008)(aff'd __Mich__, 2008) is an important decision with regard to the so-called "Heidi's Law." Before the amendment of the statute, a defendant was guilty of a felony rather than a misdemeanor for violating the statute only if he or she had been convicted of two or more drunken driving-related offenses within the previous 10 years. The amendment eliminated the 10-year window and added language permitting the use of any previous conviction in enhanced sentencing, regardless of the time elapsed between it and the defendant's current offense. Both defendants here had committed two or more prior alcohol-related offenses, though at least one outside of the previous 10-year limit. The trial court found that application of the amended statute to include OUIL's

committed outside of the previous 10-year limitations was an ex post facto violation. In an eagerly awaited and eminently predictable decision, the Court of Appeals disagreed: “the amended statute did not attach legal consequences to defendant’s prior impaired-driving conviction, but attached legal consequences to defendant’s future conduct Further, the court treated the prior ten-year limit on consideration of prior convictions as a statute of limitations that had run. But this analysis ignores the fact that defendants are not being prosecuted for the prior offenses. They are being prosecuted for actions that took place after the amendment took effect. . . .the change in the predicate offenses used to raise current conduct to the felony level does not constitute an ex post facto violation.”

The court in *People v Brown*, 279 Mich App 116 (2008) held that defendant was properly convicted, finding that 1999 AC, R 338.3122(2) is not void for vagueness; possession of an anabolic steroid that is “intended for administration through implants to cattle” is not illegal, and conversely, possession of an anabolic steroid intended for human consumption is illegal.

People v Holley, 480 Mich 222 (2008) is a rather complex case of statutory construction. Dealing with a rather difficult-to-parse statute, the court concluded that MCL 750.483a(1)(b), which provides that a “person shall not . . . [p]revent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person” does not require the prosecution to prove beyond a reasonable doubt that someone committed or attempted to commit the crime that was sought to be reported.

V. DEFENSES

People v Shahideh, __ Mich __ (No. 135495, 12-29-2008) involves an issue of the right to present a defense concerning the insanity defense. Defendant sought a court order permitting a privately retained psychologist to examine him while he was in jail for the purpose of evaluating the merits of an insanity defense. The trial court denied the defendant’s motion, holding that the defendant must first file a notice of intent to assert an insanity defense pursuant to MCL 768.20a(1) before he could obtain an evaluation by his privately retained expert. The Court of Appeals reversed, holding that MCL 768.20a did not apply because “only a defendant who ‘plan[s]’ or ‘intends’ to raise the insanity defense at trial must comply with the procedure” in the statute. In an order the Supreme Court disagreed, finding that defendant had waived the matter, as the trial court’s ruling did not prohibit the defendant from pursuing an insanity defense. “The defendant was fully aware that he could file a § 20a(1) notice and continue pursuing an insanity defense. Defense counsel gathered sufficient information through his investigation to form a good-faith basis for filing a notice of intent under MCL 768.20a(1). Instead, the

defendant elected to abandon an insanity defense in favor of a mitigation defense." Thus, "regardless of whether the trial court erred in holding that MCL 768.20a applied, the defendant abandoned the insanity defense and cannot obtain appellate relief because his chosen defense strategy failed."

In *People v Conyer*, __Mich App__ (No. 278912, 11-25-2008) the "Self-Defense Act," MCL 780.917, was held not retroactive to conduct occurring before the effective date of the statute.

VI. EVIDENCE

A. Demonstrative/Scientific

The trial court in *People v Unger*, 278 Mich App 210 (2008) permitted the defense expert to show some computer animations based entirely on his calculations, but disallowed others based on his speculation that the victim may have suffered violent seizures or convulsions. "The facts or data . . . upon which an expert bases an opinion or inference shall be in evidence." MRE 703. While an expert witness need not rule out all competing and alternative theories," he or she must have a sound evidentiary basis for his or her conclusions." The expert here was not a physician, and these animations were based on speculations that were not based on evidence, and were in fact highly unlikely. There was thus no abuse of discretion in excluding them.

The same case considered the application of Michigan's amended rule in its effective adoption of the federal "Daubert" standard. The court said that the role of the judge in this regard is "to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation." On this test, admission of the prosecution forensic pathologist's testimony was clearly proper.

B. Hearsay/Confrontation

The United States Supreme Court issued an important opinion on forfeiture by wrongdoing. The defendant shot his former girlfriend to death, but insisted it was in self-defense and thus he did not intend her to die. A Los Angeles police officer was allowed to testify to statements made by the girlfriend three weeks before the shooting to show a history of domestic violence. The question was whether the forfeiture doctrine applies in this circumstance. In *Giles v California*, __US__, 128 S Ct 2678, 171 L Ed 2d 488 (2008) the Court held that forfeiture by wrongdoing so as to avoid the dictates of *Crawford* is only

applicable where the defendant engaged in conduct *designed* to prevent the witness from testifying.

In *People v Taylor*, __ Mich __ (No. 135666, 12-19-2008) the court held that a nontestimonial declaration against penal interest by a codefendant—one not made to the police during interrogation, for example, but made to some other individual—is measured for admissibility only by the requirements of MRE 803(b)(4), and not the confrontation clause under *Crawford*.

An excited-utterance question was considered by the Michigan Supreme Court in *People v Barrett*, 480 Mich 125 (2008). A woman made statements to her neighbor, a 911 dispatcher, and a police officer indicating that her boyfriend was trying to kill her and had threatened her with an ax. But later the woman refused to testify. The court overruled its prior decision in *People v Burton*, 433 Mich 268 (1989) that in order to admit an excited utterance into evidence there must also be independent evidence of the startling event related to the utterance (a requirement not contained in the rule of evidence itself).

People v Taylor, 275 Mich App 177 (2007)(leave dismissed as improvidently granted) considered an unanswered question after *Crawford*; whether, as that case intimated, dying declarations are sui generis and are admissible even when arguably testimonial. The panel here said that 1)the dying declaration here given to the police arriving on the scene was not testimonial under *Davis v Washington*, and 2)in any event, dying declarations are not within *Crawford* as an "historical exception."

C. Uncharged Misconduct/Similar Acts

In a CSC case involving a minor, in *People v Petri*, 279 Mich App 407 (2008), two prior CSC 2 convictions of the defendant were admitted, the prosecutor citing the statute, MCL 768.27a. The court observed that "A defendant's propensity to commit criminal sexual behavior can be relevant and admissible under the statutory rule to demonstrate the likelihood of the defendant committing criminal sexual behavior toward another minor," and affirmed the trial judge (who applied Rule 403 as well).

People v Wilcox, 280 Mich App 53 (2008) concerns the so-called "propensity" statute(s), MCL 768.27a (see also MCL 768.27b). The court again held that the statute does not run afoul of Michigan's constitutional "practice and procedure" provision, nor does it violate ex post facto principles. NOTE: the leave grant in *People v Watkins*, 277 Mich App 358 (2007) was dismissed after argument.

VII. JURY

In *Snyder v Louisiana*, __US__, 128 S Ct 1203, 170 L Ed 2d 175 (2008) in a highly fact-specific case, particularly for the US Supreme Court, the majority found a *Batson* violation by rejecting the proffered race-neutral reasons.

The defendant in *People v Miller*, __Mich__ (No. 135989, 12-30-2008) was convicted of first-degree criminal sexual conduct for forcing his then-girlfriend's seven-year-old daughter to perform fellatio on him. After trial it was learned that a juror had falsely answered that he had no convictions when he had been convicted of assault with intent to commit criminal sexual conduct in 1991 and 1999 for having assaulted his sister and another person to whom he referred as an "adopted child" who was "more like a niece." At an evidentiary hearing the juror stated that he did not reveal his prior convictions on his juror questionnaire because they were old and he did not believe that they were even on his record anymore. When asked whether he had been intentionally untruthful so that he could sit as a juror, he answered, "no," and he indicated that he "didn't really want to sit on the panel in the first place . . ." The juror further testified that he had tried to be fair during the trial and that he never tried to improperly persuade the jury. Following this testimony, the trial court denied defendant's motion for a new trial, ruling that there was no evidence that defendant had suffered actual prejudice. The Court of Appeals reversed, but the Supreme Court disagreed.

By statute, MCL 600.1307a(1), the juror was not qualified to sit given the convictions, and by court rule he was subject to a challenge for cause. But MCL 600.1354(1) states that "failure to comply with the provisions of this chapter shall not . . . affect the validity of a jury verdict unless the party . . . claiming invalidity has made timely objection and unless the party demonstrates *actual prejudice* to his cause and unless the noncompliance is substantial." Because there is no constitutional right to a jury devoid of convicted felons, the requirement is simply statutory, and thus the statutory requirement of actual prejudice for its violation applies. And a juror's failure to disclose information that the juror should have disclosed is only prejudicial if it denied the defendant an *impartial* jury. Here, there was no evidence that the juror was partial; indeed, if anything he would likely have been more harmful to the prosecutor than to defendant. And this statutory violation also did not constitute "structural error" requiring reversal without the statutorily required showing of actual prejudice.

VIII. PROSECUTOR

People v Unger, 278 Mich App 210 (2008) speaks to some issues concerning prosecution closing argument: "The prosecution was free to argue that defense counsel

had "bought" the testimony of the defense expert by paying him a substantial sum; on the other hand, arguments that the expert came in to "fool the jury" and to provide "reasonable doubt for reasonable prices" were improper, but not reversibly so. Also, the prosecution should not have argued that defense counsel had "re-victimized" the victim during trial, but this comment was not reversible. Further, "The prosecution also clearly exceeded the bounds of proper argument when it suggested (1) that defense counsel had attempted to "confuse the issue[s]" and 'fool the jury' by way of 'tortured questioning,' 'deliberately loaded questions,' and 'a deliberate attempt to mislead,' (2) that defense counsel had attempted to 'confuse' and 'mislead' the jury by using 'red herrings' and 'smoke and mirrors,' and (3) that defense counsel had attempted 'to deter [the jury] from seeing what the real issues are in this case.'" Particularly problematic was that these remarks were not made in rebuttal, but during the initial closing argument of the prosecutor. Though improper, said the court, they were not reversible.

The court in *People v Petri*, 279 Mich App 407 (2008) said that a defendant seeking to disqualify a prosecutor as a necessary witness bears the burden of proof, and a prosecutor is not a necessary witness if the substance of the testimony can be elicited from other witnesses, and the party seeking disqualification did not previously state an intent to call the prosecutor as a witness. Defense counsel acknowledged that the prosecutor was a highly qualified, trained forensic interviewer, and that another trained forensic interviewer also observed the interview. The trial court denied the motion, finding "the prosecutor was not a necessary witness, because other witnesses could bring forth the information at issue, and finding that, because the motion was on the eve of trial, granting the motion would be prejudicial to plaintiff. We affirm the trial court's reasoning."