

Criminal Defense Newsletter



February, 2008
Volume 31, Number 5

Consequences of Criminal Charges and Convictions for School Employees

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Recent statutory changes have made it more important than ever for defense attorneys to be aware of the far-reaching implications of criminal charges and convictions for school employees. Rick Long, Staff Attorney at the Michigan Education Association, has provided a wealth of information about Pupil Protection Laws that we will summarize here, and retain within the CDRC's defense resources.

Rick specifically advises that attorneys sometimes wrongfully advise clients that they don't have to report convictions to the Michigan Department of Education if they arose from a deal or diversion. The duty to report is actually quite far-reaching, and the MEA is receiving cases where school employees are being fired for failing to report. The Editor.

Statutory duty to report

Effective January 1, 2006, there are a number of changes in Michigan law that impact school employees charged with or convicted of certain crimes.

Section 1230d was added to the Revised School Code, MCL 380.1230d, which requires school employees charged with crimes listed in Sections 1535a(1) or 1539b(1) of the Revised School Code, MCL 380.1535a(1) and 380.1589b(1), or a similar crime in another jurisdiction to report on a form developed by the Superintendent of Public Instruction within three business days of arraignment on the crime and to subsequently report on any conviction that results from the charges immediately upon conviction. Failure to report is a separate crime and grounds for dismissal from school employment.

Conviction of crimes that would require listing on the Sex Offenders Registration Act (SORA), [MCL 28.722\(e\)](#), will result in the dismissal of the individual from school employment and requires the immediate suspension of the individual's teaching certificate or state board authorization. Crimes listed in Section 1535a(2) of the Revised School Code, [MCL 380.1535a\(2\)](#), will also result in the automatic suspension of a teaching certificate or state board authorization. Crimes listed in Section 1535a(1) of the Revised School Code, [MCL 380.1535a\(1\)](#), may result in the suspension of a teaching certificate or state board authorization. Upon the conviction of a school employee for a felony that is not a SORA listed offense, the superintendent and board of education of the employing school district must agree in writing to the continued employment of the individual.

These laws were enacted as [2005 PA 121-134](#).

Self-Reporting Offenses

Arrest on Any Felony, Any "SORA" Offense, or any of the following misdemeanors must be reported. Failure to report is a crime.

- [MCL 750.520e](#) Fourth degree criminal sexual conduct or attempt
- [MCL 750.136b](#) Child abuse in the third degree or attempt
- [MCL 750.136b](#) Child abuse in the fourth degree or attempt
- [MCL 333.7410](#) Delivery or distribution of a controlled substance to a minor within 1,000 feet of a school
- [MCL 750.115](#) Breaking and entering or entering without permission certain buildings, including an ice shanty valued over \$100
- [MCL 750.141a](#) Knowingly allowing a minor to possess or use alcohol or a controlled substance
- [MCL 750.145a](#) Accosting, enticing or soliciting a child under age 16 for immoral purposes *
- [MCL 750.335a](#) Indecent exposure
- [MCL 750.359](#) Stealing or destroying any fixture or part of a vacant building or structure (larceny)
- [MCL 750.81](#) Assault; assault and battery
- [MCL 750.81a](#) Assault; infliction of serious injury (aggravated assault)
- [MCL 750.145d](#) Use of the internet to commit a crime involving a minor
- [MCL 436.1701](#) Selling or furnishing alcohol to a person less than 21 years of age

Any misdemeanor involving cruelty, torture, or indecent exposure involving a child.

A violation of a substantially similar law of another state, of a political subdivision of this state or another state, or of the United States.

Caution #1: all convictions of any kind must be reported once a person has been charged with a self-reporting offense.

Caution #2: some of the reportable convictions are relatively minor, such as entering an ice shanty without permission and assault and battery.

Caution #3: coming into physical contact with a student is not necessarily assault, in light of a 2002 amendment to [MCL 750.81](#). The statute excludes persons using necessary physical force in compliance with the corporal punishment law, [MCL 380.1312](#), which gives deference to the good faith judgment of the employee, volunteer or contractor.

Listed ("SORA") Offenses

Conviction of any of these offenses results in automatic termination of school employment. Arrest or conviction of any of these offenses must be reported. Failure to report is a crime and just cause for termination.

- [MCL 750.145a](#) Accosting, enticing or soliciting a child for immoral purposes
- [MCL 750.145b](#) Accosting, enticing or soliciting a child for immoral purposes, second or subsequent offenses
- [MCL 750.145c](#) Child sexually abusive activity or material
- [MCL 750.158](#) Crime against nature or sodomy where victim is under 18 years of age
- [MCL 750.338](#) Gross indecency; between male persons where victim is under 18 years of age (except for juvenile disposition/adjudication)
- [MCL 750.338a](#) Gross indecency; female persons where victim is under 18 years of age (except for juvenile disposition/adjudication)
- [MCL 750.338b](#) Gross indecency; between male and female persons where victim is under 18 years of age (except for juvenile disposition/adjudication)
- [MCL 750.349](#) Kidnapping where victim is less than 18 years of age
- [MCL 750.350](#) Kidnapping of a child under 14 years of age
- [MCL 750.448](#) Soliciting and accosting where the victim is less than 18 years of age
- [MCL 750.455](#) Pandering
- [MCL 750.520b](#) First degree criminal sexual conduct
- [MCL 750.520c](#) Second degree criminal sexual conduct
- [MCL 750.520d](#) Third degree criminal sexual conduct
- [MCL 750.520e](#) Fourth degree criminal sexual conduct

[MCL 750.520g](#) Assault with intent to commit criminal sexual conduct

A third or subsequent violation of any combination of the following, including a local ordinance of a municipality substantially corresponding to the following:

[MCL 750.167\(1\)\(f\)](#) Engaging in obscene or indecent conduct in public

[MCL 750.335a](#) Indecent exposure

Any other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age.

Any offense committed by a person who was, at the time of the offense, a sexually delinquent person as defined in [MCL 750.10a](#).

Reporting Forms

Forms exist for reporting both arraignment and conviction. Remember that arraignment must be reported to the Department of Education within just three days of the event, at the cost of creating just cause for dismissal from employment. And, the SCAO has developed form MC 292 to facilitate a defendant's reporting of status as a school employee to the court (and others), upon conviction.

Employment impacts of criminal convictions

A. SORA violations

Sections 1230 and 1230a of the Revised School Code were amended and section 1230g was added to prohibit a school from employing an individual who has a record of a criminal conviction for a "listed offense" under the Sex Offenders Registration Act (SORA).

Sections 1230c and 1230g of the Revised School Code were added to prohibit a school from continuing to employ any person once the school learns from an authoritative source that the person has been convicted of a SORA offense.

B. Convictions for other felonies.

Sections 1230 and 1230a of the Revised School Code were amended and section 1230g was added to prohibit a school from employing an individual who has a record of a criminal conviction for a felony other than a SORA violation, unless the Superintendent and Board of Education specifically in writing allow the employment.

Sections 1230c and 1230g of the Revised School Code were added to prohibit a school from continuing to employ any person once the school

learns from an authoritative source that the person has been convicted of a felony other than a SORA violation, unless the Superintendent and Board of Education specifically in writing agree to continue the employment of that person.

C. Misdemeanor convictions other than SORA offenses

Section 1230d of the Revised School Code provides for the Department of Education to advise employing school districts of all employees who have been convicted of any crime. The statute does not indicate the action, if any, that should be taken by the school based upon an employee's conviction record for a misdemeanor.

D. Teacher Tenure consequences

Article IV, section 3 of the Teacher Tenure Act was amended to provide that a tenure teacher convicted of a SORA offense shall have his or her salary discontinued pending tenure proceedings.

Article IV, section 3 of the Teacher Tenure Act was amended to provide that a tenure teacher convicted of an offense that is not a SORA violation may have his or her salary discontinued pending tenure proceedings.

Article IV, section 1a of the Teacher Tenure Act was amended to provide that a tenure teacher convicted of a crime listed in section 1535a of the Revised School Code or a violation of section 1230d of the Revised School Code shall be considered to be reasonably and adversely related to the ability of the teacher to work in an elementary or secondary school.

The State Tenure Commission has previously interpreted similar statutory language to create a rebuttable presumption of unfitness to teach.

E. Certification and State Board authorization

Pursuant to Section 1535a(2) of the Revised School Code the Superintendent of Public Instruction must suspend the teaching certificate or state board authorization upon learning of the individual's conviction of crimes listed in section 1535a(2).

The Superintendent of Public Instruction must notify a holder of a teaching certificate or state board authorization of a possible suspension and the right to a hearing for convictions of those crimes listed in section 1535a(1) that are not included in section 1535a(2).

**by Rick Long
Staff Attorney
Michigan Education Association**

Spotlight on: Michael L. Steinberg

Michael, you are on the Board of the Criminal De-fense Attorneys of Michigan (CDAM), a frequent and generous contributor to the SADO pleading database, and an experienced trial attorney. Can you please describe your practice and the types of cases you handle?



I handle a large number of criminal cases, from simple assaults, frauds, theft, narcotics, through the more complex cases such as criminal sexual conduct and murder. I am on the capital assignment list in Oakland and Macomb counties and get those types of cases almost exclusively in Macomb cases. The most common capital cases are armed robbery and criminal sexual conduct involving a family member. The latter can be extremely difficult to defend and I have developed some significant experience with them. I also have a specialty of representing adults accused of neglect in family court, many of them bridging criminal law as well. Last, I do quite a bit of drunk driving defense and matters attendant to these offenses.

What are some of the problems an attorney should watch for, or pitfalls to avoid, in the early stages of a defense? In trial?

Pitfalls are many. If you are lucky enough to get the case before charges are filed, one pitfall is assuming just because you have handled a similar matter that the new one is going to go the same. Another pitfall is coming into contact with the police with an aggressive attitude. This one got me early in my career and made me less effective. I think there is a nice way to represent your client, get information from the police and progress. Once in the case, another pitfall is not doing aggressive discovery. Many lawyers have the attitude, "I am not going to get that, so why should I seek it?" Another pitfall in cases is lawyers taking on cases that they are not competent to take on and thinking that they will learn along the way, failing to identify the right mentor out there to help, and taking on more cases than they have the ability to properly manage. I also find it difficult when a lawyer marries themselves to a theory of the case early in and not adapting when it changes. This happens a lot at preliminary examinations and in trial. A defense attorney must be flexible. Quite frankly, I do not actually commit to a theory until closing argument and even then, I still highlight other alternatives. In trial, I have seen very ineffective voir dire and lawyers asking closed questions that almost look like cross-examination. Last, in trial, a pitfall may include feeling that you must answer the prosecutor's case, rather than

tell an alternative story. Not all cases are point-for-point aligned with the prosecution. In other words, I think that we just buy the prosecution's case too much.

Do you find that certain types of cases have their own unique difficulties or problems?

I think in rape and domestic violence cases the fact that the Supreme Court continues to hold that other acts evidence, even if closely aligned factually to the immediate case, comes in, causes us to defend a multiple-front case. Juries are allowed to make a factual connection between these uncharged cases and the immediate case at bar and it places a significant burden on the defendant. In addition, I find that the delayed disclosure cases alleging rape are difficult because there is no physical evidence and the experts presented by the government many times will argue that there may not be any manifest behavior problems of the person claiming rape. In arson cases it is important to show how the determination of intentional setting does not comport to the evidence presented. The theme for me in these cases and cases where an automobile or gun may have been the instrument of death is to find the right expert that connects with me and, more importantly, with the jury.

Could you describe a case where you found unique challenges? What were the main issues in the cases, and how were the challenges resolved? Were experts involved?

I litigated a murder case in which the entire incident was captured on a gas station surveillance camera system. At the preliminary examination, the only video produced was the police holding a camcorder up to the screen of the monitor and recording the image on the screen. The case involved the decedent and his friends running a car out into the middle of the street and pulling my client's brother out of a car and beating him up. The fight spilled into gas station and my client was going around the pumps trying, in essence, to get the 3 men off of his brother. On the last turn around the pumps (low speed) another unrelated vehicle came in, causing my client to veer into the fleeing decedent.

The case was originally charged as open murder. I filed a memorandum at the district court telling the judge he did not have to bind over on open murder. He agreed and bound over on 2nd degree.

One of the difficulties in the case was in understanding the accident reconstruction. I had to go to exam without an expert. I had to learn scads of material on my own, without an expert. Once I got an expert, however, we were able to shoot some holes in the case including the claimed rate of speed of the vehicle. Another difficulty in the case was getting the

other camera angles. It took a lot but, I got a video expert appointed, Ken Glaza from KNR.* Once on the case, he was able to enhance all the angles, showing the aggression of the decedent and his pals and also actually showing the other vehicle coming onto the scene and causing my client to veer and strike the decedent. The video was graphic, showing the decedent getting catapulted onto the hood of the car.

My client was acquitted of 2nd degree murder and found guilty of involuntary manslaughter. He has never accepted his guilt and his life has been ruined. His only trouble with the police before was a driving on a suspended license. He has escalated to level V in the prison and is in a maximum security prison.

What did you learn from the case?

Well, in the case, the matter became personal between me and the prosecutor. He took direct shots at me and I allowed it to get to me. In addition, I think that I needed to draft better jury instructions. The standard jury instruction on accident as a defense was woefully inadequate. Last, I learned I needed to have more faith in my client taking the stand and telling his story. I felt that the video told his story very well. My defense was defense of others and accident. Maybe the fear of what the defendant was perceiving was necessary for them. The jury felt that he could have driven in a safer manner and that he should have called the police. So, I did present my client as well. He needed to tell them he was basically a hard-working and law-abiding citizen.

Any suggestions that you would make to other defense attorneys?

GO TO THE TRIAL COLLEGE. I went with almost 14 years of trial experience and this

revolutionized how I present trials now. Particularly on how to conduct voir dire. In addition, lose your ego. You are not "GOD's gift" to the courtroom or the case. Do not stop educating yourself and do not isolate yourself and fail to interact with other attorneys because you know everything. Find downtime for yourself and a good support network to unburden yourself. It is ok to talk shop. You'd be amazed at how many people are really interested in your cases after the initial "how can you defend the guilty person" question.

Any advice to newcomers?

GO TO TRIAL COLLEGE!!!! and every seminar that your local bar and CDAM offers. Join CDAM and the NACDL.** Find a good mentor, read good materials and ask questions. There are no dumb questions. Also, if you were a former prosecutor, that position does not automatically make you a good defense attorney. Also, do not buy the police report or the fact that the prosecution is going to threaten you with no deals if . . . as the gospel. Lastly, RELAX. A certain lack of fear is healthy. You can do this stuff if asked. In the converse, however, do not assume that simply because you worked for SADO as a research assistant and clerked for every criminal defense attorney in the greater Lansing area that you are a born defense attorney. Hear that, Mikey? LOL

***by Neil Leithauser
Associate Editor***

* K & R All Media Studios, www.knr.net

** National Association of Criminal Defense Lawyers, www.nacdl.org

DUI Defense Column

An OWI Conviction May Bar International Travel

To be lawful, a plea of guilty must be an "understanding" plea. In sum, this means that the accused has an understanding of the rights waived, the elements of the crime charged and the consequences of being convicted. The parameters of these consequences are usually set forth in the applicable statutes and so the accused will be specifically advised of them by the court during the taking of the plea. With drunk driving cases however, some of the most significant consequences are those that are not imposed by the court or even the Secretary of State, but are those that may arise "collaterally" to the conviction. A collateral consequence that is of particular importance in

Michigan is that a conviction may preclude travel to Canada.

Under Canada's Immigration and Refugee Protection Act, a person convicted of a crime may be prohibited from entering Canada to visit, work, or immigrate. This prohibition, or "inadmissibility," is discretionary, with the power to prohibit entry placed into the hands of Citizenship and Immigration Canada. Canada's criminal code divides crimes into two categories: first, indictable crimes, and second, summary conviction crimes. Indictable crimes are considered more serious. In making the determination

of into which category a particular offense falls, the test is whether or not the foreign crime, if committed in Canada, would have been an indictable offense under Canadian law. Under this test an OWI in Michigan is considered to be an indictable crime in Canada.

Of course, being a forward-thinking nation, persons convicted of an indictable offense may still gain entry into Canada so long as they are able to show that they have been "rehabilitated." In fact, Canada is so forward-thinking that there is not just one but two ways to show this rehabilitation. These include: (1) being found to be *de facto* or "deemed" rehabilitated, and; (2) being "approved" as rehabilitated. One may also apply for a temporary resident permit.

The first and perhaps least restrictive method of showing rehabilitation to the Citizenship and Immigration Canada is to be "deemed rehabilitated," and under the Act this simply requires one to remain crime-free for 10 years. Under Canadian law, anyone who can do that has achieved de facto rehabilitation, and will simply be "deemed" rehabilitated by Canadian officials.

Since many people can't wait 10 years before their next business or pleasure trip to Canada, one convicted may alternatively apply for an "Approval of Rehabilitation." In the context of OWI this application can be made only after 5 years have elapsed since the completion of the sentence imposed by the court.

After 5 years, an individual may complete and mail in an Application for Approval of Rehabilitation, which requires personal information, information about the conviction, reasons why the person should be considered rehabilitated and supporting documentation. Additionally, there will be a \$200.00 or \$1000.00 filing fee based on the severity of the underlying conviction. The review process takes six months to a year. At the end of the review, if the application is granted, then the individual may travel into Canada without issue. So, if your client can't wait 10 years, he or she may be able to gain entry by proving rehabilitation after 5 years.

For those individuals traveling regularly to Canada for business or pleasure, there is one final way to attempt to gain entry without either the 5 or 10-year waiting period, and that is through a Temporary Resident Permit. An individual may apply for this permit immediately after the conviction. However, to gain entry on this basis, an inadmissible person must demonstrate that there are compelling grounds, humanitarian and compassionate reasons or national

interest grounds for such entry, and must also show that their need to travel outweighs the safety risks to Canadian society. The form and required supporting documentation is exactly the same as the Application for Approval of Rehabilitation, as is the filing fee. However, the scrutiny of the requests for Temporary Resident Permits is much higher if applied for prior to the 5-year waiting period. The normal review period for both the Application for Approval of Rehabilitation and for a Temporary Resident Permit is six months but can take up to one year.

Knowing all this, the first thought may be to attempt to plead down the OWI to some "lesser" charge. However, this strategy has its own pitfalls because conviction for OWI may not be a firm prerequisite to inadmissibility. In some instances, Canadian Border Officers may deem an individual inadmissible even if the charges against them were withdrawn or dismissed. In those cases, the individual must provide the officer with complete details of charges, convictions, court dispositions, pardons, photocopies of all applicable sections of foreign law(s), and court proceedings to allow the officer to determine whether or not he or she is inadmissible to Canada.

In counseling persons accused of OWI it is important to learn if they travel to Canada. If the answer is "yes" then it is important for defense counsel to discuss with them how this travel may be impacted by their current predicament. In fact, other states have found that a failure to do so constitutes ineffective assistance.

by Patrick T. Barone

Patrick T. Barone is the principal and founding member of the Barone Defense Firm, headquartered in Birmingham, Michigan. The Firm exclusively represents those accused of crimes involving allegations of impaired driving. Mr. Barone is the co-author of two books on DUI-related issues, including *Defending Drinking Drivers* (James Publishing), a well-known and highly respected multi-volume national legal treatise. Additionally, he is the executive editor of *The DWI Journal, Law & Science* (Whitaker Newsletters, Inc.), a nationally circulated legal periodical dedicated to improving the knowledge and success rate of defense attorneys in drunk driving cases. He is also a frequent lecturer on trial practice and drunk driving defense tactics. He can be contacted on the web at: www.mi-dui-central.com.



Fingerprint Identification Found Scientifically Unreliable

A Maryland circuit court recently conducted a [Frye](#) hearing on the admissibility of fingerprint evidence and concluded that the State failed to prove that opinion testimony by experts regarding the ACE-V (Analysis, Comparison, Evaluation, Verification) method of latent print identification rested on a reliable factual foundation. In the case before the court, the defendant was charged with murder based almost solely on the identification of fingerprints lifted from the victim's stolen car.

The court began its analysis by summarizing the Madrid commuter train-bombing case, where latent fingerprints were misidentified by two top FBI print examiners who considered their identifications "100 percent positive." After it was proven that the examiners were wrong, the FBI convened an international panel of experts to determine how the erroneous identification occurred. They made the following conclusions:

- The first examiner failed to conduct a complete analysis before conducting an AFIS computer search.
- The first examiner disregarded important differences in appearance between the latent print and the known prints in the state AFIS data bank.
- Examiners are overconfident in the power of AFIS.
- Examiners were pressured by the high-profile of the case.
- Verification was tainted by knowledge of the first examiner's conclusion.

Maryland adheres to the standard set forth in [Frye v United States, 293 F 1013 \(CADDC, 1923\)](#), for determining the admissibility of scientific evidence: a

party must establish that a technical or scientific method is reliable and accepted generally in the scientific community. General acceptance must be established by a preponderance of the evidence.

The court found incredible the testimony of the State's expert witness that fingerprint identification is 100 percent certain. Neither the fact that latent fingerprint identifications have been admitted for nearly 100 years nor the fact that fingerprint experts take and pass proficiency tests prove the reliability of the ACE-V methodology. Its universal acceptance was based not on scientific research but on "anecdote, experience, and nineteenth century statistics." The methodology has not been subjected to scientific testing and the error rate in latent print identifications is not known; there are no standards (no minimum number of points required for a match); the criteria for absolute identification are ill-defined and subjective; and verification is not independent (the reviewer is usually a colleague).

The court concluded that the reliability of the ACE-V methodology is unproven and that the state did not show by a preponderance of evidence that a fingerprint examiner can reliably identify a fingerprint to an individual to the exclusion of all others using the ACE-V method. The court left open the possibility that if impartial scientific testing and objective criteria are established, latent print identification opinion testimony will qualify for admission under [Frye, State v Bryan Rose](#), Circuit Court for the Baltimore County (#K06-0545).

**by Chari Grove
Associate Editor**

Wisconsin Court of Appeals Orders New Trial in "Shaken Baby" Case

A January 31, 2008 decision of the Wisconsin Court of Appeals in [State of Wisconsin v Audrey A. Edmunds, Case No. 2007AP933](#), reversed a circuit court denial of a new trial to Ms. Edmunds, who had argued in a post-conviction motion that new medical testimony relating to shaken baby syndrome constituted newly discovered evidence warranting a new trial.

Ms. Edmunds was convicted of first-degree reckless homicide in the 1995 death of a seven month-old baby she was babysitting. At her trial the defense expert agreed with prosecution experts about the medical cause of death, but argued the injuries were inflicted before the baby was left in Ms. Edmunds' care. A 1997 post-conviction motion, alleging various

grounds for relief, was denied, as was further appeal. In 2006 Ms. Edmunds filed a motion contending that the significant medical developments in the area of shaken baby syndrome constituted newly discovered evidence which warranted a new trial. Six doctors called by Ms. Edmunds at the hearing testified that there was a significant debate about whether the symptoms suffered by the baby in Ms. Edmunds' case were necessarily alone indicative of shaking or shaking combined with head trauma in infants, and whether there could be a lucid interval between the time of injury and the onset of symptoms. Four prosecution experts disagreed, and maintained that the evidence at trial supported that the baby was injured while in Ms. Edmunds' care. The circuit court agreed the evidence

was newly discovered, but ruled that Ms. Edmunds' had not shown there would be a reasonable probability of a different result.

In a 15-page opinion Judge Charles P. Dykman, writing for the court, held the evidence of a significant and legitimate debate in the medical community was newly discovered, because it had developed within the ten years since Ms. Edmunds' conviction. The evidence was material, as it went to the main issue of causation of the injuries, and it provided an alternate theory for the source of those injuries. The new medical evidence represented a shift in mainstream medical opinion and, while experts yet disagreed about that evidence, the "fierce debate" provided a reasonable probability that a jury, looking at the new and the old medical testimony, would find a reasonable doubt as to guilt. The pleadings and court decision are available.

Source:

<http://www.cnn.com/2008/CRIME/01/31/shaken.baby.ap/index.html>

Additional resources:

Definition of "Shaken Baby Syndrome," as used in the Michigan Judicial Institute Child Protective Proceedings Benchbook:

"The term 'shaken baby syndrome' (SBS) was developed to explain those instances in which severe intracranial trauma occurred in the absence

of signs of external head trauma. SBS is the severe intentional application of violent force (shaking) in one or more episodes, resulting in intracranial injuries to the child. Physical abuse of children by shaking usually is not an isolated event. Many shaken infants show evidence of previous trauma. Frequently, the shaking has been preceded by other types of abuse."

Alexander & Kleinman, Diagnostic Imaging of Child Abuse: Portable Guides to Investigating Child Abuse (Washington, DC: U.S. Department of Justice, 1997), p 6. http://courts.michigan.gov/mji/resources/cppbook/Chap_13_Dispositions.pdf

Junk Science in SBS (Shaken Baby Syndrome) and Child Head/Brain Injuries, F. Martin Tieber, Criminal Defense Newsletter, May, 2004, vol. 27, no. 8 <http://www.sado.org/cdn/pdf/27cdn8.pdf>

People v Bulmer, 256 Mich App 33 (2003) (Court of Appeals affirmed second-degree murder conviction. At trial the prosecution used a computer-animated simulation of the shaken baby syndrome for demonstrative purposes. The court held the slideshow was not a re-enactment, but illustrated the expert's testimony.

**by Neil Leithauser
Associate Editor**

Public Defense Updates

As activity continues to mount on reform of Michigan's public defense system, we will continue to provide updates to our readers. These updates will include those addressing attorney fees.

Campaign for Justice Update February, 2008

Nevada Supreme Court orders fix to state's public defense system

Those concerned about Michigan's broken public defense system can look to the West for an example of bold and decisive leadership.

In early January, the Nevada Supreme Court ordered fixes to the state's public defense system. The Reno Gazette-Journal called these reforms important, courageous, and fundamentally right. The court order was based on recommendations by a commission established following news reports on widespread problems. See: <http://www.nvsupremecourt.us/info/news/index.php?cont entID=204>.

The average public defender oversees 327 felony and gross misdemeanor cases in Washoe county and 364 in Clark County, Nevada. The National Legal Aid and Defender Association recommends an average of 150 felony cases.

The court's January 4, 2008, order included a case-load study and implemented a strict set of procedures for determining who is entitled to a public defender. It also barred judges from appointing defense attorneys and mandated data collection and reporting on services provided to indigent defendants. Public defenders are required to inform county commissioners when they can no longer ethically accept appointments beyond their reasonable caseload limit. In September, the court will consider increasing funding for some state public defenders.

Michigan's own Constitutional Crisis

Michigan's public defense system is consistently rated one of the worst in the nation. Current reform initiatives include an evaluation by the National Legal Aid and Defender Association (NLADA) in cooperation with the State Bar of Michigan, a court challenge by the Michigan Coalition for Justice, and a push for legislative solutions mounted by the Campaign for Justice.

Experts believe the NLADA report, to be released this spring, will expose a shocking and widespread Constitutional crisis in Michigan's system of trial-level public defense services.

Actually ensuring the right to assistance of

counsel in criminal proceedings is a complex matter, as noted by the [Reno Gazette-Journal](#).

That is why Campaign for Justice staff and volunteers are reaching out to individuals and organizations responsible for the design, delivery and funding of Michigan's trial-level public defense system. Together, we will explore the problems of our state's broken system, discuss potential legislative solutions, and build a broadly based reform coalition. Michelle Weemhoff, Public Defense Task Force Coordinator, is coordinating local outreach efforts. She can be reached at mweemhoff@michigancampaignforjustice.org.

On January 22, the Public Defense Task Force (PDTF) hosted a roundtable discussion on the state of public defense for juveniles. Professor Frank Vandervort, director of the University of Michigan Child Advocacy Law Clinic; Referee Jennifer Pilette, 3rd Circuit Family Division; and Regina Daniels Thomas, Chief Counsel for Juvenile Law Group, Legal Aid and Defender Association in Detroit, painted a grim picture of overwhelming caseloads, inadequate funding and training for attorneys representing children, especially in delinquency cases. All three speakers agreed that the juvenile system in Michigan falls far short of meeting national and state standards.

Broad outreach underway

Campaign staff and volunteers are also reaching out to groups outside the criminal justice system, to discuss the various aspects of this issue, including the cost inefficiencies in the system, public safety and fundamental fairness. A series of public education events will be announced in upcoming issues of the newsletter.

Your help is essential!

We would like to hear from you. Here are some ways you can get involved:

- Identify real-life stories of the failures in the

public defense system [Forward anecdotes to Dawn Van Hoek at dvanhoek@sado.org];

- Join the Campaign's roster of speakers;
- Contribute to the media effort by signing letters to the editor or opinion editorial in your local newspaper [Contact Stephanie Chang at schang@michigancampaignforjustice.org];
- Assist with identifying key individuals and organization supporters.

February's Quote:

"One of the most cherished tenets of our nation is that anyone accused of a crime, rich or poor, is entitled to his or her day in court. And, in our society, that includes the services of a competent attorney with the time and resources to defend the accused properly.

That right is so fundamental to our republic that it was included in the Bill of Rights, which in the Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

Unfortunately, that simple yet very complex (For instance, how do you define a competent attorney? How much time is sufficient? How much should the assistance of counsel cost?) philosophy has been honored more in theory than in reality for indigent defendants in much of the U.S., including Nevada." – Reno Gazette-Journal

by Laura Sager

**Director, Campaign for Justice
lsager@michigancampaignforjustice.org**

Before joining the Campaign for Justice, Ms. Sager served as executive and national campaign director for Families Against Mandatory Minimums (FAMM). In Michigan, her efforts were instrumental in the repeal of mandatory minimum drug laws, leading to early parole for hundreds of prisoners.

Nevada Supreme Court Reforms Indigent Defense

The Nevada Supreme Court issued an order January 4, 2008 which impacts attorney performance standards, caseload standards, the process for appointment of counsel, and approval of fees and legal costs. The Court's order followed recommendations made by an Indigent Defense Commission, established by the Court in 2007. The order found "by any reasonable standard" there is currently a crisis in the size of public defender caseloads in Clark County (which contains Las Vegas) and Washoe County (which contains Reno). In Clark County the average caseload for a public defender was 364 felony and gross misdemeanor cases, and in Washoe County the average was 327 cases. The standard for a caseload recommended by the National Legal Aid and Defender

Association is 150 cases; the standard recommended by the Commission was no more than 192 cases per attorney.

The order also included and adopted performance standards for attorneys (twenty standards applicable to capital case representation, twenty standards for felony and misdemeanor trial cases, nine for appellate representation, and seventeen for juvenile delinquency proceedings), but did not set caseload standards, which would necessitate additional attorneys for those two counties, pending further study; results of the studies are to be filed at the court by mid-July, 2008. The Court is also considering acting on a recommendation that indigents in all counties, other than Clark, Washoe, and Elko, be represented by the State Public Defender's

Office, with funding from the state general fund. Counties currently fund 80% of the cost of the services.

The Court also ordered that each judicial district provide an administrative plan to the court by May 1, 2008 that provides for an independent body, and excludes the trial judge or magistrate from the process, of appointing counsel, approving expert witness, investigative, and attorney fees, and the determination of a defendant's indigency.

The order also provides that defendants be more vigorously screened on their need for assigned counsel, and requires that statistics be kept on the nature and quality of services to indigent defendants, and including demographic information on age, gender, race, and ethnicity of the indigents. A standard of indigency was adopted and defined an indigent as one "who is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal

counsel on his or her own." "Substantial hardship" presumptively includes all those who receive public assistance, reside in public housing, earn less than 200% of the Federal Poverty Guideline, or are currently serving a sentence in a correctional facility or are housed in a mental health facility.

Note of interest: the Nevada Supreme Court website also reports that a court of appeals may be established in Nevada, one of only eleven states that do not have an intermediate appellate court. The seven-member Supreme Court currently handles over 2,000 matters annually, which the website article said was one of the heaviest caseloads in the nation.

Source:

<http://www.nvsupremecourt.us/documents/orders/ADKT411Order.pdf> & <http://www.nvsupremecourt.us/index.php>

Practice Note: Using MySpace & Facebook Sites in Trial Preparation

Michigan Lawyers Weekly recently published an article by Edward P. Schwartz, a consultant based in Massachusetts, addressing the importance of the MySpace and Facebook websites in trial preparation and jury selection. Mr. Schwartz suggested using such sites as part of standard trial preparation.

The article cited several examples where information gleaned from sites played a significant role in trials. For example, a prosecutor used a woman's photographs of her partying and drinking to secure a prison sentence for the woman's vehicular homicide conviction. A defense attorney in an assault trial showed videos taken from the alleged victim's website which showed him beating up other people.

While searching under a person's name is important, Mr. Schwartz cautioned that people often develop web personas and may be online under pseudonyms or anonymous IDs.

He also pointed out that people may develop their web personas for confessional, aspirational, closeted, role playing, or attention grabbing, reasons, and the information obtained should be interpreted in context for the individual.

Mr. Schwartz's website: www.epsconsulting.com

**by Neil Leithauser
Associate Editor**

New and Interesting in the Online Brief Bank

Attorneys with online access to the SADO Brief Bank may be interested in the following issues recently filed by SADO attorneys. This is just a sampling of the hundreds of pleadings now available to registered criminal defense attorneys through SADO's Web site, www.sado.org. Attorneys also may use the brief bank at SADO's Detroit office, 3300 Penobscot Building, 645 Griswold, Detroit, during normal business hours.

Sentence Credit for Delay in Prosecution

The defendant has a right to sentence credit as a remedy for the prejudicial lack of due diligence in prosecuting this offense. [BB 10650](#).

"Specified Felony" for Felon in Possess Charge

There was insufficient evidence to charge and convict the appellant of felon in possession of a firearm, where more than three years had elapsed after completion of probation for malicious destruction of personal property over \$100, which is not a "specified felony" under the statute. [BB 10639](#).

Imperfect Self-Defense

The trial court violated appellant's due process rights by failing to instruct the jury on imperfect self-defense reducing murder to voluntary manslaughter, where evidence supported the instruction. [BB 10639](#).

Joint Trial with Co-Defendants

Defendant was denied a fair trial by being tried jointly with two codefendants, and trial counsel was ineffective for failing to move for severance. [BB 10644](#).

Conflict with Attorney

The defendant is entitled to a new trial because there was a breakdown in the relationship between him and his defense counsel, and because the trial court did not conduct an adequate inquiry into the breakdown. [BB 10646](#).

Cautionary Instruction on Accomplice Testimony

The trial court committed plain error in failing to instruct the jury that it should view with caution the testimony of witnesses who would be accomplices to the defendant's alleged crime, denying him his constitutional right to present a defense. [BB 10654](#).

Accessory Intent

The court denied defendant due process when it instructed the deliberating jury that it could infer an aider and abettor's intent to kill based on the number of shots fired and the placement of the wounds. [BB 10643](#).

Testimony about Intimidation

The court abused its discretion and denied defendant a fair trial when it permitted extensive testimony that a key prosecution witness was reluctant to testify due to gang intimidation minus evidence that defendant was a part of that intimidation. [BB 10643](#).

Shackled Defendant

The trial court violated defendant's due process rights by requiring him to appear in shackles at trial. [BB 10640](#).

Connection to Prison Group

The prosecutor violated appellant's due process rights by repeatedly eliciting unfairly prejudicial testimony about appellant's membership in an Islamic prison group, where the prosecutor never changed that the murder was group-related; furthermore, defense trial counsel was constitutionally ineffective in failing to object. [BB 10640](#).

Sentence Credit for Time on Parole

The trial court erred as a matter of law when it denied jail credit to defendant, who was on parole at the time of the instant offense. And, defendant is entitled to credit on the minimum term for time served prior to sentencing despite committing this offense while on parole because there is no other way that time on the minimum term in this case will ever be credited, thus violating statutory law regarding consecutive sentencing and jail credit. [BB 10642](#).

Legislative Update

We offer on a continuing basis summaries of recently passed state and important proposed legislation, as a supplement to our annual survey. Summaries are prepared by Chari Grove.

Increased Penalties for Harming Animals

2007 PA 151 and 152 [HB 4550 and HB 4551, eff. 4-1-08] amend MCL 777.16b and MCL 750.50. PA 152 revises the penalties for allowing an animal to suffer neglect, torture, or pain. The Act deletes the word "wilfully" and applies the statute only to those actions that are negligent. The first offense involving one animal is a 93-day misdemeanor; if two or three animals are involved, or the death of an animal results, the penalty is up to one year in prison; where four to nine animals are involved or the offender has one prior conviction, the offense is a two-year felony; if 10 or more animals are involved, or the offender has two or more prior convictions, the offense is a four-year felony. PA 151 revises the corresponding provisions in the sentencing guidelines.

CSC Provisions Involving Teachers Expanded to Include Volunteers

2007 PA 163 [SB 386, eff. 7-1-08] amends MCL 750.520. PA 163 expands the 2002 amendments to the criminal sexual conduct statutes involving offenders who are teachers or administrators of public or nonpublic schools to apply to "school volunteers, other school employees, and contractual service providers," as well as "a state, municipal, or federal employee" (a school liaison officer employed by a law enforcement agency) assigned to the school.

Trespassing Statute Amended

2007 PA 167 [SB 540, eff. 3-20-08] amends MCL 750.552. The trespassing statute is amended to eliminate the requirement that the offender enter another's property "willfully," and the requirement that the owner request the trespasser to leave. PA 167 also prohibits a person from entering posted farm property without the owner's consent. The maximum fine is also increased from \$50.00 to \$250.00.

Reports and Studies

2007 State Sentencing Developments

In January, 2008 the non-profit organization, The Sentencing Project, published a report by policy analyst Ryan S. King entitled The State of Sentencing 2007, Developments in Policy and Practice. The organization is described as one "engaged in research and advocacy in criminal justice policy issues," and which "works for a fair and effective justice system by promoting reform in sentencing law and practice and alternatives to incarceration."

The report noted that in 2007 there were key criminal justice policy reforms and legislation passed in 18 states [Michigan was not one of those mentioned]. Additionally, key criminal justice legislation was introduced in 6 states, 4 of which were also among the 18 passing legislation or reforms [again, Michigan was not one of those mentioned]. The legislation and reforms passed addressed such matters as parole, drug diversion, and reentry programs. The action by the states included establishing commissions and studies, enacting "Romeo and Juliet" laws (which remove sex registration and reporting requirements for teens), restoration of parole for drug offenses, and removing mandatory minimum sentences for certain drug offenses.

However, there have also been increases in some mandatory minimum sentences and in sex offender reporting requirements. Mandatory minimum sentences, as found in "Jessica's Law" [for certain sex offenses involving children], have been passed in 39 states, in various versions. Additionally, states are under pressure to comply with federal national sex offender registry requirements, pursuant to the Adam Walsh Child Protection Act of 2006.

Mr. King noted that while hardly a legislative session ends without "some penalty enhancements being added to [a] criminal code," states also are becoming increasingly cognizant of resource allocation issues and are feeling the impact of past policies upon current vital services. The strain on financial resources

will therefore continue and likely increase. State correctional populations, both in-custody and on supervision, are expected to continue to rise.

The reforms suggested by Mr. King [his headings are in bold] are as follows:

Repeal Mandatory Minimum Sentencing Provisions. This would allow greater discretion in the sentencing courts.

Implement Policies to Reduce Parole Revocations. Mr. King noted there are nearly 800,000 persons on parole in the United States, with about one-third returned to prison or jail each year, many for technical violations. Mr. King suggested that alternatives to revocation for technical violations of parole could allow people to remain in their community and support areas. Additionally, the length of parole should be reduced for low-risk offenders, and resources should be redeploying to supervision of higher risk individuals.

Reentry Investment and Oversight. Mr. King said the proportion of persons participating in prison drug treatment, vocational training, and educational preparation, has *declined*, while the number of persons returning to the community has increased. He observed that more people are being incarcerated, but fewer receive needed services to address problems underlying the criminal activity.

Expand Options to Reduce Time Served in Prison. Basically, bring back "good time." Such earlier-release mechanisms help ease overcrowding and provide incentive to inmates to commit to personal change.

The report may be accessed at: http://sentencingproject.org/Admin/Documents/publications/sl_statesentencingreport2007.pdf

From Other States

Minnesota: Limit on Nighttime Warrants Protects Privacy

The Minnesota Supreme Court found that a requirement that police have some justification for executing a search warrant at night is one of the common law privacy protections incorporated into the Fourth Amendment. A survey of the common law

when the Constitution was drafted revealed evidence of a "historical aversion to nighttime searches" which is based on the greater anxiety that they cause and on the more private nature of activities that occur inside a home at night. The Court also rejected the prosecutor's contention that the United States Supreme Court decided in Hudson v Michigan, 79 CrL 331 (2006), against applying the exclusionary rule where a valid

warrant is executed in an unreasonable manner. [State v Jackson, ___ NW2d ___ \(Minn #A05-247, 12-6-07\)](#) and [State v Jordan, ___ NW2d ___ \(Minn #A06-1445, 12-6-07\)](#); full text at <http://pub.bna.com/cl/a05247.pdf> and <http://pub.bna.com/cl/061445a.pdf>.

Fourth Circuit: Drug Conspiracy Murder Charge Barred by Prior Plea

A plea agreement in a drug-conspiracy case that alternatively used the nouns "conduct" and "crimes" in describing the government's promise not to further prosecute the defendant prevented a subsequent prosecution for murder in furtherance of the drug conspiracy, held the Fourth Circuit Court of Appeals. The Court found that the government likely did not intend to limit its ability to prosecute the defendant for murder, but it was bound to interpret the language the government used in the plea agreement, "not the language it now wishes it had chosen." [United States v Jordan, ___ F3d ___ \(CA 4, #06-4258, 12-4-07\)](#); full text at <http://pub.bna.com/cl/064258.pdf>.

Second Circuit: Mistake About Availability of Appeal Necessitates Remand Despite Waiver

The Second Circuit Court of Appeals held that a defendant who waived his right to appeal was still entitled to a resentencing in light of comments made by the district judge that indicated he had forgotten about the defendant's appeal waiver. The Court found that the district judge's mistake may have caused him to impose a harsher sentence than he would have had he remembered that defendant waived his right to appeal as part of the plea agreement. The Second Circuit also justified its decision to remand the defendant's case on the ground that the prosecutor failed to remind the district judge about the defendant's appeal waiver when the judge indicated his mistaken understanding that the defendant could appeal. [United States v Liriano-Blanco, ___ F3d ___ \(CA 2, 306-2919-cr, 12-11-07\)](#); full text at <http://pub.bna.com/cl/062919.pdf>.

Ninth Circuit: Some Parts of Anti-Terrorism Law Vague

The Ninth Circuit Court of Appeals decided that parts of the Antiterrorism and Effective Death Penalty Act that make it a crime to provide "training," "service," or specialized knowledge to a foreign terrorist organization are unconstitutionally vague.

The Court stated that these prohibitions are vague because they are unclear and could be interpreted to criminalize protected speech and expression. The Court found that the definitions of "scientific" and "technical" were clearly understandable to people of ordinary intelligence; however, the "other specialized knowledge" component and the new prohibition on giving "service" are impermissibly vague and broad enough to reach constitutionally protected expression. [Humanitarian Law Project v Mukasey, ___ F3d ___ \(CA 9, #05-566753, 12-10-07\)](#); full text at <http://pub.bna.com/cl/0556753.pdf>.

Oregon: Defendant's Disparaging Remarks About Counsel Prejudicial

A recording of a defendant making extremely disparaging comments about his appointed attorney and threatening to "sign [his] kids over to the state" if his mother did not retain him a different lawyer was more prejudicial than probative, held the Oregon Supreme Court. The Court found that the comments were relevant to the defendant's credibility, but that the statements that directly attacked trial counsel inevitably affected the jury's perception of the competence and zealotry of his trial counsel and, ultimately, of the strength of the defendant's case. No juror would view defense counsel as more credible and persuasive than the prosecuting attorney. [State v Knight, ___ Or ___; ___ P3d ___ \(#S54423, 12-6-07\)](#).

Montana: Part of Sex Offender Statute Ruled Unconstitutional As Applied

The Montana Supreme Court held that the state statute that makes it a crime for a sex offender to fail to notify authorities of a change of address is unconstitutionally vague as applied to an offender who had both an official mailing address that stayed the same and an unofficial residential address that changed. Because the statute does not define the term "address" and the term has more than one generally accepted meaning, the defendant had no notice that a mailing address was insufficient and that a residential address was required, the Court concluded, finding that the state's prosecution of the defendant for failure to register was arbitrary and discriminatory. [State v Knudson, ___ Mont ___; ___ P3d ___ \(#DA 06-0485, 12-11-07\)](#).

Training Events

The **State Bar of Michigan's Criminal Law Section (SBMCLS)** will host its 31st Mid-Winter Ski Conference, titled "Handling Confidential Informants," on **February 17-19, 2008**, at Shanty Creek Resort in Bellaire, MI. The conference begins with a review of

"high-impact" court decisions, and includes sessions on confidential informants and use of PowerPoint presentations in the courtroom. Special rates and ski packages are available for this traditionally well-

attended and interesting conference. Contact Shanty Creek directly for more information, (800) 678-4111.

The **National Association of Criminal Defense Lawyers (NACDL)** will host "New Solutions for Old Problems," a midwinter meeting and seminar, on **February 20-23, 2008**, in Tucson, Arizona. The program will include sessions on effective communication, working with challenging clients, defense of multi-defendant cases, impeachment, cross-examination, neuroscience, themes and theories of the case, persuasive use of demonstrative evidence, and closing arguments. Several workshops will explore these and other issues in an interactive format. Registration fees range from \$270 to \$520, depending on membership status, and discounted room rates are available the conference hotel, the Hilton El Conquistador Golf & Tennis Resort. For more information, see www.nacdl.org/meetings, or call (202) 872-8690.

The **Criminal Defense Attorneys of Michigan (CDAM)** will host an Advanced Criminal Defense Practice Conference and Awards Dinner on **March 13-15, 2008**, at the Crowne Plaza in Novi, Michigan. Thursday workshops will focus on new attorney training, trial practice, federal practice, computerized trial presentations, and delinquency proceedings. Friday's presenters address cross-examination, indigent defense reform, closing argument, and immigration consequences, closing with an open forum on case issues. Saturday morning will address recent developments in criminal law, computer forensics, and Michigan sentencing guidelines. CDAM's Awards Dinner will take place on Friday, March 14, 2008, beginning at 5:00 p.m., and will honor the

accomplishments of Shelli Weisberg, lobbyist for the Michigan ACLU. Conference registration is just \$50 for CDAM members, due to generous funding support from the Michigan Commission on Law Enforcement Standards, and the Awards Dinner fee is \$65. For more information or to register, see www.cdam.net.

The **National Association of Criminal Defense Lawyers (NACDL)** will host "A New Legal Architecture: Litigating Eyewitness Identification Cases in the 21st Century," on **March 14-15, 2008**, in New York City. The provocative program will address law reforms underway to improve the accuracy of eyewitness identification, as well as how to handle the issue in individual cases. Presenters will discuss investigation and discovery, suppression, working with experts, voir dire, opening statements and cross-examination, jury instructions, and appellate issues. Registration fees range from \$125 to \$375, with some scholarships and hotel discounts available. Contact Viviana Sejas for more information: viviana@nacdl.org, or (202) 872-8600.

The **National Criminal Defense College (NCDC)** will host "Theories and Themes: The Defense on Offense," on **March 28-30, 2008**, in Atlanta, Georgia. Intensive small group exercises will be supplemented by lectures and demonstrations by a nationally recognized faculty. The focus is on development of a defense theory of the case, and effective communication of that theory. Participants will receive a video record of their work. Tuition for the event is \$550, and rooms are available at a discount. For more information, contact NCDC at (478) 746-4151 or bellamy@ncdc.net.

Michigan Supreme Court: Selected Order Summary

INSTRUCTIONS – Included Offense – Over Defendant's Objection

People v Ronald Wheeler
#134552

December 7, 2007
JOHN F. ROYAL

In lieu of granting leave to appeal, reversed judgment of Court of Appeals, vacated felonious assault convictions, affirmed felony firearm conviction.

Where the information charging felonious assault was amended and defendant was tried for assault with intent to commit murder, it was error for the trial court to grant the prosecution's request to instruct on

felonious assault because it is a cognate, not a necessarily included lesser offense of assault with intent to murder.

Justice Cavanagh would vacate the felony firearm conviction as well as the felonious assault convictions.

Justice Kelly, dissenting, would vacate the felony firearm conviction because it is necessarily premised on the felonious assault convictions. To assume that the jury rendered an inconsistent verdict "overlooks this Court's responsibility to identify a logical interpretation for verdicts where possible."

Justice Corrigan would deny leave to appeal.

Michigan Supreme Court: Selected Opinion Summary

EVIDENCE – Hearsay – Dying Declaration

People v Michael William Stamper
#132887
December 27, 2007
IN PRO PER

Affirmed defendant's convictions of murder. Case below: unpublished opinion (#263436, November 16, 2006).

A child may have the capacity to be conscious of his own impending death for purposes of the dying declaration exception to the hearsay rule, MRE 804(b)(2). The four-year-old victim's statement to his mother, "Mom, I can't, I'm dead," when considered along with his severe injuries, indicated his belief that his death was imminent, making his statement implicating defendant ("Mom's wife") as his assailant admissible. A declarant's age alone does not preclude the admission of a dying declaration.

Michigan Court of Appeals: Selected Unpublished Opinion Summaries

Language in MCR 7.215(C) allows parties to cite an unpublished opinion, even though it is not precedentially binding, as long as a copy is provided to the court and opposing parties. To obtain a copy of any of the following opinions, contact Michigan Lawyers Weekly at 1-800-678-5297 (charge of \$4.00 per order plus \$2.00 per page, plus tax), providing the "MLW" number for each case, or download the opinions for free from the Court's website, www.courtsofappeals.mijud.net.

DOUBLE JEOPARDY – Multiple Punishment

People v Anthony Edward Ciavone
#256187, December 11, 2007
PC: Zahra, White, O'Connell
CHRISTINE PAGAC

Affirmed conviction of first-degree murder; remanded for correction of judgment of sentence.

The imposition of two life sentences for the murder of one person violated the prohibition against double jeopardy. The judgment of sentence must be amended to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories, premeditated murder and felony murder.

DOUBLE JEOPARDY – Multiple Punishment

People v Michael Reid Hills
#269504
December 13, 2007
PC: Wilder, Cavanagh, Hood
PETER J. ELLENSON

Affirmed convictions of first-degree murder and conspiracy to commit kidnapping; vacated conviction and sentence of kidnapping.

Defendant's convictions of both first-degree murder and kidnapping violated the double jeopardy protection against multiple punishments for the same offense. The jury did not indicate whether it found defendant guilty of premeditated murder or felony murder, but since it would violate double jeopardy to convict him of both felony murder and the predicate offense of kidnapping, the latter conviction and sentence must be vacated.

COUNSEL – Absence Of At Critical Stage

People v Omar Rashad Pouncy
#270604
December 27, 2007
PC: Smolenski, Whitbeck, Kelly
SADO – CHARI GROVE

Reversed convictions of carjacking, armed robbery, felony firearm, felon in possession of a firearm, and carrying a concealed weapon.

Defendant experienced total deprivation of counsel during critical stages of the proceedings. During pretrial proceedings, including several crucial motions, standby counsel from defendant's previous trial repeatedly stated that he was not sure whether he was representing defendant. The trial court did not ask defendant whether he wished to waive his right to counsel and completely failed to comply with the requirements for taking a waiver in MCR 6.005(D). Although defendant waived his right to counsel on the first day of trial, on the third day the trial court completely failed to advise defendant of his rights, rendering his waiver ineffective. Defendant's waiver of counsel at his previous jury trial was not sufficient to comply with MCR 6.005(D) at his bench trial.

Complete details on the training events listed below appear at page 13 of this month's newsletter.

February 17 - 19, 2008

February 20 -23, 2008

March 13 - 18, 2008

March 14 - 15, 2008

March 28-30, 2008

State Bar of MI Mid Winter Conference

Midwinter Meeting and Seminar

Spring Conference

Eyewitness Identification

Defense on Offense

SBMCLS - Bellaire, MI

NACDL - Tucson, AZ

CDAM - Novi, MI

NACDL - New York, NY

NCDC - Atlanta, GA

Criminal Defense Online

***February, 2008
Volume 31, Number 5***

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