# Criminal Defense Newsletter

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### Features



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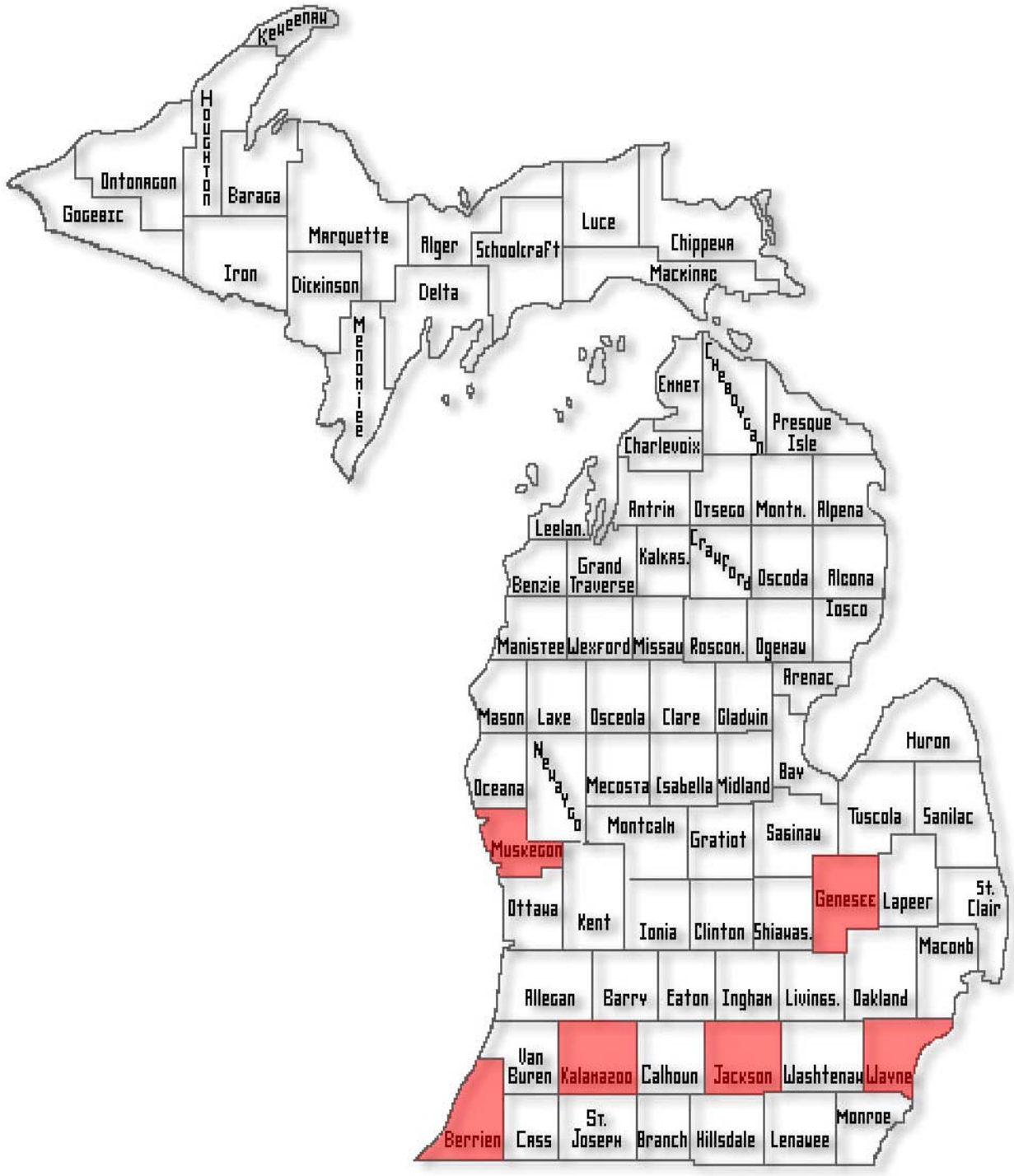
## *Michigan Public Defense Comes Under the Microscope*

***There is now no denying that Michigan's system of providing counsel and resources to indigent criminal defendants is under intense scrutiny. While some questioned the suggestion that the system is broken last fall, when the State Bar of Michigan presented a program, the debate has now moved on to the details. Significantly, the focus is not simply on attorney fees, but rather on total resources devoted to adequate representation of those who cannot afford to retain counsel. And, we're talking about any case in which the government provides counsel, including misdemeanors, probation violations, and juvenile matters. So much is happening that we will present a monthly snapshot to inform criminal defense lawyers, judges, prosecutors and the public.***

***On some points there is consensus, including that Michigan is one of just a few states that provide no state funding for indigent defense at the trial level. Counties pay, and the CDRC's annual survey reveals a patchwork of systems used to provide counsel (see www.sado.org/publicdefense). While a small number fund full-time public defender offices, and a few more operate rosters that pay counsel on an hourly or event-based schedule, most counties now enter contracts for defense services. The contracts vary widely in cost per case, most lack case-load limits, and few preclude other legal practice. In most cases, they fall short of the standards for defense contracts set by the National Legal Aid and Defender Association, http://www.sado.org/publicdefense/model_ contract.pdf.***

***While we will focus on the Michigan experience, there is much afoot nationally. A good recent piece appears in Governing Magazine ("Rights of Defense," January, 2007), detailing reforms in Montana and Louisiana. This is important. Stay tuned and get involved. The Editor.***

# Public Defense Hotspots - May, 2007




Please submit new information to: dawn@sado.org

### *Statewide*

- The Michigan Public Defense Task Force, a statewide coalition of citizens and organizations, continues its examination of potential remedies, serves as a clearinghouse for information, and educates the public on indigent defense issues. See www.mipublicdefense.org.
- SCR 39, adopted in 2006 by the Michigan Senate and House, asks the National Legal Aid and Defender Association to study and report back on the public defense systems in a representative sample of Michigan counties. Teams will finish data collection and site visits in May, with a report anticipated in early fall of 2007.
- The Criminal Defense Resource Center (CDRC) maintains a collection of public defense resources, including pleadings and studies.
- The Criminal Defense Attorneys of Michigan (CDAM) operates a Task Force on Attorney Fees, supporting criminal defense attorneys who seek reasonable fees on individual cases. See www.cdam.net.
- Appellate attorneys litigate cases from various circuits in which trial courts fail to inquire into indigent defendants' ability to pay the costs of their appointed counsel, applying People v Dunbar, 264 Mich App 240 (2004). Cases (all resulting in unpublished Court of Appeals opinions granting relief to the defendants) have arisen in Wayne County [People v Blake, CA #266094, 3-27-07]; Tuscola County [People v Fisher, CA #264294, 10-31-06]; Lapeer County [People v Harms, CA #260358, 8-8-06]; Macomb County [People v Romaniuk, CA #268813, 3-27-07]; Schoolcraft County [People v Hall, CA #263962, 11-28-06]; and Monroe County [People v Rhodus, CA #262241, 10-12-06].
- Dwayne B., et al v Granholm, et al, #2:06-cv-13548, a civil rights class action complaint was filed on August 8, 2006, in the United States District Court for the Eastern District of Michigan. The suit is on behalf of all children who are now or will be in the foster care custody of the Michigan Department of Human Services, and seeks declaratory and injunctive relief. Among other claims, the complaint alleges that the quality of legal representation provided by many lawyer guardians ad litem is impaired by oppressive caseloads.

### *Local*

- Trial Lawyers Association of Wayne County Juvenile Court, et al, v Kelly, #133616, complaint for superintending control filed April 10, 2007, in the Michigan Supreme Court, seeking reinstatement of lawyers removed as appointed counsel for their juvenile clients under a new local administrative order. The new order, LAO 2006-08, awards contracts to attorney groups, for future and pending matters. Plaintiffs allege violations of the children's due process right to counsel and effective representation.
- Duncan v State of Michigan, #07-242-CZ, a civil rights class action filed in **Ingham** Circuit Court on February 22, 2007, alleges constitutional deficiencies in systems for providing defense services in **Berrien**, **Genesee** and **Muskegon** Counties. The suit, filed by the Michigan Coalition for Justice, seeks declaratory and injunctive relief against the State of Michigan and Governor Granholm to prevent violations of the plaintiffs' legal rights and to remedy defendants' continuing failure to ensure that plaintiffs receive constitutionally adequate legal representation. See www.micoalitionforjustice.org.
- **Kalamazoo** defense attorneys left the local appointment list over a dispute in pay, expressing concern that new attorneys may be less experienced and competent. See "Lawyers' pay dispute may hurt poor clients," Kalamazoo Gazette, February 3, 2007. One of those lawyers, in a Letter to the Editor, emphasizes that the system forced lawyers to cut so many corners that they could not provide adequate representation. She adds that money collected by the county from indigents for attorney fees could fund the system adequately, if applied to that budget category instead of the county's general fund. See "Letters to the Editor: Changes hurt victims, poor defendants," Kalamazoo Gazette, March 8, 2007.
- In **Jackson** County, commissioners expressed concerns in January about bills for indigent defense services going over budget in 2006 by at least $162,000. "Public defender fees strain budget," Jackson Citizen Patriot, January 15, 2007. By April, they announced that the 2007 budget will be controlled by letting the work out for bidding among attorneys, on a contract basis. "Lawyers will jockey to represent clients," Jackson Citizen Patriot, April 11, 2007.

# Lawsuit Asks the Court to Order the State to Provide a Public Defense System

On Thursday, February 22, 2007, the Michigan Coalition for Justice filed a lawsuit against the State of Michigan and Governor Granholm in the Ingham County Circuit Court. The lawsuit asks the court to order the defendants to fund and fix the broken public defense systems in three counties – Muskegon, Berrien, and Genesee. After decades of participating in advocacy and lawsuits trying to change our public defense system, I volunteered to be counsel of record, along with Michael Steinberg of the ACLU. We are ably assisted by the New York firm of Cravath, Swaine & Moore LLP, who will also seek to become counsel of record.

This lawsuit targets the State of Michigan, not defense attorneys. It is the Constitutional responsibility of our state government pursuant to Gideon v Wainwright to step up and fulfill its obligation of due process and to provide effective assistance of counsel to those that cannot afford private counsel. The lawsuit seeks a declaration that the state's failure to do this violates plaintiffs' right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 20 of the Michigan Constitution, and an injunction requiring the state to provide a system that fully protects plaintiffs' right to counsel.

Why did we file in state court? The abstention doctrine of Younger v Harris, and the recent decisions in Tesmer v Granholm make it virtually impossible to pursue a deprivation of rights claim against the state in federal court.

Duncan, et. al. v State of Michigan pleads the facts of defendants caught up in the systems of the three counties named in the lawsuit. The facts are not pretty: clients meeting their lawyers for the first time between the bars in the lock up behind the court, lawyers not providing discovery to clients, rights being waived and pleas being entered without investigation of the prosecution's case, lawyers twisting client's arms to plead, and more. The facts plead demonstrate that criminal defendants do not receive equal justice if they cannot afford private counsel. In Michigan, all court-appointed lawyers have overwhelming caseloads, lack support staff and consistent training, have no resources to hire investigators or experts, and are not paid for jail visits, preparation, or other necessary work. There are no standards for becoming court-appointed counsel, and many lawyers are assigned to cases for which they do not have the necessary experience. Defendants forego their right to trial, are detained unnecessarily or for prolonged periods of time, are compelled to take inappropriate pleas, face harsher sentences than guidelines suggest, are assessed reimbursement that they cannot pay, and sometimes, are wrongfully convicted.

As I have stated before in articles in the Michigan Bar Journal, a state-funded public defense system that provides comprehensive standards, oversight and funding is where Michigan must go, as most other states have gone. A reformed system must abide by the Eleven Principles of a Public Defense Delivery System, adopted by the State Bar of Michigan's Representative Assembly in 2002, and based on the ABA's Ten Principles. These Eleven Principles are a concise set of recognized standards for the design of a public defense delivery system. The systems named in our suit do not meet these standards. Much of the problems we see in Michigan's public defense occur because the funding for public defense comes from the counties.

March 18th marks the anniversary of the unanimous Supreme Court decision in Gideon and presents an opportunity to reflect on both the failures of Michigan's current public defense system and the model for reform that is needed. Now, as criminal defense attorneys we must be zealous in not only our representation of our clients but in advocating for reform. Raising the problems in the current public defense system will help educate the public, and the bench, about the reform that we all know is needed. Just as it is the State's responsibility to provide a constitutionally sound public defense system, it is our duty as criminal defense attorneys to advocate for such a system that is fair to all and in which we have the resources to provide effective assistance of counsel regardless of how much money is in a client's pocket. As a defense attorney, you can advocate in every one of your cases for the funding and assistance you need to provide a proper defense, and for the reasonable fees guaranteed to you by MCL 775.16.

If your efforts to receive the funding, fees and assistance that you need are rebuffed by the courts, you may have to make a decision of conscience. Maybe it is time to advocate for fixes of the current system in which you cannot investigate, enlist the help of experts, or communicate with your client in private. You decide. Do what your conscience directs.

***by Frank D. Eaman,***
***Detroit, Michigan***

# ***Duncan, et. al. v State of Michigan* Executive Summary**

***[from the Michigan Coalition for Justice, www.micoalitionforjustice.org]***

The State of Michigan has a constitutional obligation to provide all persons accused of crimes who cannot afford to hire an attorney with counsel. The mere presence of an attorney is not enough. The state must ensure that the attorney has the resources to provide competent and effective representation.

The State of Michigan has long abdicated this constitutional duty by failing to fund or provide oversight for public defense services. Instead, Michigan has delegated to each of its 83 counties the responsibility for funding and administering the right to counsel in trial courts within their borders. As a result, public defenders lack the resources they need to represent their clients.

This lawsuit is not about individual attorneys or errors that may have occurred in individual cases. It is about a system that, as a result of the state's neglect, is so broken and underfunded that it prevents well-intentioned lawyers from providing constitutionally adequate representation.

The state does nothing to ensure that any county has the funding or the policies, programs, guidelines, and other essential resources in place to enable the attorneys it hires to provide constitutionally adequate legal representation. As a result, in Berrien, Muskegon and Genesee Counties, and many other counties in Michigan, defendants who cannot afford private counsel do not receive equal justice.

- There is no adequate attorney training or qualification standards, so public defense lawyers frequently lack the experience and skills necessary to handle the cases to which they have been assigned.

- There are no attorney workload standards and public defense lawyers are burdened by overwhelming caseloads.

- There are no written attorney performance standards or meaningful systems of attorney supervision and monitoring.

Moreover, the counties have been dramatically underfunding public defense for years, without any state intervention or assistance. In Genesee County, for example, the prosecution receives three times the funding of the public defense system. In Berrien County, the disparity is close to four to one.

The result is that the public defense provided in each of the three counties, and likely throughout Michigan, does not meet even the minimal constitutional requirements for effective assistance, no less the national standards established by the American Bar Association. Overwhelming caseloads mean that lawyers do not meet with their clients, appropriately investigate the charges, file necessary pre-trial motions, or prepare properly for court appearances. And without resources, lawyers cannot hire investigators or experts, even when necessary for an adequate defense. The cases of the named plaintiffs demonstrate these deficiencies:

- Most of the plaintiffs met with their lawyers only briefly and generally the meetings occurred only immediately before a hearing. For example, plaintiff Brian Secrest met with his attorney twice – both times on the same day as a hearing in his case - and the meetings lasted only a few minutes.

- Most of the attorneys failed to conduct any factual investigation and, despite this lack of investigation, permitted their clients to plead guilty to the crime charged. In many of the cases, the defendants had obvious and potentially viable defenses. For example, plaintiff Christopher Duncan was charged with breaking and entering and his attorney allowed him to plead guilty to the crime despite evidence that he did not commit the crime as charged.

When the fundamental right to counsel is violated in this fashion, the justice system cannot function. The result is errors – people spend much longer in jail than appropriate or worse, the wrong people are convicted. Michigan has had two such exonerations – Eddie Joe Lloyd and Ken Wyniemko. In such a system, everyone loses.

Local and national experts have been warning Michigan about its failure to provide constitutionally adequate legal representation for over thirty years.

1975 – The defense services committee, created by Michigan Chief Justice Thomas G. Kavanaugh found the county-based system significantly flawed.

1986 – The Special State Bar Task Force on Assigned Counsel Standards noted the absence of any attorney performance standards for public defense providers and recommended the adoption of specific standards.

1992 – A special issue of the Michigan Bar Journal on public defense was published in which a former prosecutor observed that "the methods we use to appoint, pay, train and supervise appointed counsel virtually guarantee that many will not perform their role effectively."

2005 – A Michigan Lawyers Weekly article notes that personnel in all branches of the criminal justice system universally acknowledge that the underfunding of public defense services in Michigan is a serious and growing problem.

2005 – An American Bar Association report on the state of public defense across the country repeatedly singled out Michigan for failing to meet the ABA Ten Principles, which are considered the fundamental criteria a system must meet to provide effective, efficient, ethical public defense. Noted deficiencies included lack of appropriate funding, inadequate access to investigators, experts and technology resources, and lack of training.

All of these warnings have been disregarded.

By its inaction, the state is in clear violation of the US and Michigan constitutions. This lawsuit seeks to compel the State of Michigan to meet its constitutional obligation to provide appropriate defense services for those who cannot afford private counsel real in Michigan. It asks the court to declare the current public defense system unconstitutional and order the state to provide representation consistent with the requirements of the US and Michigan constitutions.

Contact:

Michigan Coalition for Justice
Stephanie Chang
60 W. Hancock
Detroit, MI 48201
(313) 578-6808
schang@aclumich.org

# *Abused And Neglected Children Of Wayne County Sue Chief Judge Over Loss Of Their Lawyers*

***April 10, 2007, Detroit, Michigan.*** Children under the supervision of the Wayne County Juvenile Court and The Trial Lawyers Association of Wayne County Juvenile Court filed a lawsuit today against Wayne County Circuit Court Chief Judge Mary Beth Kelly in the Michigan Supreme Court. The lawsuit alleges a violation of the children's due process right to counsel and effective representation. The lawsuit asks the Michigan Supreme Court to exercise superintending control over the Third Circuit Court Juvenile Section.

The lawsuit alleges that Chief Judge Mary Beth Kelly and the Third Judicial Circuit Court have violated Michigan and federal law by severing attorney-client relationships with thousands of children protected by the court.

Chief Judge Kelly has removed hundreds of individual attorneys who had been appointed to represent the children, and replaced them with "attorney groups," many of whom lack experience in Juvenile Court. Attempts by the Trial Lawyers Association of Wayne County Juvenile Court to point out this denial of rights and violation of Michigan law were ignored by Court, necessitating this lawsuit.

"The Chief Judge has diverted approximately $6,000,000.00 in Wayne County funds through flat-fee contracts to handpicked attorney 'groups,' creating a 'fixed fee' system of representation, with far fewer attorneys available to represent a growing number of children, all of which undermines their constitutional rights and violates Michigan law," says TLAWCJC President John Owdziej.

"The Supreme Court has previously found "fixed fees" unreasonable. The American Bar Association has found that flat-fee systems and excessive caseloads compromise the effectiveness of legal representation for children," says Julie Hurwitz, attorney for the plaintiffs.

A further consequence is the loss of role models for the children, a vast majority of whom are African-American, due to the fact that most of the African-American attorneys have been removed as attorneys for the children.

***TLAWCJC Press Advisory***
***April 12, 2007***
***Contact: jhhurwitz@gmail.com***

# Scholarships Available for CDAM Trial Practice College

The Criminal Defense Resource Center (CDRC) of the State Appellate Defender Office is pleased to announce that full scholarships are available for criminal defense attorneys wishing to attend the Fourth Annual Trial Practice College of the Criminal Defense Attorneys of Michigan (CDAM). Thanks to generous support from the Michigan Commission on Law Enforcement Standards (MCOLES), ten full scholarships are available, at $825 each. The College is set for August 24 - 29, 2007, at the Thomas M. Cooley Law School's state-of-the-art courtroom facilities. A re-spected faculty will train on all aspects of defense trial skills, including communication and the art of per-suasion, using a combination of lectures, demonstra-tions and small group workshops. The CDRC scholarships will cover tuition, lodging (double occupancy) and meals (except for dinners) for the ten awardees.

Applications for the CDAM Trial Practice College scholarships must be submitted to the CDRC no later than June 30, 2007. Those eligible include full-time defenders or criminal defense attorneys who handle a substantial number of assigned criminal cases. The form application is posted at www.sado.org/cdn/ cdam2007.pdf.

The application and letter should be addressed to: Dawn Van Hoek, 645 Griswold, 3300 Penobscot, Detroit, MI 48226; fax: (313) 965-0372; e-mail: dawn@sado.org.

# From the Michigan Supreme Court: Rule Changes on Right to Counsel in District Court

MCR 6.001 was amended to apply subrules 6.005(B) and (C), which set forth the factors to be used by the court in determining whether a criminal defendant is indigent and which allow the court to require the defendant to contribute to attorney fees, to misdemeanor cases.

MCR 6.610 was amended to ensure that indigent defendants convicted in district court and sentenced to terms of incarceration are aware of their right to counsel pursuant to Halbert v Michigan, 545 US 605 (2005) and Shelton v Alabama, 535 US 654 (2002). After imposing a sentence of incarceration, even if suspended, the court must advise the defendant that if he/she wishes to file an appeal and is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal. The request must be made within 14 days after sentencing.

MCR 6.625 was amended to require the court to enter an order appointing a lawyer to represent an indigent defendant on appeal from a conviction in district court if the court imposed a sentence of incarceration, even if suspended, and the defendant requests a lawyer within 14 days. If a lawyer is appointed, the 21 days for taking an appeal commences on the date of appointment.

The amendments are effective May 1, 2007.

# Technical Tips

### *How to Automate Your Document Assembly*

Do you create the same document over and over but for different clients? Do you find yourself always looking up the prosecutor's, judge's, court's or client's address information to insert into your documents? There is an easier way. You should considering using Microsoft Word's merge feature to generate documents you routinely use. The mail merge feature works in conjunction with a database program or Microsoft Excel. Generally speaking, the Microsoft Office Suite includes both Word and Excel. Microsoft Excel can be used to track your client information and related information like judges, prosecutors and docket numbers, just to name a few. By entering information into a central location (database) once, you can quickly import that information into your document. Sound confusing? Maybe, but the CDRC training events listed in the Training Events section of this Newsletter will provide you the tools (and some data, too) to solve this problem. Why not sign up for one of the 3-hour events? Be sure to bring your support staff if they help you with document assembly. In the long run, you will save lots of time in preparing documents because you automated this process.

***Having difficulty solving a technology related issue? Feel free to forward your technology questions to John Powell (john@ sado.org) for solutions.***

***by John Powell, CDRC Webmaster***
***John@sado.org***

# DUI Discovery and The "126-Day" Rule: A Defense Attorney's Perspective

### Introduction

As is now well known, MCR 8.110 (c)(5) imposes certain time limits on the trial courts relative to the completion of criminal cases. Thankfully, MCR 8.110 was recently amended so that the 91-day rule was "extended" by 35 days to become the 126-day rule (effective September 12, 2006). The rule now requires that if misdemeanor cases and cases involving local ordinances that have criminal penalties remain pending after 126 days, then the chief judge must report such "untimely" cases to the state court administrator. The same is true for felony cases that remain pending after 301 days. The reporting requirement is now quarterly, rather than monthly, and there is no longer a need to give a reason for the delay. However, MCR 8.110(C)(4) was left intact, and that provision still requires the state court administrator, under the Supreme Court's direction, to take whatever corrective action is necessary against a judge that does not timely dispose of his or her judicial work.

### How Complete Discovery Often Conflicts with Compliance

Full compliance with these time limits is difficult for everyone involved. However, from the defense attorney's perspective, the number one factor that militates against such compliance is Michigan's labyrinthine criminal discovery framework. This complexity arose out of the constitutional need for information, evidence, and the production of witnesses, and because of this complexity it is probably true that many attorneys, defense and prosecution alike, don't fully understand or appreciate all of the rules, statutes, case law, and administrative orders that are involved once someone becomes "the accused." Consider for example this non-exhaustive list of discovery rules:

- Brady v Maryland 373 US 83, 83 SCt 1194 (1963)[1] and Bay County v Bay Prosecutor 109 Mich App 476, 311 NW2d 399 (1981)[2] re: due process issues;
- MCR 2.506 re: subpoenas;
- MCR 6.201 re: felony discovery;
- Admin Order 99-03 re: scope of discovery in misdemeanor cases;
- People v Greenfield 271 Mich App 442, 722 NW2d 254 (2006)[3] and People v Phillips 468 Mich 583, 663 NW2d 463 (2003)[4] re: same as above, and remedy for violations;
- People v Perlos, 436 Mich 305, 462 NW2d 310 (1990)[5] and MCL § 257.625a(6)e re: hospital blood results in OWI crashes;
- MCL § 257.625a(8) re: test results before 2 days or else evidence barred;
- MCL § 780.651 re: search warrants, tabulations, what has to be filed with court, etc.;
- HIPPA/45 CFR § 164.512 re: confidentiality of medical records & exceptions;
- FOIA re: info from governmental bodies and remedies for non-compliance;
- MCL § 600.2167 re: lab reports at prelim exam;
- MRE 1101b8 re: use of hearsay, in lieu of witnesses, at exams;
- MRE 902(11) re: certified business records (medical, bank, etc.).

Understanding the utility and interplay of these rules is difficult enough, but staying in compliance with them and with MCR 8.110 is often simply not possible.

Michigan's arduous discovery framework is fur-ther compounded by all of the different compliance methods used by the various courts, law enforcement offices and prosecuting attorneys. Many of these me-thods are markedly different from one another. In this writer's experience, most courts first require that a dis-covery demand be filed and sent to prosecuting attor-ney and/or police department. It is often unclear, especially for retained counsel, who will actually re-trieve the discovery, copy it, and then forward the dis-covery to the requesting party. In some instances this is due to the fact that most agencies require payment, which itself necessitates several additional steps, in-cluding a request for payment from the agency, the drafting of a check for payment by defense counsel and the tendering of this payment to the responsible party. In the majority of instances, request and delivery of the discovery is accomplished via regular mail. In these cases the payment must still be received before the dis-covery is actually sent to the attorney. However, some police departments induce further delay by requiring that the discovery be paid for and/or picked up in person.

All told, Michigan's discovery process requires, from request to receipt, an optimistic minimum of four to six weeks, but full compliance most often requires eight to ten weeks. Less optimistically, there are many things that might add to the time necessary to complete discovery. For example, while many police depart-ments will forward discovery to the defense attorney upon request and payment, others require that they first receive a letter from the prosecuting attorney's office authorizing the release. This of course adds more time to the mix. By accident or design, many de-partments throw up roadblocks to efficient discovery. In one extreme example, a department in Oakland County requires that defense counsel first tender their request along with a blank video cassette. Once the

video is copied, defense counsel must then again travel to the department to pay for and pick up the completed video.

Where the state police are involved, rather than or in addition to "local" agencies, (and in all drunk driving cases where there was a blood draw), the process and the requirements are further complicated. This is because state departments require a FOIA re-quest before any discovery will be released. After re-ceipt these requests are sent to the central office in Lansing where they are reviewed by the FOIA coordi-nator, and if approved, the coordinator next sends a bill to the requesting party. These steps can sometimes add weeks or even months to the time required to obtain full and fair discovery.

Adding even more difficulty to the discovery dilemma are those cases where different "parts" of discovery must be obtained through different sources. For example, in some DUI cases the narrative report is obtained through the prosecuting attorney's office whereas the videotapes and logs demonstrating (or not) the accuracy checks are obtained through the police department. If there is a blood test rather than a breath test, or if the state police are in any way involved, then there will be an additional FOIA request that must be sent to Lansing. Needless to say, the inevitable result of having many different agencies involved is more delay.

Once this discovery is in hand it must be reviewed by defense counsel, who should then schedule a time to discuss it with the accused. Afterwards, the agreed-upon defense plan must be executed, and if this is in fact a defense plan and not a plea and sentencing plan, execution will usually require the filing of motions and the scheduling of evidentiary hearings.

The above description applies only to "simple" criminal cases in the best case scenario. It does not apply to those many cases where the attorney is not retained/appointed until well after the first appearance. It also does not include those involving expert witnesses, accident reconstruction and the like. Needless to say, the more "complex" a case, the longer the discovery phase is likely to take, and drunk driving cases are by their very nature complex cases. See, e.g., People v Fett, 257 Mich App 76, 666 NW2d 676 (2003) (rejecting the notion that drunk driving cases are "simple.")

### Possible Solutions

Discovery delays are the number one issue precluding everyone involved in the system from complying with the 126-day and 301-day rules. Consequently, the bench is urged to work with prosecutors and law enforcement to fashion a system that will streamline and make uniform the manner in which discovery is requested and provided. Anything that decreases the delay will be helpful, including court rules that favor mandatory and hastened discovery criminal defendants. Once discovery is complete, the major impediment to moving the case forward with the utmost celerity will have been removed.

***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.***

### End Notes

1. The USSC held in Brady that the where another defendant admitted to the murder committed in the course of a robbery and the prosecution suppressed the confession, the co-defendant's due process rights were violated. In this case, two defendants committed a rob-bery during which an individual was killed. The initial defendant made extrajudicial statements in which he admitted committing the murder, the prosecution withheld the evidence that was demanded by the second defendant's lawyer, and the second defendant was convicted of first-degree murder and sentenced to death. The Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87.

2. The Michigan Court of Appeals held that the prosecution's instruction to the police witnesses to not speak with the defense, although questionable, did not rise to the level of reversible error, but the refusal to provide defense with the police report was an "inexcusable obstruction to the pursuit of justice." Id. at 485. With respect to the first issue, the court determined that the prosecution had the intent to subvert justice and prevent the defense from speaking with the police witnesses; however, since the defense could have used other methods, such as a deposition, to speak with the police witnesses, the defense could not claim prejudice. The court, however, did find the prosecution was obstructing justice with respect to the refusal to produce the police report. The court

indicated that the purpose of the prosecutor's office is to seek fairness within the system as well as the ascertainment of truth, and here, where the prosecution deliberately withheld the police report, it was acting to obstruct justice. Furthermore, the reading of the police report to the defense did not mitigate the damage since by withholding the whole report, and only reading portions of it, those actions suggested that the docu-ment was censored. Therefore, the Court withdrew the circuit court's writ of superintending control and reinstated the district court's dismissal of the charges.

3. In People v Greenfield the Michigan Court of Appeals held that the booking room DataMaster video-tape does not fall into the category of discoverable ma-terials encompassed by MCR 6.201, and that the de-fense did not establish "good cause" for the court to order the discovery of the videotape, and therefore the breath test results should not have been suppressed in the trial court. In this case, the defendant was arrested for OUIL 3rd offense and his defense attorney sought all videotapes, recordings, etc. . . . from the defendant's arrest. Within five days of the defendant's arrest the prosecutor asked the police to turn over all requested items, with the exception of the booking room video-tape, since she did not know there was one in existence as this was a new video system the police had recently installed. In fact, none of the parties knew of the video's existence until the preliminary exam. At the exam, the court issued a discovery order dictating that the defense counsel be provided with the video; how-ever, the police department's video system operated on a loop, and it notified the court that the oldest video in its possession was one from several days after the def-endant's arrest. The court suppressed the defendant's DataMaster results.

The Michigan Court of Appeals, however, re-versed the suppression of the DataMaster results. The court relied on MCR 6.201 and a Michigan Supreme Court case, People v Phillips, 468 Mich 583, 663 NW2d 463 (2003), to hold that either the discovery must be set forth in the rule, or the defense counsel must demon-strate good cause to demonstrate why the court should order the requested discovery, otherwise the court is without authority to mandate the discovery. In this case, the court indicated that the videotape does not fall into any category specified by the rule; therefore, it was not subject to disclosure pursuant to the rule. Further-more, since the defense counsel did not claim, or show, that the video was exculpatory or that there was any-thing favorable to the defendant on it, the prosecution did not violate any rules by failing to provide the tape. In addition, the court indi-cated that upon a showing a good cause, the court may modify the discovery rules. However, in this case, the court reasoned that the de-fense counsel alleged that a video might exist and de-manded that it be provided, which does not rise to the level of good cause. The court based its reasoning on the fact that the prosecution is generally not required to produce evidence that does not exist.

4. In People v Phillips, the Michigan Supreme Court held that MCR 6.201 governs discovery in criminal trials and that MCR 6.201 does not compel the creation of an expert's report where one does not exist. The court found that the rule only mandates disclosure of reports that already exist; it does not require the production of reports where none exist. Although the court did note that the court may modify the requirements of the rule upon a showing of good cause, this case did not rise to that level, as there was no evidence of suppression of evidence.

5. The Michigan Supreme Court held in Perlos that section 9 of the implied consent law is constitutional and the acquisition of the defendant's medical records from the hospitals did not violate the 4th Amendment. The court did recognize that a blood draw is a search or seizure under the 4th Amendment, but rejected the notion that the hospital was a state actor, and therefore, the hospital blood draw for medical purposes does not implicate constitutional protections. With respect to the hospital records, the court noted that the defendants did have a reasonable expectation of privacy in their medical records but that society does not consider this expectation of privacy reasonable. Furthermore, the court relied on several USSC cases where the Court held that individuals do not have a reasonable expectation of privacy in their records held by third parties, such as banks or accountants. Finally, the court looked at section 9 itself, and held that the legislature has determined that defendants do not have a reasonable expectation of privacy in their blood alcohol results. The court determined this was a carefully tailored statute which only allowed the state to access an individual's blood alcohol results in a narrowly tailored situation. Finally, the court indicated that the public policy of getting drunk drivers off the roads and prosecuting them supported the implied consent law.

# Reports and Studies

### *ABA Develops Policies on Alternatives to Incarceration, Collateral Consequences*

Acting at its mid-year meeting on February 12, 2007, the American Bar Association's House of Dele-gates adopted a number of policy recommendations on law reform issues, largely focused on removing legal barriers to offender reentry that drive high rates of recidivism. Full text of the recommendations appears on the site of the ABA Commission on Effective

Criminal Sanctions, www.abanet.org/cecs. Among the interesting recommendations:

**Alternatives to Incarceration and Conviction for Less Serious Offenders**

- Jurisdictions should develop, with the assistance of prosecutors and others, community supervision programs that allow all but the most serious offenders to avoid incarceration and a conviction record.

- Community-based treatment programs ought to be made available for persons whose crimes are related to substance abuse and/or mental illness even if they have more than one conviction or a history of minor violence, provided they meet other qualifications for community supervision.

- Prosecutors, defenders and courts are encouraged to form working groups to review, monitor, and improve systemic alternat incarceration and conviction.

**Legal Representation Relating to Collateral Consequences**

- Jurisdictions should assist defenders in advising their clients of the collateral consequences of conviction.

- Prosecutors should also be informed of collateral consequences that may apply in a particular case.

- Additional funds should be provided to public defender and legal aid offices to enable them to assist offenders in removing or neutralizing the collateral consequences of conviction.

- Prison, probation and parole officials should be required to advise offenders about how they may obtain relief from collateral consequences.

# 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.***

### *Other Acts of Complainant*

The trial judge reversibly erred by forbidding the defense from introducing other acts evidence to show the complainant's scheme, plan, or system for starting domestic affrays such as the one that led to the charges in issue. **BB 10459.**

### *Proximity to Drugs in Car*

Proof of proximity without more is not enough to establish a passenger's constructive possession of contraband found in a car. The evidence here showed nothing more than proximity. The defendant's conviction for drug possession violates due process. **BB 10461**.

### *Counsel of Ones Own Choosing*

The trial court violated appellant's due process rights by refusing to grant a reasonable adjournment of trial so that appellant could retain defense trial counsel of choice. **BB 10453**.

### *Obstruction of Justice*

The efforts of the defendant to reach his house without detection by anyone looking for him did not constitute an interference with the administration of justice. **BB 10462.**

### *Penalty for Testifying*

The trial court penalized defendant for exercising his constitutional right to testify on his own behalf when it told him it was imposing the maximum recommended sentence because he lied to the jury. Defendant is entitled to resentencing. **BB 10464**.

### *Sentence Credit for Parole Time*

The trial court failed to acknowledge and exercise its common law discretion to grant sentence credit for the nearly six months he spent in jail prior to sentencing despite his status as a parole violator. **BB 10464**.

### *Discovery of Personnel Files*

The trial judge denied the defendant's right to due process by summarily refusing the defense request to discover specific information form two prison guards' personnel files. **BB 10451**.

### *Guidelines Scoring for HIV*

Due process requires resentencing where the trial court improperly scored 15 points for OV2 based on appellant's HIV infection; furthermore, defense trial counsel was constitutionally ineffective in failing to object. **BB 10465**.

### *Restitution for Home Security System*

The court erred as a matter of law by ordering restitu-tion for the home security system purchased by the complaints following this home invasion offense. **BB 10452**.

### *Ability to Pay for Attorney Fees*

The defendant also challenges the order for reimbursement of attorney fees as the court made no finding of ability to pay at sentencing and the defendant does not have the ability to pay the fees. **BB 10452**.

### *Failure to Investigate Insanity Defense*

The defendant was denied his state and federal constitutional rights to the effective assistance of counsel where defense counsel failed to adequately investigate and pursue defendant's insanity defense prior to the scheduled trial date, failed to formally move for a continuance to secure an independent psychiatric exam, failed to adequately prepare his expert, failed to call police witnesses and failed to object to the assistant attorney general's closing argument. **BB 10466**.

### *Order for Speedy Psych Exam*

The defendant was denied his state and federal constitutional rights to present a defense when the trial court insisted that the psychiatric examination by an independent examiner be completed within three weeks. **BB 10466**.

### *Coerced Jury Trial Waiver*

Appellant's waiver of a jury trial was not voluntary and violated due process, where appellant did so only because defense trial counsel represented that the trial court would "slam" appellant at sentencing upon conviction by a jury. **BB 10458**.

## From Other States

### *West Virginia: Warrant Required for Wired Informant*

The West Virginia Supreme Court held that law enforcement officers must obtain a warrant before they wire an informer with surveillance devices and send him into a suspect's home. The Court overruled a 20-year-old state case upholding the admission of similar warrantless recordings because of the complete lack of analysis in that case of the expectation of privacy in the home. Activities that take place within the "sanctity of the home" must be afforded the "most exacting protection" under the state constitution, emphasized the Court. The Court further concluded that its new interpretation of the state constitution limits the state wiretap law authorizing warrantless electronic surveillance when one party consents. State v Mullens, ___ W Va ___; ___ SE2d ___ (#33073, 2-28-07); full text at http://pub.bna.com/cl/33073.pdf

### *Fourth Circuit: Exercising Trial Rights Does Not Rule Out "Acceptance of Responsibility" Adjustment*

The Fourth Circuit Court of Appeals held that a defendant who pleads guilty to some counts but insists on going to trial on one count that is excluded from the Guidelines "grouping" rules may still be eligible for the downward adjustment for "acceptance of responsibility." The court decided that the defendant must only accept responsibility for the grouped guidelines counts in order to be eligible for the reduction in offense level for that particular offense. This interpretation of the guidelines is consistent with the purpose of granting sentencing judges discretion to impose more lenient sentences on defendants who have accepted responsibility for their conduct, the Court reasoned. United States v Hargrove, 478 F3d 195 (CA4, 2007); full text at http://pub.bna.com/cl/064018.pdf.

### *Tenth Circuit: Search of Parolee Violated Privacy Expectations*

Police officers violated the Fourth Amendment when they conducted a search of the home of a parolee who was subject to a parole condition that authorized warrantless searches by parole officers, according to the Tenth Circuit Court of Appeals. Although the United States Supreme Court in Samson v California, 79 CrL 332 (2006), held that parolees have "severely diminished" expectations of privacy, the Tenth Circuit found that Samson does not represent a blanket approval for warrantless parolee searches by police without reasonable suspicion; such searches are constitutional only when authorized under state law. The Court pointed out that the parole agreement and the state department of corrections rules required warrantless parole searches to be conducted by parole officers with reasonable suspicion. United States v Freeman, ___ F3d ___ (CA10, #05-3437, 3-8-07); full text at http://pub.bna.com/cl/053437.pdf.

### *Ninth Circuit: Failure to File Notice of Appeal Within Time Limit*

The Ninth Circuit Court of Appeals found that a criminal defendant's failure to file a notice of appeal within the time limit mandated by federal rules is not fatal if the government fails to object on timeliness

grounds. The Court held that time limits imposed by the procedural rules enacted by the courts are not jurisdictional unless they "implement congressionally mandated built-in time constraints." However, the Court held that dismissal of an appeal for failure to comply with Rule 4(b) is mandatory when the opposing party files an objection on timeliness grounds. Since the government invoked the rule's timing provision, the Court concluded that its duty to dismiss the appeal was mandatory. United States v Sadler, ___ F3d ___ (CA10, #06-10234, 3-1-07); full text at http://pub.bna.com/cl/0610234.pdf.

### *Seventh Circuit: Alien May Sue for Vienna Convention Violation*

An alien arrested in the United States has an individual right to sue government officials under 42 USC 1983 for failing to advise him of his right under the Vienna Convention to contact his home country's consulate, according to the Seventh Circuit Court of Appeals. The Court concluded that even though most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals. Section 1983 provides not only the means to sue but also the means of remedying violations of individuals' Article 36 rights, the Court held. This opinion replaced an earlier one where a panel of the Court recognized an individual right under the treaty but allowed the lawsuit to go forward under 28 USC 1331. Jogi v Voges, ___ F3d ___ (CA7, #01-1657, 3-12-07) replacing 425 F3d 367; full text at full text at http://pub.bna.com/cl/011657a.pdf.

### *Tenth Circuit: Military Member Not Required to Get Permission for Successive Habeas Petition*

The Tenth Circuit Court of Appeals held that a service member seeking federal habeas relief from a military court conviction is not required to obtain authorization before filing a second or successive petition under 28 USC 2241. The successive petition provision applies to challenges to Article III court judgments, and military courts are not Article III courts, the Tenth Circuit concluded; rather, they are legislative courts established by Congress under Article I. Moreover, because military judges are not appointed for life, military courts do not meet the definition of a "court of the United States," and Section 2244(a) did not apply to the petitioner, concluded the Court. Ackerman v Novak, ___ F3d ___ (CA 10, #06-1464, 3-15-07); full text at http://pub.bna.com/cl/061464.pdf.

### *Texas: Jeopardy Attaches if State Provokes Mistrial to Avoid Acquittal*

The Texas Court of Criminal Appeals ruled that prosecutorial misconduct that causes a mistrial creates a double-jeopardy bar against a retrial even if it was simply to avert an acquittal. The Court found that the defendant's mistrial motions were made because of the state's intentional failure to disclose exculpatory evidence with the specific intent to avoid the possibility of an acquittal. The deliberate misconduct barred retrial because, the Court stated, "in a case like this, a defendant suffers the same harm as when the state intentionally goads or provokes the defendant into moving for a mistrial," and, therefore, the logic of Oregon v Kennedy, 456 US 667 (1982), bars another trial. Ex parte Masonheimer, ___Tex Crim App ___; ___ SW3d ___ (#PD-521-05, 3-21-07); full text at http://pub.bna.com/cl/PD52105.pdf.

### *Fifth Circuit: Loss of Good-Time Credit Cannot be de Minimus*

No amount of a prisoner's good-time credit is so minor that it may be taken away by prison official without affording the inmate due process, held the Fifth Circuit Court of Appeals. The district court had agreed with prison officials that the loss of 30 days' good time credit was de minimus in light of the prisoner's 45-year sentence. The Circuit Court emphasized that the right to good-time credit is "embraced within the liberty protected by the Fourteenth Amendment." In light of dicta in previous decisions that due process rights might not be implicated where the amount of credit is de minimus, the Court stated that "Now is the time to disabuse the courts of this circuit" of that belief. Teague v Quarterman, ___ F3d ___ (CA5, #05-11368, 3-21-07); full text at http://pub.bna.com/cl/0511368.pdf.

### *Arizona: Burden-Shifting Statute Not Retroactive*

The Arizona Supreme Court held that revisions to the state's criminal code that shifted the burden of proving a "justification" defense from the defendant to the state did not apply retroactively to a defendant who committed an offense before the effective date of the amendments. The defendant raised the defenses of self-defense and defense of others, and the statute was amended prior to his trial. The intermediate appellate court found that the revised statute should apply to all pending cases, but the Supreme Court reversed, finding that no law is retroactive unless the legislature expressly declares it to be so, and that the date of the offense was the operative event for applying the new law. The amendments were found to "regulate primary conduct" because the shift in the burden of proof impacts charging decisions and alters legal consequences. Garcia v Browning, 214 Ariz 250; 151 P3d 533 (2007).

**The Federal Bar Association and the United States Sentencing Commission (FBA/USSC)** will present the Sixteenth Annual National Seminar on the Federal Sentencing Guidelines, on **May 23-25, 2007**, in Salt Lake City, Utah. The seminar begins with basic guidelines training, and includes plenary sessions with Guidelines Commissioners, discussions of departure and Bureau of Prisons issues, plea bargaining, and much more. Tuition for the seminar ranges from $125 to $350, depending on options chosen, and discounted hotel rates are available. For more information, contact the Program Coordinator at (813) 229-1118.

**The Criminal Defense Resource Center (CDRC)** of the State Appellate Defender Office will offer training events, "Leveraging Desktop Technology" and "Automate Your Defense Practice," at various locations, statewide. This grant-funded training is conducted in more than a dozen locations, in computer labs and high-tech courtrooms, with small groups of criminal defense attorneys. The three-hour sessions provide valuable hands-on experience, focusing on the Web's best research sites and document automation. With special emphasis on SADO's legal databases, online discussion group (the FORUM), and online training videos, Trainer John Powell reaches both new and experienced users. Sessions are very highly rated, registration is limited, and seats are taken quickly: those wishing to attend are encouraged to register early. Due to grant support, a modest charge of just $20 covers registration. Events are currently planned for **May 31, 2007** (Ann Arbor); **June 7, 2007** (Flint); **June 14, 2007** (Bay City); **June 21, 2007** (Auburn Hills); **June 28, 2007** (Clinton Township); **July 12, 2007** (Detroit). Contact John at john@sado.org to register, or call Maria at (313) 256-9833.

The **National Defender Training Project and University of Dayton School of Law (NDTP)** will host the 2007 Public Defender Trial Advocacy Program on **June 1 - 6, 2007**, in Dayton, Ohio. This unique trial skills program will focus on developing a powerful theory of defense, including telling a client's story, and using visual aids and demonstrative evidence to persuade the finder of fact. Skills training also will address voir dire and jury selection techniques, opening statements, direct and cross-examination, closing arguments, making objections and preserving the record. Registration fees range from $775 to $875, and hotel discounts are available. Contact Ira Mickenberg with questions or to register: (518) 583-6730 or imichenberg@nycap.rr.com.

The **University of Detroit Mercy School of Law (UDM)** will present "Creating An Exit Strategy to End the 'War On Drugs' - A Road to Drug Sense & Prison Reform" at the Law School on **June 8, 2007**. Sponsored by the Michigan Coalition for Human Rights (MCHR), American Civil Liberties Union Of Michigan (ACLU), National Lawyers Guild (UDM Student and Metro Detroit Chapters) and MI NORML. Featured speaker is Ethan Nadelmann, founder and executive director of the Drug Policy Alliance. A $5 donation is requested for admission. For more information contact Dr. Michael Whitty, 248-723-0105 or at MikeWhitty@prodigy.net

**The Western Trial Advocacy Institute (WTAI)** will present its "Twenty-Seventh Annual Criminal Defense Seminar" on **July 7 - 12, 2007**, in Laramie, Wyoming. A distinguished faculty puts the emphasis on communication and story-telling, using small group workshops and individual performance and analysis. Course materials use actual cases, and enrollment is limited. Housing is at the University of Wyoming College of Law, and is a very reasonable $142 or $185 per week. For more information, contact Haydee Dijkstal at (307) 766-2422, or see http://www.westerntrial.com.

The **Criminal Defense Attorneys of Michigan (CDAM)** will present its Third Annual Trial Practice College, **August 24-29, 2007**, to be held at the state-of-the-art courtroom facilities at the Thomas M. Cooley Law School in Lansing, Michigan. Trial College participants will not only learn through lectures by nationally recognized trial lawyers, but will also apply what they have learned in daily small group training sessions. Under the instruction of the workshop faculty, the participants will engage in individual performances and receive feedback and analysis. Trial College participants will be provided materials in advance, and will have the opportunity to prepare for each phase of the trial in the evenings, after hearing the lectures. The cost of the college includes all registration fees, course materials, hotel accommodations at the Radisson Hotel in downtown Lansing, and most meals, except for dinner. Cost for attendees is $825 (double occupancy) or $950 (single occupancy). The Criminal Defense Resource Center also will offer ten full scholarships for qualifying trainees: see www.sado.org/cdn/cdam2007.pdf. A limited number of scholarships also will be available from CDAM. For up-to-date information on the CDAM Trial College, please contact jerihall3@msn.com or (517) 490-1597.

**The Criminal Defense Attorneys of Michigan (CDAM)** will host its Fall Training Conference on **November 1-3, 2007**, in Traverse City, Michigan. Details will appear here as they become available.

# U.S. Supreme Court: Selected Certiorari Granted Summary



**FREE SPEECH**

**United States v Williams**
**#06-694**
**March 26, 2007**
**80 CrL 681**

The Court will determine whether the pandering provision of the PROTECT Act, 18 USC 2252A, which criminalizes conduct intended to promote or pander material as child pornography, is overly broad and impermissibly vague, and therefore facially uncon-stitutional. **Case below:** 444 F3d 1286 (CA11, 2006).

# U.S. Court of Appeals: Selected Sixth Circuit Opinion Summaries

**SENTENCING AND PUNISHMENT -- Guidelines -- Scoring**
**SENTENCING AND PUNISHMENT -- Standards for Imposing Sentence -- Blakely**

**United States v Timothy Kosinski**
**#05-2664, March 22, 2007**
**Keith, CLAY, Mays**

Vacated sentence for tax fraud; remanded for resentencing. **Case below:** unpublished opinion (#02-80563, 10-31-05).

The district court failed to recognize its discretion to calculate and consider defendant's tax loss in sentencing defendant. A district court does not violate United States v Booker, 543 US 220 (2005), by enhancing a sentence based on factors not proven to a jury or admitted by the defendant if it considers the guidelines to be advisory and not mandatory, and the information is reliable and supported by a preponderance of the evidence.

The district court failed to consider the guidelines as advisory. In finding that it did not have the authority to depart from the guidelines, the district court's sentence violated Booker. The court also failed to state facts which supported its sentence.

# Michigan Court of Appeals: Selected Published Opinion Summaries

**SENTENCING AND PUNISHMENT -- Guidelines -- Blakely**
**DOUBLE JEOPARDY -- Multiple Punishment**

**People v Gary Steven Uphaus**
**#267238, April 3, 2007**
**SMOLENSKI, Saad, Wilder**
**SADO - DOUGLAS BAKER**

Affirmed defendant's conviction of delivery of marijuana, possession of marijuana with intent to deliver, and one count of felony firearm; vacated sentences of four to eight years and remanded for resentencing.

The trial court sentenced defendant in violation of the Sixth Amendment by relying on facts not proven to a jury beyond a reasonable doubt in departing from the guidelines' intermediate sanction cell of zero to nine months. The trial court departed based on its conclusion that defendant was a serious threat to society and particularly to the police officers involved in the case. Before calculating the guidelines, the maximum sentence for a second offender was eight years, and because defendant was not entitled to the benefit of MCL 769.34(4)(a) (the statute providing for intermediate sanction cells) until after the court calculated the variables, the court's use of factual findings in scoring the guidelines did not result in the imposition of a sentence in excess of the relevant maximum pursuant to Blakely v Washington, 542 US 296 (2004). However, when it applies, MCL 769.34(4)(a) is mandatory and establishes a new maximum sentence (not more than 12 months in jail). The trial court may not use judicial findings to support an upward departure from the limitations imposed by MCL 769.34(4)(a) without violating the defendant's constitutional rights. A term of imprisonment may be imposed only when the court states a substantial and compelling reason that is based on facts proven to a jury beyond a reasonable doubt or based on prior convictions.

The trial court did not err when it vacated three of defendant's four felony-firearm convictions. The focus of the felony firearm statute, MCL 750.227b, is on the underlying felonious conduct, which is rendered more dangerous by the presence of a firearm, rather than the number of firearms involved. The appropriate "unit of prosecution" is the felonious conduct rather than the number of firearms carried or possessed.

**DOUBLE JEOPARDY -- Multiple Punishment**
**DEFENSES -- Equal Protection**

**Todd Dawson, Ronald J Hale, Wilbur Loew, Michael Medore, and Michelle Zainea v Secretary of State and Department of Treasury**
**#264103, March 20, 2007**
**WILDER, Zahra, Davis**
**HENRY L GUIKEMA**

Affirmed order granting summary disposition of complaint regarding fees imposed under driver responsibility law (DRL).

Assessment of driver responsibility fees automatically upon a conviction of a qualifying misdemeanor or felony offense does not violate double jeopardy prohibitions. There is no violation of the prohibition against multiple prosecutions because the imposition of fees is not a prosecution but a ministerial act by the Secretary of State. Imposition of the DRL fees does not violate the prohibition against multiple punishment because the civil penalty serves a purpose distinct from any punitive purpose: raising revenue and compensating the government for some of the costs imposed by offenders. Also, such monetary assessments are traditionally not viewed as punishment, and the civil penalty is not so punitive as to transform it into a criminal penalty.

The assessment of fees under the DRL does not violate the equal protection clause. The classification scheme is rationally related to the legitimate government purpose of generating revenue from drivers who impose costs on government and society.

The driver responsibility fees do not violate the uniform taxation clause or the "distinct statement" clause of the Michigan Constitution. The driver responsibility fees are not fees but taxes because they are not proportional to the cost of any service provided, and are not voluntary. While the statute does not identify the fees as taxes, the amounts of the assessments to be paid are clearly stated. Because the actual fees paid are not obscure or deceitful, the distinct statement clause has not been violated.

Judge Zahra disagreed with the conclusion that the DLR fees are actually taxes, pointing out that they lack the essential characteristic of an enforced contribution.

Judge Davis concurred in affirming because, although the DRL imposes a
criminal fine, there is no double jeopardy violation.

**JURY -- Waiver**
**CONFESSIONS -- Right to Counsel**

**People v Reginald Williams**
**#265237, April 10, 2007**
**Wilder, Sawyer, DAVIS**
**SADO - RANDY DAVIDSON**

Affirmed convictions of armed robbery, carjacking, and retaining a financial transaction device.

The trial court did not coerce defendant into accepting a bench trial instead of a jury trial. The court refused to accept a guilty plea and, when defendant objected to the delay in scheduling a jury trial, told defendant a bench trial could be held "a lot sooner." The court did not threaten defendant with a delay for asserting his right to a jury trial. Defendant was not coerced and freely waived his right to a jury.

Trial counsel was not ineffective for failing to move to suppress defendant's statement during the second interview with police. His mere refusal to reduce his oral statement to writing at the first interview did not amount to the invocation of the right to remain silent. Defendant was approached 10 hours later and again advised of his Miranda rights. The second statement was admissible. Defendant's renewed motion for a remand was denied as he did not present any additional facts that would require the development of a record on counsel's alleged ineffectiveness.

**GUILTY PLEA -- Voluntariness**
**DEFENSES -- Statute of Limitations**
**DOUBLE JEOPARDY -- Multiple Punishment**

**People v Charles William Parker, III**
**#261376, April 10, 2007**
**Whitback, Hoekstra, WILDER**
**LEE A SOMERVILLE**

Affirmed conviction and sentence for failing to pay child support.

Defendant's plea was not involuntary. Defendant stated that he understood his rights and that he was offering the plea in exchange for the prosecutor's recommendation of probation.

Defendant's conviction was not barred by the statute of limitations. He waived this defense by pleading guilty and, moreover, the charge was brought less than six years from the date his last child support payment was due.

The failure to pay child support conviction was not barred by the prohibition against double jeopardy. Defendant's civil contempt penalties served a purpose distinct from the punitive purpose served by the criminal sanction. The contempt orders for payment or incarceration were coercive, not punitive. Criminal

sanctions for other contempt orders did not pertain to the child support owed by defendant and did not present a double jeopardy problem.

**MURDER, FIRST DEGREE PREMEDITATED**
**-- Sufficiency of Evidence**
**EVIDENCE -- Hearsay -- Dying Declaration**
**PROSECUTOR -- Comments**
**-- Opening Statement**
**EVIDENCE -- Relevancy**
**COUNSEL -- Ineffectiveness Of**
**-- Failure to Cross Examine**
**COUNSEL -- Ineffectiveness Of**
**-- Failure to Investigate**

**People v Geracer Raphael Taylor**
**#265778, April 5, 2007**
**O'Connell, SAAD, Talbot**
**LAWRENCE S. KATZ**

Affirmed convictions of first-degree murder and felony firearm.

The prosecutor presented sufficient evidence to prove that defendant shot the victim with premeditation and deliberation. The victim was shot four times as he lay in bed; the victim identified defendant as the shooter by his nickname, Booger; shotgun shells at the scene were matched to shells found in defendant's home; and defendant and the victim fought the night before the shooting, providing a motive.

The victim's statement identifying defendant was not testimonial under Crawford v Washington, 541 US 36 (2004). Where, as in the instant case, police officers arrive at the crime scene immediately after a shooting and the victim, who is clearly dying, identifies his assailant, the identifying statements given to the police are nontestimonial.

The victim's statement identifying defendant was admissible as a dying declaration. The statement was made by the victim immediately after being shot with knowledge of his impending death (the police officer told him he was not going to live much longer). Under Crawford, dying declarations are admissible as an historical exception to the Confrontation Clause.

A comment by the prosecutor during opening statement concerning evidence which the trial court later ruled inadmissible did not deny defendant a fair trial. Because the trial court had not ruled on the admissibility of the anticipated testimony, nothing indicates that the comment amounted to misconduct, and the trial court's instruction that opening statements are not evidence was sufficient to cure any prejudice.

The prosecutor did not commit misconduct by introducing evidence that defendant's mother owned a shotgun. Although this weapon was not connected to the murder, it was the prosecutor's theory that the mother had two shotguns, one of which was never recovered. Moreover, a curative instruction would have cured any possible prejudice.

Defendant was not denied his right to effective assistance of counsel. Defendant's attorney did not perform ineffectively in cross examining the police officers concerning the victim's alleged uncertainty about the direction the shooter went while fleeing the scene. There is nothing in the record that the victim made any statements about the shooter's direction or method of flight. There was no indication that trial counsel was ineffective for not conducting an investigative background check of the victim. Defendant failed to show that any such evidence existed, or that the information would have aided his case since he did not raise a self-defense claim.

# *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.courtofappeals.mijud.net.*

**DOUBLE JEOPARDY -- Multiple Punishment**

**People v Dorailontie Martel Strawther**
**#265911, February 13, 2007**
**MLW #09-61859 (6pp)**
**MARK R. HALL**

Affirmed convictions of assault with intent to do great bodily harm, felon in possession of a firearm, felony firearm, and malicious destruction of property; vacated conviction and sentence for felonious assault.

Defendant's convictions of assault with intent to do great bodily harm (GHB) and felonious assault violated his right to be free from double jeopardy. Although felonious assault requires a weapon and GHB does not, the hierarchical nature of the punishments for escalating kinds of assault crimes

demonstrates a legislative intent to proscribe the same general offense, assault, by imposing an escalating punishment depending on the severity of the assault. Also, defendant's convictions did not arise from two separate and distinct offenses. Defendant was in the process of preparing to fire a second time when the victim drove off. The victim driving away did not terminate the assault; rather, it was one continuous act.

The trial court erred by assessing 20 points for PRV 6. Defendant was not in prison or jail and he was not an escapee at the time of the conviction offenses. He was serving a probationary sentence for a prior conviction, and the correct score was 10 points. The trial court erroneously concluded that it was impossible for defendant to commit a crime while incarcerated.

**SENTENCING AND PUNISHMENT -- Guidelines**
**-- Scoring**
**SENTENCING AND PUNISHMENT**
**-- Trial Court's Mistake of Law**

**People v Shulie Burton Jones**
**#264888, February 22, 2007**
**MLW #09-61965 (4pp)**
**DEBORAH CHOLY**

Affirmed convictions of carjacking, armed robbery, and felony firearm; remanded for resentencing.

The trial court unwittingly sentenced defendant outside the correct guidelines range. The parties agreed to the scoring, but defense counsel erroneously informed the trial court of the wrong guidelines range. Because the trial court imposed a sentence outside the appropriate range and did not intend to depart upward, resentencing is necessary.

**FELON IN POSSESSION OF A FIREARM**
**-- Sufficiency of Evidence**

**People v Kenyatta Lajuan Daniels**
**#265367**
**February 22, 2007**
**MLW #09-61790 (3pp)**
**JANET L. SZPOND**

Affirmed conviction of OUIL; reversed convictions of felon in possession of a firearm and felony firearm.

The prosecutor confessed error conceding that the evidence was insufficient to support the convictions of felon in possession of a firearm and felony firearm.

Judge Smolenski, concurring in part and dissenting in part, would find that defendant had constructive possession of the firearm found in the center console of the car he was driving.

**SENTENCING AND PUNISHMENT**
**-- Standards for Imposing Sentence**
**-- Reliance on Invalid Prior Convictions**
**SENTENCING AND PUNISHMENT -- Guidelines**
**-- Scoring**

**People v Robert Phillip Carico**
**#263155, December 21, 2006**
**MLW #09-61357 (6pp)**
**SADO - MARLA McCOWAN**

The trial court may have improperly scored PRV 2 of the sentencing guidelines based on uncounseled prior felony convictions. The presentence report indicated that defendant was represented by counsel in only three of his five prior felony conviction cases. Defendant's assertion that there was no valid waiver of the right to counsel was sufficient to satisfy his burden under People v Moore, 391 Mich 426 (1974), and he is entitled to a Moore/Tucker hearing to determine the constitutional validity of those prior convictions.

**SENTENCING AND PUNISHMENT**
**-- Economic Penalties -- Attorney Fees**

**People v Antwoine L. Pittman**
**#266276, March 15, 2007**
**MLW #09-62191 (3pp)**
**SADO - JACKIE MCCANN**

Affirmed convictions of armed robbery, felon in possession of a firearm, and felony firearm; vacated attorney fees.

The trial court failed to consider defendant's ability to pay when ordering reimbursement of attorney fees. Repayment is not required as long as defendant remains indigent. A remand is necessary to reconsider reimbursement "in light of defendant's current and future financial circumstances."

**SENTENCING AND PUNISHMENT -- Guidelines**
**-- Departure Reasons**
**ECONOMIC PENALTIES -- Attorney Fees**

**People v Terance Charles Hicks**
**#266510, March 15, 2007**
**MLW #09-62193 (6pp)**
**SADO - MICHAEL MITTLESTAT**

Affirmed conviction of second-degree criminal sexual conduct; remanded for resentencing and reconsideration of order for attorney fees.

Some of the trial court's reasons for departure from the guidelines, the nature of the offense, the nature of the victim's injuries, and the need to protect society, were not substantial and compelling. Resentencing is required because it is unclear whether the trial court would have departed to the same extent on the basis of its proper reason alone.

**ECONOMIC PENALTIES -- Attorney Fees**

**People v Ollie Vincent Blake**
**#266094, March 27, 2007**
**CDRC * (4pp)**
*** Available to attorneys from CDRC**
**SADO - JACKIE MCCANN**

Order to reimburse attorney fees vacated.

The trial court failed to indicate that it considered defendant's ability to pay when it ordered him to reimburse the county for his attorney fees. Because defendant received appointed trial and appellate counsel in this case, it is apparent that he does not have the ability to pay.

**SPEEDY TRIAL VIOLATION -- Constitutional Right to Speedy Trial**

**People v Thomas Ervin Hawthorne**
**#265473, March 29, 2007**
**MLW #09-62415 (9pp)**
**SADO - CHARI GROVE**

Reversed convictions of assault with intent to do great bodily harm less than murder and second-degree criminal sexual conduct.

Defendant was denied his constitutional right to a speedy trial by the nine-year delay. The prosecution was more responsible for the delay than defendant. The complainant failed to appear at the first scheduled preliminary examination in 1993, and defendant was incarcerated pursuant to a separate case at the time of the second preliminary exam. It is the responsibility of the prosecutor to provide notice to an incarcerated defendant. Upon defendant's release from the jail, a LEIN check did not reveal any outstanding warrants, and it was not unreasonable for defendant to believe the charges had been dismissed. No action was taken by the prosecutor until 2001. Defendant's demand for speedy trial was made as soon as the prosecutor filed charges, and he did not attempt to cause the delay. Even if defendant's assertions of prejudice were less than particularized, "consideration of prejudice is not limited to the specifically demonstrable" and "affirmative proof of particularized prejudice is not essential." Prejudice against defendant was not persuasively rebutted by the prosecution.

**SENTENCING AND PUNISHMENT -- Guidelines -- Scoring**

**People v Arnold Raymond Thomas**
**#270899, March 15, 2007**
**MLW #09-62205 (3pp)**
**DONALD R. COOK**

Affirmed convictions of felon in possession of a and resisting and obstructing a police officer; vacated sentence and remanded for resentencing.

Defendant was improperly scored 15 points under OV 1 for aggravated use of a weapon. Although there was a firearm within defendant's reach, there was no evidence that it was ever in his hand, much less that he pointed it toward the arresting officer. Properly scored, defendant's guidelines range is lower and the minimum sentence represents a departure without a substantial and compelling reason.

**CONSPIRACY**
**SENTENCING AND PUNISHMENT -- Standards for Imposing Sentence**

**People v Lisa Ann Dolph-Hostetter**
**#262858, April 3, 2007**
**MLW #09-62442 (8pp)**
**P. E. BENNETT**

Affirmed conviction of second-degree murder; vacated conspiracy conviction and remanded for resentencing.

Defendant's conviction of conspiracy to commit second-degree murder must be vacated because no such crime exists.

Defendant must be resentenced because the decision to vacate the conspiracy conviction affected the scoring of prior record variable 7 for the second-degree murder conviction. Although the sentence is within the reduced range, the sentence is invalid because it was based on the erroneous misconception that defendant was properly convicted of conspiracy.

Judge White, dissenting, would find that a prosecution witness's testimony at the medical examiner's inquest was not admissible at trial. The declarant's lack of memory was not feigned, and she was not cross-examined at the inquest. The error was not harmless, according to Judge White, because the prosecutor relied heavily on the prior testimony.

**SENTENCING AND PUNISHMENT -- Consideration of Lack of Remorse**

**People v Tammy Ann Sauro**
**#265951**
**March 27, 2007**
**CDRC * (4pp)**
*** Available to attorneys from CDRC**
**SADO - VALERIE NEWMAN**

Affirmed conviction of embezzlement; remanded for resentencing.

The trial court erroneously based its departure from the guidelines on defendant's refusal to admit guilt.

**Complete details on the training events listed below appear at page 14 of this month's newsletter.**

| | | |
|---|---|---|
| May 23 - 25, 2007 | Federal Sentencing Guidelines | FBA/USSC - Salt Lake City, UT |
| May 31, 2007 | Legal Technology Training | CDRC - Ann Arbor, MI |
| June 1 - 6, 2007 | Trial Advocacy Program | NDTP - Dayton, OH |
| June 7, 2007 | Legal Technology Training | CDRC - Flint, MI |
| June 8, 2007 | War on Drugs | UDM - Detroit, MI |
| June 14, 2007 | Legal Technology Training | CDRC - Bay City, MI |
| June 21, 2007 | Legal Technology Training | CDRC - Auburn Hills, MI |
| June 28, 2007 | Legal Technology Training | CDRC - Clinton Township, MI |
| July 7- 12, 2007 | Trial Advocacy College | WTAI - Laramie, WY |
| August 24 - 29, 2007 | Trial Practice College | CDAM - Lansing, MI |
| November 1 - 3, 2007 | Fall Conference | CDAM - Traverse City, MI |

# *Criminal Defense Newsletter*

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Dawn Van Hoek, Director CDRC & Editor
Martha Soltis, Associate Editor
Chari Grove, Associate Editor
Bill Moy, Layout & Word Processing
Maria Sanchez, Mailing & Subscriptions
John Powell, Web & Database

3300 Penobscot Building
645 Griswold
Detroit, MI 48226

(313) 256-9833
www.sado.org

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