

**MICHIGAN CRIMINAL  
CASE LAW UPDATE  
November 2005 – October 2006**

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## PRETRIAL PROCEDURE

### Joinder and Severance

#### Related crimes

Joinder, over defendant's objection, of a CSC I charge and a charge of possession of child sexually abusive material was not error. The crimes were related under MCR 6.120(B): complainant and the defendant's wife testified that defendant viewed the sexual images of children on his computer while engaging in sexual acts with them; and the joinder was not unduly prejudicial under MCR 6.120(C).

***People v. Girard, 269 Mich App 15 (2005)***

### Interstate Agreement on Detainers

#### Delay caused by or intended to accommodate the defense not counted

The Interstate Agreement on Detainers requires that a defendant be tried within 120 days of his return to the state less any delay "for good cause shown in open court." This court holds that delay necessary to accommodate the defendant fits good cause requirement. The defendant's trial took place 149 days after his return. The trial court did not err in deducting 35 days from the total delay. The defense requested a 22-day adjournment to research defenses and a delay of 13 more days was necessary due to defense counsel's withdrawal from the case.

***People v. Stone, 269 Mich App 240 (2005)***

## **180-Day Rule**

### **Applies to mandatory consecutive sentencing**

Even though an imprisoned defendant is facing a new charge carrying a mandatory consecutive sentence, he still has a right to be tried within 180 days “after the Department of Corrections delivers to the prosecutor notice of the inmate’s imprisonment and requests disposition of the pending charge.” MCL 780.131. The Court unanimously overrules *People v. Smith*, 438 Mich 715 (1991), where the Court had held that the 180-day rule did not apply to defendants facing mandatory consecutive sentencing. In this case, the DOC notified the police department of defendant’s incarceration more than 180 days before defendant was brought to trial. However, the Court found that providing notice to the police does not trigger the time period. Since the defendant was tried within 180 days of the prosecutor’s receipt of notice, the rule was not violated.

***People v. Williams*, 475 Mich 245 (2006)**

## **Jurisdiction**

### **Accessory after the fact**

For accessory after the fact prosecutions, jurisdiction is proper in the county where the underlying offense took place. It does not matter that the defendant did not knowingly render assistance in that county.

***People v. King*, 271 Mich App 235 (2006)**

## **Discovery**

### **Booking room video tape not discoverable**

The trial court erred as a matter of law when it ordered the prosecutor to produce the booking room videotape in this OUIL case. MCR 6.201 governs discovery in criminal cases. The booking room videotape is not included in any of the discoverable material permitted by the rule. Additionally, although the rule also permits the discovery of other

items not specifically listed, the party seeking discovery must show good cause and defendant failed to do that in this case. Finally, the trial court abused its discretion when it suppressed the Datamaster test results as a sanction for violating the erroneous discovery order.

***People v. Greenfield (on Reconsideration), 271 Mich App 442 (2006)***

### **Dismissal of OUIL Charge**

#### **Not appropriate remedy for statutory violation**

A defendant charged with OUIL has a statutory right to a reasonable opportunity for an independent blood test. However, neither dismissal of the charges nor suppression of the blood alcohol results is the appropriate remedy for violation of the statute. Even though the Supreme Court in 1963 held that dismissal was the proper remedy, the current Court rejects that holding because the Legislature did not expressly provide for such a remedy in the statute. The majority holds that the defendant is entitled to have the jury instructed that the police violated the defendant's statutory right. Overrules *People v. Koval*, 371 Mich 473 (1963).

***People v. Anstey, 476 Mich 436 (2006)***

## **INSTRUCTIONS**

### **Lesser Included Offenses**

Keeping a house of prostitution is not a necessarily lesser-included offense of racketeering. The trial court erred when it instructed the jury on the prostitution offense over the defense objection. Although the prosecution used the allegation that the defendants kept a house of prostitution as a predicate act for the racketeering charge, that alone does not make the former a lesser included offense of the latter. The court determined that the ultimate question is whether the Legislature intended that a conviction for one offense would bar conviction for the other. The court acknowledged that although it was necessary for the prosecutor to prove all of the elements of keeping a house of prostitution in order to prove the racketeering charge, the legislature stated in

the racketeering statute, MCL 750.159j(11), that “[c]riminal penalties under this section are not mutually exclusive and do not preclude the application of any other criminal or civil remedy under this section or any other provision of law.” That language led the court to conclude that the legislature intended that a conviction of racketeering does not preclude a conviction for any predicate offense. Since one cannot be convicted of two offenses where one is a lesser-included offense of the other, predicate offenses in racketeering charges cannot be lesser-included.

*People v. Martin*, 271 Mich App 280 (2006)

## **Refusal to Instruct on Defense of Accident**

### **Reversal not required unless reliability of verdict undermined**

The trial court’s erroneous refusal to instruct on accident does not require automatic reversal. Consistent with the decision in *People v. Lukity*, 460 Mich 484 (1999), the defendant must establish that the alleged error undermined the reliability of the verdict. *People v. Lester*, 406 Mich 252 (1979) and *People v. Ora Jones*, 395 Mich 379 (1975), [overruled on other grounds in *People v. Cornell*, 466 Mich 335 (2002)] are overruled.

*People v. Hawthorne*, \_\_\_ Mich \_\_\_ (No. 128168, rel’d April 26, 2006)

## **EVIDENCE**

### **The *Corpus Delicti* Rule**

#### **Accessory after the fact**

The *corpus delicti* of accessory after the fact is the same as the *corpus delicti* of the underlying crime itself. Because the prosecutor here presented sufficient evidence of the *corpus delicti* for both murder and unlawfully driving away an automobile, the trial court properly admitted the defendant’s confession to being an accessory after the fact to both offenses. The court explicitly rejects caselaw from other states requiring that there be some showing of assistance by the defendant to establish the *corpus delicti* of accessory after the fact.

***People v. King*, 271 Mich App 235 (2006)**

## Foundation

### Fingerprint cards

The trial court did not abuse its discretion when it suppressed white cards containing prints lifted from the scene of a breaking and entering, one of which matched the defendant. The officer who processed the crime scene and transferred the prints to the cards died before having an opportunity to testify. The officer who did testify was unable to authenticate that the prints on the cards were actually taken from the crime scene. Because there was no foundation, the majority finds it unnecessary to decide whether the cards met a hearsay exception or whether their admission would violate the defendant's right of confrontation.

*People v. Jambor*, \_\_\_ Mich App \_\_\_ (No. 259014, rel'd May 2, 2006)

## SENTENCING

### Sentencing Guidelines

#### Judicial scoring of offense variables does not violate the Sixth Amendment

Michigan's sentencing guidelines scheme, which permits the sentencing judge to score offense variables and raise the minimum sentence using facts not admitted by the defendant or proven to a jury beyond a reasonable doubt, does not violate the Sixth Amendment as interpreted by the US Supreme Court in *Blakely v. Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). According to the majority, *Blakely* only prohibits judicial fact-finding when it results in a sentence "beyond that permitted by the jury's verdict." The defendant here was found guilty on one count of third degree criminal sexual conduct, and one count of fourth degree criminal sexual conduct, and then pleaded guilty to a charge of third offense habitual offender. At the time of his plea, defendant knew he was facing a maximum of 30 years in prison. The court imposed a sentence of 127 months to 30 years, which was within the statutory maximum.

*People v. Drohan*, 475 Mich 140 (2006)

Defendant’s sentencing guidelines recommended a minimum sentence range of 5 to 28 months. The sentencing court’s decision to sentence defendant to 2 to 15 years did not violate *Blakely v. Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant had argued that only prior record variables could be scored because the scoring of the offense variables involved judicial fact-finding in violation of his right to jury trial per *Blakely*. Because the PRVs alone would have resulted in an intermediate sanction (not more than one year in jail), defendant argued that the OV scoring raised his effective maximum sentence from one year to 15 years. “A sentencing court does not violate *Blakely* and its progeny by engaging in judicial fact-finding to score the OVs to calculate the minimum recommended sentencing guidelines range, even when the defendant's PRV score alone would have placed the defendant in an intermediate sanction cell.”

***People v. McCuller*, 475 Mich 176 (2006)**

### **Offense Variable 7**

The trial court erred in denying the prosecutor’s request to score 50 points of OV 7 where the defendant held the victim at gunpoint for nine hours. OV 7 may be scored at 50 points even if there is no physical abuse of the victim. MCL 777.37 provides that 50 points should be assessed if the victim is treated with sadism. Section 3 of the statute defines sadism as: “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.” The legislature did not require actual physical abuse.

***People v. Mattoon*, 271 Mich App 275 (2006)**

### **Offense Variable 9**

Offense Variable 9, which requires the trial court to score points for every person in danger of injury or loss of life, cannot be scored if the only injury is financial. OV 9 is limited to physical injury only. Seven-judge conflicts panel overrules *People v. Knowles*, 256 Mich App 53 (2003).

***People v. Melton*, \_\_\_ Mich App \_\_\_ (Docket No. 257036, 07/20/2006)**

## **Prior Record Variable 5**

Because alcohol is not included within the definition of controlled substances in the Controlled Substances Act, the trial court erred in using defendant's prior alcohol-related juvenile offenses to assess 20 points on PRV 5. The instructions for PRV 5 permit the use of a juvenile conviction "only if it is an offense against a person or property, a controlled substance offense, or a weapon offense," MCL 777.55(2)(a).

*People v. Endres, 269 Mich App 414 (2006)*

## **Improper Considerations**

### **Refusal to admit guilt**

At his trial on charges of first-degree home invasion, felonious assault, and possession of a firearm during commission of a felony, defendant testified that he never possessed a weapon. At sentencing, the trial court said "...it might go a whole lot easier if we had the weapon that was discussed in this matter." The Court of Appeals held that this comment indicated that the court was improperly punishing defendant for refusing to admit guilt. Even though the sentence was within the guidelines, the court remanded for resentencing.

*People v. Conley, 270 Mich App 301 (2006)*

## **Holmes Youthful Trainee Status**

### **Eligibility for multiple convictions**

The Youthful Trainee Act, MCL 762.11 *et seq*, does not limit its applicability to a single conviction. Even though defendant pled guilty to two offenses, he was still eligible for youthful trainee status. The sentencing court erred when it ruled that defendant was not eligible for YTA because he had two convictions.

***People v. Giovanni, 271 Mich App 409 (2006)***

## **Sexually Delinquent Persons**

### **Statutory sentencing requirements versus sentencing guidelines**

At the time of defendant's sentencing for indecent exposure as a sexually delinquent person, the statute required a prison sentence of one day to life. In a prior opinion in this case, the same panel also held that the judge had the discretion under the statute to impose a probationary sentence in lieu of one day to life. The court now is asked to resolve the conflict between the statutory sentencing requirements and the sentencing guidelines statute that provided for various minimum sentence ranges depending on the severity of the offense and the offender. The court holds that the guidelines statute controls in that it was enacted later and reflects a legislative intent that it be applied to sexual delinquency sentences. The court also notes that the sentencing provision of the sexual delinquency statute has been amended so that the conflict no longer exists.

***People v. Buehler (On Remand), \_\_\_ Mich App \_\_\_ (Docket No. 254298, 07/25/2006)***

## CRIMES

### Aiding and Abetting Murder

#### Liability for natural and probable consequences

A defendant who intends to aid, abet, counsel, or procure the commission of a crime, can be found guilty of that crime as well as any other crimes which are “the natural and probable consequences of that crime.” The prosecutor must prove that the defendant aided or abetted the commission of the offense and that the defendant intended to aid the charged offense, knew the principle intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. Here, the defendant intended only to beat up the victim when he and his co-defendant went to the victim’s home. Defendant hit the victim twice and walked away, telling his co-defendant, “That was enough.” The co-defendant then shot and killed the victim. Because defendant intended to inflict great bodily harm, he is culpable for the murder, which was a natural and probable consequence of the assault.

*People v. Robinson, 475 Mich 1 (2006)*

### Arranging For, Producing, Making, Or Financing Child Sexually Abusive Material

#### Burning images to a CD-ROM

Defendant was properly charged with arranging for, producing, making, or financing child sexually abusive material, MCL 750.145(c)(2), for downloading pornographic photos and videos involving children and burning them to CD-ROM. The definition of child sexually abusive material includes “any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image...” MCL 750.145(c)(1)(m). Since defendant made copies of the computer images on his CD-ROMs, his behavior is within the scope of the statute.

*People v. Hill, 269 Mich App 505 (2006)*

## **Failure to Pay Child Support**

### **Statute of limitations**

Defendant was charged with not paying child support. He argued that the 6-year statute of limitations barred prosecution because his last child support payment was due 8 ½ years ago. The Court held that the trial court erred in applying a 10-year statute of limitations. The statute of limitations is 6 years because this is a criminal trial and the 10-year limitation applies only to civil trials. However, under MCL 750.165, refusing to pay support to one's wife or children as required by an order of the court and not paying the order in the time required is a felony. This felony is not a continuing offense; each failure to pay within the ordered time is a separate violation. Affirming in part, reversing in part, *262 Mich App 596, 686 NW2d 790 (2004)*.

*People v. Monaco, 474 Mich 48 (2006)*

## **Felonious Driving**

### **Definition of “operating”**

The Supreme Court reversed the dismissal of the charge of felonious driving against the defendant because the defendant was “operating” the vehicle in the context of M.C.L. 257.626c. The defendant, a front-seat passenger, grabbed and turned the steering wheel without permission of the driver, and severely injured a jogger. The trial court and court of appeals found that this did not constitute operation of the vehicle because the defendant was not in actual physical control of the vehicle. The Supreme Court disagreed, finding that defendant had actual physical control because such a level of control was necessary to drive the car off the road and into the jogger.

*People v. Yamat, 475 Mich 49 (2006)*

## **Felon In Possession**

### **Applies to inoperable weapons**

The statute prohibiting convicted felons from possession firearms, MCL 750.222d, defines a firearm as “a weapon *from which a dangerous projectile may be propelled by an explosive, or by gas or air.*” Focusing on the word “may,” the Court affirms defendant’s conviction even though the gun in his possession was inoperable and incapable of firing a bullet. Because the gun could have been repaired, a dangerous projectile may have been fired from it.

***People v. Peals, 476 Mich 636 (2006)***

### **Specified felony**

A person convicted of a “specified felony” under MCL750.222d, cannot possess a firearm unless he has sought and obtained restoration of his rights to possess firearms from his local concealed weapons board pursuant to MCL 28.424. It was undisputed that defendant had not obtained restoration of his rights. Instead, he argued that his prior conviction, breaking and entering a building, was not a specified felony and therefore, not subject to the restoration requirement. The court disagrees, finding that breaking and entering a building is a specified felony.

***People v. Pierce, \_\_ Mich App\_\_ (Docket No. 261805, 10/10/2006)***

## **Felony Murder**

### **Death caused after the flight from the scene of the predicate felony**

Eighteen minutes after he fled the scene of a home invasion, the police recognized the defendant's car as the one seen fleeing the home invasion and attempted a traffic stop. Defendant failed to stop, drove the wrong way on the expressway, and ultimately collided with another car, killing two people. The court upholds defendant's two felony murder convictions based on the predicate felony of home invasion. Murder committed during the unbroken chain of events surrounding the predicate felony is committed "in the perpetration of" that felony. *People v. Podolski*, 332 Mich 508 (1952). The phrase "in the perpetration of" includes acts beyond the elements of the predicate offense. The court weighed four factors: (1) time, (2) place, (3) causation, and, (4) continuity of action. Even though the defendant had fled from the scene eighteen minutes before the collision, he was still in flight at the time. "A reasonable juror could conclude that defendant had neither escaped nor reached a point of temporary safety."

*People v. Gillis*, 474 Mich 105 (2006)

## **Using the Internet to Communicate with Another for the Purpose of Committing a Crime**

### **Each communication is a separate offense**

MCL 750.145d criminalizes use of "the internet or a computer . . . to communicate with any person for the purpose of . . . [c]ommitting, attempting to commit, conspiring to commit, or soliciting another person to commit" several enumerated crimes. The trial court erred when it dismissed a second count under this statute on the basis that the two separate communications "should be read as one series of discussions creating one offense." The two communications on two different days were properly charged as two counts.

*People v. Cervi*, 270 Mich App 603 (2006)

## **Operating A Motor Vehicle With A Controlled Substance Present In The Body**

A person found with 11-Carboxy-THC in his or her system may be prosecuted under MCL 257.625(8), which prohibits the operation of a motor vehicle with any amount of schedule 1 controlled substance in the body. Experts testified that “carboxy THC itself has no pharmacological effect on the body and its level in the blood correlates poorly, if at all, to an individual’s level of THC-related impairment.” The majority concluded that 11-carboxy-THC is a schedule 1 controlled substance under the Public Health Code, MCL 333.7212(1)(c), for the purpose of construing MCL 257.625(8) of the Michigan Vehicle Code. The Court also found that the prosecution need only prove the defendant’s driving was the cause of the accident. Additionally, the prosecutor does not have to prove that the defendant knew he or she might be intoxicated. The dissent points out that under the majority’s decision, “weeks, months, and even years after marijuana was ingested, and long after any risk of impairment has passed, a person cannot drive a car without breaking the law if a test can detect the presence of 11-carboxy-THC.”

*People v. Derror, 475 Mich 316 (2006)*

## **CONSTITUTIONAL ISSUES**

### **Search and Seizure**

#### **Consent to search car extended to contents of computer found in car**

Defendant consented to a search of his car “...including the interior, trunk, engine compartment, and all containers therein.” The officer found a laptop computer in the car, removed it, and had another officer run an image search of the computer’s hard drive. The second officer found child pornography. The court held that the consent defendant gave extended to the contents of the computer because the computer was a container in the car. The court also stressed that defendant did not revoke his consent after he knew that the police were interested in his computer.

*People v. Dagwan, 268 Mich App 338 (2005)*

## **Probable cause for a search warrant**

The magistrate issued a search warrant based on an anonymous tip that the defendants were trafficking in large amounts of marijuana and a “trash-pull” by police that only revealed a small butt of a marijuana cigarette and a very small amount of residue in a pizza box. The affidavit did not contain any information about the anonymous tipster such as basis of knowledge, credibility, or reliability as the tipster never spoke directly to the police. The trial court found that the warrant was improperly issued but denied the defendants’ motion to suppress. The court held that the magistrate only violated the warrant statute and the Supreme Court has held that the exclusionary rule does not apply to statutory violations. The Court of Appeals majority agrees that the warrant was not properly issued but applies the exclusionary rule. Because the warrant was not supported by probable cause, there was a violation of the constitution itself.

*People v. Keller, 270 Mich App 446 (2006)*

## **Right to Counsel**

### **Guilty plea appeals**

The trial court erred in refusing to appoint appellate counsel for defendant following his guilty plea. The U.S. Supreme Court in *Halbert v. Michigan* held that defendants who plead guilty in Michigan have a Due Process right to counsel to pursue a discretionary appeal. Although defendant was sentenced before *Halbert* was decided, he submitted his request for counsel shortly after the *Halbert* decision and before the time limit to file a delayed application for leave to appeal had expired. The trial court violated the clear language of *Halbert* in finding that the decision did not apply to defendant’s case and in finding that the defendant had waived his right to appointed appellate counsel simply because he had been told at his plea that by pleading guilty he was not entitled to appellate counsel.

*People v. James, \_\_ Mich \_\_ (Docket No. 266521, 08/29/2006)*

## **Impeachment, fruit of the poisonous tree, inevitable discovery**

The defendant's pre-trial statements obtained in violation of his Sixth Amendment right to counsel can be used to impeach the defendant if he testifies at trial. However, the prosecutor is prohibited from calling two witnesses whose names defendant revealed during the illegal interrogation unless the prosecutor can establish that the witnesses would have been inevitably discovered independent of the defendant's confession. Note: the court applies the fruit of the poisonous tree doctrine to confessions obtained in violation of the Sixth Amendment, something the USSCt has not explicitly done.

*People v. Frazier, 270 Mich App 172 (2006)*

## **The Exclusionary Rule**

### **Applies to prior bad act evidence**

The trial court abused its discretion under MRE 404(b) in admitting evidence of a prior bad act where that evidence was illegally seized. Defendant was on trial for a drug offense arising from a 1998 drug raid on his house. Over objection, the prosecutor was permitted to introduce evidence that police raided his house in 1992 and found very similar drugs. Because the 1992 evidence was seized in violation of the constitution, this court holds the exclusionary rule still applies to the later use of the evidence under 404(b). The court finds the error harmless in this case.

*People v. McGhee, 268 Mich App 600 (2005)*

## **Right of Confrontation**

### **Ability to impeach police officers**

The trial court abused its discretion in refusing to permit defendant to present evidence that a 1992 drug possession, which was introduced as a prior bad act under MRE 404(b), resulted in a dismissal of charges and that a civil suit by defendant resulting from that case was settled. The evidence was relevant to assess the credibility of the police witnesses. The court again finds that the error was harmless.

***People v. McGhee, 268 Mich App 600 (2005)***

### ***Bruton* error harmless**

A defendant's 6<sup>th</sup> amendment confrontation right is violated when a non-testifying codefendant's confession that inculpates the defendant is introduced at a joint trial. *Bruton v. United States*, 391 US 123; 88 S Ct 1620; 20 Led 2d 476 (1968). The defendants in this case had a joint trial in which each defendant's statement was used against the other. The trial court admitted the statements based on both defendants' pretrial representations that they would be testifying at trial. In fact, neither defendant testified. The Michigan Supreme Court held that the admission of the statements violated both defendants' confrontation rights under *Bruton*. However, the court also found that the error was unpreserved and did not "seriously affect the fairness, integrity or public reputation" of the trial. *People v. Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Without that showing, the defendant's convictions were reinstated.

***People v. Pipes, 475 Mich 267 (2006)***

## **Forfeiture of right**

The admission of statements made by the murder victim to friends, co-workers, and relatives did not violate the Confrontation Clause as interpreted in *Crawford v. Washington*. The statements were not testimonial because they were not made to government officials or to preserve evidence for trial. Moreover, even if the statements' admission violated the confrontation clause, defendant forfeited the error because he caused the declarant to be unavailable by murdering her. Finally, since defense counsel did not object to the admission of the out of court statements under the Rules of Evidence, that issue was not preserved. The court reviewed defendant's appellate claim regarding the Rules of Evidence for plain error and found none.

### ***People v. Bauder, 269 Mich App 174 (2005)***

The trial court did not violate defendant's right of confrontation when it admitted under MRE 804(b)(6), a testimonial, out-of-court statement by the prosecution's primary witness. Defendant forfeited his confrontation clause rights by procuring the unavailability of the witness. The court acknowledges that the confrontation clause requires an analysis independent of the rules of evidence. However, the court finds that both MRE 804(b)(6) and the confrontation clause provide for forfeiture if the defendant procures the witness's unavailability. The court also finds sufficient evidence that defendant was responsible for the witness's unavailability.

### ***People v. Jones, 270 Mich App 208 (2006)***

## **Overbreadth**

### **Communicating over the Internet for the purpose of committing a crime**

MCL 750.145d, which criminalizes use of "the internet or a computer . . . to communicate with any person for the purpose of . . . [c]ommitting, attempting to commit, conspiring to commit, or soliciting another person to commit" several enumerated crimes, is not constitutionally overbroad. It does not merely punish words; it punishes "specific conduct directed toward sexual abuse of children."

### ***People v. Cervi, 270 Mich App 603 (2006)***

## **Double Jeopardy**

### **Felony murder and the underlying felony**

If the defendant is convicted of premeditated murder, felony murder, and the underlying felony for felony murder for one killing, double jeopardy principles require that he only be given one murder sentence supported by two theories. Although the underlying felony conviction must be vacated on double jeopardy grounds, if his murder conviction is later vacated on appeal for reasons unrelated to the underlying felony conviction, the trial court can resentence the defendant for the underlying felony as a lesser included offense.

*People v. Williams, 475 Mich 101 (2006)*