

**MICHIGAN CRIMINAL  
CASE LAW UPDATE  
November 2007 – October 2008**

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## **PRETRIAL PROCEDURE**

### **Amendment of the Information**

#### **No prejudice to defendant**

Defendant was charged with first-degree premeditated murder and bound over on a charge of second-degree murder. At trial, the prosecutor moved to amend the information to reinstate first-degree murder, arguing that evidence of premeditation could be found in the expert testimony of an independent pathologist that had been erroneously excluded by the district court. The circuit judge agreed and allowed the amendment. The Court of Appeals affirms and finds no abuse of the circuit judge's discretion. There was no unfair surprise or inadequate notice to defendant as he had been charged with first-degree originally. Also since the circuit judge had also ruled that the expert pathologist would be permitted to testify at trial, the judge was merely correcting a variance between the charge and the proofs.

*People v. Unger*, 278 Mich App 210 (2008)

### **Disqualification of the Prosecutor**

#### **Not A Necessary witness**

The trial court did not abuse its discretion in denying the defendant's motion to disqualify the assistant prosecutor. Defendant failed to establish that the prosecutor was a necessary witness and because defendant's motion was filed the eve of trial, granting it would have caused a hardship to the prosecutor and prejudice to the prosecution.

*People v. Petri*, 279 Mich App 407 (2008)

## **Conflict of Interest**

### **Trial court's duty to assure appropriate safeguards**

The attorney who represented defendant at the preliminary exam, joined the two-person prosecutor's office before defendant's trial. The trial court committed plain error by failing to assure that the prosecutor's office had established appropriate safeguards to prevent former defense counsel from sharing confidences with the prosecutor prior to defendant's trial.

*People v. Davenport*, \_\_\_ Mich App \_\_\_ (No. 271366, 8/28/08)

## **Sequestration of Witnesses**

### **Preclusion of victim's testimony**

The trial court precluded the victim from testifying at trial because the victim remained in the courtroom for the opening statements after the court ordered all witnesses to leave the courtroom. This was an abuse of the trial court's discretion. Without deciding whether victims have a constitutional right to remain in the courtroom despite a sequestration order, the Court held that because the victim's presence was an innocent mistake (she had been told to remain by the victim coordinator and neither the prosecutor nor defense counsel was aware of her presence) and because she only heard brief opening statements and not testimony, the trial court's severe sanction of preclusion was an abuse of discretion.

*People v. Meconi*, 277 Mich App 651 (2008)

## TRIAL PROCEDURE

### Prosecutorial Misconduct

#### Cumulative misconduct did not deny fair trial

Despite the Court of Appeals' conclusion that the prosecutor in this first-degree murder case improperly appealed to the jurors' sympathy, mischaracterized testimony, and improperly denigrated defense counsel and the defense experts, the Court affirmed defendant's conviction. Defense counsel did not proffer a timely objection to all these incidents and the trial court instructed the jury that arguments of counsel was not evidence.

*People v. Unger*, 278 Mich App 210 (2008)

#### Non-constitutional error

The Court of Appeals concluded in an earlier decision in this case that the prosecutor committed misconduct at defendant's murder trial. Specifically the Court found misconduct in the prosecutor's improper elicitation of defendant's alleged gang affiliation, improper argument to the jury concerning that alleged gang affiliation, improper impeachment by the prosecution of one of its own witnesses, and improperly questioning defendant about the credibility of witnesses. The Court affirmed the conviction in the earlier appeal finding the errors harmless. The issue on remand was whether any of the prosecutor's erroneous trial tactics rose to the level of constitutional error requiring a different harmless error analysis. The Court held that the errors were not of a constitutional magnitude. First, the prosecutor's tactics did not violate a specific constitutional guarantee. Second, even if the tactics generally violated due process, they did not require reversal because the errors "...did not so infect the trial with unfairness as to make the resulting conviction a denial of due process."

*People v. Blackmon*, \_\_\_ Mich App \_\_\_ (No. 277184, 8/19/08)

## **Defendant in Leg Restraints**

### **No showing of prejudice**

Even though defendant was required to wear leg restraints during his trial, he failed to show that he was prejudiced as a result. The record establishes that no jurors saw the leg restraints during the trial (the defense table was covered by a drape and the restraints were removed outside of the presence of the jury when defendant testified). Even some jurors may have seen defendant being escorted to and from the courtroom in leg restraints, the caselaw does not prohibit shackling as a safety precaution outside of the courtroom and defendant did not establish actual prejudice as a result.

*People v. Horn*, 279 Mich App 31 (2008)

## **EVIDENCE**

### **Hearsay**

#### **Dying declaration – MRE 804(b)(2)**

The 4 year-old decedent's statement, "I'm already dead," followed by his statement that "Mike" "mom's wife" was responsible were properly admitted as dying declarations. Unanimous Court rejects defendant's argument that a 4 year-old cannot be sufficiently aware of his impending death.

*People v. Stamper*, 480 Mich 1 (2007)

#### **Excited Utterance – MRE 803(2)**

In order to introduce an out of court statement as an excited utterance, the proponent of the testimony must satisfy the trial court that the statement was indeed produced by a startling event or condition. Contrary to Michigan Supreme Court precedent, the trial court may use the statement itself to establish the existence of a startling event. Overrules *People v Burton*, 433 Mich 268 (1989).

*People v. Barrett*, 480 Mich 125 (2008)

### **Impeachment of hearsay declarants – MRE 806**

Where two witnesses against defendant at his retrial for murder were unavailable, the trial court permitted the prosecutor to introduce the witnesses' prior testimony. However, the court refused to permit the defense to introduce out-of-court statements made by each witness to impeach the recorded testimony. While the trial court agreed that the statements were admissible under MRE 806 as impeachment of hearsay declarants, they were substantially more prejudicial than probative under MRE 403 and therefore, inadmissible. The Supreme Court majority, per Corrigan, holds that the trial court did not abuse its discretion. Moreover, any error was harmless. The dissent, by Markman, would hold that the trial court did abuse its discretion and would order a new trial.

*People v Blackston*, 481 Mich 451 (2008)

### **Expert Testimony – MRE 702**

#### **Properly admitted at trial even though it was excluded at the prelim**

At defendant's preliminary exam, the district court excluded the testimony of a prosecution expert, an independent pathologist. The circuit judge did not err in holding a supplemental evidentiary hearing and concluding that the pathologist's testimony was admissible at trial. The circuit judge not the district judge presides over the trial and is entitled to make independent evidentiary rulings. More importantly, the expert's opinion testimony was clearly admissible under MRE 702.

*People v. Unger*, 278 Mich App 210 (2008)

## **Prior Bad Acts – MRE 404b**

### **Substantially more prejudicial than probative**

At defendant's trial for murder of her 7-year-old child, the prosecutor's theory was that defendant intentionally gave her daughter an overdose of prescription medication causing her death. Defendant denied giving the child any medication the day of her death and argued that the child must have taken it on her own. Based on the position of the parties, the Court held that evidence that defendant had physically abused her other children was improperly admitted. The evidence was not probative of a proper purpose. The trial court permitted the evidence under MRE 404b to show motive, malice, intent, and absence of mistake or accident. However, neither mistake nor accident was in issue in this case. Although malice and intent were in issue, the proffered evidence was not sufficiently probative and should have been excluded under MRE 403.

*People v. Yost*, 278 Mich App 341 (2008)

### **Admissible to show charged act occurred**

At defendant's trial on a charge of committing fellatio on a 4 year-old boy, the trial court admitted evidence that defendant had committed fellatio on another 4 year-old boy four months earlier. The court did not abuse its discretion under MRE 404b or MRE 403. The other act evidence was properly admitted to show that the charged act occurred in light of its substantial similarity with the charged offense.

*People v. Kahley*, 277 Mich App 182 (2007)

## **MCL 768.27b**

### **Prior acts of domestic violence**

At defendant's trial for domestic assault against his live-in girlfriend, the prosecutor was permitted to introduce evidence that defendant had pled guilty to assault on the same victim 18 months before the incident in this case. The prior act was admitted under MCL 768.27b: "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403." The Court holds that the statute does not violate the ex post facto clause or separation of powers citing *People v. Pattison*, 276 Mich App 613 (2007).

*People v. Schultz*, 278 Mich App 776 (2008)

## **MCL 768.27a**

### **Prior acts of sexual misconduct involving children**

On remand by the Supreme Court to determine "whether MCL 768.27a conflicts with MRE 404(b) and, if it does, whether the statute prevails over the court rule." The Court determines that there is a conflict and that the statute controls because it is a substantive rule of evidence.

*People v. Watkins*, 277 Mich App 358 (2007)

## **Reference to Defendant's Refusal to Take a Polygraph**

### **Reversal not required**

A police officer's brief and unrepeatable testimony that defendant refused to take a polygraph was not plain error requiring reversal where defense counsel never fully objected to the testimony and never requested a cautionary instruction.

*People v. Kahley*, 277 Mich App 182 (2007)

## **Right To Present A Defense**

### **Improper restrictions on defense witnesses**

The trial court abused its discretion when it prevented defendant's daughter and her expert psychologist from testifying regarding defendant's intellect, judgment, etc. as a means of shedding light on defendant's behavior and statements. The elimination of the diminished capacity defense in *People v Carpenter*, 464 Mich 223 (2001) does not mean a legally sane defendant can never present evidence of mental disorder or limited mental capacity where such evidence is relevant to case issues. On another related issue, the Court, *sua sponte*, held that restrictions placed on a defense pathologist's testimony denied defendant her right to a fair trial and to present a defense. The trial court erred in barring the pathologist's testimony because he relied on medical texts for certain information regarding the drug imipramine and other matters. MRE 703 does not bar use of this information as hearsay because it did not deal with "facts or data in the particular case" under the rule.

*People v. Yost*, 278 Mich App 341 (2008)

## **SENTENCING**

### **Sentencing Guidelines - Scoring**

#### **OV9 – Number of victims limited to same transaction**

The trial court erred in scoring 10 points for Offense Variable 9 based on testimony that defendant had sexually abused another child in a different transaction. The plain language of the Sentencing Guidelines instructions indicates that the offense variables are offense specific.

*People v. Sargent*, 481 Mich. 346 (2008). See also *People v. Gullett*, 277 Mich App 214 (2007)

**OV10 – Predatory conduct requires exploitation of vulnerable victim**

The trial court erred in assessing 15 points under OV10 for engaging in predatory conduct. The trial court did so based on evidence that defendant waited in his truck before a restaurant robbery until all customers were gone. The Supreme Court held that predatory conduct within the scoring of OV10 requires exploitation of a vulnerable victim. The Court remanded for specific findings of a vulnerable victim or resentencing.

*People v. Cannon*, 481 Mich 152 (2008)

**OV19 – Perjury conviction requires scoring of OV19 (interference with the administration of justice)**

The trial court erred in not scoring OV19 at 10 points for interference with the administration of justice at defendant's sentencing for perjury in a court proceeding. The trial court's scoring of zero on OV19 because the offense itself involves interference with the administration of justice was erroneous.

*People v. Underwood*, 278 Mich App 234 (2008)

**OV19 – Interference with loss prevention employees at private store**

The trial court properly scored 15 points for OV19. Defendant shoplifted a car stereo from Meijer's and struggled with store employees while trying to leave the store. Defendant argued that interference with the administration of justice requires that he interfere with government officials not private store employees. The Court disagreed. Since the store employees are statutorily authorized to make an arrest, defendant's interference with them was interference with the administration of justice.

*People v Passage*, 277 Mich App 175 (2007)

## **OV20 – Threats of terrorism are not acts of terrorism**

The trial court did not err in refusing to score OV20 at 100 points for acts of terrorism where defendant was convicted of making a terrorist threat and there was no evidence that he carried out any acts of terrorism. A score of 100 points for OV 20 is justified only when a defendant's threats also constitute acts of terrorism. Reverses in part *People v. Osantowski*, 274 Mich. App. 593 (2007).

*People v. Osantowski*, 481 Mich 103 (2008)

## **Sentencing Guidelines – Departure**

### **Substantial and compelling reasons did not justify extent of departure**

In a CSC case involving sexual abuse of a minor, the Supreme Court agrees that the trial court's reasons for departure were substantial and compelling. However, the Court found that the trial court failed to state sufficient reasons for the *extent* of the departure (15 years over the highest guidelines range) discretion. The Court remanded to give the trial court an opportunity to justify the departure or resentence defendant.

*People v. Smith*, 482 Mich 292 (2008)

### **Departure justified**

The minimum sentence of 14 years and 10 months, an almost 6-year departure from the sentencing guidelines range (43 to 107 months), was not an abuse of discretion. The trial court's reasons were substantial and compelling and the resulting sentence was not disproportionate.

*People v. Petri*, 279 Mich App 407 (2008)

## **Departure justified**

The trial court departed from the Guidelines range of 0 to 9 months and imposed a sentence of 4 to 8 years for delivery of marijuana. The departure was justified by the trial court's stated reasons that defendant was a threat to society and particularly to police officers. The court based these findings on an officer's testimony at sentencing that defendant had made threats to kill police officers.

*People v. Uphaus*, 278 Mich App 174 (2008)

The trial court departed from the Guidelines' range of 9 to 15 years and imposed a minimum sentence of 25 years for first-degree CSC. The departure was justified by the court's stated reasons: defendant admitted at sentencing that he committed perjury at trial and that the Guidelines did not adequately consider defendant's severe pedophilia.

*People v. Kahley*, 277 Mich App 182 (2007)

The trial court departed from the Guidelines' range of 171 to 356 months and imposed a minimum sentence of 40 years for kidnapping, four counts of first-degree CSC, and habitual offender-second. The departure was justified by the court's stated reasons: defendant had engaged in a continuing effort to terrorize and victimize his wife and was likely to do so in the future. Also while in jail awaiting trial, defendant tried to get someone to kill his wife.

*People v. Horn*, 279 Mich App 31 (2008)

## **A prison sentence in an intermediate sanction case is a departure requiring reasons**

The sentencing guidelines called for an intermediate sanction which is defined as “probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed.” The Supreme Court unanimously held that imposition of a prison sentence, even one within the Guidelines’ minimum sentence range, is a departure that requires reasons on the record.

*People v. Muttscheler*, 481 Mich 372 (2008).

## **Credit for Time Served**

### **Time not served due to jail overcrowding**

Defendant was originally sentenced to county jail as a condition of probation. He was released early due to jail overcrowding and subsequently sentenced to prison for probation violation. The trial court gave defendant credit for the time he actually served in jail and the time he would have served but for the overcrowding early release. The Court of Appeals held that the latter credit was improperly granted. The Legislature only intended credit for time actually served in jail.

*People v. Grazhidani*, 277 Mich App 592 (2008)

## **Parole detainees**

Defendants on parole, who are arrested for a new offense and have a parole detainer placed on them, are not entitled to credit on their new sentence for time served between arrest and sentence. That time is properly credited to the old sentence not the new one.

*People v. Filip*, 278 Mich App 235 (2008)

## **Sex Offender Registration Act**

### **Not required for conviction of bestiality**

Defendant was convicted of having sex with a sheep and ordered to register as a sex offender. The Court of Appeals vacated the order that defendant register, holding that the Sex Offender Registration Act does not apply to that portion of the crimes against nature statute that covers bestiality.

*People v. Haynes*, \_\_\_ Mich. App. \_\_\_ (No. 277185, 9/23/08)

### **No discretion to remove offender who used force or coercion**

Defendant was convicted of CSCII involving a minor when defendant himself was only 11 years old. He successfully completed his probation and then, at age 19, petitioned the trial court to remove the registration requirement. The trial court correctly denied the motion under the statute because defendant used force or coercion to commit his offense. If force or coercion is used, the trial court has no discretion to lift the registration requirement.

*People v. Hesch*, 278 Mich App 188 (2008)

### **Registration for possession of obscene materials depicting persons under 18**

Defendant was convicted of possession with intent to distribute obscene materials and ordered to register as a sex offender. The Court of Appeals upholds the order even though the offense is not listed in the SORA. Defendant's case comes within the catchall provision which requires registration if the offense is a sexual offense against a person less than 18 years of age. Because the obscene material depicted minor females, registration was required.

*People v. Althoff*, \_\_\_ Mich App \_\_\_ (No. 274906, 9/2/08)

## **Oder of Reimbursement for Appointed Counsel**

### **Must consider ability to pay**

A court may require a defendant to repay the court for the cost of appointed counsel only if that reimbursement does not cause undue financial burden on the defendant. Because the trial court in this case did not consider defendant's ability to pay, the case is remanded for further proceedings.

*People v. Trapp*, \_\_\_ Mich App \_\_\_ (No. 28662, 9/9/08)

## **Habitual Offender**

### **Two convictions from the same transaction count as two priors**

Overruling *People v. Preuss*, 436 Mich. 714 (1990), the Supreme Court holds that convictions for multiple crimes committed in a single criminal transaction count as separate convictions for habitual-offender purposes. The Court rejects the *Preuss* Court's rationale that the Legislature must have intended that the defendant have had an opportunity to reform between convictions.

*People v. Gardner*, 428 Mich 41 (2008)

## POST-CONVICTION MOTIONS

### Expungement

#### Juvenile record

The trial court erred in setting aside the juvenile convictions. The plain language of the statute authorizing the court to set aside juvenile convictions, MCL 712A.18e, limits such action to those who have only been convicted of one offense. The defendant here had been convicted of two offenses arising out of the same transaction.

*People v. Hutchinson*, 278 Mich App 108 (2008)

### Post-conviction DNA Testing

#### Statutory materiality requirement

By statute, MCL770.16, defendants may seek post-conviction DNA testing to establish their innocence if the evidence sought to be tested is material to the person's identity as the perpetrator of the crime. The trial court here denied the motion finding that defendant failed the materiality requirement because there was other evidence of defendant's guilt. The Court of Appeals reversed, holding that materiality in this context means that "there is some logical relationship between the evidence sought to be tested and the issue of identity". Finding materiality in this case, the Court ordered that defendant be provided with DNA testing.

*People v. Barrera*, 278 Mich App 730 (2008)

## **CRIMES**

### **Home Invasion**

#### **Fire damaged home is a dwelling**

Under the home-invasion statute, dwelling is defined as a structure or shelter used permanently or temporarily as a place of abode. The defendant argues that the house he broke into was not a “dwelling” because it had been damaged by fire, condemned and was not habitable at the time of the offense. The Court of Appeals disagrees, stating that an owner’s temporary absence or a structure’s habitability will not automatically preclude a structure from being a dwelling for purposes of the statute.

*People v. Powell, 278 Mich. App. 318 (2008)*

### **Interference with Reporting a Crime**

#### **Underlying crime need not be proven**

Under MCL 750.483a(1)(b), preventing the reporting of a crime, the prosecution must prove: that a defendant prevented or attempted to prevent, through the unlawful use of physical force, someone from reporting a crime committed or attempted by another person. Here the defendant argues that “committed or attempted” requires proof of the actual or attempted commission of a crime. The Supreme Court disagreed stating that the prosecution is not required to prove that the crime being reported was committed or attempted, but merely that there was interference with reporting an attempted crime.

*People v. Holley, 480 Mich. 222 (2008)*

## **Robbery**

### **Force and Fear**

Here, the defendant was convicted of robbery under MCL 750.530. The defendant argues on appeal that there was insufficient evidence to show he used force or violence because he was merely trying to evade capture and nothing more. However, the court stated that use of any force against a person during the course of committing a larceny, which includes the period of flight, is sufficient under the statute. Therefore, there was sufficient evidence to support the robbery conviction.

*People v. Passage* 277 Mich. App. 175 (2007)

Under MCLA 750.89 it isn't necessary that the victim of an armed assault with intent to rob be put in fear. The jury must look at the defendant's intent to scare and whether an ordinary person would reasonably believe a legitimate threat of harmful contact. Because the victim was frightened and didn't know defendant had a pretend firearm there is sufficient evidence to find defendant assaulted the victim.

*People v. Davis* 277 Mich. App. 676 (2008)

## **Felony Non-support**

### **Notice required**

One of the elements of felony nonsupport is that the defendant appears in or receives notice of the action in which the order was issued. Here, defendant argues that he never received notice of the actions in which the support orders were entered. The court agreed, holding that the prosecution is required to establish that defendant has received such notice; it is an element of the offense of felony nonsupport.

*People v. Herrick* 277 Mich. App. 255 (2007)

## **Nursing Home Abuse**

### **Mistreatment of deceased patient**

Here, defendants positioned the deceased in several different poses and took pictures of her, which resulted in a charge of mistreating a patient. The dispute in this case is whether a deceased person can be considered a “patient” and subject to mistreatment, abuse, or neglect. Although the trial court and circuit court found in the affirmative, the Court of Appeals held that because the deceased was not receiving statutorily defined “care and services” she cannot be construed as a patient under MCL 333.21771(1).

*People v. Shakur*, 280 Mich App 203 (2008)

### **Accidental injury**

Under Michigan statute, a nursing home administrator must report to state authorities any physical, mental, or emotional abuse, mistreatment, or harmful neglect of a patient. Here, defendant failed to report an accidental injury to a patient. However, the court held that her conduct did not constitute harmful neglect within the statute

*People v. Edenstrom*, 280 Mich App 75 (2008)

## **CSC**

### **Inappropriate, unethical behavior defined**

Defendant argues that MCL 750.520b allows for improper delegation of legislative authority because it allows a third party, the APA, to make a determination of what constitutes a prohibited behavior. Under the nondelegation doctrine the legislative body may not delegate to another its lawmaking powers; however, a subordinate body may have the authority to determine when the law shall operate. Here, defendant’s charges were reinstated because under the statute the APA doesn’t determine whether criminal charges should be filed. Rather, the APA makes factual determinations and guidelines regarding inappropriate and unethical behavior. Thus, the legislature’s deferral to and use of private standards or findings does not violate the nondelegation doctrine.

*People v. Bayer*, 279 Mich. App. 49 (2008)

## **Embezzlement by Agent**

### **Irrevocable UTMA transfers**

Where a defendant retains all proceeds of his Uniform Transfers to Minors Act account, retransfers the assets from the account to his own personal account and leaves nothing for the minor, a court can find that he converted the assets to his own. Here, the Supreme Court held that defendant's transfers made are irrevocable and the custodial property placed in the account is indefeasibly vested in the minor, therefore defendant's embezzlement conviction is affirmed.

*People v. Couzens*, 480 Mich. 240 (2008)

## **Controlled Substance**

### **Anabolic steroid possession**

Here, defendant was convicted of possession of Trenbolone, an anabolic steroid. Defendant argues the statute is unconstitutionally vague because it fails to provide notice of prohibited conduct. However, the Court of Appeals looked at the plain language and determined that it expressly identifies Trenbolone, as a prohibited schedule 3 controlled substance. Although the possession intended for administration through implants to cattle is not illegal, the possession intended for human consumption is illegal.

*People v. Brown*, 279 Mich App 116 (2008)

## **First-Degree Murder**

### **Premeditation**

To convict a defendant of first-degree murder, it must be found that defendant intentionally, premeditated and deliberately killed the victim. To prove premeditation and deliberation a defendant need only have time to “take a second look” before the ultimate killing. In this case, defendant hit victim several times, threw the victim’s body over a railing, and then moved the barely alive body into the lake. On the basis of this evidence, it can be found that because defendant moved the body into the water – after seeing the victim was still alive – defendant had time to “take a second look,” thus, establishing premeditation and deliberation.

*People v. Unger*, 278 Mich App 210 (2008)

## **Medical Fraud**

### **Knowledge of fraud**

After being convicted of Medicaid fraud defendant argues there is insufficient evidence to show the claims were false, and assuming they are false, there is lack of evidence to show he had knowledge the claims were false. The Court of Appeals held that there was sufficient testimony at trial to prove defendant’s claims were false, deceptive, and misrepresented. Furthermore, because no claims would have been submitted without defendant’s express approval and acknowledgment, the defendant had actual or constructive knowledge the claims were false.

*People v. Kanaan*, 278 Mich App 594 (2008)

## CONSTITUTIONAL ISSUES

### Double Jeopardy

#### CSC 1, First Degree Felony Murder

Defendant's convictions and sentences for first-degree felony murder and first-degree CSC are reinstated because they do not violate double jeopardy. Thus defendant could be punished for both. The Supreme Court held that first-degree felony murder contains the element "killing of a human being" not included in first-degree CSC. And first-degree CSC contains the element "sexual penetration" not included in first-degree felony murder.

*People v. Ream*, 481 Mich 223 (2008)

#### Car Jacking, Assault With Intent To Rob

Defendant's convictions of carjacking and assault with intent to rob while armed do not violate the double jeopardy clause. Under double jeopardy, if each crime requires proof of a fact that the other does not, then the clause is not violated. Assault with intent to rob while armed does not require larceny of a motor vehicle, as does carjacking and carjacking does not require the use of a weapon.

*People v. McGee*, \_\_\_ Mich App \_\_\_ (No. 279127, 9/16/08)

### Search and Seizure

#### Canine "sniff" of home

At trial, defendant moved to suppress items seized during a canine sniff outside his front door, subsequently alerting officers to the presence of a controlled substance inside his home. Although the trial court agreed, the Court of Appeals reversed and remanded the case, holding there is no reasonable expectation of privacy at the entrance to property that is open to the public, including the front porch. Here, any contraband sniffed fell within the "canine sniff" rule; therefore no search in violation of the Fourth Amendment.

*People v. Jones*, 279 Mich App 76 (2008)

### **Auto Search - incident to arrest of passenger**

The Fourth Amendment allows officers to search a vehicle incident to a lawful arrest of the passenger, regardless of whether officers believe the vehicle contains contraband or the operator is engaged in illegal activity. Here, the Court of Appeals reasoned that there is a diminished expectation of privacy in a vehicle; officers need a bright-line rule to implement; there is a need for more safety and preservation of evidence.

*People v. Mungo*, 277 Mich App 577 (2008)

### **Third party consent search of computer**

Searches and seizures conducted without search warrants are unreasonable per se, subject to several exceptions – such as, consent. Generally, the consent must come from the person whose property is being searched. Here, defendant was allowed to use a neighbor’s computer, thus no Fourth Amendment violation where the neighbor expressly consented to the search.

*People v. Brown*, 279 Mich App 116 (2008)

### **Particularity requirement**

Defendant argues the affidavit supporting the search warrant did not establish probable cause nor did it describe with particularity the items to be seized. The search warrant granted officers a search of defendant home and vehicle for “evidence of homicide.” The court stated that a reasonable person could have concluded that there was substantial basis for finding probable cause existed in the cottage and vehicle. And the general description of “evidence of homicide” is not overly broad because probable cause existed to allow such breadth.

*People v. Unger*, 278 Mich App 210 (2008)

## **Vagueness**

### **Turn signal required**

Here, the lower court held MCL 257.648(1), requiring a driver to use a turn signal when changing lanes was unconstitutionally vague. The defendant claims that this statute, fails to provide fair notice of the conduct described. MCL 257.648(1) states: that before stopping or turning from a direct line, the driver shall... give a signal as required. The Court of Appeals analyzed the words and held that a reasonable person of ordinary intelligence does not have to speculate to the meaning of the phrase, thus the statute provides fair notice and is not unconstitutionally vague.

*People v. Hrlic*, 277 Mich App 260 (2007)

## **Confrontation**

### **Prior opportunity to cross-examine**

A defendant has the right to be confronted with the witnesses against them. The 6<sup>th</sup> Amendment bars statements by a witness who doesn't appear at trial unless the witness is unavailable and defendant had a prior opportunity to cross-examine. Because defendant's trial counsel had a prior opportunity to cross-examine the witness, the admission of the videotaped witness did not violate defendant's right to confrontation.

*People v. Yost*, 278 Mich App 341 (2008)

## **Ex Post Facto Law**

### **“Heidi’s Law”**

Ex Post Facto clauses prohibit legislative bodies from enacting laws that criminalize an act after it has been committed. At first the trial court granted defendant’s enhanced sentence for OWI 3<sup>rd</sup> (known as Heidi’s Law) because he had two or more prior alcohol-related convictions. The trial court subsequently held “Heidi’s Law” to be unconstitutional as a violation of ex post facto clauses. However, defendant is not being prosecuted for the prior alcohol offenses, but for his future driving while impaired conduct. Thus, the Court of Appeals remanded the case holding that defendant’s prosecution did not violate ex post facto protections.

*People v. Perkins*, 280 Mich App 244 (2008)

## **Ineffective Assistance of Counsel**

### **Defense expert – failure to call**

To prove ineffective assistance of counsel under *Strickland* the defendant must first show that counsel’s performance was deficient, that the errors were so serious that they would violate the Sixth Amendment. Next, the defendant must show the deficient performance was prejudicial, or a reasonable probability that, but for counsel’s error, the result would have been different. Here, the Supreme Court found that counsel was not ineffective for failing to produce an expert to rebut the prosecution’s experts and that defendant was not prejudiced because there is no indication that the court would have accepted the testimony over that of the prosecution’s expert.

*People v. Dendel*, 481 Mich 114 (2008)

### **Admission of prior offenses – failure to object**

Defendant argues ineffective assistance of counsel for failing to challenge the admissibility of his two prior convictions for CSC. When a defendant is charged with CSC against a minor, evidence that the defendant committed another crime of CSC against a minor may be admitted under MCL 768.27a, independent of MRE 404(b), even if there was no conviction for the other crime.

*People v. Petri*, 279 Mich App 407 (2008)

### **Prosecution conflict of interest – failure to object**

To prove ineffective assistance of counsel, a defendant must first show counsel's performance fell below an objective standard and that but for counsel's errors, the result would have been different. Here, defendant proved that counsel's failure to raise an objection to the prosecutor's conflict of interest was objectively unreasonable. The court remanded the case concluding that the trial court should have explored more thoroughly and in greater detail, the conflict of interest, determining whether the prosecutor's office took reasonable safeguards to prevent communication regarding defendant's case.

*People v. Davenport*, \_\_\_ Mich App \_\_\_ (No. 277185, 9/23/08)

## **Right to Counsel at Sentencing**

### **Substitute counsel**

A criminal defendant does not have an absolute right to be represented at sentencing by the lawyer who represented him at trial. Here, substitute counsel was associated with defendant's trial attorney, fully represented the defendant, was introduced as defendant's attorney and stated she was standing in on the trial attorney's behalf. Because defendant made no objection to substitute counsel, he is not entitled to be re-sentenced due to trial counsel's failure to appear at sentencing.

*People v. Davis*, 277 Mich. App. 676 (2008)