

Criminal Defense Newsletter



May, 2004
Volume 27, Number 8

Features

<i>Criminal Law in the Sun Seminar a Success</i>	7
<i>Junk Science in SBS</i>	1
<i>More on ACLU Juvenile Lifer Project</i>	8
<i>Proposed Court Rule Changes Draw Vociferous Comments</i>	10

Departments

<i>From Other States</i>	13
<i>From Our Readers:</i>	
<i>Losing Blood and Liberty on America's Highways: A Case Review</i>	8
<i>Legislative Update</i>	10
<i>New and Interesting in the Online Brief Bank</i>	16
<i>Reports and Studies</i>	11
<i>Technical Tips</i>	11
<i>Training Calendar</i>	24
<i>Training Events</i>	17

Appellate Courts

<i>Michigan Court of Appeals</i>	
<i>Published Opinion Summaries</i>	21
<i>Unpublished Opinion Summaries</i>	23
<i>Michigan Supreme Court</i>	
<i>Opinion Summaries</i>	20
<i>Order Summaries</i>	20
<i>United States Supreme Court</i>	
<i>Certiorari Granted Summaries</i>	18
<i>Opinion Summaries</i>	18

Junk Science in SBS (Shaken Baby Syndrome) and Child Head/Brain Injuries:

A Case Study

We are fortunate this month to feature an in-depth article on defense of a shaken baby case, written by F. Martin Tieber. Mr. Tieber recently won a new trial for a client convicted of second-degree murder, largely as a result of his investigation of problems with evidence often treated as unimpeachable. An application for leave to appeal has been filed by the Attorney General's Office. His review of the case follows. The Editor.

Introduction

John Plunkett, M.D., a nationally prominent pathologist working out of the Regina Medical Center in Hastings, Minnesota, who has published repeatedly in the area of child head injury, has stated: "Judicial weight of a medical conclusion of abuse is too great." Indeed, jurors, and in the Branch County case described in this article even a judicial fact-finder, are so impressed by "scientific" medical and forensic evidence that glaring weaknesses in a case and the clear absence of proof beyond a reasonable doubt are often overlooked. There is a substantial danger that jurors will find "scientific" evidence reliable, even if the evidence is effectively attacked on cross-examination.

Attorneys defending in proceedings to terminate parental rights or criminal cases, where it is alleged that a parent or care-giver's intentional acts resulted in brain injury to an infant or young child, must make every effort to consult and present appropriate experts (biomedical/biomechanical engineer, pediatric neurosurgeon, clinical pathologist). This is so because of the complexity of the issues, which in most cases are not capable of being understood by lay persons, including attorneys, because of the "junk science" myths being parroted by medical professionals who should know better and because the research in this area is in its infancy, though some prosecutors and medical professionals are prematurely treating critical issues as having been resolved.

Accident Or Intentional Act – A Case Study

The defendant, convicted of second degree murder and serving a 17-30 year sentence in Michigan's Carson City Correctional Facility when this writer was retained in January of 2003, once had a promising future. Graduating with honors from a prominent Ohio university, with graduate work under his belt, he came to Michigan to earn some needed funds working with an uncle who managed a large manufacturing plant in the south-central part of the state. While living in Michigan he met a woman who recently had arrived from Iowa. She was the mother of a baby girl who was about ten months old when the mother and daughter moved in with the defendant in the fall of 2000.

By all accounts defendant loved and nurtured the baby girl, caring for her at times when the mother was at work. Relatives testified that he had always been good with children. In the dead of winter in 2001, close to the baby's first birthday, defendant took over care in the late afternoon after dropping mom off at work. He had just finished a long shift, was buoyed by a promotion at work and looking forward to his first long weekend off in months.

After shopping with the baby for a few hours, defendant returned to the apartment he shared with mother and baby, bathed and fed the infant, and settled her in for the night. Mid-evening he got a call from the mother at work. She told him she was cramping and bleeding and might be miscarrying (she and defendant felt she might be pregnant with defendant's child). She asked him to come get her and take her to the hospital.

In a panic defendant woke and bundled the baby and, in a quick pace, left his second story apartment. He tripped on the second riser of an interior stairway (wood stairs covered by threadbare indoor/outdoor type carpeting) and the baby shot out of his arms and

flew down and into the stairwell, striking her head on the hard wooden stairs. He took her back to the apartment, and after attempting first aid and removing vomit, immediately took her to the hospital, picking up the mother on the way.

The baby was treated at the first hospital, then airlifted to a regional pediatric intensive care facility. Brain trauma was extensive and the baby was removed from life support several days later. Defendant was charged with murder and convicted after a bench trial in the fall of 2002. He was sentenced to 17-30 years in prison. The case is People v Anthony Scott Campbell, Branch County Circuit Court No. 01-017197-FC. It was tried before the Honorable Michael H. Cherry.

Medical Junk Science

At the bench trial in the study case nine doctors testified. To varying degrees they stated that the presence of retinal hemorrhage indicated SBS, or "shaken baby syndrome." They testified that the presence of subdural hemorrhage/hematoma, in combination with the retinal hemorrhages, established conclusively that the injury which ended the baby's life was intentionally inflicted and could not have been accidental. The doctors at trial, relying on a "history" provided by the investigating officer (who was taped stating that he wanted to "hang" the defendant), claimed that the injury which caused death could not possibly have occurred in the manner described by the defendant, which these medical witnesses relayed as a "tumble down carpeted stairs."¹ They based their conclusions on "the literature."² One doctor went so far as to say that the injury suffered by the baby would require a 40-50 foot drop.³

Doctor A, an ER physician, testified that the baby was brought into the emergency room at the original treating hospital. He stated that in his view the retinal hemorrhaging he observed was "extremely suggestive or diagnostic . . . for a child shaking death" and stated that the existence of blood in the eyes signifies abuse "until proven otherwise." Doctor A insisted that this injury could only have occurred through child abuse.

Doctor B, a pediatric intensivist at the second treating hospital, did, unlike Doctor A, see a skull fracture when the baby arrived at his hospital for treatment. He agreed with Doctor A that retinal hemorrhages are pathognomonic for non-accident trauma. He admitted, however, that this (conclusion that the force generated to cause the trauma which undeniably resulted in serious injury to baby was intentionally exerted as opposed to accidentally caused) was a wholly subjective opinion, not based on any scientific fact and not supported by testing of any sort.⁴

Doctor B claimed that the baby had suffered a shattered spleen and discussed possible causes of this "injury." He also noted a fractured rib. Though both of these serious injuries were later ruled out, Doctor B stressed the severity of injuries and distribution of injuries as inconsistent with a fall down stairs. Doctor B indicated, however, that a CT of the cervical spine revealed no pathology.

Doctor C, a forensic pathologist, did the autopsy. He stated that there were no injuries to the ribs or to the spleen, clearly indicating that Doctor B was wrong about these findings.⁵ He stated that the injury which caused death was in turn caused by the slamming of the head against a "hard, unyielding surface." His finding of homicide was based on a perceived discrepancy between the history "that I was provided and that I understood to be a summary of the events that occurred and the severity of the injuries that I saw." Doctor C's history was "a simple fall in a home" and was provided in large part by the investigating officer. The pathologist admitted that the cause of death determination in this case was subjective and that he needed the history provided by the officer to call it - physical injury alone would not do it.

Doctor C said the stairs would not cause this injury but admitted he had not examined the stairs. He noted there was nothing specific or objective upon which to base his conclusions and generally based his finding of homicide on "the literature." The autopsy showed that the only evidence of trauma to the skull was a linear fracture (as opposed to a depressed fracture where the bone is driven inward), there was no definitive evidence other than a singular trauma site, one blow caused death (this was not likely shaken baby syndrome as suggested by others), the hemorrhaging was "not massive"⁶ and there was no evidence of prior injuries to the child. Doctor C clearly stated that the baby was not an abused child, that one severe blow to the head caused her death.

Importantly, at trial, Doctor C extensively discussed the nature of his finding of homicide versus accident in this tragedy. He stated unequivocally and repeatedly that this finding was based on the history, the information leading up to the event - and he was very forthcoming about the fact that that information came primarily from the investigating officer, who had earlier, on tape, expressed an intent to "hang" the defendant. Doctor C admitted that he had done no investigation to independently verify the critical history information. The pathologist agreed that no testing was done to determine force necessary to "occasion an injury of the type you've seen" and admitted "this isn't hard science." He clearly indicated his conclusions were based on the literature and on anecdotal evidence.

Doctor D, a neurosurgeon, was told "fall down the stairs" by others and claimed "it didn't fit" the injury. He described a child's fall down stairs as "they either tumble or they slide." He did not see a fracture. Doctor E, a critical care doctor, stated unequivocally that "you do not get retinal hemorrhages from falling down a flight of stairs" which she assumed were carpeted and "somewhat cushioned," although she could not cite any articles or books from which she drew her conclusions. She admitted to inaccurate observations and agreed that doctors "rely on the word provided to you by your fellow practitioners to reach the conclusions that you reach."

Doctor F, another pediatric intensivist, called this a "very classic, indisputable case of abusive head trauma" and claimed he didn't need any history to call it. He based his conclusions on repeated head trauma, splenic laceration and a posterior third rib fracture, all of which had been debunked by the pathologist at autopsy.

At trial the prosecutor stated that "We have not had one doctor that has said that this is a result of an accident. If we did, we would not be here today, your honor."

Revision Of MRE 702 And 703, Daubert And Kumho Tire

After trial in the study case, the Michigan Supreme Court amended [MRE 702](#) (testimony by experts, amendment effective January 1, 2004) and [MRE 703](#) (bases of opinion testimony by experts, amendment effective September 1, 2003). Previously, under [702](#), an expert could testify "in the form of an opinion or otherwise" if the court determined "that recognized scientific, technical, or other specialized knowledge" would assist the fact finder in understanding the evidence or in determining a fact in issue as long as the witness was "qualified as an expert by knowledge, skill, experience, training, or education." Revised [MRE 702](#) reads as follows:

"If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The staff comment to the 2004 amendment suggests the change is designed to demand gate-

keeping activity by trial courts in order to exclude unreliable scientific testimony in line with the United States Supreme Court's pronouncements in [Daubert](#)⁷ and [Kumho Tire Co.](#)⁸ In [Daubert](#), the Court agreed that the [Frye](#)⁹ "general acceptance" test for admission of expert scientific testimony had been superseded by the Federal Rules of Evidence. Noting that experts are allowed to stray from the "usual requirement of first hand knowledge,"¹⁰ the Court demanded that an expert have "a reliable basis in the knowledge and experience of his discipline"¹¹ for testimony presented to a fact finder. While not purporting to set out a clearly defined checklist, and while agreeing that "general acceptance" can still play a role, the Court suggested that the extent of testing, peer review publication, and the known or potential error rate and the standards controlling the operation of the technique or scientific theory at issue are important.

In [Kumho Tire](#) the Court further developed the gate-keeping function, demanding that an expert employ "in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."¹² The Court had previously held that [Daubert](#) was applicable to all expert testimony and not simply that which could be labeled "scientific."¹³ Examining the facts closely, the Court upheld the federal district court's rejection of a tire expert's testimony after the district court had found unreliable "the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis."¹⁴

While [MRE 702](#), governing testimony by experts, runs substantially parallel to its federal counterpart, the same cannot be said of [MRE 703](#), which dictates requirements for the basis of expert testimony and which was also recently revised, amendment effective September 1, 2003. Previously [703](#) allowed an expert to base his or her opinion on facts made known to him or her at or before the hearing. The facts did not have to be admitted in evidence, though the court, in its discretion, could require admission of underlying facts or data. Revised [MRE 703](#) states:

"The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

[FRE 703](#) allows facts or data that "need not be admissible in evidence" to underly an expert's opinion as long as the facts/data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

SBS As Junk Science

As revealed by the "medical" testimony in the study case described above, the notion that medical "experts" can determine intent from physical findings is the epitome of junk science. During cross-examination of several of the doctors in the case described, trial defense counsel utilized a particularly effective form of cross-examination. He first suggested that a baseball catcher was injured by a blow to the head when the batter swung before he saw the catcher move into the batter's cage and accidentally hit the catcher. In the second described scenario the catcher made a ribald comment concerning the batter's mother and the batter swung and hit the catcher intentionally. Assume precisely identical injury. Can the expert determine from the injury alone, from the physical findings, which blow was struck intentionally and which accidentally?

The answer to the question posed above is clearly and emphatically in the negative. Nonetheless this is exactly what the medical experts did in the study case described above. They stated that the presence of retinal hemorrhage and subdural or subarachnoid hematoma/hemorrhage, is pathognomonic for child abuse. In other words, the medical experts testified that certain physical findings can reveal whether injuries were sustained accidentally or intentionally. As will be shown later in this article, such a conclusion is unacceptable under the "general acceptance" theory as well as under [Daubert](#) and [Kumho Tire](#), and certainly fails the test for admissibility set out in revised [MRE 702](#) and [FRE 702](#).

Shaken Baby Syndrome (SBS), a theory espoused for decades, suggests that subdural hematoma/ hemorrhage and TAI (traumatic axonal injury), serious conditions which can lead to brain death, can be caused by shaking alone. An appendage to this theory claims that the presence of retinal hemorrhage indicates a baby was shaken. There is no legitimate medical/scientific support for these conclusions. Retinal hemorrhaging can be caused by many events, including resuscitation efforts. Subdural and subarachnoid hemorrhaging, bleeding in the brain cavity which can create swelling which in turn can damage the brain cells and cut off signals to the respiratory system, which in turn deprive the brain of oxygen leading to brain death, can be caused by short falls in the home.¹⁵ The claim, often put forward by medical "professionals" testifying in criminal cases where children have received fatal or debilitating brain injury, that high speed auto accidents or multi-story falls are necessary to label the injury an accident, is junk science, pure and simple.

In fact, the premise that shaking alone can cause severe brain damage and death has been questioned recently by the leading proponents of this theory. The siren call of such a radical medical theory for prosecutors is obvious. If you can say that certain physical findings (retinal hemorrhage, for example) indicate shaking, a finding of intentional abuse easily follows. This is so because, as in the batter/catcher example previously described, it is difficult to determine accident versus intentional act if, as in the study case described in this article, a single blow to the head caused the injury which led to death. It is virtually impossible, however, for a baby to be accidentally shaken.

In a recent article several of the original proponents of SBS as a sole cause of serious brain injury in infants, including Susan S. Margulies of the Department of Bioengineering at the University of Pennsylvania, have concluded:

“...[T]here are no data showing that the maximum change in angular velocity and the peak angular acceleration of the head experienced during shaking and inflicted impact against unencased foam is sufficient to cause subdural hematomas or primary traumatic axonal injury in an infant.”¹⁶

In other words there is no legitimate science supporting the conclusion that retinal hemorrhage, or subdural or subarachnoid bleeding, leading to brain death, can be caused by shaking alone. Or that traumatic brain injury, which can lead to death, can be caused by shaking alone. This is why most of the proponents of the SBS theory have turned to a new claim: shaken and slammed. This allows for acceptable medical conclusions while still importing a “shaking” which, again, establishes an intentional act.

The problem with the shaken and slammed claim, however, is the difficulty in establishing, with any medical/scientific reliability, the claim that a baby was shaken. Retinal hemorrhage can arise from a multiplicity of factors, and any medical professional who testifies that a retinal hemorrhage establishes shaking is not only promoting junk science, he or she is exhibiting intellectual dishonesty. There is simply no basis for such a claim. Ronald H. Uscinski, M.D., a pediatric neurosurgeon with three decades of experience who continues to operate on children’s brains and teach at Georgetown Medical Center in Washington D.C., testified in the study case, at a motion for new trial hearing, that if it were theoretically possible to severely injure an infant’s brain by shaking, you would crush its chest and break

its neck before the brain injury was severe enough to cause death.

Debunking The Junk

As noted in the introduction, it is critical that anyone defending against charges of intentional abuse in child head injury cases consult a medical professional, either a practicing neurosurgeon or a clinical pathologist or both. A biomedical or biomechanical engineer is also of extreme importance if it is necessary to establish that a claimed accidental occurrence caused the injury at issue.¹⁷

In the study case, in addition to the testimony of Dr. Uscinski at the hearing on a motion for new trial, conducted in December of 2003, Dr. Chris A. Van Ee, a Ph.D. in biomedical engineering, provided critical debunking testimony. Dr. Van Ee conducted crash-dummy tests on the stairway where, according to defendant, the baby fell. Test results revealed HIC (head injury criteria) values that clearly could have caused massive brain injury. Dr. Uscinski followed up by noting that the impact experienced by the fall as described by the defendant in this case would have led to an injury that likely would have resulted in brain death shortly after impact with no available, successful treatment options. Thus the prosecution’s primary premise, that the injury could not have occurred in the manner described by defendant, fell when subjected to appropriate testing and legitimate medical analysis.

Unlike the nine doctors at trial, who based their theories on conjecture, anecdote, and unspecified “literature,” both Dr. Van Ee and Dr. Uscinski were able to frequently refer to published and specific medical treatises and studies while testifying at the hearing on the motion for new trial. In addition to disproving the prosecution’s main premise on causation, they were able to eliminate the possibility that the baby had been shaken (the primary evidence of this was gleaned by review of the CT scans which revealed no injury whatsoever to the cervicle spine). The fact that the baby in this case had no other injuries beyond the severe head blow that caused death further diminished the likelihood that death resulted from intentional abuse.

The trial court in the study case, a learned and attentive jurist, asked probing and intelligent questions during the testimony of Van Ee and Uscinski and ultimately granted a new trial, having originally delivered a second-degree murder verdict at the conclusion of a three week bench trial. The case is currently subject to further appellate review.

(continued)

Conclusion

Shaken Baby Syndrome claims have resulted in countless convictions for decades. In many instances these convictions are based on junk science and are not supported by fact or accepted medical knowledge. The complexity of brain injury cases is unquestioned. The issues are generally beyond easy understanding by legal professionals or lay jurors. Handling these cases requires precise attention to the particular facts and demands consult with qualified experts.

**by F. Martin Tieber
East Lansing**

F. Martin Tieber (right), recently retired from the Michigan State Appellate Defender Office, where he directed the Lansing office since 1978, to begin a private law practice. He is currently sharing space with the Farhat & Story law firm in East Lansing, Michigan. Mr. Tieber is a past president of the Criminal Defense Attorneys of Michigan and a life member of the National Association of Criminal Defense Lawyers. He founded Michigan's Innocence Project and served as the first chair of the Innocence Project Commission in 2000-2001. In 2003 he was named a "Lawyer of the Year" by Michigan Lawyers Weekly. In 2002 Tieber was retained by the family of the defendant in the case study described in this article to appeal a second degree-murder conviction. The December, 2003 grant of a new trial was re-affirmed by the trial court in March of 2004, and an application for leave has been filed in the Court of Appeals by the Attorney General. Mr. Tieber can be contacted by e-mail at marty@fmtieberlaw.com.



Endnotes

1. Not one "expert" witness at trial had even looked at the stairway in question, much less analyzed the length or speed of the fall, the hardness of the stair surface or the force of the resulting collision.
2. One doctor grounded his opinion on someone identified only as "Craig Henry" who apparently claims that "if there's bilateral retinal hemorrhage...he associates that with abuse, period."
3. This claim is particularly noteworthy as the limited linear skull fracture and the outward condition of the baby's head and body after the injury clearly indicate that the statement is patently absurd.
4. Indeed, Doctor B stated that he had never gone to the site or measured the stairs in question. No one had given him any information regarding the hardness of the stairs or the height from which the baby had fallen

or the number of stairs. When confronted with the reality that he had taken none of this into account, had not verified any of the history, even though he based his theory of intentional act over accident on the "history" he responded: "And that was based on the severity of the illness - or the injury inclusive of the retinal hemorrhages." Doctor B's conclusion of intentional act versus accident was based on the fact that the "purported mechanism of injury that was given to us the night of arrival did not support the severity of injury." The mechanism being a tumble down carpeted stairs. According to Doctor C, the history was provided by the investigating officer.

5. Doctor C also indicated that the autopsy revealed no bruising to the inner thigh as had been indicated by others. It was earlier revealed that ER treatment at the two hospitals (such as use of betadine soap) could have suggested injuries that did not exist. Back bruising could have been caused after admission to the ER.
6. At trial Doctor C indicated that the retinal hemorrhage was "faint" and described a "small hematoma."
7. [Daubert v Merrell Dow Pharmaceuticals, Inc](#), 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).
8. [Kumho Tire Co, Ltd v Carmichael](#), 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).
9. [Frye v United States](#), 293 F 1013; 54 App DC 46 (1923).
10. [Daubert](#), 509 US at 592.
11. [Id.](#) at 592.
12. [Kumho Tire](#), 526 US at 152.
13. [Id.](#) at 147-148.
14. [Id.](#) at 153, quoting from Civ. Action No. 93-0860-CB-S (S.D. Ala., June 5, 1996).
15. Plunkett, J, [Fatal pediatric head injuries caused by short-distance falls](#). Am J Forensic Med Pathol 22:1-12 (2001).
16. [Prange, M.T. et al, Anthropomorphic simulations of falls, shakes, and inflicted impacts in infants](#). J Neurosurg 99:143-150 (2003).
17. In appointed, indigent cases an effort should be made to request public funding for consult with these experts. The federal constitutional right to present a defense should be argued. US Const, Amend. XIV; [Chambers v Mississippi](#), 410 US 284; 93 SCt 1038; 35 LEd2d 297 (1973). See [Ake v Oklahoma](#), 470 US 68; 105 SCt 1087; 84 LEd2d 53 (1985) and [People v Tanner](#), 469 Mich 437; 671 NW2d 728 (2003) ("safely proceed to trial" standard) for assistance in arguing for appointment of an expert.

Second Annual Criminal Law in the Sun Seminar is Great Success

Tucson, Arizona Seminar for Michigan Criminal Defense Practitioners Attended by NACDL Staff

The second in an annual series of a "sun spot" criminal defense seminars geared specifically to Michigan Criminal Defense attorneys, put on by Rosemary Gordon and Marty Tieber with an assist from Cooley criminal law professor Ron Bretz, was run from April 1-3 at Tucson, Arizona's Hilton El Conquistador golf and tennis resort.

Turnout tripled from the first run of the seminar in 2003 as CLE credits were added and more effort was made to publicize the event. The seminar was monitored by Gerald Lippert, Director of Institutional Development at the National Association of Criminal Defense Lawyers, who indicated that he was very impressed with the substance of the presentations. All in attendance spoke highly of the organization of the material and the quality of the speakers, and the accommodations, pricing, and location were, by all accounts, phenomenal. The unusually damp weather was a bit discouraging but this was more than made up for by the piano wizardry of keynote speaker Steve Fishman, who closed the bar at the hotel every night of the conference, regaling conference attendees and other hotel guests with his Motown revue.

The three principal organizers of the endeavor are all members of the Criminal Defense Attorneys of Michigan. Rosemary Gordon is a solo practitioner who specializes in preparing pre-trial motions and appeals for the defense in criminal cases. She entered private practice after 13 years with the Wayne County Prosecutor's Office and was a founding member and long time Secretary of the State Bar Appellate Practice Section and also chaired the Criminal Law Section Council in the early nineties. She currently lives in Tucson but still works primarily on Michigan cases.

Ronald J. Bretz is a criminal law professor at Cooley Law School in Lansing. While at the State Appellate Defender Office for 20 years he established himself as an expert in the use of serology/DNA and other scientific evidence and argued and won a case before the United States Supreme Court.

F. Martin Tieber is a past president of CDAM and is now engaged in a solo private practice in East

Lansing. He retired from the State Appellate Defender in 2002 after 29 years of service.

In addition to presentations by Gordon (Sex Offender Registration Act Update), Bretz (Law Updates and the new MRE 702 and 703) and Tieber (A Study in Junk Science: the Shaken Baby Syndrome), this year's offerings included a very well researched presentation by former Wayne Circuit Judge Robert L. Evans on drug courts and a fascinating session on The Five Most Effective Characteristics of Criminal Trial Attorneys by Wayne County Circuit Court Judge Timothy M. Kenny. Noted Detroit criminal defense lawyer Steven F. Fishman presented the keynote topic: Handling High Profile Cases: the Chris Webber Case.

The seminar ran Thursday through Saturday, mornings only (two sessions each day), leaving the afternoons and evenings for enjoyment of the company and the incredible setting. The resort is nestled into cliffs which provide a spectacular view. The rooms are very reasonably priced in April and the weather is normally perfect - crisp, sunny 80 degree days with comfortable nights in the 60s (the organizers have promised to issue a guarantee next year!) If



"Motown" Steve Fishman plays for your pleasure.

you golf or play tennis, the facilities are world class. A superb health spa and pool and hiking/jogging trails with views that will take your breath away round out the exercise opportunities. This year the entire group enjoyed dinner at a wild west dance hall after a reception at Rosemary Gordon's desert

horse ranch.

Look for information regarding the Criminal Law in the Sun seminar next year and mark the dates on your calendar now. The seminar will be run a bit later in 2005, Thursday through Saturday, April 14-16.

Steve Fishman has indicated that he will again be on the piano nightly!

More on ACLU Juvenile Lifer Project

The Criminal Defense Resource Center has learned more about the design of the upcoming ACLU project looking into the growing number of children being sentenced to life without parole. As reported in the last [Criminal Defense Newsletter](#), the Michigan Chapter of the American Civil Liberties Union (ACLU) has been awarded a \$100,000 grant from the New York "Justice, Equality, Human Dignity and Tolerance" Foundation (JEHT) to conduct this research.

"Our research will examine race, gender, and economic disparities and illuminate inequities within the sentencing of juveniles. We hope this information will lead to a variety of reform initiatives, shaping future policy and litigation challenges to sentencing juveniles to life without parole," Michigan ACLU Director Kary Moss recently told the [Criminal Defense Newsletter](#). "Once our research is done, we hope that both criminal defense attorneys and prosecutors will work with us to reform a system that is cruel in its treatment of children."

Ms. Moss explained that such sentences are in violation of international law. "Life sentences without possibility of parole have been renounced internationally as a violation of human rights. The Convention on the Rights of the Child specifically forbids sentences of life imprisonment for children under the age of eighteen in Article 37(a) and the United States stands alone in rejecting this article of the convention."

Project Director Attorney Deborah LaBelle told the [Criminal Defense Newsletter](#) that she is "disturbed by the concept that there is no such thing as redemption." Many of the children had their cases filed directly in

adult court. Says LaBelle, "I am not sure that the legislature intended that the child's status would never, ever be considered, and that no one would ever look at the case again. It is not too big a step toward tolerance and compassion to give the Parole Board the ability to review these kids as they grow up, and to determine whether in fact they have redeemed themselves, and can rejoin society."

Ms. LaBelle is also looking at how jail affects juveniles, many of whom spend long periods in isolation awaiting trial. "When I read transcripts and statements about a child's life affect, I have to wonder: how would anyone feel after eight months of isolation?" says LaBelle.

Ms. LaBelle is also working in conjunction with the Columbia Law School Human Rights Institute to prepare petitions to the Inter-American Commission on behalf of several juveniles who are serving life without parole.

Information about the experiences of defense attorneys and judges who have handled such cases would be useful for the study. Information on the resources available to attorneys in such cases would be particularly helpful, especially regarding the extent to which a defense attorney was able to collect and present information on the intelligence and comprehension levels of a defendant. To contact Ms. LaBelle, call (734) 996-5620 or e-mail deblabelle@aol.com.

Sources: *interviews*; jehtfoundation.org; *Columbia Law School website*.

From Our Readers: Losing Blood and Liberty on America's Highways: A Case Review

Practitioners that aggressively defend the drunk driving accused have undoubtedly come to the conclusion that the protections afforded by our state and federal Constitutions simply don't apply in the context of the drunk driving case. This is what is often called the "drunk driving exception" to the Constitution. While this trend has been evident for many years, two new developments are alarming even for the most cynical among us.

On January 13, 2004, in a 6-3 decision, the United States Supreme Court upheld the use of roadblocks to solve crimes in the case of [Illinois v Lidster](#), ___ US ___, 124 SCt 885; 157 LE2d 843 (2004). Upon learning of the

decision, DUI Defense Attorney Donald J. Ramsell, of Wheaton Illinois, who represented Robert Lidster before the Supreme Court, had these comments:

"Today is a sad day for the US Constitution. From this point forward, all citizens will be subject to police stops and brief interrogation even when they have committed no wrongdoing. 200 years ago, our Revolution occurred because the British army was seizing and interrogating innocent persons who were not suspected of a crime. With this decision, our country has come full circle. I will continue to fight for the rights of all Americans to be free from governmental interference in their daily activities."

The Illinois case arose out of the following facts. On August 23, 1997, at about 12:15 a.m., an Illinois bicyclist was struck by a vehicle which then failed to remain at the scene of the accident. The bicyclist died as a result of his injuries. At or about midnight, August 30, 1997, the Lombard police set up a roadblock on North Avenue in Lombard, Illinois. The roadblock was set up one week later at the same location and at approximately the same time as the accident. The roadblock was set up to "work out a fatal hit-and-run accident," according to Detective Vasil, who stopped the defendant's vehicle that evening.

While Detective Vasil was standing in the center lane of traffic, the Illinois defendant, Robert Lidster pulled up about 15 feet to the spot where Vasil was standing. Vasil then approached the defendant and noticed the odor of an alcoholic beverage on Lidster's breath and slurred speech as Lidster spoke. Vasil directed the Defendant to a side street on the north side of North Avenue. Thereafter, the defendant was arrested and later convicted for driving under the influence of alcohol.

Now that the United States Supreme Court has placed its imprimatur on the use of roadblocks, it seems that Michigan's prohibition against the use of sobriety checkpoints is now in danger of being re-thought and perhaps even overturned. There is no question that the Lidster decision will promote a loosening of the rules relative to roadblocks. This fallout can be observed in the case of State v Mitchell, 358 NC 631, 592 SE2d 543 (2004), where the North Carolina Supreme Court stated: "Thus, we conclude that the absence in Lidster of any focus on an issue dealing with supervisory permission and written guidelines indicates that these issues do not merit a constitutionally mandated reversal in a roadblock case . . ."

Another significant development is the loosening of the rules applicable to blood draws for the drunk driving accused. In an Orwellian development in Arizona law, police officers there are "qualified" to draw blood, and they routinely do so at the roadside. The rules in Arizona provide that blood may be drawn only by a physician, registered nurse, or "other qualified person." Decisional law says other qualified persons include law enforcement qualified by training or experience to draw blood. State ex rel Pennartz v Olcavage, 200 Ariz. 582, 30 P3d 649 (Ariz App, 2000). In response to this ruling, a Phoenix College has even created a phlebotomy course for law enforcement officers, and as irony would have it, Arizona police officers now keep white lab coats in their police cruisers. These officers will put the lab coats on over their uniforms before actually conducting the field

blood draw. This apparently is intended to make them appear more "medical" to their road side "patients."

Michigan law is quite similar to the Arizona law, although it does (at least for now) appear to offer somewhat more rigorous protections. Here in Michigan the law provides that "only a licensed physician, or an individual operating under the delegation of a licensed physician under section 16215 of the public health code, 1978 PA 368, MCL 333.16215, qualified to withdraw blood and acting in a medical environment, may withdraw blood at a peace officer's request to determine the amount of alcohol or presence of a controlled substance or both in the person's blood, as provided in this subsection". See MCLA § 257.625a(6)(c).

However, the Michigan Statute defines very broadly who is a "qualified licensed health care professional," and like Arizona, allows blood to be drawn by his or her delegate who is "otherwise qualified by education, training, or experience." See MCL §333.16215. Also, the recent case of People v Callon, unpublished Court of Appeals opinion (No. 234421, April 15, 2003), indicated that the requirement that blood be drawn by a person "acting under the direction of a physician" only applies to cases where blood is drawn pursuant to search warrant.

Based on Callon, and other recent cases addressing these issues, it seems not to far a stretch to imagine a time in the not to distant future when Michigan's finest will be donning white lab coats and sticking needles into the arms of those drivers whom they believe to be intoxicated or impaired by alcohol or drugs. It is the readers of this publication, and the more generally, the criminal defense bar, that stand in the way of this anti-drunk driving juggernaut. Unless the defense bar takes it upon itself to educate the public, this longstanding trend will continue, and we'll soon have blood draws conducted by police officers at sobriety check points in Michigan.

**by Patrick T. Barone,
ptbarone@mid3.net
Birmingham, Michigan**

Tired of talking to yourself? Talk to other readers or the Editor by sending a letter to the Criminal Defense Resource Center, for publication in the Criminal Defense Newsletter.

Address letters to the Editor, Criminal Defense Newsletter, 3300 Penobscot Building, 645 Griswold, Detroit, MI 48226.

Proposed Court Rule Changes Draw Vociferous Comments: Public Hearing Set for May 27, 2004

Major changes in criminal procedure rules were proposed earlier this year by the Michigan Supreme Court's Committee on the Rules of Criminal Procedure, and were published for comment along with additional changes proposed by the Court's staff. Administrative Order 2003-04 addressed several dozen rules, proposing changes we first summarized in the [February 2004](#) issue of the [Criminal Defense Newsletter](#). These changes ranged from expanded video proceedings to an "actual innocence" standard for post-conviction motions for relief from judgment in guilty plea cases.

The documents posted for comment appear at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-04-Report.pdf>; <http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-04-2-3-04.pdf>.

The comment period on the proposals expired on May 1, 2004. Comments are posted on the Court's web site, <http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm>, and they are both more numerous and strongly-worded than usual. In addition to comments sent by prominent individuals, a number of groups were moved to write. The comments sent in by the Criminal Defense Attorneys of Michigan, the product of a CDAM committee, were particularly cogent.

A public hearing on the proposal has been scheduled for May 27, 2004, from 9:30 a.m. to 11:30 a.m., at Lansing's Hall of Justice. Individuals wishing to address the Court must notify the Office of the Clerk of the Court in writing at P.O. Box 30052, Lansing, Michigan 48909, or by e-mail at MSC_clerk@courts.mi.gov, no later than Tuesday, May 25, 2004.

Legislative Update

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

Granolm Signs Underage Drinking Bill into Law

On April 13, 2004, Governor Jennifer Granholm signed into law an act that tightens Michigan's laws concerning underage drinking. Senate Bill 0637, enacted as [2004 PA 63](#) (effective 9-1-04), allows judges to sentence underage drinkers to jail if they are brought before the court at least three times for drinking offenses. It also allows judges to wipe out a youth's first drinking offense if he or she stays out of trouble.

The bill originally allowed police to charge 19 and 20-year-olds with minor in possession (MIP) if they had even trace amounts of alcohol they legally drank in Canada in their system. But Rep. Leon Drolet (R-Clinton Twp.) successfully argued for a change: if the 19-and 20-year-olds can prove they drank the alcoholic beverages in Canada, they cannot be found guilty. However, the bill still allows police to charge youths with MIP if alcohol illegally drunk in Michigan is being carried in their stomachs.

For more information on this or any other bill, visit the Michigan Legislature's homepage at www.michiganlegislature.org.

Sources: 3-31-04 and 4-13-04 MIRS [Capitol Capsule](#).

Legislature Hears About MATRIX Pilot Project

As reported in a recent edition of this newsletter ([February 2004](#)), Governor Jennifer Granholm has agreed to allow Michigan to participate in the controversial MATRIX (Multistate Anti Terrorism Information Exchange) database project. It was described in late April to the House and Senate Appropriations Subcommittees on State Police and Military Affairs.

Starting in late May, investigators in Michigan and elsewhere will be able to find all sorts of information about Michigan residents with one simple inquiry. The MATRIX system brings together a number of disparate facts about individuals into a quickly searchable database. Many other states have withdrawn from the controversial program, citing privacy and cost concerns--but Michigan remains involved.

According to the Michigan Information and Research Service, a recent newsletter of the MATRIX project described the initiative as follows:

MATRIX is a pilot proof-of-concept project initiated in response to the increased need for timely information sharing and exchange of terrorism-related and other criminal information among members of the law enforcement community.

FACTS, or Factual Analysis Criminal Threat Solution, is one of the applications used through the MATRIX project. FACTS provides law enforcement a

technological, investigative tool allowing query-based searches of billions of available state and public records. Using FACTS, an investigator can conduct a query using incomplete information, such as a portion of a vehicle license number. FACTS will search the system and assemble information matching the partial description.

Under Michigan's pilot project with the system, investigators in participating states will be able to search for Michigan residents and review information from the following, currently separate databases:

- Any Department of Corrections records;
- Whether the individual is listed on the Michigan Sex Offender Registry;
- All relative criminal history records;
- Driving records;
- Any vehicles registered to the individual who is the subject of the search;

- Readily available financial and private records such as real estate holdings, financial history, and other records that industries such as insurance and others can access.

Only five states participate in MATRIX.

Source: 4-23-04 MIRS Capitol Capsule.

First and Second-Degree Vulnerable Adult Abuse Added to Felony Murder Statute

2004 PA 58 [HB 5104, eff. 6-11-04] amends MCL 750.316. As a result of this Act, murder committed in the perpetration or attempt to commit first or second-degree vulnerable adult abuse will be punishable by life imprisonment. The abuse of the elderly and vulnerable is increasing, and the legislature believed that prosecutors should be allowed to charge felony murder, rather than open murder, when someone dies as a result.

Technical Tips

Question: In Microsoft Word when I type (c) it automatically changes into the copyright symbol (©). How do I stop this?

The problem described is an overactive Microsoft Word function in AutoCorrect. AutoCorrect is used to correct common typographical errors or expanding abbreviations with few key strokes. To correct this particular problem in Microsoft Word 2002 or later versions, select "AutoCorrect Options" under the "Tools" pull-down menu. Select the (c) "row" and then

strike the delete button. This will permanently rid your computer of this problem. Perhaps while you remove this annoyance, there are other common phrases that you type repeatedly, that you can abbreviate and let Word complete for you and save you time. For more information, search for "autocorrect" in Microsoft Word's Help.

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

Reports and Studies

Exonerations are Tip of Iceberg: Study Suspects Thousands of False Convictions

A newly released report by University of Michigan Law School Professor Samuel Gross and several UM law students documents a dramatic increase in exonerations nationwide. Over the past 15 years, the number of defendants convicted for serious crimes they did not commit has ballooned. The report suggests that these exonerations are the tip of the iceberg - that there is a much larger number of false convictions that remain undiscovered, and do not end in exoneration.

In the report's executive summary, the authors state: "This is a report on a study of exonerations in the United States from 1989 through 2003. We discuss all

exonerations that we have been able to locate that occurred in that fifteen-year period, and that resulted from investigations into the particular cases of the exonerated individuals. Overall, we found 328 exonerations, 316 men and 12 women; 145 of them were cleared by DNA evidence, 183 by other means. With a handful of exceptions, they had been in prison for years. More than half had served terms of 10 years or more; 80% had been imprisoned for at least 5 years. As a group, they had spent more than 3400 years in prison for crimes for which they should never have been convicted - an average of more than ten years each."

Almost all the exonerations were in murder and rape cases. The study's authors argue that this suggests many innocent people have been convicted of

less serious crimes. In prosecutions for lesser offenses, defendants benefit neither from the scrutiny that murder cases receive, nor from the DNA evidence that can establish innocence. In fact, the authors state, "if we reviewed prison sentences with the same level of care that we devote to death sentences, there would have been over 28,500 non-death-row exonerations in the past 15 years rather than the 255 that have in fact occurred." Death row inmates represent a quarter of 1 percent of the prison population but 22 percent of the exonerated.

Biological evidence helped to free 88 percent of the exonerated defendants in rape cases. But DNA evidence is far less likely to be available or provide definitive proof in other kinds of cases. Even in murder cases, only 20 percent of the murder exonerations involved DNA evidence--and most of these were rape-murders.

Some 90 percent of false convictions in the rape cases involved misidentification by witnesses, very often across racial lines. On the other hand, the study found that the leading causes of wrongful convictions for murder were false confessions and perjury: by co-defendants, informants, police officers or forensic scientists.

According to the New York Times, critics of the Michigan study questioned its methodology, saying it overstated the number of authentically innocent people. The study calls every nullification of a conviction by a governor, court or prosecutor declaring a person not guilty of a crime an exoneration.

The report is available online at <http://www.law.umich.edu/NewsAndInfo/exonerations-inus.pdf>.

Sources: 4-19-04 New York Times; University of Michigan Law School website, www.law.umich.edu.

Alcohol Related Traffic Deaths Drop

Michigan traffic deaths resulting from alcohol and or drug use reached record lows last year. New data released on April 22 by the Michigan State Police Criminal Justice Information Center (CJIC) shows a small decrease from prior years.

According to the recent statistics, 442 people died in alcohol and or drug related traffic crashes in 2003. This is a 4 percent decrease from 2002. The percent of alcohol and/or drug-involved fatalities fell to 34.5 percent of all fatalities, a 27 percent decrease since 1990 when it represented nearly 47 percent of all traffic deaths.

Overall, Michigan reported 391,488 traffic crashes in 2003, 1,172 fatal crashes and 76,598 injury crashes. The number of people killed increased slightly from 1,279 in 2002, to 1,283 in 2003. Injuries went down by over 6 percent from 2002, and represented the lowest number in the past 15 years.

Source: 4-22-04 MIRS Capitol Capsule

Poll: Education Leads Voters to Reject Death Penalty

The Michigan Catholic Conference recently released a poll demonstrating that voter education will defeat a measure to enact the death penalty. 53 percent of respondents initially said they strongly support the death penalty. But their support drops to 41 percent when respondents are informed that Michigan mandates life without parole for convicted offenders of first-degree murder.

Among those who support the death penalty, 26 percent believe it is a deterrent, 30 percent believe it to be a form of punishment and 41 percent believe in the death penalty as both a punishment and a deterrent.

"The results of this polling data prove that informed Michigan citizens do not favor a culture of death or state-sanctioned killing in Michigan," said Michigan Catholic Conference Vice-President Paul A. Long in a statement released on the group's website. "By coordinating a voter education campaign on this important issue, the Catholic Conference is adamant in its belief that even if a petition drive is successful, informed and educated voters will defeat any such attempt to change Michigan's Constitution."

To learn more, visit the Catholic Conference's website at www.micatholicconference.org and click on the link to the poll results, or go directly to www.micatholicconference.org/pdf/DeathPenaltyPollingNumbers4-7-04.pdf.

Sources: 4-7-04 MIRS Capitol Capsule; MI Catholic Conference website.

Study: Some More Likely to Falsely Confess

A study considering 125 cases involving false confessions was published in the North Carolina Law Review in March. The authors are Steven A. Drizin, a professor of law at Northwestern University Law School, and Richard A. Leo, a professor of criminology at the University of California, Irvine.

The authors found that such confessions were most common among certain groups of people most

vulnerable to suggestion and intimidation. "There are three groups of people most likely to confess," Drizin told the [New York Times](#). "They are the mentally retarded, the mentally ill and juveniles."

Professor Drizin said that false confessions were most common in murder cases. "Those are the cases where there is the greatest pressure to obtain confessions," he said, "and confessions are often the only way to solve those crimes." Professor Drizin further stated that videotaping of police interrogations would cut down on false confessions.

Sources: 4-19-04 [New York Times](#); [Northwestern University of Law website](#).

Experts' Predictions of Violence Questioned

A recent study by the Texas Defender Service, a nonprofit organization that represents individuals in capital murder cases, shows that expert witnesses' predictions of violent behavior were wrong in 95 percent of the cases they examined. The research was based on the records of 155 inmates obtained from Texas state corrections officials.

The report is entitled "[Deadly Speculation: Misleading Texas Capital Juries with False Predictions](#)"

of [Future Dangerousness](#)." Only eight of 155 inmates convicted of murder later engaged in behavior that resulted in serious injury. And the vast majority of the inmates had no or only minor disciplinary infractions while in prison.

"This is a very solid and thoughtful piece of empirical research," John Monahan, a University of Virginia law school professor who specializes in risk assessment, told the [Los Angeles Times](#). The study included every Texas case identified as having had state-sponsored testimony on future dangerousness, Monahan said. It is the first large-scale examination of prison violence among death row inmates.

Texas is one of only two states where predictions of future violence are a major factor in determining whether a convicted murderer is sentenced to death. Such testimony is barred in most death penalty states.

For more information, see the Texas Defender Service's website at www.texasdefender.org. To read the report, click on "Publications" and scroll down to the study's title, or go directly to <http://www.texasdefender.org/DEADLYSP.PDF>.

Sources: 3-31-04 [Los Angeles Times](#); [texasdefender.org](http://www.texasdefender.org).

From Other States

Oregon: Disorderly Conduct Statute Unconstitutional

The Oregon Supreme Court struck down a state statute that outlawed the refusal to disperse on police orders while congregating in a public place with the intent to cause inconvenience or alarm. The court held that the law was overbroad in violation of the state constitution in reaching beyond the type of conduct (such as fighting or interfering with an investigation) that may give rise to a lawful police order to disperse. According to the Supreme Court, the statute exceeded necessary police powers for maintaining order by penalizing a person who refuses to disperse, whether or not any harm results from that refusal. [State v Ausmus](#), 336 Or 493; 85 P3d 864 (2004); full text at <http://pub.bna.com/cl/s49207.htm>.

Seventh Circuit: Market-Oriented Approach to Calculating Methamphetamine Quantity

Only usable or consumable mixtures or substances may be taken into account when calculating drug quantity for purposes of the federal statute that provides a mandatory minimum sentence for offenses

involving a threshold amount of methamphetamine, according to the Seventh Circuit Court of Appeals, taking a position on the circuit-splitting issue of how to calculate drug quantity. The court observed that weighing everything for sentencing purposes can lead to irrational results, such as requiring that all the earth in a marijuana grower's field be weighed along with the crop remnants plowed back into the soil. [United States v Stewart](#), 361 F3d 373 (CA7, 2004); full text at <http://pub.bna.com/cl/031857.pdf>.

Hawaii: Short-Term Guest Has Reasonable Privacy Expectation

The Hawaii Supreme Court ruled that short-term guests have expectations of privacy in their hosts' homes under the Hawaii Constitution's counterpart to the Fourth Amendment. The defendant was playing cards in the garage of a friend's house when police entered and searched. The court cited Justice Ginsburg's dissenting opinion in [Carter](#), that when a homeowner personally invites a guest into his or her home to share in a common endeavor, that guest should share his host's shelter against unreasonable searches and seizures. Visiting the home of friend or

relative serves functions recognized as valuable by society. State v Cuntapay, 104 Haw 109; 85 P3d 634 (2004); full text at <http://pub.bna.com/cl/24841.pdf>.

Third Circuit: Reference to Attached Affidavit Did Not Broaden Scope of Search

A search warrant that referred to a single, named resident in its description of the premises and people to be searched, but incorporated an attached affidavit that requested permission to search "all occupants" of the premises, did not authorize a search of anyone other than the named resident, held the Third Circuit Court of Appeals. The scope of a narrowly worded warrant cannot be expanded by references to a broadly-worded affidavit, the court concluded. The Third Circuit further held that strip searching the plaintiff, who was not named in the warrant, clearly exceeded the scope of the warrant and that the officers were not entitled to qualified immunity. Doe v Groody, 361 F3d 232 (CA3, 2004); full text at <http://pub.bna.com/cl/024532.pdf>.

Armed Forces: Attorney's Gay Sex with Soldier Defendant Led to Conflict

The U.S. Court of Appeals for the Armed Forces found that the existence of a homosexual relationship between a charged service member and his army lawyer was inherently prejudicial and created a per se conflict of interest that denied the defendant his Sixth Amendment right to counsel. The court emphasized that the possible consequences to the military lawyer if his relationship with his client were revealed provided counsel with a compelling motivation to place secrecy above trial strategy. Counsel faced a conflict between his personal interests and his responsibility to give advice concerning the range of options facing the defense. United States v Cain, 59 MJ 285 (CMA, 2004); full text at <http://pub.bna.com/cl/030212.pdf>.

Illinois: Introduction of Other Crime Per Se Ineffective

A capital murder defendant received per se ineffective assistance of counsel when his lawyer failed to understand the trial judge's order excluding evidence of a previous uncharged murder and highlighted the evidence in her opening statement, held the Illinois Supreme Court. The prosecution took advantage of defense counsel's opening of the door to evidence of the murder and obtained an admission of guilt from the defendant under cross-examination. The court observed that trial counsel's inexcusable mistake had severe repercussions at trial. Because there was no meaningful adversarial testing of the defendant's case, the court granted a new trial. People v Morris, ___ Ill ___; ___ NE2d ___ (#87645, 3-18-04); full text at <http://pub.bna.com/cl/87645.pdf>.

Arkansas: Warrantless Home Search Requires Advice of Right to Refuse Consent

The Arkansas Supreme Court decided that police officers conducting a "knock and talk" for the purpose of obtaining consent to a warrantless search of a home are required by the state constitution to inform the home owner that he or she may refuse to consent. The court observed that it was not limited by the United States Supreme Court's conclusion in Schneckloth v Bustamonte, 412 US 218 (1973), that the Fourth Amendment does not require knowledge of the right to refuse as a prerequisite to a showing of voluntary consent. State v Brown, ___ Ark ___; ___ SW3d ___ (#CR 03-914, 3-25-04); full text at <http://pub.bna.com/cl/03914.pdf>.

Fourth Circuit: Internet Porn Law Found Unconstitutional

A Virginia statute criminalizing the dissemination of material harmful to minors over the Internet was found unconstitutional under the First Amendment and Commerce Clause by the Fourth Circuit Court of Appeals. Although the government had a compelling interest in protecting minors from sexually explicit Internet materials, the Act was not narrowly tailored enough to survive a strict scrutiny analysis. The court found that the statute prohibited a substantial amount of protected expression. Furthermore, the broad reach of the Internet makes it impossible for the statute to have only a local effect, according to the Fourth Circuit. PSINet Inc v Chapman, 362 F3d 227 (CA4, 2004); full text at <http://pub.bna.com/cl/012352.pdf>.

Florida: Ineffective Assistance for Failure to Advise of Defense Before Plea

The Florida Supreme Court held that a defendant asserting that his attorney provided ineffective assistance by failing to advise him about a defense before he pleaded guilty is not required to show that the defense would have been successful at a trial. The defendant need only show a reasonable probability that if he had known about the defense he would have exercised his right to trial instead of pleading guilty. Whether the defense was likely to succeed is only one factor to be considered when looking at the totality of the circumstances, concluded the Florida court. Grosvenor v State, ___ So2d ___ (Fla, #SC02-1307, 3-25-04); full text at <http://pub.bna.com/cl/sc021307.pdf>.

Second Circuit: Downward Departure to Mitigate Overlapping Enhancements

A sentencing judge may depart downward from the U.S. Sentencing Guidelines to mitigate the effect of overlapping sentence enhancements when it places the

defendant at the higher end of the sentencing table, held the Second Circuit Court of Appeals. The court reasoned that the sentencing commission did not adequately consider the combined effect of the aggregation of overlapping enhancements when a significant increase in the sentencing minimum results. The court rejected the government's argument that such a departure unjustly "rewards" a defendant at the higher end of the offense level. United States v Lauersen, 362 F3d 160 (CA2, 2004); full text at <http://pub.bna.com/cl/011526.pdf>.

California: Sex Offender Registration Satisfied by Mailing of Change of Address

A sex offender is not required by California's sex offender registration statute to ensure that his change-of-address notice that he dropped in the mail was actually received by the police, according to the California Supreme Court. The court observed that ordinarily mailing is a reliable method of notification, and had the Legislature intended a non-mail notification requirement, it would have imposed one. The court suggested that the legislature amend the statute to provide clear notice that the registrant should use electronic mailing or other means to prove transmission. People v Smith, 32 Cal4th 792; 86 P3d 348; 11 CalRptr3d 290 (2004); full text at <http://pub.bna.com/cl/s108291.pdf>.

Maryland and New York: Hearsay Admissibility After Crawford

In the aftermath of the United States Supreme Court decision in Crawford v Washington, 74 CrL 401 (2004), the Maryland Court of Special Appeals ruled that the prosecution may no longer use a "tender years" statute as a vehicle for introducing hearsay statements made by children under 12 years of age who are available to testify. The Maryland Court found that the children's statements to a social worker were "testimonial" under Crawford since they were interviewed for the express purpose of enabling the social worker to develop their testimony. People v Moscat, ___ NYS2d ___ (NY City Crim Ct #2003BX 044511, 3-25-04); full text at <http://pub.bna.com/cl/044511.htm>.

The Criminal Court for the City of New York ruled that a domestic assault victim's 911 call for help was not testimonial in nature. A 911 call, reasoned the court, is generally initiated not by police but by the victim of a crime with the desire to be rescued from imminent danger. Also, a 911 call may be considered part of the criminal incident itself, rather than part of the ensuing prosecution, stated the court. Snowden v State, ___ Md App ___; ___ A2d ___ (Md Ct Spec App, #2933, 4-5-04); full text at <http://pub.bna.com/cl/2933s02.pdf>.

Wisconsin: Preemptive Admission of Priors Does Not Waive Objection

A defendant who decides at trial to bring up his own prior record to "soften the blow" does not waive his objection to the trial court's pretrial ruling that the prior convictions are admissible for impeachment, according to the Wisconsin Supreme Court. The court elected not to follow the U.S. Supreme Court decision in Ohler v United States, 529 US 753 (2000), which held that, in federal court, a defendant must choose between introducing the evidence in direct examination and preserving his objection to admission of the prior convictions. The Wisconsin Court noted that it was not bound by Ohler since it did not involve a question of federal constitutional law, and further noted that most state courts do not follow the Ohler rule. State v Gary M.B., ___ Wis2d ___; 676 NW2d 475 (2004); full text at <http://pub.bna.com/cl/013393.pdf>.

Second Circuit: Narcotics Agent's Expert Opinion Should Have Been Excluded

The Second Circuit Court of Appeals held that a federal narcotics agent should not have been allowed to testify as an expert in drug jargon that the phrase "to watch someone's back" is "drug code" for acting as a lookout during a narcotics transaction. The Court reasoned that when a police officer testifies as both a fact and expert witness, there is a risk of misleading the jury into giving unwarranted credibility to the witness's nonexpert testimony. The officer's interpretation of the ambiguous phrase, which could have meant a number of things, was outside his area of expertise, concluded the Court. The Court also found insufficient evidence to support the conviction. United States v Cruz, 363 F3d 187 (CA2, 2004); full text at <http://pub.bna.com/cl/021458.pdf>.

First Circuit: Government Must Prove Child Depicted in Child Porn is Real

According to the First Circuit Court of Appeals, in order to obtain a conviction under a federal law criminalizing possession of images portraying children in sexually explicit poses, the government has the burden to prove that the children are real. The U.S. Supreme Court in Ashcroft v Free Speech Coalition, 535 US 234 (2002), held that the making of images that look like child pornography but are produced without children is speech protected by the First Amendment. The First Circuit concluded that the government must introduce relevant evidence in addition to the images to prove the children are real. United States v Hilton, 363 F3d 58 (CA1, 2004); full text at <http://pub.bna.com/cl/031741>.

New Mexico: Request for Passenger's Identification Not Justified

In a case of first impression, the New Mexico Court of Appeals held that the Fourth Amendment does not allow a police officer conducting a traffic stop to request identification from a passenger in the vehicle in the absence of any justification other than generalized officer safety. The Court found that the detention was unlawful and that the idea that such an encounter was consensual was a fiction. To allow officers to check passenger identification under such circumstances would be to "open the door to the type of indiscriminate, oppressive, fearsome authoritarian practices and tactics of those in power that the Fourth Amendment was designed to prohibit." *State v Affsprung*, 87 P3d 1088 (NM Ct App 2004, released 4-6-04); full text at <http://pub.bna.com/cl/23591.pdf>.

Eighth Circuit: Uncorroborated Anonymous Tip Did Not Justify No-Knock Entry

Police officers executing a search warrant for drugs could not rely on an anonymous, uncorroborated tip that the house contained a methamphetamine lab in order to justify their failure to knock and announce

their presence, held the Eighth Circuit Court of Appeals. Police can justify a no-knock entry by demonstrating a reasonable belief that the announcement would put them in danger, but the officers did not sustain their burden to demonstrate sufficient facts to support a finding of exigent circumstances, concluded the Eighth Circuit. *Doran v Eckold*, 362 F3d 1047 (CA8, 2004); full text at <http://pub.bna.com/cl/031810.pdf>.

Ninth Circuit: Best Evidence of Data From GPS Device

The best evidence of data from a GPS device is the device's display itself, or a recording of its data, and not testimony concerning such data, according to the Ninth Circuit Court of Appeals. Only if the proponent of the evidence can show that the GPS device or its record is unavailable do the Federal Rules of Evidence allow the party to substitute testimony of a witness who viewed the device's display of its data. The government made no such showing, and the admission of the testimony was not harmless error, concluded the Court. *United States v Bennett*, 363 F3d 947 (CA9, 2004); full text at <http://pub.bna.com/cl/0250442.pdf>.

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.

Preservation of Evidence

The police violated appellant's due process rights by failing to preserve key trial exhibits during the pendency of appellant's direct appeal. [BB 9739](#).

Untimely Request for Counsel

The appellant's mental retardation and illiteracy provided "good cause" for appellant's failure to timely request appellate counsel for an appeal of right. [BB 9736](#).

Impeachment with Inconsistent Statements

The defendant was denied his constitutional right to present a defense where counsel was prevented from impeaching the key prosecution witness with

inconsistencies in his police report about what controlled substance was involved and whether there was any delivery of narcotics. [BB 9744](#).

Accessory to Drunk Driving

The defendant's conviction should be reversed, as the prosecution failed to present legally sufficient evidence under its alternative aiding and abetting theory that the driver of defendant's vehicle was visibly impaired or under the influence of intoxicating liquor. [BB 9749](#).

Missing Defense Witness

The defendant was denied his Sixth Amendment right to call witnesses on his behalf and to present a complete defense where the trial court did not grant a sufficient amount of time for the defense to locate its final witness. [BB 9726](#).

Mis-scored Sentencing Guidelines

The trial court failed to state substantial and compelling reasons to depart and impose a prison sentence as the first reason given was clearly erroneous and the remaining reasons had already been scored by the guidelines with no stated reason why the guideline consideration was inadequate. [BB 9735](#).

Training Events

The **National Criminal Defense College (NCDC)** will host its 2004 Trial Practice Institutes on **June 13-26, 2004** and **July 18-31, 2004**, at Mercer Law School in Macon, Georgia.

Each two-week session is limited to 96 participants, who are divided into small groups according to trial experience. Under the supervision of nationally-recognized attorneys, attendees participate in group exercises covering client interview, jury selection, direct and cross-examination, impeachment, and closing argument. The exercises are supplemented by faculty lectures and demonstrations. Some scholarships are available.

More information may be obtained from the NCDC at (478) 746-4151. The application deadline for the summer sessions is March 15, 2004.

The **State Bar of Michigan's Criminal Law Section (SBMCLS)** will offer its Annual Training Conference and Golf Outing on **June 25-26, 2004**, at the Marriott/Eagle Crest Conference Center in Ypsilanti, Michigan.

The conference is titled "Issues in Testimonial Privileges and Discovery: Non-Traditional Expert Testimony. The event is just \$20, with golf available at \$65 on Friday evening. For more information on the program, call Ralph Simpson at (313) 859-4173; to register, contact Becky Hunter at (517) 346-6321.

The **Western Trial Advocacy Institute** will offer its "Twenty-Fourth Annual Criminal Defense Seminar" at the University of Wyoming College of Law in Laramie, Wyoming, on **July 10-16, 2004**.

Led by experienced trial attorneys, the institute concentrates on effective communication skills, including not only "how," but also "why." Demonstrations are supplemented by small group workshops, as well as use of real cases as training vehicles. Tuition is \$750, and reasonably priced housing is available in University facilities (6 nights for a total of \$175 or \$120).

For more information or to reserve one of the limited spaces available, contact Lindsay Eckes at (307) 766-2422 or Trial_Advocacy@hotmail.com.

The **National Association of Criminal Defense Lawyers (NACDL)** will host its 2004 Annual Meeting and Seminar at the Argent Hotel on **July 28-31, 2004**, in San Francisco, California. Titled "The Power of Persuasion: Winning Over Judges and Jurors," the meeting will feature nationally known presenters and

ample time to explore the city. Details are not yet available: check www.nacdl.org/meetings periodically.

The **Criminal Defense Attorneys of Michigan (CDAM)**, with Thomas M. Cooley Law School, will host a Trial Practice Institute from **August 18 - 22, 2004**, at the Cooley Law School in Lansing, Michigan.

The Institute will cover every aspect of trial practice, from voir dire to opening statement, cross-examination, and closing argument, with all sessions taking place in Cooley's courtroom facilities. Tuition for the event is \$675 (double housing) or \$800 (single housing). More information is available from Jeri Hall at (517) 490-1597 or jerihall3@msn.com.

The **National Association of Criminal Defense Lawyers (NACDL)** will present "DWI means: Defend With Ingenuity," on **October 13-16, 2004**, in Las Vegas, Nevada at the Venetian Resort and Casino. Topics likely to be covered include accident reconstruction, challenges to forensic evidence, cross-examination of chemical test experts, field sobriety testing, voir dire, and opening and closing statements. For more information, visit www.nacdl.org/meetings, or call CLE Director Gerald Lippert at (202) 872-8600, ext. 236.

The 12th International Conference of the **National Child Abuse Defense & Resource Center (NCADRC)** will feature "Child Abuse Allegations: Separating Fact from Fiction," on **October 14-16, 2004**, in Las Vegas, Nevada. Designed for defense attorneys, the conference will feature psychologists, medical doctors and experienced attorneys, who will address issues of trends, false confessions, memory distortion, lab forensics, interviewing of young children, bruises and burns, infant cerebral injuries, and scientific reliability. The conference fees range from \$450 (public defenders) to \$525 (private practitioners). For more information, contact the NCADRC at (419) 865-0513.

The **Duquesne University School of Law (DUSL)** and the **Cyril H. Wecht Institute of Forensic Science and Law (CWIFSL)** will present "Tackling Terrorism in the 21st Century: A National Symposium on the Science and Law of Combating Political Violence," on **October 21-23, 2004**, in Pittsburgh, Pennsylvania.

The symposium will involve government officials and experts in discussions of the USA Patriot Act, criminal profiling, torture, extradition, and the competing interests of domestic and international law. For more information, call (412) 396-1049.

U.S. Supreme Court: Selected Certiorari Granted Summaries

PAROLE

Wilkinson v Dotson
#03-287, March 22, 2004
74 CrL 2197

Review was granted on a prisoner's procedural challenge to parole eligibility. The Court will decide whether the favorable termination requirement applies where success by the prisoner would result only in a new parole hearing, and whether a federal court judgment ordering a new parole hearing necessarily implies the invalidity of the decision at a previous parole hearing. **Case below:** 329 F3d 463 (CA6, en banc, 2003).

FELON IN POSSESSION OF A FIREARM

Small v United States
#03-750, March 29, 2004
74 CrL 2205

The Court will decide whether the term "convicted in any court," for purposes of a felon in possession of a firearm conviction, includes convictions entered in foreign courts. **Case below:** 333 F3d 425 (CA3, 2003).

FRAUD

Pasquantino v United States
#03-725, April 5, 2004
75 CrL 2001

The Court will decide whether the federal wire fraud statute authorizes criminal prosecution of a

fraudulent scheme to avoid payment of taxes potentially owed to a foreign sovereign. The defendants participated in a scheme to smuggle alcohol from the United States into Canada to avoid paying Canadian excise taxes. **Case below:** 336 F3d 321 (CA4, 2003).

SEARCH AND SEIZURE – Automobiles

Illinois v Caballes
#03-923, April 5, 2004
75 CrL 2001

At issue is whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop. **Case below:** 207 Ill2d 504; 802 NE2d 202).

ARREST – Probable Cause

Devenpeck v Alford
#03-710, April 19, 2004
75 CrL 2013

The Court will decide whether an arrest violates the Fourth Amendment when the police officer has probable cause to arrest for an offense which is not closely related to the offense for which the defendant was actually arrested. The Court will also address the question of qualified immunity where there was a split in the circuits regarding application of the "closely related offense" doctrine. **Case below:** 333 F3d 972 (CA9, 2003).

U.S. Supreme Court: Selected Opinion Summaries

SEARCH AND SEIZURE -- Border Search

United States v Manuel Flores-Montano
#02-174, March 30, 2004
74 CrL 479

Reversed judgment of Ninth Circuit Court of Appeals affirming district court order suppressing evidence. **Case below:** 279 F3d 709 (CA9, 2002).

The government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. The reasons that might support a suspicion requirement in the case of intrusive searches of persons do not carry over to vehicles. The interference with a motorist's possessory interest in his

gas tank is justified by the governments' paramount interest in protecting the border.

FREEDOM OF INFORMATION ACT

National Archives and Records Administration
v Allan J. Favish et al
#02-954
March 30, 2004
124 S Ct 1570

Reversed judgment of Ninth Circuit Court of Appeals affirming district court order releasing death-scene photographs of the body of Vincent Foster, deputy counsel to former President Clinton. **Case below:** unpublished opinion, 37 Fed Appx 863 (CA9, 2002).

The FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images. Exemption 7(C) excuses from disclosure information compiled for law enforcement purposes if its production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The Foster family's privacy interest outweighs the public interest in disclosure.

DOUBLE JEOPARDY -- Multiple Prosecutions

United States v Billy Jo Lara
#03-107, April 19, 2004
74 CrL 48

Reversed judgment of Eighth Circuit Court of Appeals finding a violation of double jeopardy. **Case below:** 324 F3d 635 (CA8, 2003).

The Double Jeopardy Clause did not prohibit the federal government from proceeding with a successive prosecution because the Indian Tribe acted in its capacity as a sovereign authority in prosecuting the defendant for assault. The defendant was a not a member of the tribe, but Congress had passed a statute affirming the power of Indian tribes to exercise criminal jurisdiction over all Indians, including non-members. The source of that power was inherent tribal sovereignty rather than delegated federal authority. Congress possessed the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over non-member Indians.

HABEAS CORPUS -- Federal

Dretke, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division v Haley
#02-1824
May 3, 2004
75 CrL 91

Reversed judgment of Fifth Circuit Court of Appeals affirming district court order for state court to resentencing defendant. **Case below:** 306 F3d 257 (CA5, 2002).

A federal court faced with allegations of actual innocence must first address all non-defaulted claims for comparable relief and other grounds for cause to excuse the procedural default. There was insufficient evidence to convict the defendant as an habitual offender, but the lower courts failed to address the claim that defense counsel was ineffective for failing to raise the procedurally defaulted issue in a timely manner. The question of whether the actual innocence exception should be extended to procedural default of

constitutional claims challenging noncapital sentencing error (in addition to conviction and capital sentencing error) was not answered, and the case was remanded for consideration of the ineffective assistance claim, which, if defendant is successful, will result in the relief he seeks.

INSTRUCTIONS -- Self-Defense **INSTRUCTIONS - Charges as a Whole** **to Determine Error**

Raymond L. Middleton, Warden v
Sally Marie McNeil
#03-1028, May 3, 2004
541 US___

Reversed judgment of Ninth Circuit Court of Appeals reversing district court order granting petition for habeas corpus in California second-degree murder case. **Case below:** 344 F3d 988 (CA9, 2003).

The Ninth Circuit Court of Appeals erred in finding that an erroneous instruction on imperfect self-defense violated due process. The trial court correctly instructed the jury three times that if the defendant had an honest but unreasonable belief in the need to act in self-defense, the offense was manslaughter, but gave one incorrect instruction that a reasonable person must have so believed. Not every ambiguity or deficiency in a jury instruction rises to the level of a due process violation. The state court did not unreasonably apply federal law when it found that there was no reasonable likelihood that the jury was misled. Neither did the state court err by relying, in part, on the prosecutor's closing argument which resolved the ambiguity in favor of the defendant.

APPEALS -- Preservation of Issue

Jay Shawn Johnson v California
#03-6539
May 3, 2004
75 CrL 103

Dismissed for lack of jurisdiction. **Case below:** 30 Cal 4th 1302; 71 P3d 270 (2003).

The jurisdiction of the U.S. Supreme Court is limited to review of final judgments rendered by the highest court of the state, and the judgment of the California Supreme Court reversing the Court of Appeal on a Batson [Batson v Kentucky, 476 US 79 (1986)] issue and remanding for further proceedings was not a final judgment. None of the exceptions in Cox Broadcasting Corp v Cohn, 420 US 469 (1975) applied. If the California Court of Appeal on remand affirms the conviction, petitioner can once more seek review of his Batson claim.

Michigan Supreme Court: Selected Order Summaries

SENTENCING AND PUNISHMENT – Indeterminate Sentence

People v Robert Antonio Powe, Jr.
#124711, April 9, 2004
SADO - GAIL RODWAN

In lieu of granting leave to appeal, the Supreme Court reversed in part the judgment of the Court of Appeals and reinstated the sentences of 18 years nine months to 25 years for armed robbery and carjacking. The Court of Appeals held that the sentences violated People v Tanner, 387 Mich 683 (1972) because the maximum sentences were not at least one-and-a-half times the minimum. The Supreme Court held that MCL 769.34(2)(b) provides that a court shall not impose a minimum sentence that exceeds 2/3 of the statutory maximum, and that since the statutory maximums for armed robbery and carjacking are life or any term of years, the circuit court did not impose sentences that violated the statute. Since the minimum sentences fell within the properly-scored guidelines range, the sentences had to be affirmed.

Justices Cavanagh and Kelly would grant leave to appeal.

JURY – Verdict DOUBLE JEOPARDY – Multiple Prosecutions

People v Thomas R. Brunas
#124956, April 9, 2004
SADO – VALERIE NEWMAN

The Supreme Court denied leave to appeal to the defendant in a form order. The Court of Appeals affirmed the conviction of manslaughter. The jury was asked how the jurors found as to the first count, first-degree murder, and the foreman responded “not guilty.” After polling the jury, the trial court released the jury to the jury room at 3:30 p.m. However, the verdict form showed that the jury had convicted

defendant of the lesser included offense of voluntary manslaughter. At 3:31 p.m., the jury was brought back in and the foreperson affirmed that the verdict was guilty of manslaughter. The trial court concluded that it had not yet discharged the jury and that there was no violation of double jeopardy. The Court of Appeals found no error since the orally stated verdict was obviously incorrect, it was immediately cleared up, it was “questionable” whether the jury was discharged, and none of the concerns regarding a discharged jury, such as outside influences, was present.

Justice Kelly would grant leave on the important double jeopardy principles presented by this case. Justice Kelly would grant leave to consider whether the rule of reasonableness should control, whether a verdict is final before it is recorded, whether “departure” of the jury occurs when it leaves the courtroom or when it leaves the trial court’s control, and which controls, a written or spoken verdict.

BAIL -- Pretrial

People v Harry Javens
#125216, April 9, 2004
JOHN ROYAL

Granted motion for immediate consideration; in lieu of granting leave to appeal, reversed order of Oakland County Circuit Court denying bail.

Solicitation to commit murder is not an offense for which bail may be altogether denied. On remand, the circuit court may impose the terms, conditions, and amount of any bond that it deems appropriate to secure the defendant’s attendance.

Justice Young, concurring, observed that the circuit court decided not to give effect to binding legal authority based on the “absurd results” doctrine, but that this doctrine allows a court to engage in “judicial lawmaking,” exceeding the scope of its authority.

Michigan Supreme Court: Selected Opinion Summaries

DOUBLE JEOPARDY -- Multiple Prosecutions -- Same Transaction

People v Melissa Ann Nutt
#120489
April 2, 2004
DANIEL VAN NORMAN

Affirmed on other grounds judgment of Court of Appeals affirming conviction of receiving and

concealing the same stolen property that defendant was previously convicted of stealing during the same transaction. **Case below:** unpublished opinion (#225887, 11-9-01).

The same transaction test for double jeopardy adopted by the Court in People v White, 390 Mich 245 (1973), is overruled, and the same-elements test is reinstated. The meaning of “same offense” in art 1 section 15 of the Michigan Constitution must be

construed consistently with federal and state double jeopardy law as it existed at the time of the ratification of the 1963 constitution. Therefore, the same-elements test as defined in Blockburger v United States, 284 US 299 (1932), which focuses on the statutory elements of the offense, is the appropriate method of defining the Fifth Amendment term "same offence." If each offense requires proof of a fact that the other does not, the Blockburger test is satisfied. The same transaction test has been consistently rejected by the United States Supreme Court. The ratifiers of the Michigan Constitution were informed that Michigan's double jeopardy protection would parallel that of the federal constitution. The Court in White disregarded decades of precedent, as well as the "will of the people of this state," by adopting the same transaction test based on the rationale that the state should not be allowed to make repeated attempts to convict a defendant.

Because the two offenses in this case (second-degree home invasion and receiving and concealing stolen property) are not the same offense under either the Fifth Amendment or art 1, sec 15, defendant is not entitled to the dismissal of the receiving and concealing charge.

Justice Cavanagh, joined by Justice Kelly, dissenting, would find a violation of double jeopardy and reverse the conviction. Justice Cavanagh wrote that the majority's decision to overrule White is grounded in the improper belief that the same elements test is the sole test used by the U.S. Supreme Court to protect citizens' constitutional rights under the United States Constitution. The U.S. Supreme court has used other tests because it recognized that the same elements test is not an adequate safeguard to protect the right against double jeopardy. The same elements test permits multiple prosecutions stemming from a single incident, while the same transaction test protects Michigan citizens against government harassment and overreaching. Defendant's actions in this case represent a single act and goal, and the events were part of a continuous time sequence.

CONFESSIONS -- Absence of Counsel

People v John Rodney McRae #121300, April 22, 2004 SADO - GARY ROGERS

Reversed judgment of Court of Appeals affirming first-degree murder conviction. **Case below:** unpublished opinion (#217052, 2-12-02).

The admission of Defendant's statements to a sheriff's reserve deputy violated Defendant's Sixth Amendment right to counsel. Under the circumstances of this case, the reserve deputy, who was Defendant's former neighbor and to whom Defendant requested to speak, was a state actor when he questioned Defendant. The deputy possessed actual state authority, he was in full uniform and was granted direct access to a restricted area by virtue of his status. The deputy brought up the subject of the murder and relayed the contents of the conversation to the officer in charge of the investigation. He was not acting solely out of concern for Defendant's welfare.

The deputy's questioning of Defendant violated his right to counsel. Defendant did not initiate a discussion relating to the investigation; it was the deputy who tried at least four separate times to question Defendant about the offense. Defendant initially refused to answer, and the deputy continued to press him for information, deliberately eliciting incriminating statements in violation of the bright-line rule established in Edwards v Arizona, 451 US 477 (1981), as clarified in Oregon v Bradshaw, 462 US 1039 (1983). The error was not harmless beyond a reasonable doubt.

Justice Markman, dissenting, would find that Defendant's right to counsel was not violated because the deputy was acting as a friend, not a police officer, when he spoke to Defendant. There was no governmental action and, therefore, no violation of Defendant's Sixth Amendment rights, in Justice Markman's opinion.

Michigan Court of Appeals: Selected Opinion Summaries

SENTENCING AND PUNISHMENT -- Guidelines -- Departure Reasons

People v Duane Eugene Reincke
(On Remand)
#232662, January 27, 2004
Approved for Publication March 16, 2004
PC: Whitbeck, Owens, Kelly
IN PRO PER

Affirmed sentence of 30 to 60 years in prison.

The trial court articulated substantial and compelling reasons for departing from the guidelines, including the horrific, brutal nature of the injuries defendant inflicted on a three-year-old girl, the vulnerability of the child, and the need to protect society from defendant. These reasons were objective and verifiable, and keenly grabbed the attention of the court.

The trial court's departure reasons justified the sentence imposed. Nothing in the guidelines adequately accounts for defendant's "brutal act of barbarity," and the sentence fell within the range of reasonable and principled outcomes.

EVIDENCE -- Relevance
SENTENCING AND PUNISHMENT -- Guidelines
-- Scoring

People v Duane Joshua Houston
#245889, April 1, 2004
PC: Jansen, Markey, Gage
SADO - GAIL RODWAN

Affirmed convictions of second-degree murder and felony firearm, and sentence of life imprisonment.

Evidence that defendant possessed a .380 caliber pistol three days before the crime was directly relevant to identifying defendant as the killer; the victim was shot with a .380 caliber gun. The prosecutor did not use the evidence to establish an improper character-to-conduct inference. Therefore, MRE 404(b) was not implicated. Even if it were, the evidence was properly admitted because of its relevance for a reason other than to prove character. Moreover, the trial court's cautionary instruction eliminated any possible unfair prejudice.

The trial court may have erroneously scored OV 3 at 25 points (because the sentencing offense was a homicide), but resentencing is not necessary because the life sentence was still within the appropriate guidelines range. Although the revised sentencing grid does not include life imprisonment, the statute is the controlling authority. Whether a life sentence is within the guidelines is a function of the upper limit of the recommended minimum sentence range. Where the upper range is 300 months or more, a life sentence is an appropriate alternative sentence within the guidelines recommendation.

SENTENCING AND PUNISHMENT -- Guidelines
-- Scoring

People v Jason William Cathey
#244626, April 6, 2004
MURRAY, Murphy, Markey
SADO -- ANNE YANTUS

Reversed sentence of 36 to 180 months for third-degree criminal sexual conduct.

The trial court erred in refusing to score any points for OV 3 because of the victim's pregnancy. Pregnancy is a "bodily injury" within the meaning of MCL 777.33. The term is undefined in the statute, but it must be assumed that the legislature was aware of

existing case law definitions of bodily injury. The Court in People v Woods, 204 Mich App 472 (1994), defined bodily injury to include pregnancy. Moreover, by necessity, a woman's body suffers "physical damage" when carrying and delivering a child.

Judge Murphy, dissenting, would hold that the plain and ordinary meaning of "bodily injury" does not encompass a pregnancy. Judge Murphy wrote that the creation of a new life, innocent of any wrongdoing, cannot be relegated to the designation of "damage" unless the legislature clearly expresses that intent.

STATUTORY INTERPRETATION
VICARIOUS LIABILITY

People v Hock Shop, Inc.
#245777, April 8, 2004
Cavanagh, GAGE, Zahra
JOHN MONAGHAN

Affirmed dismissal of charges of two counts of sale of a firearm and ammunition to a felon.

A corporate employer cannot be held vicariously liable under MCL 750.224f for the criminal acts of its employees committed during the course of their employment. Although defendant "Hock Shop" is a legal person, it is not automatically criminally liable for the acts of other persons. The statute in question contains no express or implicit provision for vicarious responsibility, nor is it ambiguous on the issue. The Court cannot read such intent into the statute.

CONFESSIONS -- Failure to Record
Entire Statement
CONFESSIONS -- Voluntariness -- Promise of
Leniency or Help
CONFRONTATION
EVIDENCE -- Hearsay -- Catch-all Exception
SENTENCING AND PUNISHMENT -- Guidelines
-- Departure Reasons

People v Dale Allen Geno
#241768, April 27, 2004
White, Markey, OWENS
SADO - RANDY DAVIDSON

Affirmed conviction of first-degree criminal sexual conduct and sentence, as an habitual offender, of 30 to 90 years in prison.

There is no federal or state constitutional requirement that electronic recordings be made of custodial interrogations and defendant was not entitled to suppression of his statement on those grounds. The decision so holding in People v Fike, 228 Mich App 178 (1998) is binding.

The trial court's finding that defendant's confession was voluntary was not clearly erroneous. Giving proper deference to the trial court's credibility determination, there were no promises or threats made to obtain defendant's statement.

The trial court did not err in allowing the admission of hearsay testimony by the executive director of the Children's Assessment Center under the catch-all exception to the hearsay rule, MRE 803(24), nor did admission of this evidence violate defendant's right of confrontation. The two-year-old child's statement that defendant hurt her did not constitute "testimonial evidence" and Crawford v Washington, 541 US___ (2004) does not apply. The statement was reliable and trustworthy as it was made in response to a non-accusatory question while the director was helping the child use the toilet. The statement tended to establish a material fact, it was the most probative that the prosecutor could offer, and it did not fall within any other hearsay exception. Moreover, there is no evidence to support defendant's suggestion that the child's father had a motive to influence the victim to make the statement.

The trial court did not abuse its discretion in departing upward from the guidelines. Although the trial court mentioned the future risk defendant posed

to small children, the actual factors the court considered were defendant's past criminal history of sex crimes with children, his admitted sexual attraction to children, and his repeated failure to rehabilitate himself when given the opportunity. These factors are objective and verifiable and constitute substantial and compelling reasons for departure.

EVIDENCE -- Blood Samples

People v Kathie Michele Fett (On Remand)
#238781, April 27, 2004
PC: Markey, Cavanagh, Hoekstra
SADO - CRISTINE A. PAGAC

Affirmed conviction of OWI third offense.

The trial court erred by admitting, during cross-examination of an expert witness, the results of a preliminary breath test (PBT) contrary to MCL 257.625a(2)(b). However, it does not appear more probable than not that the error was outcome-determinative. Both the PBT and the Data-Master test results were above the legal limit, the accuracy of both tests was equally disputed, and the jury obviously discounted both results because it found defendant not guilty of operating with an unlawful alcohol level.

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 \$1.50 per page), providing the "MA" number for each case, or download the opinions for free from the Court's website, www.courtsofappeals.mijud.net.

JURY -- Exclusion of Jurors Based on Race, Gender, etc.

People v Ramon Lee Bryant
#241442, March 16, 2004
MLW #09-51685 (9pp)
ARTHUR RUBINER

Remanded for evidentiary hearing regarding defendant's challenge to the jury venire.

The evidence indicates that the underrepresentation of African Americans on defendant's jury quite possibly resulted from a lack of

random selection. The prosecutor conceded that there was a problem in the jury selection process in Kent County from late 2001 to July 2002: a computer program used to select potential jurors chose a disproportionately large number of jurors from areas with lower zip codes, which resulted in the selection of fewer jurors from a county where African Americans reside.

On remand, if defendant is able to show that the Kent County jury selection system resulted in systematic exclusion of African Americans, the state bears the burden of justifying the infringement of defendant's right to a jury drawn from a fair cross section of the community.

Judge Borrello, concurring in part and dissenting in part, would find that Kent County engaged in the systematic exclusion of African Americans, denying defendant his Sixth Amendment right to a fair and impartial jury. There is no requirement of intent to exclude African Americans from the jury pool. Judge Borrello would reverse defendant's conviction.

Training Calendar

Complete details on the training events listed below appear at page 17 of this month's newsletter.

June 13 - 26, 2004	Trial Practice Institute	NCDC - Macon, GA
June 25 - 26, 2004	Annual Training Conference	SBM - Ypsilanti, MI
July 10 - 16, 2004	Communication Skills	WTAI - Laramie, WY
July 18 - 31, 2004	Trial Practice Institute	NCDC - Macon, GA
July 28 - 31, 2004	Annual Meeting & Seminar	NACDL - San Francisco, CA
August 18 - 22, 2003	Trial Practice Institute	CDAM - Lansing, MI
October 13 - 16, 2003	Drunk Driving Defense	NACDL - Las Vegas, NV
October 14 - 16, 2004	Child Abuse Defense	NCADRC - Las Vegas, NV
October 21 - 23, 2004	Tackling Terrorism	DUSL/CWIFSL - Pittsburg, PA

May, 2004 **Volume 27, Number 8**

Dawn Van Hoek, Director CDRC & Editor
Kim Easter, 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

Address Service Requested