

**SENTENCING UPDATES**  
**CRIMINAL ADVOCACY PROGRAM, NOVEMBER 2007**  
**ANNE YANTUS (SADO)**

**I. HOT TOPICS**

❖ ***Financial Penalties:***

Trial court has the duty to consider defendant's ability to pay before ordering attorney fees. *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007); *People v DeJesus*, 477 Mich 996; 725 NW2d 669 (2007); *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004).

*Note: According to MCR 1.110, fines, costs and other financial obligations imposed by the court "must be paid at the time of assessment, except when the court allows otherwise, for good cause shown." For restitution purposes, MCL 780.766(10) and MCL 769.1a(10) provide that the court may order restitution to be paid immediately, or within a specified period, or in specified installments. Under MCL 600.4803(1), costs and fees must be paid within 56 days after they become due or the offender is subject to a 20% late penalty. "A late penalty may be waived by the court upon the request of the person subject to the late penalty." Id.*

❖ ***Jail Credit - Parolees***

After a circuit judge in Genesee County disagreed with existing case law and granted jail credit to a parolee, the prosecutor appealed and the Court of Appeals granted leave to appeal. *People v Jeffrey Edward Filip*, Court of Appeals Docket Number 277204 (leave granted May 21, 2007). The case is presently pending.

**II. PENDING IN MICHIGAN SUPREME COURT**

*Scoring of Offense Variable 10 – Predatory Conduct*

The Supreme Court has granted leave to appeal on what constitutes a vulnerable victim for purposes of scoring 15 points under OV 10 for predatory conduct. *People v Cannon*, 478 Mich 861; 731 NW2d 407 (2007).

### *Scoring of Offense Variable 9 – Multiple Victims*

The Supreme Court has granted leave to consider whether the rule of *People v Chesebro*, 206 Mich App 468 (1994), that victims of the precise sentencing offense are the only victims scored under the judicial sentencing guidelines, applies to the scoring of the statutory sentencing guidelines. *People v Sargent*, \_\_\_ Mich \_\_\_; 737 NW2d 767 (2007).

### *Validity of Stoudemire/Preuss Rule for Habitual Offenders*

The Supreme Court has granted oral argument on whether the Court “correctly held” in *People v Stoudemire*, 429 Mich 262 (1987), and *People v Preuss*, 436 Mich 714 (1990), “that multiple convictions arising out of a single criminal incident may count as only a single prior conviction for habitual offender purposes[.]” *People v Gardner*, 477 Mich 1096; 729 NW2d 519 (2007) (Wayne County).

## III. NEW LAWS – 2006

### ❖ *First-Degree CSC – New Penalties:*

***First Offense Involving Minor Under 13*** - Effective August 28, 2006, MCL 750.520b was amended to provide for a penalty of “life or any term of years, *but not less than 25 years*” for commission of first-degree CSC involving an individual under the age of 13 by an offender 17 years or older. MCL 750.520b(2)(b) (emphasis added). 2006 PA 169.

***Second or Subsequent Offense Involving Minor Under 13*** –Effective August 28, 2006, the amended statute also provides for a sentence of “*life without possibility of parole*” for conviction of first-degree CSC against an individual under the age of 13 by an offender 17 years or older, if the offender has a prior conviction for either first-degree, second-degree, third-degree or fourth-degree CSC, assault with intent to commit sexual contact or assault with intent to commit sexual penetration, if the prior offense also involved a minor under the age of 13. MCL 750.520b(2)(c) (emphasis added). 2006 PA 165.

***Electronic Monitoring and Lifetime Parole*** - There are also new provisions for electronic monitoring for life of individuals convicted of first and second degree CSC involving minors under the age of 13, MCL 750.520c(2)(b); MCL 750.520c(2)(c); MCL 750.520n, and lifetime parole for persons convicted of first-degree CSC involving a person under the age of 13, MCL 791.242. The offender must pay the cost of electronic monitoring. MCL 791.285(2).

### ❖ *Kidnapping – New Penalties:*

***(Aggravated) Kidnapping*** – Effective August 24, 2006, kidnapping is now defined as the knowing restraint of another person with the intent to a) hold that person for ransom or reward, b) use that person as a shield or hostage, b) engage in criminal sexual conduct,

d) take that person outside the state, or e) hold that person in involuntary servitude. MCL 750.349; 2006 PA 159. The offense is punishable by life or any term of years.

***Unlawful Imprisonment*** – Effective August 24, 2006, the new crime of unlawful imprisonment replaces much of the old kidnapping statute and requires that a person knowingly restrain another person either a) through the use of a weapon or dangerous instrument, b) by means of secret confinement, or c) to facilitate the commission of another felony or flight following a felony. The maximum penalty is fifteen years imprisonment. MCL 750.349b; 2006 PA 160.

❖ ***Jail Escape –Maximum Increased to 5 years***

Effective December 29, 2006, the maximum sentence for jail escape increased from four to five years. MCL 750.197c. 2006 PA 535

**IV. NEW LAWS – 2007**

❖ ***OUIL Third Offense– No Ten-Year Period (Heidi’s Law):***

Effective January 3, 2007, the statute prohibiting OUIL Third Offense (OWI Third Offense) no longer requires that both prior convictions occur within ten years of the sentencing offense. MCL 257.625(9). 2006 PA 564.

*Note: Seven-Year Period Retained for Second Offense*

❖ ***Habitual Offender Statutes– Must Give Underlying Maximum Penalty***

Effective January 9, 2007, the habitual offender statutes now provide that the trial judge may not impose a maximum sentence less than the maximum penalty for the underlying offense. MCL 769.10 *et seq.* 2006 PA 655.

❖ ***Prior Record Variables 1, 2, 3, 4 and Out of State/Federal Convictions***

Effective January 9, 2007, the first four prior record variables were amended to permit points to be assessed for Michigan felony convictions (or comparable juvenile adjudications under PRV 3 and 4) that have that have not been classified by the legislative sentencing guidelines. Moreover, out of state or federal convictions that do not “correspond” to crime listed in the guidelines may be counted based on the length of the maximum possible sentence. Offenses punishable by ten years or more are considered high-severity, while offenses punishable by less than ten years are considered low-severity. MCL 777.51-54. 2006 PA 655.

*Note: Applies to Crimes Committed on or after 1-9-07. See MCL 769.34(2).*

❖ ***Special Offenses – Scoring of Offense Variables***

Effective January 9, 2007, Special Offenses as listed in MCL 777.18 (conspiracy, inducing minor to commit a felony, second or subsequent controlled substance offense, etc.) require scoring of the offense variables for the special crime group and *also the offense variables for the underlying offense*. The crime class is always “variable” because it depends on the crime class of the underlying offense. If there are multiple underlying felonies, the crime class for a special offense is the same as the felony with the highest crime class. MCL 777.21(4). 2006 PA 655.

*Note: Applies to Crimes Committed on or after 1-9-07. See MCL 769.34(2)..*

❖ ***Offense Variable 9– Scoring for Victims of Property Loss Authorized***

Effective March 30, 2007, Offense Variable 9 now add points for victims of property loss. MCL 777.39. 2006 PA 548.

*Note: --Applies Only to Crimes Committed on or after 3-30-07. See MCL 769.34(2).*

*--Effectively Overturns **People v Melton**, 271 Mich App 590; 722 NW2d 698 (2006), although **Melton** is Fully Retroactive. See **People v Parks**, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2007 (Docket No. 270652) (Request for Publication Pending).*

❖ ***Discretionary Consecutive Sentencing Authorized***

*-Resisting and Obstructing and Offenses Committed During Same Transaction:*

Effective December 29, 2006, discretionary consecutive sentencing is authorized for resisting and obstructing and any other violation arising from the same transaction. MCL 750.81d(6). 2006 PA 517.

*-CSC First Degree and Offenses Committed During Same Transaction*

Effective August 28, 2006, the first-degree CSC statute now permits, but does not require, consecutive sentencing for CSC first-degree and any offenses committed during the same transaction. MCL 750.520b(3). 2006 PA 169.

*-Violation of Lifetime Electronic Monitoring of CSC Offenders*

Effective August 28, 2006, a term of imprisonment imposed for violation of lifetime electronic monitoring of CSC offenders may run consecutively to any term of imprisonment imposed for another violation arising out of the same transaction. MCL 750.520n. 2006 PA 171.

*-Embezzlement and Vulnerable Victim:*

Effective March 30, 2007, the felony embezzlement provisions permit (but do not require) consecutive sentencing if the offense involved a victim who was a vulnerable adult, age 60 or older, or a non-profit or charitable organization. MCL 750.174. 2006 PA 573.

❖ ***Probation Length Extended for Misdemeanor Child Abuse***

Effective December 29, 2006, MCL 771.2a was amended to authorize up to five years probation for misdemeanor child abuse provisions found within MCL 750.136b; 2006 PA 507; MCL 771.2a(3).

*Note: Probation of at Least Five Years is Required for Aggravated Stalking, MCL 750.411i; MCL 771.2a(2). Probation of up to Five Years is Permitted for Non-Aggravated ( Misdemeanor) Stalking, MCL 750.411h; MCL 771.2a(1). And Probation of at Least Five Years is Required for Any Listed Offense Under the SORA, MCL 771.2a(6).*

❖ ***Drug Court Statutes Amended to Relax Residency Limitations***

Effective January 3, 2007, the drug court statutes were amended to allow a drug court program to accept participants from any other jurisdiction in Michigan based upon either a participant's residence in the receiving jurisdiction or the unavailability of a drug court program in the jurisdiction where the participant was charged. MCL 600.1060; MCL 600.1062. 2006 PA 620.

V. **NEW CASE LAW – IN GENERAL**

Trial court may not base its sentencing decision even in part on a defendant's continued assertion of innocence, *People v Hatchett*, 477 Mich 1061; 728 NW2d 462 (2007), or refusal to admit guilt and demand a trial, *People v Jackson*, 474 Mich 996; 707 NW2d 597 (2006). The trial court's improper reliance on a defendant's claim of innocence can be raised on appeal despite the fact that the sentence falls within the applicable guidelines range. *People v Conley*, 270 Mich App 301; 715 NW2d 377 (2007).

Possession of Marijuana as a second drug offense is not a felony for purposes of consecutive sentencing under the Public Health Code. *People v Wyrick*, 474 Mich 947; 707 NW2d 188 (2005).

*Note: With the Statutory Amendment of MCL 777.21(4)(b), effective January 9, 2007, there is argument to be made that the guidelines can be scored for a one-*

*year misdemeanor drug offense that is enhanced as a second or subsequent offense under MCL 333.7413. While the offense is still a misdemeanor, it is*

possible to score the guidelines because the default crime class is now “G,” and MCL 333.7413 is listed within the crime list. But this amendment applies only to crimes committed on or after January 1, 2007.

Michigan restitution statutes do not provide an exclusive list of remedies and may include the cost of labor to determine the amount of lost property and to replace lost property. *People v Gubachy*, 272 Mich App 706; 728 NW2d 891 (2006).

Restitution is proper despite the existence of a civil settlement between the victim and defendant that included a settlement amount and a release from further claims. *People v Bell*, 276 Mich App 342; \_\_\_ NW2d \_\_\_ (2007).

If sentencing offense “by its nature” was a sexual offense against an individual less than 18 year old, SORA catchall provision applies. In *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007), the Court of Appeals affirmed the trial court’s order that defendant must register under the SORA as he was convicted of unauthorized access to computers, despite the hung jury on the charge of possession of child sexually abusive material and despite the fact that defendant committed the computer violations in sexual and non-sexual ways (and the factual basis for the jury verdict was unclear).

The rule of *Blakely v Washington*, 542 US 296 (2004), does not apply in Michigan. *People v McCuller*, 479 Mich 672 (2007); *People v Harper and Burns*, 472 Mich 599 (2007). [But cert petition to be filed in *McCuller*.] The Michigan Supreme Court also abrogated *People v Uphaus*, 275 Mich 158; 737 NW2d 519 (2007) (holding that *Blakely* applied to intermediate sanction cells).

## **VI. NEW CASE LAW- SENTENCING GUIDELINES**

**PRVs** -Foreign Convictions cannot be scored under the prior record variables, but may constitute a valid reason to depart from the guidelines range (if the foreign jurisdiction afforded due process). *People v Price*, 477 Mich 1; 723 NW2d 201 (2006).

**PRV 5** – Error to score based on prior charge of possession of marijuana for which the defendant was assigned 7411 status (MCL 333.7411), where the defendant received discharge and dismissal of proceedings. *People v James*, 267 Mich App 675; 705 NW2d 724 (2005).

**OV 1, OV 2, OV 3** – Multiple offender instruction does not apply where defendant was not convicted of same offenses as co-defendants. *People v Quentin Johnston*, 478 Mich 903; 732 NW2d 531 (2007).

**OVI** - HIV-infected blood is “harmful biological substance” and can support scoring of 20 points where defendant spit at officer while bleeding from the mouth. *People v Odom*, 276 Mich App 407; \_\_\_ NW2d \_\_\_ (2007).

**OV 10** – Trial court did not err in scoring 10 points for exploitation of youth in criminal sexual conduct case where defendant was 20 and victim was 15. *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006).

**OV 11**- Trial court erred in scoring 50 points under OV 11 for “penetrations that did not arise out of the particular sentencing offenses.” *People v Amos*, \_\_\_ Mich \_\_\_; 737 NW2d 704 (2007).

**OV 11** – Trial court erred in scoring 50 points under OV 11 because the penetrations “did not ‘arise out of’ the sentencing offense.” *People v Van Cleve*, \_\_\_ Mich \_\_\_ (Docket No. 133295, September 24, 2007).

**OV 20** – Trial court erred in failing to score 100 points for act of terrorism where defendant threatened to use pipe bomb against students. *People v Osantowski*, 274 Mich App 593; 736 NW2d 289 (2007).

## **VI. NEW CASE LAW – SENTENCING GUIDELINES DEPARTURES**

### **--IMPERMISSIBLE REASONS FOR DOWNWARD DEPARTURE:**

#### **❖ *Defendant’s Sobriety and Ability to Refrain From Crime While Sober:***

The Supreme Court agreed with the Court of Appeals that the defendant’s continued sobriety and ability to conform his behavior when not inebriated were not objective and verifiable departure reasons for a downward departure in a sexual delinquency case. *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007).

#### **❖ *Defendant’s Age (22), Lack of Prior Record, Continuous Work Record, Use of Small Knife and Cooperative Attitude Toward Counsel and Court:***

The Court of Appeals reversed a downward departure in an armed robbery case, noting that the smaller size of the knife was not an appropriate departure reason where the presence of a weapon did not increase the recommended range of the guidelines at all. The Court also was not impressed by the defendant’s age, work record and lack of prior record. *People v Young*, \_\_\_ Mich App \_\_\_ ; \_\_\_ NW2d \_\_\_ (August 23, 2007, Docket No. 268227).

*Note: Court would not rule out departure based on age and lack of record, although noting 22 is not such an old age for lack of a prior record. Court also notes that extraordinary employment history may support downward departure.*

❖ *Defendant's Lack of Prior Record:*

The defendant's lack of a prior record (at age 18) is not a valid downward departure reason where the trial judge failed to explain how the guidelines did not adequately account for this factor. *People v Denton*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2007 (Docket No. 267612, 267790). [*But see further discussion of this case under Permissible Downward Departure Reasons.*]

--*PERMISSIBLE REASONS FOR DOWNWARD DEPARTURE:*

❖ *Defendant's Age/Youth, Mitigating Factors of the Offense and Family Support:*

Although the Court of Appeals remanded to the trial court for clarification of whether it would have departed without the invalid departure reason of defendant's lack of a prior record, the Court noted that the trial court permissibly relied on the defendant's age (18), the mitigating facts of the offense (CSC offense following high school graduation party that involved drinking), and the strong family support of the defendant in order to support a downward departure. *People v Denton*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2007 (Docket No. 267612, 267790).

--*IMPERMISSIBLE REASONS FOR UPWARD DEPARTURE:*

❖ *Defendant's Age as Correlated with Future Dangerousness:*

While affirming the upward departure on other grounds (see below), the Court of Appeals noted that the trial judge improperly departed based on defendant's age (43) and the need to keep him away from society for a long time unless he could be safely returned. *People v Cline*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 268604, September 18, 2007).

❖ *Factors Already Scored Within Guidelines:*

Where the trial court relied on the "excessive brutality" of the crime as an upward departure reason and did not explain how the characteristic was given inadequate or disproportionate weight by the guidelines, remanded for resentencing. *People v Jackson*, 474 Mich 996; 707 NW2d 597 (2006).

Corrigan, J., concurring, states that the "magic language" that the guidelines have "given inadequate or disproportionate weight" to a factor "is now indisputably required" and "sentencing judges need to comply precisely with the *Babcock* requirements so that unnecessary remands may be avoided." 707 NW2d at 598, 599.



❖ *Stricter Supervision Through Process of Parole Board and Parole:*

Trial court improperly departed from intermediate sanction range to impose prison sentence in part based on presumably stricter supervision of parole process versus probation. *People v Ousley*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2006 (Docket No. 261409).

❖ *Inadequate Funding for Substance Abuse Programs:*

Lack of funding for intensive substance abuse program is not a substantial and compelling reason to depart from an intermediate sanction cell (although 17 prior misdemeanor convictions otherwise supported the departure). *People v Joyner*, unpublished opinion per curiam of the Court of Appeals, issued March 8, 2007 (Docket No. 273657).

--*PERMISSIBLE REASONS FOR UPWARD DEPARTURE:*

❖ *Multiple Acts of Aggravated Physical Abuse, Pattern of 18 Crimes Against the Person, and Total OV Score that was at the Upper Limit of Applicable Grids:*

The Court of Appeals affirmed an upward departure in a case where although defendant received 50 points under OV 7 for aggravated physical abuse, the guidelines did not account for the *multiple* acts of aggravated physical abuse. Moreover, OV 13 did not adequately account for the 18 crimes against the person. And the defendant's total offense variable scores were 120 and 135 points, well beyond the upper limit of the applicable grids. *People v Cline*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 268604, September 18, 2007).

❖ *Defendant's Perjury at Trial:*

The Court of Appeals affirmed an upward departure from the guidelines based on the defendant's low potential for rehabilitation due to his outright perjury at trial. The trial judge indicated that defendant had presented the "most preposterous, ridiculous defense" in a drug case the judge had ever heard. The Court of Appeals agreed that this reason was objective and verifiable based on the jury's outright rejection of the defendant's story at trial (that he was at the drug house to mow the lawn). *People v McCoy*, unpublished opinion per curiam of the Court of Appeals, issued February 22, 2007 (Docket No. 266093).

*See also, People v Sims*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2006 (Docket No. 262959) (upward departure from the guidelines affirmed in a case where the record supported the conclusion that defendant perjured himself at trial and had minimal prospects for rehabilitation. The panel noted that neither factor was taken into consideration by the scoring of the guidelines.

*But see, People v Baiz*, unpublished opinion per curiam of the Court of Appeals, issued January 9, 2007 (Docket No. 262912) (while defendant's perjury may be scored under OV 19, court notes that even where jury chose to believe victim's version of the offense over the defendant's does not make the victim's version the truth, and perjury must always be willful, material and flagrant. Remanded to trial court for specific findings as to how defendant perjured himself.

## **VII. MISCELLANEOUS POINTS TO CONSIDER**

The trial judge may sentence below the range of an intermediate sanction or straddle cell without departing. MCL 769.34(4)(a)&(c)(ii).

The *Tanner* two-thirds rule (the minimum sentence cannot exceed 2/3's of the maximum sentence) does not apply where the maximum sentence is life or any term of years. *People v Powe*, 469 Mich 1032; 679 NW2d 67 (2004).

Financial ability to pay is relevant to court costs imposed as condition of probation and may be relevant to costs imposed with a prison sentence. *See* MCL 771.3(6) (court may not order court costs as condition of probation unless defendant has or will have ability to pay during probationary term).