SENTENCING LAW UPDATES

CRIMINAL ADVOCACY PROGRAM, NOVEMBER 2008

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SENTENCE ENHANCEMENT

STOUDEMIRE/HABITUAL OFFENDERS – Multiple felony convictions that arise out of the same criminal incident or transaction may be counted as separate prior convictions for purposes of habitual offender sentence enhancement, *overruling People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987). *People v Gardner*, ___ Mich ___; 753 NW2d 78 (2008).

HEIDI'S LAW – An individual may be convicted of OUIL third offense based on two prior drunk driving convictions, regardless of when the two prior offenses occurred. The amendment of MCL 257.625, effective January 3, 2007, does not violate *ex post facto* provisions. *People v Perkins*, ___ Mich App ___; ___ NW2d ___ (2008).

***BLAKELY* AND CONSECUTIVE SENTENCING -** The United States Supreme Court heard oral argument on October 14, 2008, as to whether the Sixth Amendment requires that facts necessary to impose consecutive sentences (other than prior convictions) be found by a jury or admitted by the defendant. *Oregon v Ice*, No. 07-901.

TANNER (TWO-THIRDS) RULE

TANNER RULE – Due to conflicting orders of the Michigan Supreme Court, it is unclear whether the *Tanner* rule (that the minimum term must not exceed two-thirds of the maximum sentence) applies to offenses carrying a maximum penalty of life or any term of years. See *People v Powe*, 469 Mich 1032; 679 NW2d 67 (2004) (the two-thirds rule of MCL 769.34(2)(b) does not apply where the statutory maximum penalty is life or any term of years); *People v Floyd*, 481 Mich 938; 751 NW2d 34 (2008) (reversing under *Tanner* and MCL769.34(2)(b) where the minimum sentence of 62 years exceeded two-thirds of the 80-year maximum sentence for kidnapping and various lesser offenses)

SPECIAL ALTERNATIVE INCARCERATION

BOOT CAMP ELIGIBILITY – Defendants sentenced to their first or second prison term may be eligible to participate in the Special Alternative Incarceration program, provided the sentencing judge does not object. Placement is statutorily prohibited if the defendant is serving, or has served, a sentence for certain offenses (most life offenses, nearly all CSC offenses, manslaughter and various other offenses). The defendant is also ineligible if sentenced as an habitual offender. The defendant's minimum sentence term must be 36

months or less (24 months or less for breaking and entering an occupied dwelling). MCL 791.234a; 2008 PA 158 (effective May 4, 2008).

JAIL CREDIT

JAIL CREDIT – A defendant is entitled to credit for time spent in jail awaiting resolution of the case even if there was no right to bail under Const 1963, art 1 sec 15, where the defendant was charged with murder and the proof was evident. *People v Radtke*, ___ Mich ___ (Docket No. 136472, September 22, 2008).

JAIL CREDIT (AT RESENTENCING) – Although the defendant was entitled to no jail credit at the time of sentencing because the offense was committed while on parole, he is entitled to jail credit at the resentencing (credit from the date of the original sentencing) where the sentence was later vacated as an unwarranted departure from the sentencing guidelines. *People v McDaniel*, 480 Mich 1162; 746 NW2d 867 (2008).

JAIL CREDIT (PAROLEES) – A defendant who commits a new offense while on parole is not entitled to credit for time served prior to sentencing because the time served is not the result of an inability to post bond or a denial of bond, but rather due to a parole detainer. *People v Filip*, 278 Mich App 635; 754 NW2d 660 (2008).

JAIL CREDIT – Court declines to extend the rule of *People v Resler*, 210 Mich App 24 (1995) (jail credit should be granted for period of release pursuant to sheriff's good-time credits) to similarly grant credit for the amount of time a sentence is reduced under the jail overcrowding act. *People v Grazhidani*, 277 Mich App 592; 746 NW2d 622 (2008).

FINANCIAL PENALTIES

ATTORNEY FEES – Court finds no lack of inquiry by the trial judge as to ability to pay under *People v Dunbar*, 264 Mich App 240 (2004), where the trial judge specifically addressed, without objection, defendant's ability to pay attorney fees and other costs at the time of sentencing. *People v Davis, supra*.

ATTORNEY FEES- The trial court must consider a defendant's ability to pay attorney fees even where the fees are assessed pursuant to MCL 769.1k (effective January 1, 2006). The statute does not eliminate the requirements of *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004). But as the statute provides legislative authorization for the fees, they may be included on the judgment of sentence. *People v Trapp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 282662, September 9, 2008).

COURT COSTS - The trial court may require the defendant to repay the costs of the prosecution's expert witness as a condition of probation under MCL 771.3(5), which statute authorizes the court to order the probationer to pay "the expenses specifically incurred in prosecuting the defendant." *People v Brown*, 279 Mich App 116; ___ NW2d ___ (2008).

RESTITUTION - The court should consider the actual loss suffered by the victim, not the amount paid by the insurance company. In other words, while an insurance company may pay for the *replacement* value of an item, the defendant is responsible for the actual loss suffered by the victim. *In re McEvoy*, 267 Mich App 55; 704 NW2d 78 (2005); *People v Bell*, 276 Mich App 342; 741 NW2d 57 (2007).

RESTITUTION – The trial court plainly erred in assessing restitution of $12,500 in a case of attempted larceny of a spool of copper cable where a section was partially severed from the spool and the value of the entire spool was $9,616. On remand, the trial court is ordered to determine the value of the cable as partially severe as scrap or otherwise, and deduct that amount from $9,616 to set the proper amount of restitution because restitution is to be equal to the value of the property damaged les the value that is returned. *People v Ballantine*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2008 (Docket No. 275205).

RESTITUTION – In a case of unlawfully driving away an automobile, the trial court erred in imposing restitution as requested by the victim for a total loss of the vehicle where the vehicle was accidentally crushed in the police impound lot because of paperwork error, where the destruction did not result directly from the defendant's criminal conduct. On remand, the prosecutor shall be afforded an opportunity to present evidence to establish the extent of damage that occurred as a result of the defendant's driving and use of the vehicle. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2007 (Docket No. 271215).

RESTITUTION – In a case of larceny in a building, the trial court improperly assessed restitution in the amount of $4,350.40 to a funeral home and the State of Michigan as reimbursement for the victim's funeral expenses where the victim's death was completely unrelated to the crime and neither the funeral home nor the State of Michigan were victims as described in the Crime Victim's Rights Act. While the defendant's acts arguably caused the victim's poverty and consequently left her estate unable to pay the costs of the funeral, the defendant did not cause the victim's death. *People v Rodrigues-Ostland*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2007 (Docket No. 267941).

RESTITUTION- Restitution for loss wages should be based on after-tax income, not gross income. *People v Lamb*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2008 (Docket No. 280705).

SEX OFFENDER REGISTRATION

SEX OFFENDER REGISTRATION ACT – Although the defendant was eligible to petition the trial court for removal from the sex offender registry because he was 11 years of age at the time of the offense, the trial court did no err in denying the defendant's petition where it found that the defendant had used force or coercion to commit sexual penetration and this factor precludes removal from the registry. *People v Hesch*, 278 Mich App 189; 749 NW2d 267 (2008).

SEX OFFENDER REGISTRATION ACT – In a three-part ruling on remand from the Michigan Supreme Court, the Court of Appeals held that in applying the "catch-all" provision of SORA, 1) the particular facts of a violation are to be considered in determining whether the offense, by its nature, constitutes a sexual offense against an individual less than 18 years of age, 2) possession of pornographic photographs of children would constitute an offense against an individual less than 18 years of age, and 3) the trial court may consider all record evidence so long as the defendant has an opportunity to challenge factual assertions and the facts are substantiated by a preponderance of the evidence. Applied to the case before it, the Court upheld the registration requirement where defendant was convicted of possession with intent to disseminate obscene material (based on his possession of pornographic material on computer discs), the probation agent repeatedly stated at sentencing, without objection, that defendant had viewed pornography *involving children*, and a detective testified that the females appeared to be 13 to 16 years old in part because they did not appear to be fully physically developed. *People v Althoff*, ___ Mich App ___; ___ NW2d ___ (Docket No. 274906, September 2, 2008).

SEX OFFENDER REGISTRATION ACT – On remand from the Michigan Supreme Court, the Court of Appeals held that the crime of bestiality under MCL 750.158 does not require registration under SORA as a sheep is not a victim within the provisions of SORA. *People v Haynes*, ___ Mich App ___; ___ NW2d ___ (Docket No. 277185, September 23, 2008).

SENTENCING GUIDELINES

--*Application of the Guidelines:*

Second CSC Offenses – the legislative sentencing guidelines apply to offenders sentenced for a second CSC offense where by virtue of the enhancement provision of MCL 750.520f, there is a mandatory minimum term of at least five years. *See People v Wilcox*, ___ Mich App ___; ___ NW2d ___ (Docket No. 278189, 6/5/08). *See also, People v Walton*, unpublished opinion of the Court of Appeals, issued June 3, 2008 (Docket No. 276161).

--*Scoring Decisions:*

PRV 1 – Trial court erroneously scored 25 points for prior high severity felony conviction based on Texas conviction that was labeled "assault threatening bodily injury." *People v Gonzalez*, 480 Mich 1150; 746 NW2d 303 (2008).

PRV 5 – Failure to stop at the scene of a property damage accident is not a scorable misdemeanor because it is not a crime against the person, property, a controlled substance offense or a weapon offense. "To the extent damage to a vehicle must occur for this misdemeanor to be committed, the damage is complete before the failure to stop, and it is the failure to stop, not the damage, that is proscribed by statute." *People v Glover*, unpublished

opinion per curiam of the Court of Appeals, issued November 29, 2007 (Docket No. 272993).

PRV 7 – Possession of marijuana as a second controlled substance offense is a felony for purposes of scoring concurrent felony convictions under PRV 7. While the offense is a misdemeanor under the Public Health Code, it is considered a felony under the Code of Criminal Procedure (where the statutory sentencing guidelines are found). *People v Pounders*, unpublished opinion per curiam of the Court of Appeals, issued October 30, 2007 (Docket No. 272039).

OV 3 – Error to score five points for bodily injury not requiring medical treatment where the record was insufficient to support the scoring. *People v Woolsey*, 480 Mich 909; 739 NW2d 611 (2007).

> *See also, People v Endres*, 269 Mich App 414; 711 NW2d 398 (2006) (error to score 5 points for physical injury based on prosecutor's "file notes" indicating victim suffered rectal pain where no record evidence to support the scoring).

OV 4 – While the trial court reasonably assumed that the victim would have suffered psychological injury from a carjacking in which the victim and her three young children remained in the car, there was no record evidence to support the scoring and the victim, who had made a request for restitution, did not mention psychological injury and did not speak at sentencing; thus, the variable was improperly scored. *People v Perry*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2008 (Docket No. 278484).

> *See also, People v Biskner*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2008 (Docket No. 278006) (error to score OV 4 in case involving serious assault and home invasion where "[a]lthough the prosecutor referred to a victim's impact statement describing some emotional injury, the statement does not appear to have been presented to the trial court."

> *See also, People v Hicks*, 259 Mich App 518; 675 NW2d 599 (2003) (error to score ten points where record reflects no evidence of serious psychological harm as a result of forceful purse snatching).

> *But see, People v Wilkens*, 267 Mich App 728; 705 NW2d 737 (2005) (no error in scoring ten points where minor male victim's attitude took disturbing turn during making of sexually abusive videotape and his demeanor on the stand was rather casual, indicating severe psychological injury that rendered him unable to comprehend the gravity of his actions; no error in scoring variable as to minor female victim where defendant's actions caused her anxiety, altered her demeanor and caused her to withdraw as well as result of making of sexually abusive videotape).

OV 9 – Trial court erred in scoring a second victim of sexual abuse by the defendant where the incident was uncharged and was not part of the offense for which the defendant was being sentenced. *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008).

OV 9 – Victims of related but uncharged or dismissed crimes cannot be scored under OV 9; the variable is limited to the number of victims endangered during the specific transaction leading to the offense of conviction (i.e., the offense being scored by the guidelines). *People v Gullett*, 277 Mich App 214; 744 NW2d 200 (2007).

OV 10 – In order to score 15 points for predatory conduct, there must be a *vulnerable* victim and *exploitation* of that vulnerability in addition to pre-offense conduct directed at a victim for the primary purpose of victimization. *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008).

> *See also*, *People v Davis*, ___ Mich ___ (Docket No. 136073, 9/10/08), *vacating in part* 277 Mich App 676; 747 NW2d 555 (2008) (remanded to trial court for reconsideration of OV 10 post-*Cannon*; Court of Appeals found no error in scoring 15 points where defendant cased the store and concluded that lone female storeowner posed a suitable victim, although he greatly underestimated her ability to thwart the co-defendant).
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> *See also*, *People v Russell*, ___ Mich ___ (Docket No. 133522, September 24, 2008) (remanding to the Court of Appeals to address whether points for predatory conduct may be assessed where the victim is a police decoy).
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> *See also*, *People v Kaddis*, ___ Mich ___; 739 NW2d 81 (Docket No. 133793, September 24, 2008) (same as *Russell*).
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> *See also*, *People v Saif*, ___ Mich ___ (Docket No. 133362, September 24, 2008) (same as *Russell*, except also directing Court of Appeals to decide whether "a defendant's intent to commit other offenses and his entire course of conduct may be considered as "preoffense" conduct for purposes of assessing points for predatory conduct under *People v Cannon*, *supra*).

OV 19 – Properly scored for force and threats aimed at store loss prevention officers as they were trying to arrest defendant for shoplifting. Court finds interference with the administration of justice because loss prevention officers are statutorily authorized to make an arrest under MCL 764.16(d), and court notes that the wording of the variable refers to threats used against a "person" rather than police officers. *People v Passage*, 277 Mich App 175; 743 NW2d 746 (2007).

OV 19 – No error in scoring 15 points under OV 19 for using force or threat of force to interfere with the administration of justice where defendant threatened to kill the CSC victim *before* he was charged with the CSC crime. Defendant knew the victim "would be the primary witness" against him if criminal charges were filed. *People v Endres*, 269 Mich App 414; 711 NW2d 398 (2006).

OV 19 – Ten points properly scored where defendant was convicted of perjury even though the conduct necessarily involved an interference with the administration of justice. *People v Underwood*, 278 Mich App 334; 750 NW2d 612 (2008).

OV 20 – 100 points improperly scored where defendant's threat to use explosive device to harm others, communicated via email to 16-year old girl in another state, did not constitute an "act of terrorism," as defined by MCL 777.543b. *People v Osantowski*, 481 Mich 103; 748 NW2d 799 (2008).

DEPARTURES FROM INTERMEDIATE SANCTION CELLS

In a unanimous decision, the Supreme Court held that when the sentencing guidelines recommend an intermediate sanction penalty for a crime committed in prison by a prisoner, it is a departure to impose a prison sentence. *People v Muttscheler*, 481 Mich 372; 750 NW2d 159 (2008). The Court left open whether the parties could bargain for such a sentence and whether the trial court could impose a consecutive jail sentence that would be served, per court direction, in the prison setting.

** DEPARTURES AND PROPORTIONALITY STANDARD**

In a late July 2008 opinion, the Michigan Supreme Court held that the trial court must justify the extent of the departure in addition to articulating substantial and compelling reasons for the departure when choosing to sentence above or below the sentencing guidelines range. Justice Markman referred to this as the "two-part burden on the sentencing court" in his concurring opinion. The majority held that it is appropriate to "ground" or "anchor" a departure in the sentencing guidelines (i.e., to compare the departure to other cells within the appropriate sentencing grid). The Court reversed a sentence of 30 to 50 years for first-degree CSC where the guidelines recommended a range of 9 to 15 years imprisonment and the trial judge had not explained the "extreme upward departure." *People v Gary Smith*, ___ Mich ___; 754 NW2d 284 (Docket No. 134682, 7/31/08).

In an unpublished opinion following on the heels of *Smith*, the Court of Appeals affirmed a 13- month departure where the trial judge had not explained the extent of the departure (as this requirement did not exist at the time of sentencing), but the judge departed based on the seriousness of the offense and the Court of Appeals concluded that considering the diagonal progression in the guidelines grid, "if an OV level VII existed" the sentence might be within it. *People v Kellett*, unpublished opinion per curiam of the Court of Appeals, issued September 4, 2008 (Docket No. 276817).

REASONS FOR DEPARTURE

According to the *Smith* Court, the trial court properly departed based on 1) the prolonged period of abuse (15 months), 2) defendant's threat to evict the victim and her family if she

told anyone, and 3) the frightening gynecological exam for the 10-year old victim. *People v Gary Smith, supra*.

Per Smith: Generally Improper to Depart Based on:

1. Exploitation of the position of trust without considering the scoring of OV 10 and whether this factor was given inadequate weight by the guidelines.
2. The heinous nature of the crime (noting that "[a]ll criminal-sexual conduct cases involving young children are heinous."

3. Commonplace repercussions of criminal activity (gynecological exams in rape cases- although the exam in *Smith* "added considerably to the victim's trauma.")

In a case involving an intermediate sanction cell, the Supreme Court held that the trial court improperly relied on the erroneous assumption that defendant would serve additional time in prison on a parole matter as a reason to depart from the guidelines and impose a prison sentence. The Court also noted that "the possibility of a current prisoner or parolee serving a sentence in the county jail does not relate to the seriousness of the offense or the culpability of the offender, and is not a compelling reason to deny the defendant an intermediate sanction . . . ." *People v Ratliff*, 480 Mich 1108; 745 NW2d 762 (2008).

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 a prior record. The Court would not rule out, however, a departure based on age and lack of a prior record, although noting that 22 is not such an old age for lack of a prior record. The Court also noted that an "extraordinary employment history" could support a downward departure. *People v Young*, 276 Mich App 446; 740 NW2d 347 (2007).

The Court of Appeals affirmed an upward departure in a case where the defendant was convicted of both marijuana and weapons offenses, but also reportedly threatened to kill police officers. The trial judge departed based on the conclusion that defendant was a threat to the community in general and to police officers in particular in light of the threats, noting that the judge did not believe the defendant's denial of the threats and claim that the officers were lying. The Court of Appeals concluded that the trial judge properly departed based on the threat posed to the community and police officers, and disagreed that the trial judge departed based on defendant's lack of remorse or failure to admit the threats. *People v Uphaus (On Remand)*, 278 Mich App 174; 748 NW2d 899 (2008).

In a decision that squarely sets forth the standard for departures based on future dangerousness, the Court of Appeals held that a trial judge may depart from the guidelines based on the anticipatory harm to a victim that is based on an established pattern of escalating violence toward that specific victim. The Court contrasted this type of permissible departure from an impermissible departure based on a generalized concern for future dangerousness that is not based on objective and verifiable factors. The Court also concluded that the ten-year departure

was proportionate based on the repetitive and increased severity of defendant's criminal conduct toward his wife which included an attempt to solicit her murder while he was in custody for kidnapping and raping her. *People v Horn*, 279 Mich App 31; ___ NW2d ___ (2008).

MISCELLANEOUS AREAS OF INTEREST

DO THE GUIDELINES APPLY TO HYTA?

Probably "No" as HYTA provides an alternative sentencing scheme with limited sentencing options (no more than 12 months jail, three years probation or three years in prison) and MCL 762.11 *et seq* cannot be found in the Crime List or the Guidelines Legislation. But note HYTA diversion is considered a "conviction" for scoring PRV 1-5 under MCL 777.50.

********Still Wise to Score the Guidelines for Discretionary Reference*****

OFFENSE VARIABLE 19 – Interference with the Administration of Justice

Three Michigan Supreme Court justices (Kelly, Cavanagh and Markman) would grant leave to appeal in a case where the defendant attempted to hide himself and items used to produce methamphetamine when the police arrived at the home to investigate a crime committed by another person. Justice Markman noted that "it would be extraordinary for a criminal perpetrator *not* to attempt to hide evidence of his or her crime or to make such crime less detectable [and] it would seem that OV 19 would almost always be scored under the trial court's interpretation." *People v Spangler*, 480 Mich 947; 741 NW2d 25 (2007).

ADVANCE DISCLOSURE OF PRESENTENCE REPORT

By court rule, the "court must provide copies of the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time ***before the day of sentencing.***" MCR 6.425(B) (emphasis added).