

**SENTENCING UPDATES**  
**CRIMINAL ADVOCACY PROGRAM, FALL 2006**  
**ANNE YANTUS (SADO)**

**I. NEW LAWS**

- **MCL 750.520b (Amended)**- Effective August 28, 2006, provides 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).

The amended statute also provides for a sentence of “*life without possibility of parole*” for the commission 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 involved a minor under the age of 13. MCL 750.520b(2)(c) (emphasis added).

There are also new provisions for electronic monitoring for life of individuals convicted of certain sex crimes, MCL 750.520c(2)(b); MCL 750.520n, and lifetime parole for persons convicted of first-degree CSC involving a person under the age of 13, MCL 791.242.

- **MCL 769.1k** – Effective January 1, 2006, as part of the sentence imposed following a plea of guilty or nolo contendere, following trial or pursuant to a deferred or delayed sentence, the court “shall impose the minimum state costs” and “may” impose “[a]ny fine,” “[a]ny cost in addition to the minimum state cost . . .,” “[t]he expenses of providing legal assistance to the defendant,” and “[a]ny assessment authorized by law.”

**II. PENDING LEGISLATION**

- Restoration of Disciplinary Credits (Referred to Committee)
- Parole at Minimum Term Absent Misconduct (Referred to Committee)

*Note: 2004 Parole Approval Rates at Minimum Term:*

*79.1% for Drug Offenders, 69.3% for Non-Violent Offenses,  
34.5% for Violent Offenses, 13.0% for Sex Offenses*

### **III. MICHIGAN AND BLAKELY v WASHINGTON, 542 US 296 (2004)**

- *People v Drohan*, 475 Mich 140; 715 NW2d 798 (2006)
- *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006)

### **IV. NEW ISSUE – CONSECUTIVE SENTENCING**

Increasing case law support for finding consecutive sentencing provisions of MCL 768.7a do not apply where offense is committed while on federal supervised release (rather than parole):

- *People v Williams*, 463 Mich 942; 621 NW2d 214 (2000) (Corrigan, J., dissenting from denial of leave to appeal).
- *People v Shaw*, unpublished opinion per curiam of the Court of Appeals, issued July 2, 1999 (Docket No. 210717).

### **V. HOT ISSUE – ATTORNEYS FEES**

Attorneys fees may not be ordered as part of a criminal sentence (except with probationary sentences):

- *People v Nowicki*, 213 Mich App 383, 387; 539 NW2d 590 (1995)

[But this may be contradicted by MCL 769.1k (effective January 1, 2006).]

There is also increasing case law support for trial court duty to inquire into defendant's ability to pay before ordering attorneys fees:

- *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004)
- *People v Harms*, unpublished opinion per curiam of the Court of Appeals, issued August 8, 2006 (Docket No. 260358)

### **VI. HOLMES YOUTHFUL TRAINEE ACT (HYTA)**

- *People v Giovannini*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2006), defendant is not ineligible for sentencing under HYTA “solely because he was convicted of two criminal offenses.”

## **VII. FAILURE TO PAY CHILD SUPPORT**

- *People v Monaco*, 474 Mich 48; 710 NW2d 46 (2006), failure to pay child support is **not** a continuing offense, overruling *People v Westman*, 262 Mich App 184; 685 NW2d 423 (2004). The crime is complete when the individual “either pays the full ordered amount after the due date or pays an amount less than the ordered amount before the due date and the due date passes without the individual making full payment.” Slip op at 4.

*Note: The date of the offense will therefore determine the applicable sentencing guidelines.*

## **VIII. INVALID SENTENCES AND SHERIFF GOOD-TIME CREDITS**

- *People v Tyrpin*, 268 Mich App 368; 710 NW2d 260 (2005), sheriff’s good time credits earned in conjunction with an illegal jail sentence cannot be applied to the sentence upon resentencing.

## **IX. SEXUALLY DELINQUENT PERSONS**

- *People v Buehler (On Remand)*, \_\_\_ Mich App \_\_; \_\_\_ NW2d \_\_\_ (July 25, 2006), where the statutory sentencing guidelines recommended a range of 42 to 70 months for a person convicted of indecent exposure as a sexually delinquent person, no error to impose a probationary term where probation was a statutorily-authorized alternative sentence at the time of the offense (MCL 750.335a was later amended to remove, arguably, the discretion to impose a probationary sentence). Court further finds that the statutory sentencing guidelines would otherwise control the length of a prison sentence for an individual convicted of being a sexually delinquent person for an offense that occurred before December 21, 2005, but court does not reach question whether offenses committed after this date are controlled by the alternative statutory penalty of one day to life imprisonment, MCL 750.335a(c), or rather fall within the ambit of the statutory sentencing guidelines.

## **X. CONTROLLED SUBSTANCE ENHANCEMENT**

- *People v Wyrick*, 474 Mich 947; 707 NW2d 188 (2005), the term “felony” for purposes of consecutive sentencing under the Public Health Code, MCL 333.7401(3), does not include conviction of marijuana possession, second offense.
- *People v Williams*, 268 Mich App 416; 707 NW2d 624 (2005), both the bottom and top end of the guidelines range may be doubled when

sentencing pursuant to the second drug offender provisions of MCL 333.7413, although doubling is not required.

## **XI. DEFENDANT’S REFUSAL TO ADMIT GUILT AT SENTENCING**

- *People v Jackson*, 474 Mich 996; 707 NW2d 597 (2006), court may not base its sentencing decision in whole or in part on a defendant’s refusal to admit guilt and the exercise of the right to trial. Departure based on the fact that defendant, unlike his co-defendants, subjected the victims to trial and did not “step up to the plate . . . and admit . . . guilt” was improper.
- *People v Conley*, 270 Mich App 301; 715 NW2d 377 (2006), court may not imply more favorable treatment at sentencing if defendant identifies the location of the gun, effectively admitting guilt. Appellate court may reverse constitutional error even if the sentence falls within the sentencing guidelines range.

## **XII. DEPARTURES AND SENTENCING GUIDELINES**

- *People v Wiley*, 472 Mich 153; 693 NW2d 800 (2005), the sentencing court need not state “additional substantial and compelling reasons” for departure where the sentence is imposed pursuant to a “valid plea bargain.”
- *People v McKay*, 474 Mich 925; 706 NW2d 11 (2005), leave denied after oral argument because “by accepting a valid *Cobbs* agreement, defendant waived his objection to the scoring of OV-13.”
- *People v Jackson*, *supra*, where the trial court relied on the “excessive brutality” of the crime as a departure reason and did not explain how the characteristic was given inadequate or disproportionate weight by the guidelines, remanded for resentencing.

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.

## **XIII. SENTENCING GUIDELINES SCORING ISSUES**

- PRV 5 – *People Endres*, 269 Mich App 414; 711 NW2d 398 (2006), offender’s prior non-OUIL alcohol-related misdemeanor convictions

cannot be scored under PRV 5. Alcohol is not a controlled substance for purposes of the scorable crime groups for PRV 5.

- OV 1 – *People v Novak*, 474 Mich 883; 704 NW2d 701 (2005), remanded to Court of Appeals to determine whether defendant’s use of toy gun is accounted for by the sentencing guidelines.
- OV 3 – *People v Endres, supra*, error to score 5 points under OV 3 based on prosecutor’s “file notes” indicating the victim suffered rectal pain where there was “no record evidence” to support the scoring.
- OV 4 – *People v Hicks*, 259 Mich App 518; 675 NW2d 599 (2003), error to score ten points for psychological injury where record reflects no evidence of serious psychological harm as a result of forceful purse snatching. *See also, People v Ellis, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2005 (Docket No. 252368)* (error to score 10 points where victim did not testify to psychological injury at trial on charge of assault with intent to murder involving multiple gunshot wounds and did not submit victim impact statement at sentencing); *People v Cannon, unpublished opinion per curiam of the Court of Appeals, issued July 25, 2006* (error to score ten points where robbery victims did not testify to psychological harm at trial and did not appear at sentencing or submit victim impact statements). *But see, People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004) (10 points properly scored where victim of CSC offense testified she was fearful during encounter with defendant); *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004), *aff’d on other gds* 475 Mich 140 (2006) (evidence of victim’s disrupted life, her nightmares and her plans to seek treatment support ten point score).
- OV 7 – *People v Mattoon*, \_\_\_ Mich App; \_\_\_ NW2d \_\_\_ (2006), actual physical abuse not required and emotional or psychological abuse that leads to extreme or prolonged humiliation is sufficient.
- OV 7 – *People v Kegler*, 268 Mich App 187; 706 NW2d 744 (2005), where the victim may have been alive when he was left outside naked in the cold, no error in finding aggravated physical abuse; variable focuses on the conduct of the defendant, not the experience of the victim, and even if the victim was unaware of the conduct, variable may be scored where defendant thought victim might still be conscious and intentionally tortured him with excessive brutality.
- OV 8 – *People v Cox*, 268 Mich App 440; 709 NW2d 152 (2005), no error in scoring 15 points where mentally incapable 17 year old boy was voluntarily transported to defendant’s home for sexual acts.

- OV 9 – *People v Juderjohn*, 474 Mich 951; 706 NW2d 728 (2005), Supreme Court denies leave to appeal, although Justice Kelly would have granted leave on whether there was a “victim” where the undercover officer posed as a child victim in an internet sex case.
- OV 9 – *People v Melton*, \_\_\_ Mich App \_\_; \_\_\_ NW2d \_\_\_ (2006), special panel overrules *People v Knowles*, 256 Mich App 53; 662 NW2d 824 (2003) (holding that financial injury is included within OV 9), and holds that OV 9 does not apply unless there is danger of *physical* injury.
- OV 9 – *People v Klinger*, unpublished opinion per curiam of the Court of Appeals, issued July 18, 2006 (Docket No. 267930), variable scored based on specific criminal transaction that gives rise to conviction, per *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994), and therefore court should not count other victims from separate, dismissed breaking and entering offense of another establishment on a separate occasion.
- OV 10 – *People v Cox*, *supra*, no error in scoring 15 points for predatory conduct where mentally incapable victim had been to defendant’s home on five to ten occasions before the offense, defendant kept pornographic materials at the home and victim viewed these materials, and defendant visited victim at foster home and admitted harboring victim as runaway from foster home.
- OV 11 – *People v Bernard Thompson*, 474 Mich 861; 703 NW2d 189 (2005), reversing and remanding for resentencing where no showing the uncharged penetrations arose out of the sentencing offense for purposes of scoring OV 11.
- OV 11 – *People v William Johnson*, 474 Mich 96; 712 NW2d 703 (2006), trial court erred in scoring 25 points under OV 11 because “the two penetrations that formed the bases of the two sentencing offenses in this case occurred on different dates and there is no evidence they arose out of each other. . . .”
- OV 11 – *People v Kuroda*, 475 Mich 864; 714 NW2d 295 (2006), finding “circuit court erred by assessing defendant 50 points under Offense Variable 11 on each conviction for penetrations that did not arise out of the particular sentencing offense.”
- OV 11 – *People v Minter*, 475 Mich 865; 714 NW2d 296 (2006), finding “circuit court erred in assessing 50 points under Offense Variable 11 for penetrations that did not arise out of the particular sentencing offense.”
- OV 11 – *People v Cox*, *supra*, no error in scoring 25 points for second of two penetrations even if defendant convicted of two counts of criminal

sexual conduct, following *People v McLaughlin*, 258 Mich App 635; 672 NW2d 860 (2003).

- OV 13 – *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006), court concludes five year period must include sentencing offense, overruling *People v McDaniel*, 256 Mich App 165; 662 NW2d 101 (2003).
- OV 19 – *People v Endres*, *supra*, 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 victim.