Criminal Law and Procedure Manual

2002

Supplement

Add to page 2-4
Defenses to crimes – MCL 768.37

(1) Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.

(2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.

(3) As used in this section:

(a) "Alcoholic liquor" means that term as defined in section 105 of the Michigan liquor control code of 1998, 1998 PA58, MCL 436.1105.

(b) "Consumed" means to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body.

(c) "Controlled substance" means that term as defined in section 7104 of the public health code, 1978 PA 368, MCL 333.7104.

Add to page 2-4
Entrapment

📖 People v Johnson, MSC No. 118351 (July 9, 2002)

Officers received information that another police officer owned some houses that he rented out and allowed drug transaction to occur at the residences by protecting them. An undercover officer, pretending to be a drug dealer, met with the suspect and asked him if he would be interested in protecting him against “rip-offs” during drug sales. The suspect agreed. Defendant and the undercover officer met and a staged drug deal occurred between two undercover officers. Armed with a gun in his pocket, defendant

stood one and a half car lengths from the passenger side of the second undercover officer's vehicle. After the transaction began, the defendant was asked to come to the driver's side of the undercover officer's vehicle and was then handed the package of drugs. Defendant took the package and returned to the vehicle and waited. At that time, defendant was to check them, ensure that the package was correct, and notify the officer of any problems. Sykes stated that in order for defendant to fulfill his duty to protect against "rip-offs," defendant would be required to hold and examine the drugs purchased. He was paid $1,000 for his assistance. He assisted during another staged drug deal at which time he was arrested and charged with two counts of possession with intent to deliver. The lower courts held that the defendant had been entrapped. The Michigan Supreme Court reversed.

HELD - "Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. When examining whether governmental activity would impermissibly induce criminal conduct, several factors are considered: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted." The Michigan Supreme Court looked at several of these factors to see if entrapment occurred. "Because defendant's previous drug activity amounted to possession with intent to deliver, the undercover activity at issue in this case did nothing more than present defendant with an opportunity to commit that crime." "In addition, defendant's willingness to participate in the crimes charged is evidenced by his agreement to participate in further transactions after he participated in the first transaction, which included his taking possession of the drugs." The Court also looked at the amount the defendant received for the transaction.

"We conclude that, given defendant's understanding that he would receive $1000 for each transaction, the compensation was neither excessive or unusually attractive. Each transaction involved approximately ten ounces of cocaine, which had an estimated street value of $75,000. A $1,000 fee for a transaction involving almost $75,000, roughly one percent of the street value, is not excessive." As for the reprehensible conduct charge the Court again held the subject was not entrapped. "Given our conclusion that defendant had previously committed the offense of possession with intent to deliver and that he agreed to provide protection against 'rip-offs,' which clearly includes handling the drugs in order to inspect them, the police did nothing more than provide defendant with an opportunity to commit a crime. Such conduct was not reprehensible and does not establish entrapment."

Add to page 4-1

Breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion.

📖 People v Silver, 466 Mich. 386 (2002)

A woman came home to find a subject inside her house. When she yelled he stated that he, "Just had to use the potty." He then ran outside. She initially reported that nothing was missing but a couple days after the incident she reported that some change was missing from her bedroom. The defendant claimed that he had worked for the victim in the past and while near her house had to use the bathroom. He knocked on her door but when she did not answer he entered because of his urgent need to use the bathroom. After she confronted him he ran outside. The question for the jury was whether he should have been convicted of entering and breaking without permission or home invasion.

HELD – "We hold that breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion. Breaking and entering without permission requires (1) breaking and entering or (2)entering the building (3) without the owner's permission. It is impossible to commit the first-degree home invasion without first committing a breaking and entering without permission. The two crimes are distinguished by the intent to commit "a felony, larceny, or assault," once in the dwelling."

Add to page 4-11

Clergy added to requirements of reporting child abuse - PA 693 of 2002 (MCL 722.623) effective March 1, 2003

Clergy members are added to list of occupations required to report suspected child abuse.

"Member of the clergy" means a priest, minister, rabbi, Christian science practitioner, or other religious practitioner, or similar functionary of a church, temple, or recognized religious body, denomination, or organization.

Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under section 3 if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under section 3.

Add to page 4-13
Child pornography – Increased penalties (MCL 750.145c P.A. 629 of 2002)

New definitions

“Appears to include a child” means that the depiction appears to include, or conveys the impression that it includes, a person who is less than 18 years of age, and the depiction meets either of the following conditions:
(i) It was created using a depiction of any part of an actual person under the age of 18.
(ii) It was not created using a depiction of any part of an actual person under the age of 18, but all of the following apply to that depiction:
(A) The average individual, applying contemporary community standards, would find the depiction, taken as a whole, appeals to the prurient interest.
(B) The reasonable person would find the depiction, taken as a whole, lacks serious literary, artistic, political, or scientific value.
(C) The depiction depicts or describes a listed sexual act in a patently offensive way.

“Child” means a person who is less than 18 years of age, subject to the affirmative defense created in subsection (6) regarding persons emancipated by operation of law.

It is an affirmative defense to a prosecution under this section that the alleged child is a person who is emancipated by operation of law under section 4(2) of 1968 PA 293, MCL 722.4, as proven by a preponderance of the evidence.

A person who **knowingly possesses** any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. This subsection does not apply to any of the following:

If a defendant in a prosecution under this section proposes to offer in his or her defense evidence to establish that a depiction that appears to include a child was not, in fact, created using a depiction of any part of an actual person under the age of 18, the defendant shall at the time of the arraignment on the information or within 15 days after arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney of record a notice in writing of his or her intention to offer that defense. The notice shall contain, as particularly as is known to the defendant or the defendant¹s attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant¹s notice shall include specific information as to the facts that establish that the depiction was not, in fact, created using a depiction of any part of an actual person under the age of 18. Failure to file a timely notice in conformance with this subsection precludes a defendant from offering this defense.

Add to page 4-17
Sexual contact redefined – MCL 750.520a

“Sexual contact” includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) Revenge. (ii) To inflict humiliation. (iii) Out of anger.

Add to page 4-20

Mental health official added to Fourth Degree CSC

The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. This does not indicate that the victim is mentally incompetent.

MCL 330.1100b - “Mental health professional” means an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is 1 of the following: (a) A physician who is licensed to practice medicine or osteopathic medicine and surgery in this state under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws.

CSC includes actions by teachers – P.A. 714 of 2002 (April 1, 2003)

CSC 1 and 2 now includes:

b) That other person is at least 13 but less than 16 years of age and any of the following:

(i) The actor is a member of the same household as the victim.

(ii) The actor is related to the victim by blood or affinity to the fourth degree.

(iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(iv) *The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.*

CSC 3 and 4 now includes:

(e) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.

Definitions

"Nonpublic school" means a private, denominational, or parochial school.

"Public school" means a public elementary or secondary educational entity or agency that is established under this act, has as its primary mission the teaching and learning of academic and vocational-technical skills and knowledge, and is operated by a school district, local act school district, special act school district, intermediate school district, public school academy corporation, strict discipline academy corporation, or by the department or state board.
Public school also includes a laboratory school or other elementary or secondary school that is controlled and operated by a state public university described in section 4, 5, or 6 of article VIII of the state constitution of 1963.

Add to page 4-18
The prosecutor does not have to prove that the victim for CSC was overcome by force.

📖 People v. Carlson, 466 Mich. 130 (2002)

The complainant in this case allowed the defendant to unbutton her blue jeans and to digitally penetrate her. She testified that he than wanted to have sex with her and she said no. "He asked me why. I just said because I don't want to." After an interval, the defendant repeated his request that they have sexual intercourse. The complainant again said "no," explaining that she "didn't want to." "He [next] asked me if he could just stick [it] in once and I said no." He essentially repeated the question several times, and she would not answer him "[bec]ause I didn't want to answer him any more." She acknowledged that she did not physically restrain or push him away and then said, "He stuck it in any ways and kept moving and asked me if I was enjoying it and I said I didn't want to do it." When asked how he got it in, she said, "He got on top of me and put it in."

The district court refused to bind the defendant over on CSC third because there was no showing that the defendant overcame the victim through any type of physical force. The Michigan Supreme Court disagree with the standard the district court used. "To be sure, the 'force' contemplated in M.C.L. § 750.520d(1)(b) does not mean 'force' as a matter of mere physics, i.e., the physical interaction that would be inherent in an act of sexual penetration, nor, as we have observed, does it follow that the force must be so great as to overcome the complainant. Rather, the prohibited 'force' encompasses the use of force against a victim to either

induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes."

Add to page 4-21 (Taken from information provided by Charlotte Marshall of the sex offender registration unit.)

RE: Public Act 295 of 1994 Sex Offender Registration Act Amendment
Public Act 542 of 2002 Campus Sex Crimes Prevention Act

On July 25, 2002, Governor John Engler signed Senate Bill 1275 into law. It amended the Michigan Sex Offender Registration Act 295 of 1994 to include new mandatory federal requirements for registered sex offenders.

No later than January 25, 2003, all registered sex offenders who attend and/or work at an institute of higher learning in Michigan must report the following information to local law enforcement in addition to the information previously required:

1. Offenders must report this information if they are enrolled and/or work or volunteer at institutes of higher learning for 14 or more consecutive days, or 30 or more days in a calendar year.
2. Offenders must provide the name of the campus.
3. Offenders must provide the city where the campus is located.
4. Offenders must provide proof of student and/or employment status such as but not limited to a W-2 form, pay stub, or written statement by an employer, a contract, a student identification card or a student transcript.
5. Offenders must report any changes of status within 10 days such as new employment, termination, dropping out of school, or new enrollment or any combination of the above.

All registered sex offenders who come into local law enforcement agencies January 1-15 to verify their residential address must sign a NEW REVISED DD-4A "Notification of Duties to Register as a Sex Offender". Regardless if the offender has signed the new form or not, instruct the offender to sign a NEW REVISED DD-4A at verification time. The NEW REVISED DD-4A shall then be mailed by the agency to:

Michigan State Police
Criminal Justice Information Center
Sex Offender Registration
7150 Harris Drive
Lansing MI 48913

Currently, the Michigan State Police is working on adding new scan lines in LEIN to accommodate the changes. The new DD-4 "Sex Offender Registration" forms and new DD-4A "Notification of Duties to Register As a Sex Offender" forms have been revised and will be distributed to law

enforcement agencies in the field as soon as possible. The Michigan State Police will be notifying all sex offenders who are not incarcerated by US mail of the new reporting requirements. Department of Corrections will be responsible for offenders who are in their custody.

Note that also amended in the law, which are effective immediately:

- **All 90-day misdemeanors of the SOR Act have been amended to 93-day misdemeanors/$1000 fine.**

- **Sex Offenders convicted of 750.145A "Accosting, Enticing, soliciting a child for immoral purposes" after June 1, 2002, shall be guilty of a FELONY violation and therefore must verify their address quarterly.**

On August 21, 2002, the Michigan Sex Offender Registration File was returned to the public internet web site at www.mipsor.state.mi.us/. The U.S. 6th Circuit Court of Appeals ruled on this date that the sex offender list may remain for public access pending the appeal of the federal district court ruling (refer to the June and July 2002 LEIN News Bulletin articles). Therefore, the Message Key "PSOR" used by police agencies to access the public list from a LEIN station has also been restored.

SORA notification

📖 People v Lockett, C/A No. 236461 (September 6, 2002)

A registered sex offender moved without changing his address with the police. He was charged with failing to change his address but argued that he did not do so willfully because he did notify his probation officer of the change. The Court of Appeals disagreed.

HELD – Under the SORA law a sex offender must notify the local police agency of any change of address. He had been put on notice of this by his probation officer. Notifying the probation officer was not enough to meet the requirements of the statute and the charges were upheld.

Add to page 4-29 under unarmed robbery
For robbery the forceful act must be used to accomplish the taking.

📖 People v Randolph, MSC No. 117750 (July 11, 2002)

The defendant in this case took merchandise from a Meijer's store without paying for them. Security attempted to stop him in the parking lot and the defendant attempted to flee and when stopped he assaulted one of one of the guards before being subdued. The prosecutor charged him with unarmed robbery. The Court of

Appeals dismissed the charges because the subject never escaped. The Michigan Supreme Court also dismissed the charges but not for the same reason.

HELD – "Both the armed and unarmed robbery statues are clear that the forceful act must be used to accomplish the taking. The force must occur contemporaneously with the taking. Larceny is complete when the taking occurs. Thus if the violence, force or putting in fear occurred after the taking the crime is not robbery, but rather larceny or perhaps assault. In the present case the use of force or violence was not to take the property, but to retain it and escape apprehension."

Add to page 4-29 under carjacking
Carjacking may still occur if the victim did not have lawful possession of it.

📖 People v Small, MSC No. 120617 (September 17, 2002)

The driver of a car may have come into possession of the vehicle illegally. As he was driving it around he picked up some friends who later grabbed him from the back and stabbed him in the chest with a knife in the process of stealing the car from him. The friends were charged with carjacking. They argued that they could not be charged because the victim did not have lawful possession of the car in the first place.

HELD – "We conclude that the Legislature did not intend to require legal possession as a prerequisite to all carjacking convictions. Because the prosecutor's theory in this case was based on a taking from another person, in the presence of that person, we reject defendant's claim that the evidence was insufficient to support his carjacking conviction.

Add to page 4-31
Changed wording for malicious use of phones and increased fines

P.A. 577 of 2002 (November 3, 2002) – MCL 750.540e

(1) A person is guilty of a misdemeanor who maliciously uses any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quiet of another person by any of the following:

(a) Threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a

telecommunications service or device.

(b) Falsely and deliberately reporting by message through the use of a telecommunications service or device that a person has been injured, has suddenly taken ill, has suffered death, or has been the victim of a crime or an accident.

(c) Deliberately refusing or failing to disengage a connection between a telecommunications device and another telecommunications device or between a telecommunications device and other equipment provided for the transmission of messages through the use of a telecommunications service or device.

(d) Using vulgar, indecent, obscene, or offensive language or suggesting any lewd or lascivious act in the course of a conversation or message through the use of a telecommunications service or device.

(e) Repeatedly initiating a telephone call and, without speaking, deliberately hanging up or breaking the telephone connection as or after the telephone call is answered.

(f) Making an unsolicited commercial telephone call that is received between the hours of 9 p.m. and 9 a.m. For the purpose of this subdivision, "an unsolicited commercial telephone call" means a call made by a person or recording device, on behalf of a person, corporation, or other entity, soliciting business or contributions.

(g) Deliberately engaging or causing to engage the use of a telecommunications service or device of another person in a repetitive manner that causes interruption in telecommunications service or prevents the person from utilizing his or her telecommunications service or device.

(2) A person violating this section may be imprisoned for not more than 6 months or fined not more than $1,000.00, or both. An offense is committed under this section if the communication either originates or terminates in this state and may be prosecuted at the place of origination or termination.

(3) As used in this section, "telecommunications", "telecommunications service", and "telecommunications device" mean those terms as defined in section 540c.

MCL 750.540c

(c) “Telecommunications” means the origination, emission, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method including but not limited to electronic, magnetic, optical, digital, or analog.
(d) “Telecommunications device” means any instrument, equipment, machine, or device that facilitates telecommunications. Telecommunications device includes but is not limited to a computer, computer chip or circuit, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem or device that enables use of a modem, cables, converters, decoders, descramblers, satellite equipment, or other devices and equipment.
(e) “Telecommunications service” means providing, allowing, facilitating, or generating any form of telecommunications through the use of telecommunications devices or telecommunications access devices over a telecommunications system.

Add to page 5-24
Receiving and concealing stolen property

📖 People v Pratt, C/A No. 228081 (December 17, 2002)

The defendant in this case took his ex-girlfriend’s 1990 Buick. He argued that he borrowed the car but his girlfriend testified that she did not give him permission to us the car. The jury convicted him of receiving and concealing stolen property valued more than $1,000 and less than $20,000. He argued that he did not have the intent to steal the car when he took it so it was not “stolen” as required under the statute. The Court of Appeals disagreed.

HELD – MCL 750.535 requires that a defendant must have possessed stolen goods. The dictionary defines steal as “to take the property of another without permission.” Based on the ex-girlfriend’s testimony sufficient evidence was presented to show that the car was taken without permission. The court also upheld the value of the car. The victim’s father testified to what he paid for the vehicle. This was sufficient to prove the property’s value.

Statute created for possession of stolen car – MCL 750.535(7) (P.A. 720 of 2002) effective 4-1-03

(7) A person shall not buy, receive, possess, conceal, or aid in the concealment of a stolen motor vehicle knowing that the motor vehicle is stolen, embezzled, or converted. A person who violates

this subsection is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00 or 3 times the value of the motor vehicle purchased, received, possessed, or concealed, whichever is greater, or both imprisonment and a fine. A person who is charged with, convicted of, or punished for a violation of this subsection shall not be convicted of or punished for a violation of another provision of this section arising from the purchase, receipt, possession, concealment, or aiding in the concealment of the same motor vehicle. This subsection does not prohibit the person from being charged, convicted, or punished under any other applicable law.

Add to page 6-1
Ecstasy/MDMA – Schedule 1 drug

PA 710 of 2002 amended MCL 333.7212 to include the drug ecstasy and MDMA into a schedule 1 drug. Effective 4-1-2003.

Add to page 6-1
Changes in drug penalties – MCL 333.7401 (P.A. 665 of 2002) effective March 1, 2003

Penalties for **manufacturing/delivering/etc** for schedule 1 and 2

Which is in an amount of 1,000 grams or more of any mixture containing that substance is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $1,000,000.00, or both.

(ii) Which is in an amount of 450 grams or more, but less than 1,000 grams, of any mixture containing that substance is guilty of a felony and punishable by imprisonment for not more than 30 years or a fine of not more than $500,000.00, or both.

(iii) Which is in an amount of 50 grams or more, but less than 450 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $250,000.00, or both.

(iv) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both.

Penalties for **possession** of schedule 1 or 2

(i) Which is in an amount of 1,000 grams or more of any mixture containing that substance is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $1,000,000.00, or both.

(ii) Which is in an amount of 450 grams or more, but less than 1,000 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 30 years or a fine of not more than $500,000.00, or both.

(iii) Which is in an amount of 50 grams or more, but less than 450 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $250,000.00, or both.

(iv) Which is in an amount of 25 grams or more, but less than 50 grams of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $25,000.00, or both.

(v) Which is in an amount less than 25 grams of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $25,000.00, or both.

Life time probation

(4) If an individual was sentenced to lifetime probation under subsection (2)(a)(iv) before the effective date of the amendatory act that added this subsection and the individual has served 5 or more years of that probationary period, the probation officer for that individual may recommend to the court that the court discharge the individual from probation. If an individual's probation officer does not recommend discharge as provided in this subsection, with notice to the prosecutor, the individual may petition the court seeking resentencing under the court rules. The court may discharge an individual from probation as provided in this subsection. An individual may file more than 1 motion seeking resentencing under this subsection.

Add to page 6-3
Possession of drugs can be constructive

📖 People v Hardiman, MSC No. 118670 (June 25, 2002)

Officers executed a search warrant for narcotics inside an apartment. No one was inside at the time but sometime during the search the defendant was stopped outside in the parking lot. Drugs were found as well as two letters addressed to the defendant at the address and woman's clothing.

"A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance.

The courts have frequently addressed the concept of constructive possession and the link between a defendant and narcotics that must be shown to establish constructive possession. It is well established that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown."

"The evidence that supported the inference of defendant's residence at the apartment was strong: two letters addressed to defendant were found at the residence—one in the mailbox and one (correspondence from a local government agency) in a nightstand in the bedroom. Women's clothing was found in the bedroom closet. Additionally, the police found defendant in the parking lot behind the apartment. Viewed in a light most favorable to the prosecution, this evidence permitted as a reasonable inference that defendant resided in the apartment."

Add to page 6-17

Police officers are allowed to carry certain weapons - Public Act 536 of 2002 - MCL 750.231 (July 26, 2002)

(1) Except as provided in subsection (2), sections

- 224 (prohibited weapons, i.e. machine gun, black jack etc),
- ***224a (stun gun, taser),***
- ***224b (short barreled shot gun/rifle),***
- ***226a (mechanical knife),***
- 227(CCW),
- 227c(transporting loaded firearm), and
- 227d (transporting unloaded firearm)

do not apply to any of the following:

(a) A peace officer of an authorized police agency of the United States, of this state, or of a political subdivision of this state, who is regularly employed and paid by the United States, this state, or a political subdivision of this state.

(b) A person who is regularly employed by the state department of corrections and who is authorized in writing by the director of the department of corrections to carry a concealed weapon while in the official performance of his or her duties or while going to or returning from those duties.

(c) A person employed by a private vendor that operates a youth correctional facility authorized under section 20g of 1953 PA 232, MCL 791.220g, who meets the same criteria established by the director of the state department of corrections for departmental employees described in subdivision (b) and who is authorized in writing by the director of the department of corrections to carry a concealed weapon while in the official performance of his or her duties or while going to or returning from those duties.

(d) A member of the United States army, air force, navy, or marine corps or the United States coast guard while carrying weapons in the line of or incidental to duty.

(e) An organization authorized by law to purchase or receive weapons from the United States or from this state.

(f) A member of the national guard, armed forces reserve, the United States coast guard reserve, or any other authorized military organization while on duty or drill, or in going to or returning from a place of assembly or practice, while carrying weapons used for a purpose of the national guard, armed forces reserve, United States coast guard reserve, or other duly authorized military organization.

(2) As applied to section 224a(1) only, subsection (1) is not applicable to an individual included under subsection (1)(a), (b), or (c) unless he or she has been trained on the use, effects, and risks of using a portable device or weapon described in section 224a(1).

Add to 6-24
Statute on stun guns rewritten – MCL 750.224a (P.A. 709 of 2002)
Immediate effect

Sec. 224a. (1) Except as otherwise provided in this section, a person shall not sell, offer for sale, or possess in this state a portable device or weapon

from which an electrical current, impulse, wave, or beam may be directed, which current, impulse, wave, or beam is designed to incapacitate temporarily, injure, or kill.

(2) This section does not prohibit any of the following:

(a) The possession and reasonable use of a device that uses electro-muscular disruption technology by a peace officer, an employee of the department of corrections authorized in writing by the director of the department of corrections, probation officer, court officer, bail agent authorized under section 167b, licensed private investigator, aircraft pilot, or aircraft crew member, who has been trained in the use, effects, and risks of the device, while performing his or her official duties.

(b) Possession solely for the purpose of delivering a device described in subsection (1) to any governmental agency or to a laboratory for testing, with the prior written approval of the governmental agency or law enforcement agency and under conditions determined to be appropriate by that agency.

(3) A manufacturer, authorized importer, or authorized dealer may demonstrate, offer for sale, hold for sale, sell, give, lend, or deliver a device that uses electro-muscular disruption technology to a person authorized to possess a device that uses electro-muscular disruption technology and may possess a device that uses electro-muscular disruption technology for any of those purposes.

(4) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

(5) As used in this section, "a device that uses electro-muscular disruption technology" means a device to which all of the following apply:

(a) The device is capable of creating an electro-muscular disruption and is used or intended to be used as a defensive device capable of temporarily incapacitating or immobilizing a person by the direction or emission of conducted energy.

(b) The device contains an identification and tracking system that, when the device is initially used, dispenses coded material traceable to the purchaser through records kept by the manufacturer.

(c) The manufacturer of the device has a policy of providing the identification and tracking information described in subdivision (b) to a police agency upon written request by that agency.

Add to page 6-32
Enforcement action for MIP violations

📖 Shorecrest Lanes and Lounge v MLCC, C/A No. 226227 (August 9, 2002)

Officers set up a MIP sting where a bartender sold beer to a 19 year old decoy. While making contact with the owner, an officer noticed another subject who was 19 years old and had also been served. The officers issued a MIP ticket to Minor #2 but did not issue any citations to the bar tender. LCC subsequently issued a complaint against the bar. MCL 436.1701 states:

(4) If the enforcing agency involved in the violation is the state police or a local police agency, a licensee shall not be charged with a violation of subsection (1) or section 801(2) **unless enforcement action . . . is taken against the minor who purchased or attempted to purchase, consumed or attempted to consume, or possessed or attempted to possess alcoholic liquor and, if applicable, enforcement action is taken under this section against the person 21 years of age or older who sold or furnished the alcoholic liquor to the minor. . . .** However, this subsection does not apply under any of the following circumstances:

The violation of subsection (1) is the result of an undercover operation in which the minor purchased or received alcoholic liquor under the direction of the state police, the commission, or a local police agency as part of an enforcement action. However, any initial or contemporaneous purchase or receipt of alcoholic liquor by the minor shall have been under the direction of the state police, the commission, or the local police agency and shall have been part of the undercover operation.

"Because the impermissible service of alcohol to Minor #2 did not occur as the result of an undercover operation, but was only discovered because of the undercover operation, enforcement action was required to be taken against the server if the server was 21 years of age or older." The court remanded the case to the lower court to determine if the server was 21 years or older for enforcement purposes.

MIP statute revisited – PA 725 of 2002 – MCL 436.1701

If the enforcing agency involved in the violation is the state police or a local police agency, a licensee shall not be charged with a violation of subsection (1) or section 801(2) unless all of the following occur, if applicable:

(a) Enforcement action is taken against the minor who purchased or attempted to purchase, consumed or attempted to consume, or possessed or attempted to possess alcoholic liquor.

(b) Enforcement action is taken under this section against the person 21 years of age or older who is not the retail licensee or the retail licensee's clerk, agent, or employee who sold or furnished the alcoholic liquor to the minor.

(c) Enforcement action under this section is taken against the clerk, agent, or employee who directly sold or furnished alcoholic liquor to the minor.

A peace officer or law enforcement officer described under section 201 or an inspector of the commission who witnesses a violation of section 701(1) or 703, or a local ordinance corresponding to section 701(1) or 703, may stop and detain a person and obtain satisfactory identification, seize illegally possessed alcoholic liquor, and issue an appearance ticket as prescribed in section 9c of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.9c.

Sec. 905. (1) Notwithstanding section 903, if a retail licensee or a retail licensee's clerk, agent, or employee violates this act by selling or furnishing alcoholic liquor to a minor, or by allowing a minor to consume alcoholic liquor or possess alcoholic liquor for personal consumption on the licensed premises, and if the enforcing agency involved in the prosecution of the violation is the state police or a local police agency, the commission shall not take any action under section 903 to suspend or revoke the licensee's license or assess an administrative fine against the licensee unless all of the following occur, if applicable:

(a) Enforcement action is taken against the minor who purchased, consumed, or received the alcoholic liquor from the retail licensee or the retail licensee's clerk, agent, or employee.

(b) Enforcement action is taken under section 701 against the person 21 years of age or older that is not the retail licensee or the retail licensee's clerk, agent, or employee but who sold or furnished the alcoholic liquor to the minor.

(c) Enforcement action is taken under section 701 against the retail licensee's clerk, agent, or employee.

Add to page 7-9
Disorderly conduct must occur in a public place.

📖 People v Favreau, C/A No. 232585 (January 14, 2003)

Defendant and two others were in a motel room that they had rented. Police were called because of noise coming from the room and the motel employees seeing the girlfriend crying in the lobby with a bloody nose. Officers heard noise coming from the room as the approached. The girl friend answered the door and had a bloody nose. The defendant was sitting in the room, quiet but visibly intoxicated. He was than arrested for disorderly and taken to jail. During the booking process officer located cocaine in his possession.

HELD – "We conclude that because the noise came from defendant's hotel room, he was not in a public place when he created the disturbance. Thus, his conduct did not fall within the definition of disorderly person under MCL 750.167(1)(e) and, therefore, his arrest on disorderly conduct was unlawful. The discovery of the cocaine is fruit of the poisonous tree and it should have been suppressed from evidence."

Add to page 7-19
Encumbering property with the intent to harass of intimidate

📖 People v Cynar, C/A No. 234398 (June 25, 2002)

Defendant improperly filed liens against the real property of three individuals. The circuit court held the liens were not valid and dismissed them. The subject was then charged with MCL 600.2907a(2), which prohibits encumbering property through the use of liens without lawful cause and with the intent to harass or intimidate. The lower courts dismissed the charges on constitutional grounds but the Court of Appeals reversed and held the statute is valid and reinstated the charges.

Add to page 7-22
Flee and Elude

📖 People v Grayer, C/A No. 229267 (July 26, 2002)

An officer attempted to stop defendant's vehicle for a tail light out. The officer activated his lights and siren but promptly turned off his siren. Initially the defendant slowed down for some railroad tracks but then accelerated to approximately 40 to 45 mph. The officer testified that the speed limit was 35 mph. The vehicle then pulled into a parking area behind a house and the driver exited and ran up to the house and sat on the porch. As the officer approached the defendant stated the subject just ran around the house. The officer then placed him under arrest. The distance between the point where the officer activated his lights and defendant's home was less than a mile and the total time for the pursuit was about twenty seconds. The defendant was convicted of fleeing and eluding. The Court of Appeals upheld the conviction.

HELD - M.C.L. § 750.479a reveals no requirement that the defendant's speeding exceed a certain level or that the speeding occur over a long distance in order for the elements of the statute to be met. Viewing the evidence in a light most favorable to the prosecution, there was testimony that defendant exceeded the speed limit for a short period of time; therefore, despite the fact that the speeding was not extremely excessive or long-lasting, there was sufficient evidence to support the conviction. Additionally, there was sufficient evidence that defendant was trying to flee and avoid capture in his vehicle based on the speeding, the sharp turn made down a street close to defendant's home, and defendant's actions after exiting the vehicle. Although the foot chase and defendant's actions after the vehicle pursuit ended could not form the basis of the fleeing and eluding conviction, the actions constituted circumstantial evidence of defendant's intent to flee and elude the police while he was operating his vehicle.

Add to page 8-4
Assisting in locating witnesses

📖 People v Koonce, MSC No. 117527 (Jul 9, 2002)

The defendant argued that his case should be dismissed because the prosecutor failed to produce a witness. MCL 767.40a states, "The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness." The prosecutor argued since the witness was considered an accomplice he should not have to attempt to locate him. In a careful analysis of MCL 767.40a the Michigan Supreme Court held that attempting to locate witness includes accomplice witnesses. In this case the

prosecutor only informed the defendant that the witness lived in Baltimore, Maryland. The Court remanded the case to the Court of Appeals to determine if this amounted to reasonable assistance.

Police must use due diligence in attempting to locate witnesses.

📖 People v Jackson, MSC No. 120300 (September 17, 2002)

A key witness for the prosecution failed to show up for an armed robbery trail. The prosecutor moved to admit the witness's testimony from the preliminary examination. The court held a hearing on whether the prosecutor had used due diligence in attempting to locate the witness for trial. The officer in charge of the case testified that he had served the subpoena on the witness a month before trial who gave no indication that he would not appear for the trial. The trial court held that the prosecutor had not exercised due diligence because it had made no efforts to produce the witness apart from serving the subpoena. The Michigan Supreme Court reversed.

HELD – "The police here successfully served the subpoena. The witness had previously cooperated with the police and prosecution, and they had no reason to expect that his cooperation would not continue. We do not know what further efforts the court could have expected of the prosecution or police in these circumstances. We do not require the prosecutor to assume that every witness is a flight risk who must be monitored to ensure his attendance at trial. Accordingly, we hold that the trial court abused its discretion in denying the request for a continuance.

Add to page 8-14 under MRE 404(b)
Evidence is admissible if can establish a commons scheme or plan.

📖 People v Hine, MSC No. 120484 (September 17, 2002)

Defendant was convicted of felony murder with the underlying felony being child abuse in the first degree. He had been watching a two and half year old when he called 911 to report that the child had stopped breathing. An autopsy revealed that the child suffered several internal injuries and the cause of death was from blunt force. The doctor also discovered bruises on the child's jaw that resembled a fingernail imprint. During trial the prosecutor offered evidence from three prior girlfriends, including the child's mother, that they had suffered similar injuries. The women testified that the defendant would "head-butt" them, poke them with his fingers, grab and throw them around. He also was known to do a "fish hook"

assault that was described as forcefully placing his hands or fingers inside the victim's mouth and pulling. The trial court allowed this testimony not to show the defendant's propensity to commit the crime but rather to show the defendant's scheme, intent, system, or plan in committing the acts and to show a lack of accident. The Michigan Supreme Court also allowed the evidence from the prior girlfriends.

HELD - "Specifically, the evidence established that the 'fish-hook' assaults on the defendant's former girlfriends were similar to the method or system that could have caused the fingernail marks on Caitlan's right cheek. One witness also described a forceful and hurtful 'poking' inflicted upon her by the defendant. The forensic pathologist testified that Caitlan had fifteen to twenty circular bruises on her abdomen, the largest of which measured about one inch. The expert on child abuse testified that these injuries were typical of injuries received when a child has been poked, and that accidental injuries in that area of a child's body were completely atypical. The trial court did not abuse its discretion in determining that the assaults by the defendant on his former girlfriends and the charged offenses regarding Caitlan shared sufficient common features to permit the inference of a plan, scheme, or system. The charged and uncharged acts contained common features beyond similarity as mere assaults."

Add to page 9-8
Police Authority Outside Jurisdiction

PA 483 of 2002 - MCL 764.2a (October 1, 2002)

(1) A peace officer of a county, city, village, township, or university of this state may exercise the authority and powers of a peace officer outside the geographical boundaries of the officer's county, city, village, township, or university under any of the following circumstances:

(a) If the officer is enforcing the laws of this state in conjunction with the Michigan state police.
(b) If the officer is enforcing the laws of this state in conjunction with a peace officer of any other county, city, village, township, or university in which the officer may be.
(c) If the officer has witnessed an individual violate any of the following within the geographical boundaries of the officer's county, city, village, township, or university and immediately pursues the individual outside of the geographical boundaries of the officer's county, city, village, township, or university:

(i) A state law or administrative rule.
(ii) A local ordinance.
(iii) A state law, administrative rule, or local ordinance, the violation of which is a civil infraction, municipal civil infraction, or state civil infraction.

(2) The officer pursuing an individual under subsection (1)(c) may stop and detain the person outside the geographical boundaries of the officer's county, city, village, township, or university for the purpose of enforcing that law, administrative rule, or ordinance or enforcing any other law, administrative rule, or ordinance before, during, or immediately after the detaining of the individual. If the violation or pursuit involves a vessel moving on the waters of this state, the officer pursuing the individual may direct the operator of the vessel to bring the vessel to a stop or maneuver it in a manner that permits the officer to come beside the vessel.

Add to page 10-20
Corpus delecti Rule

📖 People v Ish, C/A No. 228534 (July 5, 2002)

Officers found defendant inside of a house watching T.V. When asked what he was doing, he stated that he was looking for food. The officer found that the window had been opened and the screen had been ripped out. First of all he argued that the corpus delecti rule prohibited the charges.

"The purpose of the corpus delicti rule is to prevent the use of a defendant's confession to convict him of a crime that did not occur. The rule bars the prosecution from using a defendant's confession in any criminal case unless it presents direct or circumstantial evidence independent of the defendant's confession that the specific injury or loss occurred and that some criminal agency was the source or cause of the injury. In this case there was sufficient evidence beyond the confession to show a breaking and entering had occurred."

There was also no Miranda violation because the subject was not in custody when questioned by the officer. "A police officer may ask general on-the-scene questions to investigate the facts surrounding the crime without implicating the holding in Miranda. We believe such to be the case here. Defendant's statements were in response to the officer's brief on-the-scene questioning to investigate the reason for defendant's presence in the complainant's living room. The police officer reacted naturally and spontaneously to the scene

before him. More importantly, defendant was not under arrest or in a police dominated, coercive atmosphere as intended by Miranda."

Add to page 10-20 under People v Good
The court will look at the totality of the circumstances in determining the voluntariness of a confession made by a juvenile.

📖 People v Hall, 249 Mich. App. (2002)

Defendant, a fifteen year old, was arrested for robbery, arson and felony murder. He was taken to the police station and advised of his *Miranda* rights. No one was present at the time of the interview but the police had tried unsuccessfully to contact his grandmother prior to questioning. The defendant had never been arrested before and had very limited contact with the police prior to his arrest. He waived his rights and agreed to give a statement. He was questioned for 45 minutes and admitted to his involvement in the crime. He was encouraged to be truthful but was not coerced or abused during the interview. Prior to trial he requested that his statement be suppressed because he was not immediately turned over to his parents or taken before the court in violation of MCL 764.27 and that it was not voluntarily obtained. The Court of Appeals disagreed and allowed the confession.

HELD – "A statement obtained in violation of M.C.L. § 764.27 and MCR 5.934 is not subject to automatic suppression because of the violation. Rather, the violation is considered as part of the totality of the circumstances to determine whether the statement was voluntary. The factors that must be considered in applying the totality of the circumstances test to determine the admissibility of a juvenile's confession include (1) whether the requirements of *Miranda v. Arizona* have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with M.C.L. § 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. In the present case before questioning defendant the police attempted to reach defendant's grandmother but were unable to reach her until defendant's interview was completed. Defendant's statement was recorded, and the transcript establishes that

defendant was advised of his *Miranda* rights, stated that he understood them, and waived them. The questioning was not unduly prolonged or coercive, and defendant was not abused. Although M.C.L § 764.27 and MCR 5. 934 were violated, defendant was of reasonable intelligence and had sufficient experience with the police that these violations are not controlling. In summary, the evidence establishes that the trial court did not clearly err in finding that defendant's statement to the police was voluntary."

Add to page 13-7
Duty to retreat and the "Castle Doctrine"

📖 People v Riddle, MSC No. 118181 (July 31, 2002)

Defendant and two friends were in the backyard just outside defendant's house, in the driveway near a detached garage. An argument erupted and the defendant shot one of the friends 11 times in his legs. He subsequently died from his injuries. One witness stated the shooting occurred after the friend made a remark about the defendant's fiancée. Defendant testified that he intervened in an argument between the two friends. Seeing a "dark object" in the descendant's hand and believing it to be a gun, defendant immediately reached for his rifle that was located in the garage and shot the friend. A person may use deadly force in lawful self defense. But in Michigan, before using the self defense doctrine there is a duty to retreat. A person does not have to retreat if he is in his house at the time of the attack. The defendant argued that the jury should have heard the jury instruction that he did not have a duty to retreat because he was in his own home.

HELD – "Upon the theory that a man's house is his castle, and that he has a right to protect it and those within it from intrusion or attack, the rule is practically universal that when a person is attacked in his own dwelling he may stand at bay and turn on and kill his assailant if this is apparently necessary to save his own life or to protect himself from great bodily harm."

"Defendant, who was outside his home in the driveway or yard between the home and a detached garage at the time of the homicide, contends that he was wholly excused from any obligation to retreat because he was in his 'castle.' We disagree and hold that the castle doctrine, as it applied in this state and as was codified in our murder statute in 1846, applies solely to the dwelling and its attached appurtenances."

Add to page 13-7

A person can claim defense of an unborn child

📖 People v Kurr, C/A No. 228016 (October 4, 2002)

Defendant and her boyfriend got into an argument about his cocaine use. The boyfriend then struck her two times in the stomach at which time she warned him not to hit her because she was carrying his babies. He then came towards her again and she stabbed him in the chest with a knife. He subsequently died from the injury. During the trial she wanted to enter as a defense that she killed her boyfriend to protect her unborn children. In Michigan a person may use self defense in the defense of others.

HELD – "We conclude that in this state, the defense should also extend to the protection of a fetus, viable or nonviable, from an assault against the mother, and we base this conclusion primarily on the fetal protection act adopted by the Legislature in 1998. This act punishes individuals who harm or kill fetuses or embryos under various circumstances.

"Because the act reflects a public policy to protect even an embryo from unlawful assaultive or negligent conduct, we conclude that the defense of others concept does extend to the protection of a nonviable fetus from an assault against the mother. We emphasize, however, that the defense is available solely in the context of an assault against the mother. Indeed, the Legislature has not extended the protection of the criminal laws to embryos existing outside a woman's body, i.e., frozen embryos stored for future use, and we therefore do not extend the applicability of the defense of others theory to situations involving these embryos."

The holding does not apply to what the United States Supreme Court has held to constitute lawful abortions.

Add to page 14-2
Attempted OUIL

📖 People v Burton, C/A No. 226530 (July 5, 2002)

Officers found defendant sleeping in a pickup truck with its engine running and lights off. He was parked next to a golf storage building in the course parking lot. After he was eventually awaken he stated that he had been drinking and had been abandoned by friends. He then drove the pick up across the parking lot next to the shed where he had fallen asleep. He was arrested and the datamaster test indicated a .17 and .18.

The prosecutor charged him with attempted OUIL. For an attempt the action in furtherance of the alleged crime must be unequivocal and more than mere preparation to commit the crime must have occurred. The prosecutor must prove the specific intent to commit a crime.

HELD – "We conclude that this evidence fails to establish that defendant possessed the requisite specific intent. The evidence does not sufficiently establish that defendant was intending to use his truck as a motor vehicle as opposed to just a shelter. The mere fact that the engine was running does not sufficiently establish that defendant had or was intending to put the vehicle in motion. As one of the arresting officers conceded, it was possible that defendant was simply keeping the truck warm while he slept. We also conclude that the prosecution did not introduce sufficient evidence for the jury to find beyond a reasonable doubt that defendant took an act in furtherance of the crime. The mere fact that he was intoxicated and in his truck with the engine running does not establish that he tried and failed to drive while intoxicated. Certainly, defendant took steps that would have prepared him to commit the crime. However, while these acts were necessary for the commission of the crime had not the officers arrived on the scene, they do not establish the immediacy of the crime. Defendant may have been one step away from completing OUIL/UBAL, but such a step was not necessarily and unambiguously implied by his prior conduct."

The Court did uphold the questioning that occurred prior to the suspect's arrest. "Ordinarily, routine traffic stops do not involve taking an individual into custody for purposes of Miranda warnings. While we conclude that prior to his arrest a reasonable person in defendant's place would have felt that he was seized within the meaning of the Fourth Amendment, we also conclude that such a reasonable person would not have believed that he was in police custody to the degree associated with a formal arrest. The testimony establishes that the questioning of defendant prior to the field sobriety test was brief. Defendant was not handcuffed or confined to the officers' patrol car while he was being questioned. While defendant was told that he was not going to be allowed to leave the scene, he was not told that this was because he was going to be arrested. Rather, the officers told defendant that they needed to conclude their investigation." The statements were admissible.

Add to page 14-7

Second degree murder and OUIL

📖 People v Werner, C/A No. 226394 (December 27, 2002)

The defendant in this case became intoxicated and drove his pick up the wrong way on a busy freeway. He collided head- on with a jeep and killed the passenger and seriously injured the driver. He was convicted of second degree murder as well as other felonies. For second degree murder under these circumstances the prosecutor must prove "the intent to do an act that is in obvious disregard of life-endangering consequences." There must be misconduct that "goes beyond that of drunk driving."

HELD – "This is not a case where a defendant merely undertook the risk of driving after drinking. Defendant knew, from a recent prior incident, that his drinking did more than simply impair his judgment and reflexes. He knew that he might actually become so overwhelmed by the effects of alcohol that he would completely lose track of what he was doing with his vehicle. If defendant knew that drinking before driving could cause him to crash on boulders in front of a house, without any knowledge of where he was or what he was doing, he knew that another drunk driving episode could cause him to make another major mistake, one that would have tragic consequences.

Although there is no evidence regarding defendant's behavior between his departure from Parrish's house and the fatal collision, or regarding his state of mind just before the crash, we are satisfied that plaintiff met its burden by showing that defendant had a recent episode of an alcohol-induced black-out while driving, but that he nonetheless drank heavily while he was out with his vehicle.

Add to page 17-5
Acting under color of law

📖 Neuens v Officer Bridges, 2002 FED App. 0313P(6th Cir.)

An altercation arose at a waffle house at approximately 2:00 a.m. after a night of drinking. The fight arose between two different groups. In one of the groups there was an off duty police officer. At no time was the officer identified as an officer. He did not display his badge and was not in uniform. He was subsequently sued under a 1983 action. One of the key elements under 1983 is that the person must be acting under color of state law. The Sixth Circuit held here that under these circumstances the officer was not acting under state law and dismissed the 1983 action against the officer.

HELD – "It is the nature of the act performed, which determines whether the officer has acted under color of law. The record clearly demonstrates that Bridges was acting in his private capacity on the morning of December 26, 1998. Bridges was not in uniform, he was not driving in a police car, and he did not display a badge to Neuens or anyone else at the Waffle House restaurant. Bridges was not at the Waffle House pursuant to official duties; rather, he was out with his personal friends for social reasons. Neither Bridges nor his friends made any suggestions that Bridges was a police officer. In fact, Neuens concedes in his appellate brief that he had no idea that one of them, Appellant Bridges, was a Columbus police officer."

Add to page 17-5
Liability – Clearly established rights

🕮 Thomas v Cohen, 2002 FED App. 0287P (6th Cir.)

Plaintiffs resided in the Augusta House and during this case retained keys to the premises and had full rights of entry. The Augusta House is a transitional shelter for women attempting to acclimate themselves to mainstream society. Each resident paid $140 a month in rent to the House. At one point a disagreement arose between the manager of the house and the plaintiffs. The manager argued that they had been violating the house rules and decided to evict the tenants for these violations. The plaintiffs met with an attorney from legal aid who informed them that in her opinion, the plaintiffs were residents of the house and that the manager would have to follow eviction proceedings to get them to be removed.

At one point an employee of the house called the police to have the tenants removed. The first officer stated that he could not force them out and that they would have to follow eviction laws. The next day the manager called the police and two officers responded. The manager told them that she wanted the plaintiffs out of their rooms for violating house rules. The manager stated that it was "standard procedure" under the circumstances to have them removed from the house. The officers then entered their rooms and informed them that they would have to leave. The plaintiffs tried to show the officers the letter from the attorney but they would not look at it. When they tried to call the attorney the officers refused to allow them to make the call. There was no physical confrontation and no property was destroyed but the plaintiffs were unable to obtain all their property before the eviction. They then brought the suit.

HELD – The Sixth Circuit applied the test for liability based on precedent of the United States Supreme Court. Generally, police officers cannot be held liable for violating a person's constitutional rights unless the rights are clearly established. The Fourteenth Amendment guarantees that, "No state shall deprive any person of life, liberty, or property, without due process of law." The tenants in this case had a property interest in their apartment and due process generally requires notice and a hearing prior to an eviction. "Based upon Supreme Court and Sixth Circuit precedent, we hold that Plaintiff's eviction from the Augusta House constituted a violation of their clearly established Fourteenth Amendment rights. In addition we hold that the officers had no reasonable basis to believe that the eviction was justified in the absent of exigent circumstances."

Violation of 48 hour rule

📖 Alkire v Irving, 2002 FED App 0319P (6thCir.)

A subject was arrested for OUIL and lodged. There was also an arrest warrant for him for OUIL. He was arrested on Saturday at 9:40 a.m. and arraigned on Tuesday morning, almost 72 hours after his arrest. No probable cause hearing was held before the arraignment. He subsequently sued the sheriff's department and the sheriff arguing that his Fourth Amendment rights had been violated. The sheriff had established a policy of detaining a person in the county jail until their initial court appearance. The plaintiff argued that his Fourth Amendment right's were violated under the U.S. Supreme Court decision of Riverside v McLaughlin, 500 U.S. 44 (1991). In that case the Court held the following:

1. A judicial determination of probable cause within 48 hours is generally constitutional.
2. A judicial determination of probable cause within 48 hours may still be unreasonable if for example the delay was to gather additional evidence, or ill will or a delay for the sake of delay.
3. A delay of more than 48 hours is presumptively unconstitutional. In that case the burden shifts to the government to demonstrate a bona fide emergency or other extraordinary circumstance.

HELD – The sheriff in this case was not granted qualified immunity unless the plaintiff was being held on the warrant and not the warrantless arrest. "We conclude that Sheriff Zimmerly did not enjoy qualified immunity from this claim. According to the doctrine of qualified immunity, government officials performing discretionary functions generally are shielded from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Qualified immunity involves a two-step inquiry. First, the court must determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiff show that the defendants violated his constitutional rights. If a favorable view of the facts does demonstrate a constitutional violation, the next step is to ask whether the right was clearly established at the time of the defendants' actions. We also conclude that Sheriff Zimmerly is not entitled to qualified immunity as to the plaintiff's Fourth Amendment claim. We have already determined that, if plaintiff's version of the facts is believed, a constitutional violation has occurred. There is little doubt, moreover, that the relevant law was clearly established at the time of defendants' actions. The constitutional violation in the instant case follows directly from the Supreme Court's 1991 decision in McLaughlin. Since the events at issue in the instant case occurred more than four years after McLaughlin was decided, it seems apparent that the plaintiff's constitutional right to receive a probable cause determination within forty-eight hours of his arrest was clearly established at the time of his arrest. Therefore, the district court's dismissal on this issue is reversed. Because there are genuine issues of material fact concerning Alkire's Fourth Amendment claim, however, the district court's denial of Alkire's motion for summary judgment is affirmed. This case is remanded for further proceedings to determine whether Alkire was being held on the arrest warrant or the DWI arrest."

Liability may occur where arrest is made by a desire to retaliate against a person's first amendment rights.

📖 Greene v Barber, 2002 WL 31487268 (6th Cir. Mich.)

A subject walked into the lobby of the Grand Rapids police department to complain about his vehicle being towed. During the discussion with an intern he became upset about the expenses and began to talk loudly. According to the subject, the police lieutenant became arrogant and the subject called the officer an "asshole." The lieutenant then responded by saying you cannot talk to me like that in my building. At which point the subject stated that this was America where there is freedom of speech and if the officer did not like it he should move to another country. The officer then said, well you still do not talk like that in my building at which time the subject stated that if he really felt that way the officer was really stupid. At which point the officer informed the subject he was under arrest. An altercation arose and the subject had to be sprayed with

pepper spray before being subdued. He was charged under a local ordinance that prohibits creating a disturbance. The subject was acquitted of the charges and then brought a lawsuit.

HELD – "Government officials in general, and police officers in particular, may not exercise their authority for personal motives, particular in response to real or personal slights to their dignity. The fighting words doctrine may be limited in the case of communications addressed to a properly trained police officer because police officers are expected to exercise great restraint in their response than the average citizen. Under the facts of this case although the officer may have had probable cause to believe the subject was violating an ordinance, the existence of probable would not justify the arrest if the officer's true motivation was to punish a slight to his dignity." The Sixth Circuit remanded the case on the immunity to the officer. "We hold that that the officer should have known that an arrest undertaken at least in part as retaliation for a constitutionally protected insult to the officer's dignity would be impermissible, unless it could be shown that the officer would have made the arrest even in absence of the retaliatory motive."

Seizing personal property falls under Fourth Amendment analysis.

📖 Farm Labor Organizing Communities v Ohio Highway Patrol, 2002 FED App. 0316P (6th Cir.)

Ohio troopers stopped two subjects driving a vehicle with a faulty headlight. During the stop he located both their green cards and asked if they had if they had paid for their cards which would indicate that they were improper. The subjects thought they were asked if they had paid the proper processing fees and answered yes to the question. Based on this response, the trooper seized the green cards. Since it was Sunday, INS was not open to verify the accuracy of the cards. The trooper did not give a receipt for the cards or inform them how they could get them back. The next day the subjects retained a lawyer in an attempt to get the cards back. The lawyer was unable to get any information on the incident. Four days after the incident he was able to get the cards back. When asked why it had taken four days the trooper stated that he had been off duty and had a difficult time contacting INS during that time.

The subjects in the car subsequently brought a lawsuit against OSP and the trooper for violating their constitutional rights for holding on to the green cards. "We conclude that the facts presented by the plaintiffs are sufficient to show that the officers four-day detention of

the plaintiffs' green cards based upon mere reasonable suspicion was unreasonable in duration. We think that Trooper Kiefer's seizure interfered with both the plaintiffs' possessory interests in the green cards and their liberty interests in continuing uninterrupted with their travels. Failure to carry one's green card on his or her person can subject a legal resident alien to criminal sanctions and green cards are an essential means by which resident aliens can establish eligibility for employment and participation in federally funded programs. Given the importance of these documents, the challenged seizure undoubtedly subjected the plaintiffs to disruption of their travel plans in order to remain with the documents or arrange for their return. Moreover, the facts alleged by the plaintiffs sufficiently demonstrate that the length of the detention was excessive in light of the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. Although we decline to set a definitive time limit, we agree with the district court that reasonable suspicion would permit the trooper to detain the green cards no longer than until the following day, when they could be verified by the INS. The trooper has not articulated any reason why a longer detention would have been necessary. The undisputed facts indicate that the INS could be reached to verify the authenticity of the plaintiffs' green cards on the Monday following the initial stop. By waiting for four days to return the plaintiffs' green cards, the officer failed to diligently pursue his investigation. The unreasonable nature of the seizure was exacerbated by the undisputed fact that the trooper did not make clear to the plaintiffs how long the documents would be held or when or how he would return them to plaintiffs if they proved authentic."

Add to page 18-5 under abandonment
No expectation of privacy in an abandoned house

📖 People v Taylor, C/A No. 237223 (October 8, 2002)

Officers responded to a residence reference a narcotics complaint. The windows at the residence were boarded up and no doors hung in the doorway. As the officer approached they heard a cell phone ringing inside. A board was hanging down over the door and was removed by the officers as they entered the residence. In the basement they found the defendant packaging cocaine. He argued that the officers needed a warrant to enter.

HELD – “We hold that the entry into and contemporaneous search of an abandoned structure is presumptively reasonable because, ‘the owner no longer has an expectation of privacy in the property

that he has abandoned." Police officers do not need a warrant before entering structures, that, by all objective manifestations, appear abandoned. Consequently, the officers did not tread upon any interest protected by the Fourth Amendment when they entered the house without a warrant and observed defendant in plain view placing crack cocaine into individual baggies."

Add to page 18-6
What is curtiledge?

📖 U.S. v Elkins, 2002 FED App. 0262P (6th Cir.)

Officers suspected that a building contained a marijuana grow operation. They proceeded to the location and saw a "No Trespassing" sign hanging on the building. They located an unpaved path used to reach an apartment complex behind the building. They walked on the path and saw a PVC pipe protruding from the side of the building at approximately two to three feet from the ground. They peered through the pipe and observed marijuana leaves. A search warrant was obtained based on the observations.

HELD - The area next to the PVC pipe at issue in this case was accessible to the public. The officers ventured onto a path apparently used to gain access to an apartment building. No gates or fences shielded the area where Bell stood. The area was visible from the street. The Elkinses argue that the path should be treated as protected curtilage, in part because there was a "no trespassing" sign on the building. However, this court has recognized that the presence of a no-trespassing sign cannot confer curtilage status on an area that otherwise lacks it.

There may be circumstances in which the area adjoining a business structure is sufficiently private to enjoy a protection analogous to a home's curtilage. We hold, however, that even if "business curtilage" is a viable doctrine in this Circuit, it does not apply here. The path next to 2896 Walnut Grove was, for Fourth Amendment purposes, a place which police could enter under the "open fields" doctrine. Therefore Bell was lawfully present next to the PVC pipe and the opening in the east side of 2896 Walnut Grove.

Add to page 18-13
Staleness of probable cause

📖 People v Sobczak-Obetts, C/A No. 236963 (September 20, 2002)

For a probable cause determination the court must simply ensure that there is a "fair probability" that contraband or evidence of a crime will be found in a particular place while reading the affidavit in a common sense manner.

In reviewing the affidavit in this case the Court of Appeals upheld the sufficient of probable cause. "In the affidavit, two informants stated that business records were kept on a computer system and were backed up regularly on to disks. All the informants indicated that defendant maintained an office at her home, which had a computer system with a hard drive and modem. Two informants had observed defendant place the back-up disks from the company in her briefcase and remove them from the premises. One informant personally observed these disks and paper copies of business records at defendant's residence, although the informant did not specify as to when."

"However, we do not believe that the fact the affidavit did not contain any specific dates was fatal to the establishment of probable cause. The affidavit indicated that defendant and Obetts had engaged in their fraudulent activities for at least two years, using the business computer system, to which defendant had access from her home computer, to electronically make changes to databases, records, and accounts for both professional and personal gain. Given that so many of these records related to personal acquisitions and records of this type are generally kept for long periods of time, it was reasonable to infer that at least some of these records would still be at defendant's home."

Add to page 18-21
Affidavit is public record after 56 days

MCL 780.651

On the fifty-sixth day following the issuance of a search warrant, or on August 1, 2002, whichever is later, the search warrant affidavit contained in any court file or court record retention system is public information unless, before the fifty-sixth day after the search warrant is issued, or before August 1, 2002, whichever is later, a peace officer or prosecuting attorney obtains a suppression order from a magistrate upon a showing under oath that suppression of the affidavit is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness. The suppression order may be obtained ex parte in the same manner that the search warrant was issued. An initial suppression order issued under this subsection expires on the fifty-sixth day after the order is issued. A second or

subsequent suppression order may be obtained in the same manner as the initial suppression order and shall expire on a date specified in the order. This subsection and subsection (8) do not affect a person's right to obtain a copy of a search warrant affidavit from the prosecuting attorney or law enforcement agency under the freedom of information act

Add to page 18-21
Once the search is done under a warrant, officers need a second warrant to reenter the property.

📖 United States v Keszthelyi, 6th Cir., No. 00-6630 (10/17/02)

Officers executed a search warrant for drugs and with drug sniffing dogs searched the residence for hours. They seized money but only four grams of cocaine. One agent felt very strongly that they had missed something and returned the following day to search again. This time the officers found an additional ounce of cocaine. The issue presented was whether the officer could reenter the second day without a securing a second warrant.

HELD – The Sixth Circuit court held that a single warrant might authorize more than one entry into a premise as long as the second entry is a "reasonable continuation" of the original search. The court used as an example a case where officers obtained a search warrant for a vehicle but could not get the hood latch to open. So they returned the next day with a mechanic. The court held this to be a continuation of the original search. Officers may take as long as "reasonably necessary to execute the warrant and generally may continue to search the premises described in the warrant until they are satisfied that all available evidence has been located. Once the execution of the warrant is complete, the authority conferred by the warrant terminates." In reviewing the facts the court held that for the second search the officers should have obtained a second search warrant. The officers testified that at the end of the first day they had felt the search was completed. There was nothing indicated that part of their search was not completed. The use of the dogs and the indication of the thoroughness of the search indicates the officers completed their search on the first day.

Add to page 18-36
Reasonableness of Length of Terry Stop

📖 U.S. v Orsolini, 2002 FED App. 0280P (6th Cir)

"Although an officer may have reasonable suspicion to detain a person or his possessions for investigation, the officer's investigative detention can mature into an arrest or seizure if it occurs over an unreasonable period of time or under unreasonable circumstances." “An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." There is, however, "no rigid time limitation on the lawfulness of a Terry stop." A court should instead "examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant...."

The Sixth Circuit reviewed the above case law and held the following as applied to the facts of this case. We are of the opinion that Orsolini was not detained for an unreasonable length of time. The traffic stop began at 3:11 p.m. By 4:02 p.m., the canine unit had arrived on the scene and alerted the officers to the presence of illegal drugs. The entire investigation thus lasted for less than one hour. Of that time, approximately 35 minutes were spent waiting for a canine unit to arrive. This is not an unreasonable amount of time, particularly given that much of the delay occurred because the canine unit was off-duty. Moreover, at 3:27 p.m., the officers told Orsolini and his passenger that they were free to leave the scene of the traffic stop, and they actually left at 3:47 p.m. to travel with Officer Ferguson to the nearest interstate exit. The officer dropped Orsolini and his passenger off at a store and later stood by while they walked down the road away from the store. Although Orsolini and his passenger were eventually picked up and brought back to the scene of the traffic stop, that was only after the canine unit had alerted to drugs in the trunk of Orsolini's car. Under all of these circumstances, there is no reason to believe that the officers did not diligently pursue their investigation or that the detention lasted any longer than was reasonably necessary to effectuate the purpose of the initial Terry stop. We therefore conclude that the district court erred in holding that Orsolini was detained for an unreasonable length of time.

Reasonable suspicion to stop

US v Orsolini, 2002 FED App. 0280P (6th Cir)

An officer detained two occupants of a motor vehicle based on the following factors:

1. The recent purchase of the vehicle with cash in a source city for drugs;

2. Inconsistent stories about where and why they had been in Texas;
3. Inconsistent stories from them about whom they were going to see in Boston;
4. Inconsistent stories as to the nature of the relationship between the two;
5. The driver became visibly nervous when he was asked for consent to search the vehicle; and his subsequent revocation of his consent.
6. The driver's only proof of identity was a photocopy of an interim driver's license issued by the state of California,
7. The officer thought it suspicious that Orsolini and his passenger had their luggage on the back seat of the car as opposed to in the trunk, and
8. Based on the officer's observation of a food bag and several food wrappers on the floorboard of the car and a large pile of clothes on the backseat, he inferred that Orsolini and his passenger had been traveling without stopping to eat or change clothes.

"None of these individual circumstances is sufficient by itself to create a reasonable suspicion of criminal activity, but when combined, we believe that they are sufficient to support a reasonable suspicion. The Supreme Court has recently reiterated that 'factual inferences drawn by the law enforcement officer'must be given 'due weight' in analyzing the totality of the circumstances. United States v. Arvizu, 534 U.S. 266, (2002) (holding that the following circumstances supported a finding that a border patrol agent had a reasonable suspicion to believe that Arvizu was engaged in illegal activity: (1) Arvizu slowed his vehicle down when he saw the agent, (2) Arvizu failed to acknowledge the agent, (3) the knees of the children in the car were in a raised position, (4) the children in the car waved to the agent in an unusual manner, (5) the little-used road Arvizu was driving on was commonly used by smugglers, (6) Arvizu approached the area at approximately the same time that agents changed shifts, and (7) minivans are often used by smugglers). This is admittedly a close case. But in comparing the factual inferences drawn by the officers in this case, with those that the Supreme Court held justified the stop in Arvizu, we are of the opinion that the circumstances here provide--both qualitatively and quantitatively--even stronger support for a finding that the officers had 'a reasonable suspicion of criminal activity.'"