



THE DOCKET

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Inhalants and Driving: A Dangerous Combination

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Most everyone knows the dangers of drinking and driving, but recent news articles have put the spotlight on another danger on our roads—huffing and driving:

“Traverse City Man Arrested for Huffing While Driving.”

“Huffing causes Mills Township crash, driver arrested.”

“Man huffing cans of air duster crashes car into Otsego church, police say.”

“Police: Man ‘huffing’ narrowly misses MDOT workers before crashing.”

Huffing is the inhaling of chemicals, which many times involves chemicals found in aerosol cans. It is an extremely dangerous and illegal activity that can cause permanent brain damage. As the name implies, inhalants enter the body through breaths drawn in with the nose and/or mouth. Methods of ingestion are to either inhale the product’s fumes after placing the fumes inside a plastic bag, or, as in the case of paint thinner and gasoline, to inhale directly from an open container.

The fumes produce an instant high that can vary widely among users. It will depend on the substance being inhaled, method of inhalation, and other factors such as frequency of use and amount being inhaled.

The effects of inhalants include, but are not limited to, the following:

- Slurred speech
- Loss of motor coordination
- Wheezing
- Loss of consciousness
- Memory Impairment
- Red or watering eyes
- Hallucinations

Inhalants are found everywhere, including in drivers on our roads. This is where Michigan Public Act 543 of 2012, effective, March 31, 2013, comes into play.

The act states in pertinent part as follows:

Sec. 625. (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, “operating while intoxicated” means any of the following: (a) The person is under the influence of alcoholic liquor, a controlled substance, or

other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

(25) As used in this section: (a) “Intoxicating substance” means any substance, preparation, or a combination of substances and preparations other than alcohol or a controlled substance, that is either of the following: (i) Recognized as a drug in any of the following publications or their supplements: (A) The official United States pharmacopoeia. (B) The official homeopathic pharmacopoeia of the United States. (C) The official national formulary.

(ii) *A substance, other than food, taken into a person’s body, including, but not limited to, vapors or fumes, that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication.*

In testimony before the Senate Judiciary Committee, a Grand Blanc police officer said he had encountered several cases in which a driver’s ability to operate a vehicle was impaired. The officer told of responding to a car crash in which a driver was “huffing” an aerosol spray can. The driver had four spray cans in his car and 20 empty cans in the trunk. Another former law enforcement officer recalled having pulled over a driver who was sucking on a rag soaked with lighter fluid. All of these drivers were a threat to themselves and others because they were operating vehicles while impaired by an intoxicating substance.

Because inhalants fall under the category of “intoxicating substance,” a person violates this law only when he or she operates a motor vehicle while under the influence by an intoxicating substance. “Under the influence” means that, because of consuming an intoxicating substance, a person’s ability to operate a motor vehicle in a normal manner was substantially lessened. The test is whether one’s mental or physical condition is

significantly affected and they are no longer able to operate a motor vehicle in a normal manner. In essence, if a police officer suspects someone is inhaling while driving, there are signs that are indicators that the driver is under the influence of an intoxicating substance.

Common examples include loss of normal road awareness, loss of the ability to react properly to changing driving circumstances, loss of the ability to properly control driving speed, loss of the ability to safely maintain position within a lane, loss of the ability to follow other vehicles at a safe distance, and an increased tendency to attempt unsafe driving maneuvers. As with alcohol intoxication, these impairments create seriously elevated risks for involvement in crashes that damage property and/or lead to major injuries or fatalities. Additional signs to look for are appearance of rashes or blisters around the mouth and nose of the user. Many times the vapors are toxic enough to cause rashes or burns with frequent use. Their behavior may be similar to someone who is drunk, but most often speech will be slurred and behavior will be erratic.

We have a responsibility for road safety in Michigan. One way we can make a difference is by making sure inhalant-abusing drivers are kept off our roads.

GHSA issues report on pedestrian traffic fatalities for 2017

(Originally published in the Safety Network, March 2018 by the Office of Highway Safety Planning – used with permission)

The Governors Highway Safety Association (GHSA) estimates nearly 6,000 pedestrians were killed in motor vehicle crashes nationwide in 2017. This marks the second year in a row for numbers not seen in 25 years. The GHSA’s annual Spotlight on Highway Safety provides the first glimpse at state and national trends in

pedestrian traffic fatalities for 2017, using preliminary data provided by the highway safety offices in all 50 states and the District of Columbia.

States reported a total of 2,636 pedestrian fatalities for the first six months of 2017. Adjusting the raw data based on past data trends, GHSA projects that pedestrian deaths in 2017 will total 5,984, essentially unchanged from 2016, in which 5,987 people on foot lost their lives in motor vehicle crashes. Pedestrians now account for approximately 16 percent of all motor vehicle deaths, compared to 11 percent just a few years ago.

Two recent trends present an interesting correlation with rising pedestrian fatalities: the growth in smartphone use nationally and the legalization of recreational marijuana in several states.

While the report does not find or imply a definitive link between these factors and pedestrian deaths, it is widely accepted both smartphones and marijuana can impair the attention and judgment necessary to navigate roadways safely behind the wheel and on foot.

The reported number of smartphones in active use in the U.S. increased 236 percent from 2010 to 2016, and the number of cell phone-related emergency room visits also increased as the devices become more prevalent in daily life. The District of Columbia and the seven states that legalized recreational marijuana use between 2012 and 2016 experienced a collective 16.4 percent increase in pedestrian fatalities for the first half of 2017, while all other states saw a combined 5.8 percent decrease.

In addition to looking at pedestrian fatality crash characteristics, the report also discusses promising strategies to reduce pedestrian and motor vehicle crashes through a combination of engineering, education, and enforcement efforts. It outlines specific examples from 41 states such as: training law enforcement officers to understand and enforce

laws aimed to protect pedestrians; collaboration between state highway safety offices and departments of transportation; and policy changes to prioritize safety for all road users, regardless of mode.

The full report, including state-by state data and infographics, is available at ghsa.org.

2018 MADCM Annual Conference

By: James Pahl, Editor

Save the dates: September 19, 20 & 21, 2018, the Inn at Bay Harbor.

From SCAO

Beginning January 1, 2018, the maximum claim amount for small claims cases will increase from \$5,500.00 to \$6,000.00. The Affidavit and Claim, Small Claims form (DC 84) has been amended to reflect the increased maximum claim amount.

Court Rules and Administrative Orders

Proposed

MCR Cite: 1.109, 2.107, 2.113, 2.114, 3.206, 3.901, 3.931, 3.961, 4.302, 5.113, 5.114, 6.001, 6.101, 8.117, and 8.119

ADM File No: 2002-37

Effective Date: September 20, 2017 (Comment expired January 1, 2017)

Staff Comment: The amendments in this proposal are intended to begin moving trial courts toward a statewide uniform e-Filing process. The rules are required to be in place to enable SCAO's e-Filing vendor to begin programming the statewide solution. In addition, the proposal would move existing language into MCR 1.109 as a way to, for the first time, include most filing requirements in one single rule, instead of scattered in various rules. The proposal largely mirrors the administrative orders that most e-Filing pilot

projects have operated under, but contains some significant new provisions. For example, courts would be required to maintain documents in an electronic document management system, and the electronic record would be the official court record. ***Pending results of 1/23/18 public hearing.**

MCR Cite: 6.429

ADM File No: 2015-04

Comment expires: May 1, 2018

Staff Comment: This proposed amendment is intended to provide trial courts with broader authority to *sua sponte* address erroneous judgments of sentence, following the Court's recent consideration of the issue in *People v Comer*, 500 Mich 278 (2017).

MCR Cite: 9.200, *et seq.*

ADM File No: 2015-14

Comment expires: December 1, 2016

Staff Comment: The proposed amendments rearrange and renumber the rules applicable to the Judicial Tenure Commission to provide clarity and facilitate navigation. The proposed amendments also include new rules and revisions of current rules regarding costs and sanctions, as well as other substantive proposed changes. ***Pending results of 1/17/17 public hearing.**

MCR Cite: 8.110 and 8.111

ADM File No: 2015-20

Comment expires: October 1, 2017

Staff Comment: The proposed amendments would explicitly provide that corrective action may be taken by the State Court Administrator, under the Supreme Court's direction, against a judge whose actions raise the question of the propriety of the judge's continued service. Such corrective action may include relieving a judge of the judge's caseload and reassigning such cases to another judge or judges. The proposed amendments also would provide explicit authority for a chief judge (with approval from the State Court Administrator) to order a judge to submit to an independent medical examination if there is a good faith doubt as to the judge's fitness that prompted

the chief judge's report. ***Pending results of 1/23/18 public hearing.**

MCR Cite: 6.610

ADM File No: 2016-08

Comment expires: April 1, 2018

Staff Comment: The proposed amendment of MCR 6.610 would eliminate an arguable conflict between MCR 6.610(E)(4) and MCR 6.610(E)(7).

MCR Cite: 7.212

ADM File No: 2016-25

Comment Expires: February 1, 2018

Staff Comment: The proposed amendment of MCR 7.212 was submitted by the Court of Appeals. Proposed amendments of MCR 7.212 would require an appellant to file an appendix with specific documents within 14 days after filing the appellant's principal brief. The proposal is intended to identify for practitioners the key portions of the record that the court deems necessary for thorough and efficient review of the issues on appeal.

MCR Cite: 9.112 and 9.131

ADM File No: 2016-30

Comment expires: April 1, 2018

Staff Comment: The proposed amendments of MCR 9.112 and MCR 9.131 would provide that spouses of Attorney Grievance Commission or Attorney Discipline Board members or employees would be subject to the same procedure for review of allegations of misconduct as the board or commission member or employee. This change would comport with recent Supreme Court practice. These proposed amendments are intended to address any perceived conflict of interest that may exist if the procedures in MCR 9.112 were to be used to review a request for investigation of the spouse of a member or employee of the Attorney Grievance Commission or Attorney Discipline Board.

MRPC Cite: 1.16

ADM File No: 2016-31

Comment expires: April 1, 2018

Staff Comment: These alternative proposed amendments of MRPC 1.16(b) are intended to address the possibility of an involuntary plea as the result of an attorney's threat to withdraw as counsel for a criminal client if that client does not accept a previously offered plea (under Alternative A) or more broadly if a lawyer seeks to withdraw because the lawyer considers the client's objective repugnant or imprudent. Under the proposed amendments, the attorney would be required to advise the client that the attorney may not withdraw without permission of the court. Under Alternative A, the requirement would apply only where the client refuses to accept a previously-offered plea agreement; under Alternative B, the requirement would apply in any criminal case in which the lawyer intends to withdraw under MRPC 1.16(b)(3). These proposed amendments arose during the Court's consideration of *People v Townsend*, docket 153153.

MCR Cite: 6.310, 6.429, and 6.431

ADM File No: 2016-42

Comment expires: April 1, 2018

Staff Comment: The proposed amendments of MCR 6.310, 6.429, and 6.431 would provide a "prison-mailbox" rule for post-sentencing motions to withdraw plea, motions to correct an invalid sentence, and motions for new trial filed by in pro per defendants in the custody of the Department of Corrections.

MCR Cite: 9.211

ADM File No: 2016-45

Comment expires: April 1, 2018

Staff Comment: The proposed amendment of MCR 9.122 would establish a 56-day time period within which a grievant may file a complaint in the Supreme Court after the Attorney Grievance Commission has dismissed a request for investigation.

MRPC Cite: 1.18 and 7.3

ADM File No: 2016-49

Comment expires: May 1, 2018

Staff Comment: The proposed addition of new rule MRPC 1.18 and amendment of MRPC 7.3 would

clarify the ethical duties that lawyers owe to prospective clients and create consistency in the use of the term "prospective client." This proposal was submitted to the Court by the Representative Assembly of the State Bar of Michigan.

MCR Cite: 6.417

ADM File No: 2017-10

Comment expires: May 1, 2018

Staff Comment: This proposed new rule, based on FR Crim P 26.3, would require a trial court to provide parties an opportunity to comment on a proposed order of mistrial, to state their consent or objection, or suggest alternatives. The proposal was pursued following the Court's consideration of *People v Howard*, docket 153651.

ADM File No: 2017-26

Comment expires: July 1, 2018

Staff Comment: The proposed amendments of Canon 3 and Canon 7 of the Code of Judicial Conduct would incorporate the ABA Model Code of Judicial Conduct 2.10 language and clarify its application to public comments made by judges.

Adopted

MCR Cite: 2.602

ADM File No: 2014-29

Effective Date: May 1, 2018

Staff Comment: The amendment of MCR 2.602 provides procedural rules regarding entry of consent orders for conditional dismissal.

MCR Cite: 6.425

ADM File No: 2014-36

Effective Date: May 1, 2018

Staff Comment: The amendments of MCR 6.425(G) reflect recent changes to the appellate counsel assignment process by extending and segmenting the timeframe for courts to respond to appointment requests, requiring judges to provide a statement of reason when appellate counsel is denied, encouraging courts to liberally grant untimely requests for appellate counsel in guilty plea cases, requiring the filing of all lower court transcripts as part of an order appointing counsel,

and clarifying MAACS' assumption of the trial court's service obligations.

MCR Cite: 2.105

ADM File No: 2016-23

Effective Date: May 1, 2018

Staff Comment: The amendment of MCR 2.105 adds reference to service on the "agent for service of process" so that it is consistent with MCL 449.1105(a)(2).

MCR Cite: 3.977 and 6.425

ADM File No: 2017-08

Effective Date: May 1, 2018

Staff Comment: The amendments of MCR 3.977(J) were submitted by the Court of Appeals, and require the production of the complete transcript in appeals from termination of parental rights proceedings when counsel is appointed by the court. The amendments codify existing practice in many courts, and the Court of Appeals believes they promote proper consideration of appeal issues and eliminate unnecessary delays to the appellate process. Note that the proposal published for comment also contained a similar revision of MCR 6.425. That concept is included with other substantive changes as part of ADM File No. 2014-36 at MCR 6.425(G)(1)(f) and will be incorporated in the order that issues in that file.

Legislation

Statute Cite: MCL 333.27102

P.A. Number: 2018 PA 5

Effective Date: January 28, 2018

What it Does: Makes numerous revisions to the Medical Marihuana Facilities Licensing Act, many of which are technical in nature. Significant amendments include the following:

- Creating protection for certified public accountants (CPAs) and financial institutions from certain civil, criminal, and administrative sanctions when, respectively, they review a financial statement for or provide a financial service to a licensee.
- Prohibiting the Medical Marihuana Licensing Board from issuing a facility license unless the

municipality in which an applicant intends to operate has adopted an ordinance allowing that type of facility.

- Revising the information a municipality must provide if it adopts ordinances that allow facilities to operate in its jurisdiction, and requiring that the information be provided to the Department of Licensing and Regulatory Affairs (LARA) and not to the Board.
- Allowing a grower to sell marihuana to another grower, and allowing a processor to sell and transfer marihuana or marihuana-infused products to another processor.
- Allowing, with some exceptions, information provided to LARA by a municipality to be subject to FOIA.
- Allowing certain transfers of marihuana between licensees to be done without a secure transporter if specified conditions are met.

Statute Cite: MCL 750.1 – 750.568

P.A. Number: 2018 PA 29 and 2018 PA 30

Effective Date: May 22, 2018

What it Does: Amends the Michigan Penal Code by adding Section 204b, to apply the federal standards for explosives, and Section 204c, to prohibit a person from handling explosive materials while under the influence of an alcoholic liquor or controlled substance. A person that violates this section is guilty of a misdemeanor punishable by imprisonment for not more than two years or a fine of not more than \$10,000.00, or both. PA 30 amends the sentencing guidelines in the Code of Criminal Procedure to include a violation of the newly created 204b. The act adds a Class "G" public safety sentencing guideline for the crime of importing, manufacturing, distributing, or storing explosives in violation of certain federal laws and regulations, which would include a maximum imprisonment sentence of two years.

Statute Cite: MCL 257.732a

P.A. Number: 2018 PA 43

Effective Date: March 1, 2018

What it Does: Beginning September 30, 2018, a Driver's Responsibility Fee (DRF) that had been assessed could not be collected; an individual

would not be liable for an outstanding DRF or responsible for completing community service; and an individual whose driving privileges were suspended for unpaid DRFs could reinstate his or her operator's license.

Statute Cite: MCL 257.1-257.923

P.A. Number: 2018 PA 44

Effective Date: March 1, 2018

What it Does: The Department of Treasury will work with MDOS, DHHS, the Unemployment Insurance Agency, Michigan Works, and MDOC to educate individuals whose DRF obligations have been affected by the changes made to the law. (Appropriate \$160,000 to implement).

Statute Cite: MCL 257.732a

P.A. Number: 2018 PA 45

Effective Date: March 1, 2018

What it Does: If an individual entered into an installment payment plan for DRFs on or before February 1, 2018, then the balance could not be collected and the individual would not be responsible for any outstanding DRFs. If driving privileges had been suspended, the individual could reinstate his or her operator's license.

Statute Cite: MCL 257.304

P.A. Number: 2018 PA 48

Effective Date: March 1, 2018

What it Does: Currently, the Vehicle Code requires SOS to issue a "restricted" license to a person whose license was suspended because of a DUI (alcohol or drugs) if the person was admitted into a DWI/sobriety court. All DRFs are held in abeyance during participation in the program, but then must be assessed and paid under the payment schedule described in the code. The bill would waive the DRFs for a person who successfully completed a DWI/sobriety court program on or after October 1, 2018.

Statute Cite: MCL 257.255

P.A. Number: 2018 PA 64

Effective Date: June 12, 2018

What it Does: Amends the Michigan Vehicle Code to require a person to attach a valid registration plate to his or her vehicle not later than 30 days

after the vehicle was registered or the vehicle's registration was renewed. Violation of this provision is a civil infraction with a civil fine of up to \$100. Misdemeanor penalties apply if the vehicle is a commercial vehicle.

Statute Cite: MCL 760.1 – 777.69

P.A. Number: 2018 PA 65

Effective Date: June 12, 2018

What it Does: Amends the Code of Criminal Procedure by doing the following:

- Requires an individual's arrest record to be removed from the Internet Criminal History Access Tool (ICHAT) if the charge or charges were dismissed before trial.
- Requires an arrest record, biometric data, fingerprints, and DNA samples to be expunged or destroyed, and an entry of a charge to be removed from the Law Enforcement Information Network (LEIN), if the prosecutor agreed, or if the prosecutor or judge did not object within 60 days after an order of dismissal was issued.
- Requires the Michigan Department of State Police (MSP) to comply with the requirements after receiving an order from the district or circuit court. Tie barred with 2018 PA 66 and 2018 PA 67.

Statute Cite: MCL 28.214

P.A. Number: 2018 PA 66

Effective Date: June 12, 2018

What it Does: Amends the CJIS Policy Council Act to require the Criminal Justice Information Systems Policy Council to establish policy and promulgate rules concerning expunction or destruction of information and data in criminal justice information systems, as required by 2018 PA 65.

Statute Cite: MCL 28.243

P.A. Number: 2018 PA 67

Effective Date: June 12, 2018

What it Does: Amends the fingerprinting law to reflect the following:

- Requires an individual's arrest record to be removed from ICHAT if the charge or charges were dismissed before trial.

- Requires an arrest record, biometric data, and fingerprints to be expunged, and an entry of a charge to be removed from LEIN, if the prosecutor agreed, or the prosecutor or judge did not object within 60 days after an order of dismissal was issued.
- Requires the MSP to comply with the bill's requirements after receiving an order from the district or circuit court.
- Specifies that an existing exception to requirements for the destruction of biometric data and an arrest card for certain individuals would apply except as provided under this law.

Case Law

People v Bennett, ___ Mich ___, ___ (2018): The Michigan Supreme Court vacated “that part of the [unpublished] Court of Appeals judgment addressing whether the erroneous admission of . . . music videos and gang-affiliation evidence was harmless,” and remanded to the Court of Appeals to “determin[e] whether the defendant . . . carried his burden of showing prejudice” under the applicable standards of review for preserved and unpreserved evidentiary issues; additionally, the Supreme Court directed the Court of Appeals to “address whether the erroneously admitted evidence, in conjunction with the prosecutor’s arguments in closing that this evidence showed the ‘mentality’ of the defendant and his friends on the night of the offense and the ‘lifestyle’ they lived, constituted impermissible character evidence used to prove that the defendant ‘acted in conformity with the character traits commonly associated with gang members on a particular occasion, in violation of MRE 404(a). “[T]he Court of Appeals failed to adequately explain why the erroneous admission of the music videos was harmless under [the outcome-determinative standard of review for preserved error], especially in light of the prosecutor’s concession that the record d[id] not reflect . . . a gang-motivated killing, the defendant’s admission that he was the shooter, and, in particular, the defendant’s asserted affirmative defenses of self-defense and defense of others, which the prosecution bore the burden of

disproving beyond a reasonable doubt.” *Id.* at ___ (noting that these same considerations applied to the unpreserved error in the admission of the gang-affiliation testimony).

District of Columbia v Wesby, 583 US ___, ___ (2018): This case relates to the fourth amendment and probable cause for warrantless arrest of partygoers in a vacant house. District of Columbia police officers responded to a complaint about loud music and illegal activities in a vacant house. They found a make-shift strip club in the living room, and a naked woman and several men in an upstairs bedroom. Many partygoers scattered when they saw the uniformed officers, and some hid. The officers questioned everyone and got inconsistent stories. Two women identified “Peaches” as the house’s tenant and said that she had given the partygoers permission to have the party. But Peaches was not there. When the officers spoke by phone to Peaches, she was nervous, agitated, and evasive. At first, she claimed that she was renting the house and had given the partygoers permission to have the party, but she eventually admitted that she did not have permission to use the house. The owner confirmed that he had not given anyone permission to be there. The officers then arrested the partygoers for unlawful entry. The Supreme Court ruled the officers had probable cause to arrest partygoers in a vacant house for unlawful entry; “[c]onsidering the totality of the circumstances, the officers made an ‘entirely reasonable inference’ that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party” where multiple neighbors informed the officers that the nearly barren house had been vacant for several months, “[t]he living room had been converted into a makeshift strip club,” and “the partygoers gave vague and implausible responses” to the officers’ questions about who had given them permission to enter (holding that the District and the officers were entitled to summary judgment in the partygoers’ action for false arrest under the Fourth Amendment, 42 USC 1983, and District law, and noting that “[t]here was no controlling case holding that a bona fide belief of a right to enter defeats probable cause, that officers cannot infer a

suspect's guilty state of mind based on his conduct alone, or that officers must accept a suspect's innocent explanation at face value") (citation omitted).

People v Bruner, ___ Mich ___, ___ (2018). Carl Bruner II was convicted following a jury trial of first degree premeditated murder, assault with intent to commit murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. This was in connection with the shooting of two security guards outside a Detroit nightclub in June 2012. No eyewitnesses saw the shooter. Bruner was tried jointly before a single jury with codefendant Michael Lawson. The prosecution argued that Bruner was the shooter and that he was aided or abetted by Lawson. Bruner denied being present at the scene and was not the shooter. A witness that testified in the preliminary examination against Lawson was deemed unavailable at trial but his testimony against Lawson was allowed to be read in court to the single jury and instead of saying "Bruner" where the witness indicated that name in his testimony, they said "blank." The single jury was given the "limited instruction" to not consider the redacted testimony against Bruner and only against Lawson. The defendant appealed and the Court of Appeals affirmed both defendants' convictions in an unpublished per curiam opinion, issued October 11, 2016 (docket nos. 325730 and 326542), holding that Bruner's right to confront the witnesses against him under the Sixth Amendment of the United States Constitution was not implicated by the testimony of the witness. The defendant applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 500 Mich 1031 (2017). In a unanimous opinion by Justice McCormack, the Supreme Court, in lieu of granting leave to appeal, held: "[T]he admission at a joint trial with a single jury of an unavailable witness's prior testimony about a codefendant's confession violated the defendant's constitutional right to confrontation, notwithstanding the

redaction of the defendant's name and the reading of a limiting instruction to the jury" because "[t]he defendant had no opportunity to cross-examine the witness, and because the substance of the witness's testimony—the codefendant's confession that implicated the defendant—was so powerfully incriminating, the limiting instruction and redaction were ineffective to cure the Confrontation Clause violation." The judgment of the Court of Appeals was reversed, and the case was remanded for that Court to consider whether the prosecution established that error was harmless beyond a reasonable doubt.

People v Pennington, __ Mich App __, __ (2018). The defendant's convictions arose from the December 24, 2013 shooting death of the victim in the driveway of Great Lakes Power & Equipment. It is undisputed that the defendant shot the victim during a verbal altercation, causing his death. Two witnesses, each with varying stories testified. Their versions varied from the statement that the defendant provided which was that he shot the victim in self-defense and that the victim was "coming at me with a gun." A surveillance camera on the scene captured much of the encounter and the defendant's statement was inconsistent with the events on video. In the video the victim had his hands near his sides and nothing was in his hand. The defendant argued that at most, he was guilty of voluntary manslaughter. The trial court rejected his self-defense theory and found him guilty of second-degree murder and the firearm charges. The defendant appealed claiming that the court improperly reviewed testimony from his preliminary examination transcript. He also claimed that his convictions must be reversed because he was denied the effective assistance of counsel. The defendant also argued that the trial court erred by failing to consider the lesser included offense of manslaughter and convicting him instead of second-degree murder. He requested that his sentence be vacated and that his case be remanded to a different judge. He asserts that the trial court sentenced him pursuant to a blanket policy of imposing a sentence at the top of the guidelines on defendants who exercise their

right to a trial rather than pleading guilty. The defendant did go to trial and did receive the highest sentence that can be imposed within the guidelines. The COA disagreed with all of the claims except for the last, agreeing that “[A] policy of sentencing all defendants who go to trial to the top of the guidelines is fundamentally inconsistent with the principle of individualized sentences” and “is a violation of both due process and [the] law governing sentencing.” They affirm the defendant’s convictions, vacate his sentences, and remand for resentencing before a different judge.

People v Cook, ___ Mich App ___, ___ (2018). The defendant was charged with operating a vehicle with the presence of a controlled substance third offense and misdemeanor possession of marijuana. The defendant filed a motion requesting an evidentiary hearing so that she could prove her Section 8 defense to both charges. The court denied the defendant’s motion. The defendant appealed. This matter is before the COA on remand from the Supreme Court, which directed the COA to consider, as on leave granted, “the following issues: (1) whether the defendant’s plea was conditional and reserved her right to appeal, (2) whether the defendant waived appeal of the trial court’s decision denying her an evidentiary hearing under Section 8 of the Michigan Medical Marihuana Act [(MMA)], MCL 333.26421 et seq., if her guilty plea was not conditional, and (3) if the defendant has preserved her right to appeal, whether the trial court erred in denying defendant a Section 8 evidentiary hearing.” We affirm defendant’s conviction and conclude that (1) defendant’s plea was not conditional, a fact that defendant admits, (2) defendant waived the right to appeal the trial court’s denial of an evidentiary hearing under Section 8 of the statute, MCL 333.26428, and (3) we are precluded from resolving the third issue on remand because, as noted under (2), the issue was waived. “[B]y tendering an unconditional guilty plea, defendant waived the Section 8 [affirmative] defense[, MCL 333.26428,] and cannot raise the denial of the defense on appeal” because “[i]t is an affirmative defense to charges that the prosecution

has the right to bring against a defendant” and “defendants raising a Section 8 defense must ultimately be able to prove their factual entitlement to that defense *at trial*”; “[t]hus, a Section 8 defense does not implicate the right of a prosecutor to bring a defendant to trial in the first instance, as the defense specifically contemplates the matter potentially proceeding to a trial, where the defense will be weighed by the jury,” and “[a] guilty plea waives all the rights and challenges associated with that trial.”

People v Anderson, ___ Mich ___, ___ (2018). The defendant was charged with assault with intent to commit murder, carrying a concealed weapon, felonious assault, and carrying a firearm during the commission of a felony following an incident that allegedly occurred between her and the victim (father of her child). The only evidence presented at the preliminary examination was the victim’s testimony. The judge found the victim’s testimony not credible and therefore dismissed the complaint. The prosecutor appealed to the circuit court where the judge treated the claim of appeal as a motion and denied it without further explanation. The COA affirmed in a split decision. *People v Anderson*, unpublished per curiam opinion of the Court of Appeals, issued Nov 29, 2016 (Docket No. 327905). The prosecutor sought leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 500 Mich 1011 (2017). In a unanimous opinion the Court, in lieu of granting leave to appeal, held that “[A] magistrate’s duty at a preliminary examination is to consider all the evidence presented, including the credibility of both the prosecution and defense witnesses’ testimony, and to determine on that basis whether there is probable cause to believe that the defendant has committed a crime, i.e., whether the evidence presented is sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief in the accused’s guilt”; “[i]f a witness’s lack of credibility, when considered together with the other evidence presented during the examination,

is so lacking that a person of ordinary prudence and caution [would not] conscientiously entertain a reasonable belief of the accused's guilt, a magistrate may not bind over the defendant for trial." (quotation marks and citations omitted; third alteration in original) (noting that "the adversarial nature of a preliminary examination would be largely meaningless if a magistrate were required to accept as true any testimony that is not patently incredible or that does not defy physical reality").

People v Williams, ___ Mich App ___, ___ (2018). In 2016, the Michigan State Police, using a decoy, conducted a sting operation at the Greektown Casino in Detroit. The decoy placed a \$100 ticket on the deck of a slot machine and sat about a foot away from the machine with her back to the ticket while she played on her cell phone. At some point, the defendant approached the decoy and the ticket, passed by twice while looking at the decoy and the ticket, walked behind the decoy, reached down, took the ticket with her right hand and immediately walked away. The police arrested the defendant after she walked about five feet with the ticket in her hand. She was charged with Larceny from Person and Larceny in a Building. She was sentenced to two years' probation for each violation. The defendant appealed her convictions indicating that there was insufficient evidence to convict her of larceny from the person because the prosecution failed to prove, beyond a reasonable doubt, that she took property from the person of another. The COA disagreed. The defendant also argued that her conviction should be vacated because the prosecution failed to prove that she intended to permanently deprive the decoy of the ticket. The COA disagreed. However, the COA directed the parties to brief an additional issue "whether under the circumstances of this case, the convictions for larceny from a person and larceny in a building are inconsistent such that one of the two convictions must be vacated." After a review of the briefs and record, the COA concluded that "a larceny may be 'from a person' or 'in a building,' but not both at the same time"; "[t]he fact that the victim of a larceny from a person is in a building at the time of the larceny, is not sufficient to convict of larceny in a building . . . [t]hus, although a defendant may be charged with these offenses in the alternative as

to the same larceny, he may not be convicted of both (affirming the defendant's conviction of larceny from a person, MCL 750.357, and vacating the defendant's conviction of larceny in a building, MCL 750.360, because "the two convictions require findings that are mutually exclusive, a circumstance resulting in a situation where a guilty verdict on one count logically excludes a finding of guilt on the other") (quotation marks and citation omitted).

From MJI

From materials supplied by Peter Stathakis, Program Manager, Michigan Judicial Institute

Held New Magistrate Seminar: March 13-15, 2018 -31 New Magistrates completed the certification. Thank you to Magistrates who served as instructors: Robert Clark, Ted Johnson, Ashley Justice, Kevin McKay, Jim Pahl and Millicent Sherman. MADCM once again sponsored the "New Magistrate Dinner".

The **Magistrate Specialty Seminar** will be July 26, 2018 at the Hall of Justice in Lansing. Further details coming later.

MJI is always in need of experienced magistrates to act as instructors for the one-day visitation, especially in mid and northwest part of the state. During this visitation, the experienced magistrate meets with the new magistrate to review the process for conducting civil infraction hearings in traffic matters and demonstrates conduct of hearings. It is a commitment of zero to several days per year. If you are an experienced magistrate interested in acting as a magistrate instructor, please contact Peter Stathakis.

Manual for District Court Magistrates (html version:

https://mjieducation.mi.gov/training/DCMMResponsiveHTML5/#t=DCMM%2FCover_and_Acknowledgments%2FDistrict_Court_Magistrate_Manual_Revised_Edition-s834a.htm) has been updated through March 21, 2018

New Magistrate Traffic Adjudication Manual

Also updated thru March 21, 2018.

Website <https://mjieducation.mi.gov/> MJI website is regularly updated with upcoming events, items of interest, videos and publications updates.

Publications

IMPACT email IMPACT is a bi-weekly email sent to subscribers. It contains summaries of recent court and legislative activity (as it becomes effective, not necessarily when it is passed or enacted) impacting trial court procedure and is separated into six global topics: Administrative, Civil, Criminal, Family, Probate, and Problem-Solving Courts

“What’s New at MJI?” A once-a-month email sent to subscribers. IMPACT provides an update on upcoming MJI events, as well as new or updated publications and resources.

Update your [email preferences](#). Choose the types of emails you receive from SCAO or MJI, or to unsubscribe from ALL email communication.

Publications Updates Started a new updating process in October, 2017. Rather than having 3 months dedicated to updates, staff is adding updates to the books and QRMs throughout each month as the new cases, statutes, and court rules come out. In all months except January, we will post the updated documents online. We will still be sending CDs three times per year (Feb, Jun, and Oct). We believe this new approach better serves our customers by providing online users with more current information (posted almost monthly) and by providing our faithful CD orderers with CDs in a more timely (i.e. more current) fashion.

If you have any feedback or comments regarding the benchbooks please contact Sarah Roth, MJI Publications Manager at roths@courts.mi.gov

MJI Benchbooks:

Quick Reference Materials Under the

Publications tab as well, includes a section on traffic/recreational vehicles. QRMs of interest to Magistrates. MJI is pleased to offer quick reference materials such as checklists, tables, and flowcharts on a variety of topics in the following areas: [civil](#), [contempt](#), [criminal](#), [family](#), [probate](#), and [traffic/recreational vehicles](#).

Input

I want to hear from you. If you are interested in becoming a Magistrate Instructor or have ideas for MJI magistrate training, please contact me at stathakisp@courts.mi.gov or 517-373-7607

From OHSP

The 23rd Annual Traffic Safety Summit was held March 20-22, 2018 at the Kellogg Hotel and Conference Center, East Lansing, Michigan. Another excellent educational opportunity with several plenary speakers and workshops. While not designed with magistrate's in mind, this is a very worthwhile educational opportunity.

Michigan Traffic Safety campaigns

The goal is to increase seat belt use and reduce impaired driving on Michigan roads. This is done through statewide enforcement and outreach.

Activity coming up:

- April is Distracted Driving Awareness month: April 9-22 will be an enforcement mobilization
- May 21-June 3 will be a Click It or Ticket mobilization
- August 17 – September 3 will be a Drive Sober or Get Pulled Over crackdown

Michigan Traffic Safety Materials Catalog - all items are free unless otherwise noted. You can view the catalog at: https://www.michigan.gov/documents/msp/2014MaterialsCatalog_460159_7.pdf

Congratulations!

To board member Yvonna C. Abraham, on the birth of a daughter.

To long time board member Dena Altheide on her retirement from the 67th District Court

Your Contribution Here

Please send me your interesting/humorous traffic letters, births, weddings, retirement notices, photos of new magistrates, the list of possibilities is endless. This is your newsletter; help me make it a great one. Submit your materials to jbpahl0824@gmail.com



Michigan Department of State Frequently Called Telephone/Fax Numbers

CDL Help Desk ----- 517-322-5555

Driver Records Activity Unit

Abstracts ----- 517-322-1598

Email ----- sosabpr@michigan.gov

Fax ----- 517-322-6570

Actions ----- 517-322-6406

Email ----- sosap@michigan.gov

Fax (Death Certificate Notification) ----- 517-322-1072

Combines/Alias ----- 517-322-6692

Email ----- combines@michigan.gov

Fax ----- 517-322-1072

FAC/FCJ Fee Transmittal (Dept of Treasury) ----- 517-373-8730

Financial Responsibility (Sobriety Check Inquires) ----- 517-322-6406

General Information ----- 888-767-6424

Implied Consent ----- 517-322-1182

Inventory Services Section ----- 517-335-4793

Fax ----- 517-373-1475

(To order forms, pamphlets, etc.)

Out-of-State Resident Services ----- 517-322-1473

Record Look-up Unit ----- 517-322-1624

Driver Responsibility Fee

(Department of State)888-767-6424

(Department of Treasury*)800-950-6227

* Telephone lines for Department of Treasury are open from 8 a.m. – 9 p.m. Monday thru Thursday, 8 a.m. – 7 p.m. on Friday and from 8 a.m. – 12 noon on Saturday.

SOS LEIN Hours of Operation ----- 8 a.m. – 5 p.m. Monday thru Friday

(Covered Holidays from 9 a.m. – 5 p.m. are Martin Luther King Jr Day, President's Day, Day after Thanksgiving, Christmas Eve, and New Years Eve)