Violence Against Women Newsletter

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The System's Response When Victims Use Force: One County's Solution

by Doug Miles, Chief Deputy District Attorney, Colorado Springs, Colorado

As a prosecutor specializing in domestic violence cases for the past twenty years, I have witnessed many changes in the "system" response to these cases. In many ways, my own education and increased understanding of the complexities of intimate partner violence parallels the evolution of the criminal justice system's response. From the late 1980s, when the response was no response at all, through the adoption of mandatory arrest and treatment, I have continued to search for effective ways to address this insidious crime.

Oddly enough, I now find myself constrained by the very forces that previously informed me. The "one-size-fits-all" mandates contained in state statutes written in response to historical inaction, while effective in forcing the criminal justice system to respond, are also effecting unjust and draconian results on a significant number of individuals. Here is an example of the dilemma I (and I suspect many other prosecutors) face:

Rebecca has been in an intimate relationship with Jack for four years. During that time Jack has become increasingly abusive, verbally and physically. Rebecca has never called the police, but her neighbors have called and the police responded to investigate twice. On one occasion no charges were filed as the police found no probable cause to arrest. On the second call Jack was charged with misdemeanor Domestic Violence Assault. Jack received a deferred sentence (guilty plea with judgment of conviction deferred if he completed thirty-six weeks of domestic violence treatment). Jack successfully completed treatment and the charges were dismissed. Yet, Jack continued to be abusive. One night after Jack had pushed and slapped Rebecca he left to go to the local bar. Frustrated and angry, Rebecca put her foot through one of Jack's prized stereo speakers. When Jack returned he was furious. He called the police. Rebecca admitted what she had done and she was arrested for misdemeanor Domestic Violence Criminal Mischief. Jack was also arrested, but his case was dismissed because Rebecca did not appear for trial and there was no independent evidence upon which the prosecutor could proceed with an evidence based prosecution.

*Justice is best served when **appropriate** consequences are imposed*

There are several challenges I face in Rebecca's case because Rebecca's conduct fits within the broad definition of domestic violence in my state:

"Domestic violence" means an act or threatened act of violence upon a person with whom the actor is or has been

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Violence Against Women Project
PAAM
116 W. Ottawa, Suite 200
Lansing, MI 48913
517-334-6060 ext 829/806
tannerh2@michigan.gov
doerrj@michigan.gov

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involved in an intimate relationship. "Domestic violence" also includes any other crime against a person or against property … when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship. "Intimate relationship" means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time.

Once under this definition, certain statutorily mandated consequences begin to flow. Police officers must arrest Rebecca because the statute mandates arrest upon probable cause. She will spend the night in jail until she can appear before a judge to post bond, and until she is advised of, and acknowledges the existence of a mandatory protection order. Further, the prosecutor may not, by statute, plead the case to a non-domestic violence charge when a prima facie case against her exists. Upon conviction (or deferred sentence) Rebecca will be labeled a domestic violence offender and ordered to complete a minimum of thirty-six weeks of domestic violence treatment (also mandated by state treatment standards) in a female offender group.

Once Rebecca's case reaches my desk I am left with two options: dismiss the case or attempt to negotiate a plea agreement which includes the mandatory conditions mentioned above. Both, in my view, are unacceptable. While I am sympathetic to Rebecca's situation, I cannot condone her decision to destroy Jack's property. Her prior abuse makes her conduct understandable, but it does not make her immune from the criminal law. My fear is that dismissal will send the wrong message and escalate her retaliatory conduct in the future. Her conduct constitutes a crime, but she is not a batterer. Labeling her a domestic violence "offender" (the term used in my state) will have serious adverse consequences for her. Her ability to successfully use the criminal justice system in the future will be impacted. In any future case against Jack, the fact that she is now a "domestic violence offender" will be used against her by the defense. Other collateral consequences could include barriers to her future employment and adverse effects on child custody determinations. The cost and inconvenience of completing thirty-six weeks of domestic violence treatment will likely deter her from ever calling the police again. She may, as a result, be in greater danger than she was before "the system" got involved.

The rigid response to domestic violence mandated by many state statutes simply does not account for the complex dynamics present in these cases. Yet, there is a valid concern that abandoning such mandates might trigger a return to uninformed inaction. Just and appropriate consequences require, in my view, a more detailed and thorough evaluation of the context within which the violence occurs.

Contextual Analysis

I was first introduced to the analytical concept of contextual analysis three years ago at a presentation by Ellen Pence of Praxis International, Inc. See Re-Examining 'Battering', Are All Acts of Violence Against Intimate Partners the Same? , Pence and Dasgupta, 2006. http://data.ipharos.com/praxis/documents/FINAL_Article_Reexaming_Battering_082006.pdf. The value of contextual analysis is that it goes beyond the single charged incident and examines the relationship history. By thoroughly analyzing the history and dynamics of the relationship, the intent, purpose and effect of the violent act can be better understood. The deeper understanding of the nature of the violence that comes from the analysis allows the criminal justice system to more effectively respond.

Pence identifies five categories of intimate partner violence: Battering,

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Did you know?

The VAW Project offers technical assistance to prosecutors in any domestic violence or sexual assault case. The VAW Project can help with evidentiary, procedural or statutory issues at any point in your case.

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Resistive/Reactive Violence, Situational Violence, Pathological Violence, and Anti-Social Violence. A brief description of each category follows, but I urge the reader to study Ms. Pence's and Ms. Dasgupta's article for a more complete understanding.

Battering

Battering is the use of violence (physical, emotional, psychological, etc.) to control and dominate an intimate partner. The pattern of violence (though not necessarily a "cycle") is intended to maintain control over one's partner. It is this type of violence that most state domestic violence legislation was drafted to address.

Resistive/Reactive Violence

This is violence used by a victim in response to violence. The intent is to stop or escape the violence, or at least establish some sense of parity in the relationship. Yet, under many state laws this conduct falls within the statutory definition of domestic violence. This violence can be legally justified conduct (such as self-defense) or illegal retaliation which will subject the actor to mandatory arrest.

Situational Violence

This type of violence is used in an intimate relationship in an attempt to control a situation or in reaction to a unique situation. Situational violence lacks the pattern of intimidation intended to establish control over the victim. Batterers can often be misdiagnosed as situational, and will actively seek to portray their violence as situational.

Pathological Violence

Pathological violence is the result of mental illness, trauma, severe drug or alcohol abuse or other mental or physical impairments. The violence is a result of the pathology and the intent of the violence, if one is formed at all, is difficult to determine.

Anti-Social Violence

This form of violence is not restricted to intimate partners. Anti-social violence can be directed toward anyone in any social setting at any time. There is little or no remorse for the conduct or empathy for the victims.

Pre-Pilot Procedure

The Fourth Judicial District Attorney's Office currently prosecutes approximately three thousand misdemeanor domestic violence offenses every year. All domestic violence misdemeanors in the jurisdiction are handled by the county courts.

Historically, deputy district attorneys would base their plea offer on a review of the probable cause affidavit, offense report, prior criminal history and victim input. The offer included a stipulated term of probation or deferred sentence – usually two years. As a condition of the sentence the defendant would be required to complete thirty-six weeks of domestic violence treatment with a state-approved domestic violence treatment provider. Defendants were typically required to waive their right to seal the criminal justice records in deferred sentence cases even though the case was dismissed upon successful completion of all conditions.

The Pilot Project

The Domestic Violence Pilot Project was developed to incorporate contextual analysis into the criminal justice system's response to misdemeanor domestic violence crimes. The challenge was to practically apply the concepts developed by Pence and Dasgupta to the existing statutory scheme in an efficient and affordable manner while protecting the defendant's constitutional rights and maintaining offender accountability and victim safety. The project was imple-

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This project was sponsored by Grant #00-wf-NX-0026 awarded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. The assistant Attorney General, Office of Justice Programs, coordinates the activities of the following program offices and bureaus: Bureau of Justice Assistance, Bureau of Statistics, National Institute of Justice, Office of Juvenile Justice and Deliquency Prevention, and the Office for Victims of Crime. Points of view in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice or the Michigan Domestic Violence and Treatment Board.

Thank You....

MICHIGAN DOMESTIC VIOLENCE PREVENTION & TREATMENT BOARD

The VAW Project is a collaboration of the Michigan Domestic Violence Prevention Treatment Board and the Prosecuting Attorneys Association of Michigan. PAAM wishes to thank the MDVPTB for their financial support of this project.

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mented in one of the eight county court divisions with the cooperation of the county court judge.

Under the Pilot Project, plea offers differ from the routine method of handling misdemeanor domestic violence cases. Rather than a stipulated term of probation or deferred sentence, Pilot Project offers are stated in terms of "caps" (i.e. cap of two years probation or deferred sentence). This offer is based on a legal analysis of the defendant's past and present criminal conduct. Offers for repeat offenders include jail time. This is what we, as prosecutors are good at. We can analyze evidence and determine if the elements of a crime can be proven. The more difficult task is to then determine what consequences are appropriate, especially given the complex dynamics present in domestic violence cases. Thus, a "cap" offer allows flexibility in sentencing once additional information is gathered.

Under the Pilot Project, the necessary additional information is gathered through a pre-sentence evaluation. Once the plea is entered, the defendant is ordered to schedule and complete the pre-sentence evaluation. Sentencing is set out approximately eight weeks to allow the defendant time to accomplish this. The cost of the evaluation ($200 - $400 based upon the defendant's ability to pay) is borne by the defendant.

The evaluator, a state-approved domestic violence treatment provider and mental health professional (L.C.S.W., L.P.C., etc.) then completes an evaluation of the defendant using a number of evaluative tools. These tools include several risk assessment inventories, an MCMI-III, screenings for substance abuse, trauma, cognitive functioning and learning style. These tools are administered during an extensive interview with the defendant. Criminal histories for both the victim and the defendant are reviewed. One or more interviews with the victim are conducted. Additional information is gathered from therapists, doctors, friends and family members when indicated. All of this information is used to determine the broader context and dynamics present in the relationship. Finally, the evaluator completes a written report outlining the information gathered and, based upon that information, the recommended treatment.

A review of treatment recommendations reveals a wide variety of interventions. Approximately 30% of the cases include recommendations that include but exceed the basic thirty-six weeks of treatment (usually repeat batterers or anti-social). In addition to the thirty-six weeks, recommendations include individual therapy, drug and/or alcohol treatment, parenting classes, adult literacy classes and many others. In about 35% of the cases the recommendation is for the thirty-six weeks of domestic violence treatment recognized by state standards (batterers). However, in roughly 20% - 25% of the cases the evaluator recommends some form of alternative treatment (resistive/reactive, situational or pathological). Common Treatments include trauma counseling, individual therapy only, credit counseling, conflict resolution, alcoholics anonymous, narcotics anonymous, gamblers anonymous, sexual addiction treatment, and on and on. Most interestingly, of the group receiving alternate treatment recommendations, *almost 80% are female defendants!*

Prior to the defendant's sentencing hearing a copy of the evaluation is faxed to the judge and the prosecutor. At the sentencing hearing the prosecutor makes sentencing recommendations to the court based upon the evaluation. Further, the prosecutor recommends a length of probation or deferred sentence necessary for the defendant to complete the treatment recommendations. Sentences range from three months to three years. In fact, in a few cases the prosecutor recommended dismissal of the charges based on additional information provided by the evaluator. Additionally,

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in deferred sentence cases where the evaluator finds there is a low risk of future violence (resistive/reactive or situational) the prosecutor agrees to allow the defendant to petition to seal his/her criminal justice records upon successful completion of the recommended treatment. Sealing allows resistive/reactive defendants, who are often victims of past domestic violence, to avoid being labeled as domestic violence offenders and to seek the protection of the criminal justice system in the future.

All domestic violence cases are monitored for compliance. Accountability after the sentence is an essential component of the program. Non-compliant offenders are ordered back into court and their hearings are set quickly on an expedited docket.

Lessons Learned

As the Pilot Project nears its second year, we continue to learn from our experience. A few observations and lessons learned are listed below.

All participants (judges, prosecutors, evaluators, probation officers, etc.) must be educated, fully familiar with and supportive of the concepts of contextual analysis and the procedures of the program.

For victim safety reasons, victim quotes are not included in the written evaluation. Victim concerns can be summarized for consideration by the prosecutor and the judge.

To avoid financial conflict of interest claims, evaluators do not treat defendants whom they have evaluated. Defendant requests to do treatment with the evaluator must be reviewed and approved by a probation officer.

Completion of the pre-sentence evaluation is a condition of bond. Failure to complete the evaluation without a valid excuse can result in revocation and an increase of the bond and possible incarceration.

Failure to complete the evaluation will result in an "open sentence". The judge will be free to impose the full range of statutory penalties.

To increase compliance, the judge must set specific timelines for completion of the recommended treatment. Requiring the defendant to appear in court for review of compliance also improves the rate of successful completion.

Batterers, even those with prior records will accept the plea offer. Their willingness to plead is motivated by their belief in their ability to manipulate the prosecutor, the judge and the evaluator. Everyone involved has to be aware of the batterer's attempts to manipulate them.

The most difficult case to evaluate is situational violence. Batterers will often attempt to characterize their violence as situational.

As other judges (and defense attorneys) begin to see the value of contextual analysis, the process will "creep" into other courts. Be prepared to add resources as necessary.

Who is Doug Miles?

Doug is the Chief Deputy District Attorney in the Fourth Judicial District of Colorado, in Colorado Springs. He graduated from the University of Colorado School of Law in 1984. He served as a judicial clerk for the Hon. Matt M. Railey, Fourth Judicial District Court Judge, for 18 months before joining the District Attorneys Office in 1986. He developed the Domestic Violence Diversion Program in the Fourth Judicial District Attorney's Office and spearheaded the development of the of the Domestic Violence Fast Track Program in Colorado Springs. He serves on numerous boards including the Greenbook Project's Oversight Committee and Judicial Integration Committee. Greenbook is a federally-funded Grant Project examining the co-occurrence of domestic violence and child maltreatment. He is a frequent lecturer across the country on domestic violence.

If you are in a state where a manda-

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tory length of treatment exists, you may experience resistance from the treatment industry.

A prosecutor's evaluation of a case is only as good as the available information. Always be willing to reassess the case in light of additional credible evidence.

A sliding scale and payment plan are essential to the success of the program.

Having evaluators present during sentencing to answer questions or refute the defendant's claims that they couldn't get a hold of the evaluator is invaluable.

Conclusion

The overriding goal of any prosecutor is to do what is in the interests of justice. Individuals are ultimately accountable for their own conduct and justice is best served when *appropriate* consequences flow from their conduct. Contextual analysis of the complex dynamics of what has been broadly defined as domestic violence allows prosecutors and judges to tailor the consequences to each individual circumstance. The process is neither simple nor quick, but it affords an opportunity to hold offenders appropriately accountable, to provide safety for victims and respond to each individual in the most effective manner.

Motive And Opportunity To Develop Cross-Examination

There are ample opportunities for prosecutors to use MRE 804(b)(1) in domestic violence cases. It is not unusual for victims of domestic violence to be involved in several parts of the justice system, custody cases, PPOs, and so on, that sometimes yield prior testimony. What does it mean to have "an opportunity and similar motive to develop testimony" under MCR 804(b)(1)? The Court of Appeals gave some guidance on answering this question in *People v. Farquharson*, 274 Mich App 268 (2007), but with a different twist.

MRE 804(b)(1) provides that "former testimony" is not excluded by the hearsay rule if the declarant is unavailable and the testimony is "given as a witness at another hearing...if the party against whom the testimony is now offered...had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." The twist in the *Farquharson* case was that the defendant was the party offering the prior testimony.

The defendant was charged in a shooting at an after-hours club in Flint. Before the charges were issued, witness Mathis gave sworn testimony pursuant to an investigative subpoena, implicating someone other than defendant in the shooting. Mathis was listed as a witness by the prosecution, but died before the trial. The defendant moved to introduce the transcript of Mathis's investigative subpoena testimony, and the trial court granted that motion. The prosecutor appealed.

Although it is usually the prosecutor

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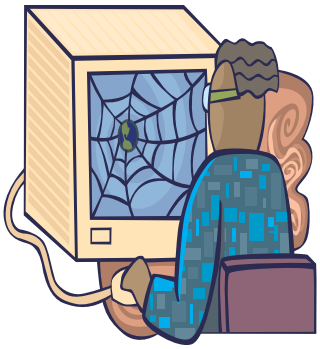
who relies on former testimony, the foundation elements for admission are the same when the defendant is the proponent of the evidence: the testimony must be given at "another hearing," and the party against whom the evidence is offered must have had a similar motive and opportunity to develop the testimony.

The prosecutor conceded that the investigative subpoena was "another hearing" under the Rule, akin to a grand jury proceeding. That left only the decision whether the prosecutor had an opportunity and similar motive to develop the testimony at the investigative subpoena proceeding.

Again relying on the investigative subpoena's similarity to grand jury proceedings, the Court of Appeals adopted this non-exhaustive list of factors to examine in determining whether a party had a similar motive to develop testimony: "(1) Whether the party opposing the testimony had an interest of 'substantially similar intensity to prove (or disprove) the same side of a substantially similar issue'; (2) the nature of the two proceedings-both what is at stake and the applicable burden of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and available but forgone opportunities)." Quoting *U.S. v. DiNapoli*, 8 F.3d 909 (2nd Cir. 1993). The Court of Appeals then remanded the case back to the trial court to determine whether the prosecutor had a similar motive to develop the testimony at the investigative subpoena.

Computer Growing Cobwebs?

An unsolicited testimonial from a Group member: "By the way, I LOVE THAT CRAWFORD FOLDER!!! great way for Crawford cases that affect DV to be quickly accessed and reviewed."



This APA is talking about the *Crawford* file that is part of the VAW Project Group site, hosted at Yahoo! The site is accessible only to members of the Group. When members visit the site, they can view files of interest to prosecutors, including a file of recent case law interpreting and applying the Confrontation Clause post-*Crawford*. In addition, there are files with recent training announcements and registration forms, past editions of the Newsletter, and even past presentations.

But the good news doesn't stop there. Membership means that you can contact over 160 prosecutors and other professionals across the state and the nation who share your concern and passion for victims of crime. When you become a member, you join that growing group of professionals, and with a few key strokes share your questions, concerns, and successful practices.

The Group's site and list serve is available only by invitation and protected for access only by members who've been invited and have properly signed up. To get an invitation, email Herb Tanner at tannerh2@michigan.gov. Shake off the cobwebs and do it today!

Implementing Federal Firearms Restrictions for Michigan DV Misdemeanants

By Gail L. Krieger, J.D., Staff Attorney, Michigan Domestic Violence Prevention & Treatment Board

A question facing Michigan law enforcement professionals is to what extent, if any, a domestic violence misdemeanant who has completed his probation and jail sentence is prohibited from possessing firearms under federal law, 18 USC 922(g)(9). In 2000, the U.S. District Court for the Western District of Michigan concluded that Michigan law excludes a domestic violence misdemeanant who has been released from jail or completed probation from federal prosecution for firearms possession under 18 USC 992(g)(9). *United States v. Wegrzyn* (*Wegrzyn I*), 106 F. Supp. 2d. 959, 960 (W.D. Mich. 2000), aff'd (*Wegrzyn II*), 305 F.3d 593 (CA 6, 2002). This case has been considered by many as conclusive authority for the proposition that a domestic violence misdemeanant who has completed his probation and jail sentence is not prohibited from possessing firearms under federal law.

However, the *Wegrzn* opinions may not be the final word on a domestic violence misdemeanant's right to possesses firearms. There is a strong argument that by amending MCL 28.425b in 2001 to impose concealed wapons restrictions on DV and other specified misdemeanants, the Michigan Legislature created a partial restriction on a domestic violence misdemeanant's right to transport a firearm which results in a complete prohibition on the right to possess firearms under 18 USC 922(g). The United States Supreme Court has held that even a partial state restriction on the state firearms rights results in a complete prohibition on the right to possess firearms under 18 USC 922(g). *United States v. Caron*, 524 US 308 (U.S. 1998). Applying *Caron*, three federal district courts in Michigan's Eastern District have concluded that Michigan's concealed weapons statute operates as a partial prohibition on felon's right to transport a firearm, and accordingly a felon is prohibited from possessing any firearms until such time as he is eligible to obtain a license to carry a concealed weapon. *United States v Brown*, 69 F Supp. 2d. 939 (E.D. Mich. 1999); *United States v. Carnes*, 113 F. Supp. 2d 1145 (E.D. Mich. 2000); *United States v. Kenny*, 375 F. Supp. 2d. 622 (E.D. Mich. 2005). Analogously, it can be argued that Michigan's concealed weapons statute is a partial state restriction on a domestic violence misdemeanant's right to carry firearms, which results in a complete prohibition on a misdemeanant's right to possess firearms under federal law until such time as he is eligible to obtain a license to carry a concealed weapon.

Federal Firearms Prohibitions and Wegrzyn

18 USC 922(g) prohibits a person convicted of certain predicate crimes, including certain felonies or misdemeanor crimes of domestic violence, from possessing, transporting, or shipping any firearm or ammunition. The statute provides in relevant part:

> "It shall be unlawful for any person . . .
> (1) who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year;
> * * * *
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence;
> to ship or transport in interstate or

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foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

18 USC 921 further defines a conviction for a "crime punishable by imprisonment for a term exceeding one year" and a conviction for a "misdemeanor crime of domestic violence." Both definitions contain nearly identical language stating that a conviction will not be considered a conviction for purposes of the chapter if the person has had his civil rights restored "unless" the restoration of civil rights "expressly provides that the person may not ship, transport, possess, or receive firearms." 18 USC 921(a)(33)(B)(ii); 18 USC(a)(20)(B).

MCL 750.224f provides that a convicted felon may not possess firearms in Michigan for a period of three years after completion of imprisonment, parole/probation, and payment of fines associated with the conviction, or for specified felonies, it provides that a convicted felon may not possess firearms for a period of five years after completion of imprisonment, parole/probation, payment of fines and the submission of an application to a county board.

18 USC 921(a)(33)(B)(ii) provides:

"A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] . . . if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

18 USC 921(a)(20)(B) provides:

"What constitutes a conviction [a crime punishable by imprisonment for a term exceeding one year] . . . shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

As summarized by one court, two separate inquires are called for in order to determine whether a defendant's conviction is a conviction for the purposes of 18 USC 922(g). First, the court must determine under the law of the prosecuting jurisdiction, whether a given conviction has been expunged, set aside, or whether the defendant was pardoned or had his civil rights restored at some point after serving his sentence. If so, the court must next determine whether, notwithstanding this pardon, expungement, or restoration of civil rights, the law of the prosecuting jurisdiction nevertheless continues to restrict the former felon's firearm privileges. *Brown*, *supra*, 935-939; See also *Carnes*, *supra*. The second prong of this two part inquiry has been termed the "unless" clause by the United States Supreme Court. *Caron*, *supra*,

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209.

In *Wegrzyn I* the Court examined the first prong of this inquiry and concluded that any domestic violence misdemeanant who has completed a jail sentence or probation has had his civil rights restored. Thus, the Court concluded that Michigan law excludes persons who commit misdemeanor crimes of domestic violence from prosecution under § 992(g)(9). *Id*., 960. *Wegrzyn I* did not need to reach the second prong of the inquiry—the so called "unless" clause. *Id.* Citing *Caron v. United States, supra,* the District Court recognized that even if civil rights have been restored, firearms possession is forbidden by § 992(g) if state law imposes any sort of restriction upon possession of firearms, such as the prohibition that MCL 750.224f places on felons. *Wegrzyn I, supra,* 962 n. 1. However, the Court declined to address the "unless" clause because "neither party has advised the Court of a comparable provision for misdemeanants convicted of crimes of domestic violence in Michigan." *Id.*

United States v. Caron*: A Partial State Restriction on a Person's Right to Possess Firearms Triggers the "Unless" Clause*

In *United States v. Caron*, 524 US 308 (U.S. 1998), the United States Supreme Court examined the "unless" clause contained in the definition of a felony conviction in 18 USC 921(a)(20)(B). *Id*., 309. Caron, who had three prior Massachusetts felony convictions, was convicted of violating 18 USC 922(g) after he entered a home and threatened a family with a semi-automatic rifle. All parties agreed that Caron's civil rights had been restored under Massachusetts law and that Massachusetts law allowed him to possess rifles and shotguns. However, the Court concluded that Massachusetts law prohibited Caron from possessing handguns outside of his home or business. It appears that the Massachusetts statutory scheme, in fact, prohibited felons from "carrying" a handgun and Massachusetts' courts have interpreted it to allow felons to possess a handgun at home or a place of business. See *United States v. Caron*, 941 F. Supp. 238, 249-251 (D. Mass. 1996) (summarizing the Massachusetts statutory scheme regulating firearms).

Caron argued on appeal that where state law permits a person to possess some firearms the "unless" clause in 18 USC 921(a)(20)(B) was not triggered. The government argued that where state law forbids the possession of one or more firearms the "unless" clause is triggered to prohibit the possession of any firearm.

The Supreme Court concluded that a partial restriction on the petitioner's right to possess firearms triggered the unless clause contained in 18 USC 921(a)(20)(B). Thus, the Court concluded that because Caron was prohibited from possessing handguns outside of his home or business by state law he was prohibited from possessing *any* firearms under federal law. The Court adopted the government's reasoning, noting:

> "A state weapons limitation on an offender activates the uniform federal ban on possessing any firearms at all. This is so even if the guns the offender possessed were ones the State permitted him to have. The State has singled out the offender as more dangerous than law-abiding citizens, and federal law uses this determination to impose its own broader stricture.
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> ****
>
> "In sum, Massachusetts treats petitioner as too dangerous to trust with handguns, though it accords this right to law-abiding citizens. Federal law uses this state finding of dangerousness in forbidding

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petitioner to have any guns." *Id.* 315, 316-317.

Michigan's Concealed Weapons Statute

The Michigan Legislature amended the concealed weapons statute, MCL 28.425a *et seq.*, effective on July 1, 2001. The amended statute imposed more severe restrictions on the ability of convicted felons to obtain a concealed weapons permit, and introduced such restrictions on convicted misdemeanants for the first time.

The amendment to MCL 28.425b(7)(f) permits only those persons to carry concealed weapons who ave never been convicted of felony in theis state or elsewhere, doing away with a previous provision that had permitted convicted felons to apply for a CCW license eight years after conviction. Moreover, the 2001 amendment imposes new restrictions on misdemeanants' right to carry concealed weapons. MCL 28.425b(7)(h)-(i). Depending on the crime at issue, misdemeanants are prohibited from obtaining a CCW license for three or eight years following conviction; the eight-year prohibition applies to persons convicted of stalking, assault, domestic assault, and aggravated domestic assault, amon gother crimes.

Only convictions that qualify as a "misdemeanor crime of domestic violence" trigger the prohibition of 18 USC 922(g)(9). A "misdemeanor crime of domestic violence" is defined by 18 USC 921(a)(33)(A) as an offense that is "a misdemeanor under Federal, State, or Tribal law; and . . . has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." Accordingly, only certain convictions contained in MCL 28.425b(7)(h) or (i) would trigger the federal prohibition on firearms possession.

Is Michigan's Concealed Weapons Statute a Partial Restriction on the Right to Transport or Possess Firearms?

Three separate federal court decisions issued in Michigan's Eastern District have applied the holding in *Caron* to find that Michigan's concealed weapons statute is a partial restriction on the right of a convicted felon to transport firearms and that this restriction triggered the "unless" clause in 18 USC 921(a)(20).

In *United States v. Brown*, 69 F Supp. 2d. 939 (E.D. Mich. 1999) the district court relied on *Caron*, *supra*, to conclude that Michigan's former concealed weapon's statute, 1994 PA 338 [former MCL 28.426], triggered the "unless" clause in 18 USC 921(a)(20) and prohibited a former felon from possessing any firearm until he is eligible to carry a concealed weapon.

When Brown was indicted in 1998, Michigan's concealed weapon statute allowed licensees to "carry a pistol concealed on the person or to carry a pistol, whether concealed or otherwise, in a vehicle." Persons convicted of a felony during the eight year period immediately preceding the date the application were prohibited from obtaining a license.

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The district court concluded that "the term 'transport' as used in the 'unless' clause of § 921(a)(20)(B) encompasses restrictions on a convicted felon's right to 'carry' firearms, such as the prohibitions on carrying concealed weapons or carrying pistols in vehicles as set forth in [former MCL 28.426]." *Id*., 942 citing *Muscarello v. United States*, 524 U.S. 125, 135 (U.S. 1998) (holding that the term "transport" as used in federal firearms statutes, "is a broader category that includes 'carry' but also encompasses other activity"). Thus, the district court concluded that because Brown was not eligible to carry a concealed weapon he was prohibited from possessing any firearms under 18 USC 922(g). *Id.*, 944; See also *Carnes*, supra, 1159 (concluding that Michigan's concealed weapons statute triggered the § 921(a)(20) "unless" clause).

In *United States v. Kenny*, 375 F. Supp. 2d. 622 (E.D. Mich. 2005), the Court applied Michigan's amended concealed weapons statute and reached the same conclusion as the Court in *Brown* and *Carnes*. In *Kenny*, the defendant was convicted of being a felon in possession of a firearm in violation of § 922(g)(1). *Kenny* argued that his civil rights were restored and that the "unless" clause did not apply because he was no longer restricted from possessing a firearm under MCL 750.224f, which provides generally that a convicted felon may not possess, use, transport, sell, purchase, carry, ship, receive, or distribute firearms in Michigan for a period of years after completion of imprisonment, parole/probation, and payment of fines associated with the conviction [see sidebar]. The court concluded that even if MCL 750.224f allowed defendant to possess a firearm, Michigan's concealed weapons statute operated as a partial restriction on his right to carry a firearm. Accordingly, the Court concluded that the concealed weapons statute triggered § 921(a)(20)'s "unless" clause and, under *Caron*, the defendant was prohibited from possessing any firearms under § 922(g).

Does Michigan's Concealed Weapons Statute Trigger the "Unless" Clause

Under *Brown*, *Carnes*, and *Kenny*, above, an argument can be made that a domestic violence misdemeanant who is prohibited from obtaining a CCW license under MCL 28.425b(7)(h) or (i) for a period of years is further prohibited from possessing any weapon for the same period of years under 18 USC 922(g).

While *Caron*, and the lower court cases have interpreted the "unless" clause contained in the definition of a felony conviction, 18 USC 921(a)(20)(B), the "unless" contained in the definition of a misdemeanor conviction, 18 USC 921(a)(33)(B)(ii), is almost identical:

> ". . . unless *such* pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 USC 921(a)(20)(B) (emphasis added).
>
> ". . . unless *the* pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 USC 921(a)(33)(B)(ii) (emphasis added).

In *Caron*, the Supreme Court applied what it considered to be the plain language of the "unless" clause, placing no particular importance on the fact that the clause was contained in the definition of a felony conviction. *Caron*, *supra* at 314. Indeed, lower federal courts have consistently relied upon language found in § 921(a)(20)(B), the definition of a felony conviction, to guide interpretation of similar language found in § 921(a)(33)(B)(ii), the definition of a misdemeanor domestic violence conviction. See *Wegrzyn I*, *supra*, 961-962 (relying on an interpretation of § 921(a)(20)(B) to conclude that analogous

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language in § 921(a)(33)(B)(ii) warranted the same interpretation).

In applying the logic of *Caron* it would seem that by amending Michigan's concealed weapons statute, the Michigan Legislature has deemed certain misdemeanants "too dangerous to trust" with carrying a concealed weapon, "though this right is accorded to law abiding citizens." *Caron*, *supra*, 316. Thus, it can be argued that federal law "uses this finding of dangerousness in forbidding [domestic violence misdemeanants] to have any guns." *Id.*

Some have argued that *Caron* is distinguishable on the grounds that it only addressed possession. See *United States v. Flores*, 118 Fed. Appx. 49 (2004). It is notable that the underlying Massachusetts statutory scheme in fact prohibited felons from "carrying" handguns. Massachusetts Courts have interpreted the statutory scheme to allow felons to possess handguns in their home or business. Yet, the Supreme Court framed the issue as a restriction on the right to possess rather than a restriction on the right to transport. However, nothing in *Caron* or the federal firearms statute cabins the application of "unless" clause to state laws that restrict possession. The federal firearms law broadly forbids convicted felons and domestic violence misdemeanants "to *ship* or *transport* . . . or *possess* . . . or to *receive* any firearm or ammunition." 18 USC 922(g) (emphasis added). 18 USC 921 further excludes convictions where a person's civil rights have been restored "unless" the restoration of civil rights "expressly provides that the person may not *ship, transport, possess,* or *receive* firearms." 18 USC 921(a)(33)(B)(ii); 18 USC(a)(20)(B) (emphasis added).

Conclusion

It remains to be seen whether the Sixth Circuit Court of Appeals will reach the same conclusion as the U.S. Distsrict Court for the Eastern District of Michigan that Michigan's concealed weapons statute triggers a complete prohibition on a felon's right to possess firearms under § 922(g)(1) and whether a domestic violence misdemeanant's rights are similarly restricted under § 922(g)(9). It is clear, however, that *Wegrzyn* is not the final word on whether a domestic violence misdemeanant can be prosecuted for possession of firearms under federal law.

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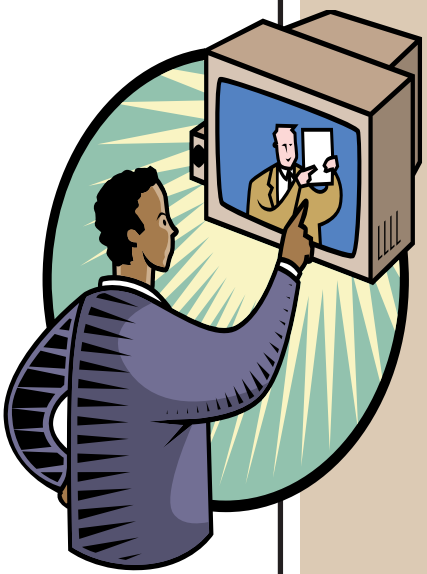

A Primer On The Concept Of Forfeiture By Wrongdoing

by Tim Baughman, Wayne County Prosecutor's Office, Chief of Research and Appeals

The rather technical evidentiary term "forfeiture by wrongdoing" is grasped intuitively by children, who express it—often derisively to an offender—as "cheaters never prosper." The general legal maxim is that one may not profit from his or her own wrongdoing. The evidentiary doctrine of forfeiture by wrongdoing is simply a specific application of this principle, and one that has recently gained greatly increased importance.

One constitutional protection enjoyed by all Americans is the right to "confront their accusers" when accused of a crime. But the precise contours of this protection have proved difficult to establish. Viewed strictly, no hearsay—no statement made out of court by someone who is not then testifying in-court so as to be "confronted" regarding the statement—is admissible. But at least some hearsay was viewed as admissible at the time of the ratification of the Constitution. More recently, our United States Supreme Court has struggled to give the protection expressed by the phrase "the right to confront the witnesses against" the defendant in a criminal trial more clearly defined meaning. And though the Court has addressed the question on more than one occasion, many questions remain. Suffice it to say for our purposes here that the Court has not banned all hearsay, but has focused on the meaning of the phrase "witnesses against" to conclude that at least some degree of formality and some government involvement in the taking of the statement that is sought to be used at trial must be involved before the out-of-court statement falls within this protection. And it must be remembered, concern *only* arises under the Confrontation Clause if the person who gave the statement does *not* appear at trial, for admission of an out-of-court statement given by one who *does* appear and testify at trial cannot violate this protection, as the person who made the statement is there on the stand to be questioned about the statement he or she previously made.

Applying these principles can prove very difficult, and the Court has only recently said that ordinarily a 911 emergency call is admissible even if the maker of the call does not appear at trial. On the other hand, when the police arrive at the scene of a radio run for help, statements made to the police are only admissible at trial—where the maker of the statement does not appear for trial—if the statements were made to the police to help them resolve an emergency situation, rather than to enable the police to simply gather evidence. A statement as to what has happened and

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who did it, made promptly on arrival of the police, will on most occasions be considered necessary for the police to resolve an emergency, as they need to know of any ongoing danger to themselves or others.

This is a rough statement of the recent changes in the law, which have increased the importance of the doctrine that one cannot profit from his or her own wrongdoing. Remember, the confrontation problem only arises when the person who made the statement does not appear at trial to testify. But what if the reason that person does not appear is through the wrongdoing of the defendant? As may often happen in domestic violence cases, what if the defendant, who has abused his wife, causes her to fail to appear to testify against him? Does he gain the benefit of the Confrontation Clause, so as to be able to keep any statement she made to the police out of the trial, where those statements would ordinarily be admissible? The Supreme Court has made clear that the answer is no, and there is also a rule of evidence on the point. MRE 804(b)(6). If one procures the absence of a witness in some fashion—by threats of further violence, for example—then by so doing he or she "forfeits" the protection of the Confrontation Clause, and anything this witness said out of court is no longer barred. The defendant cannot profit by his or her wrongdoing.

This article started as a challenge: introduce the subject of forfeiture by wrongdoing in easy, understandable terms, something longer than hiaku but shorter than "War and Peace." Tim overcame this challenge.

This principle—and the new decisions on the meaning of the Confrontation Clause—put a greater burden on prosecutors and police to try to ascertain *why* a witness, particularly a victim of some violence crime, has not appeared when he or she fails to appear for trial. If it can be proven, by what is known as the civil standard of proof—not beyond a reasonable doubt, as is necessary to convict someone, but by a "preponderance of the evidence" — that the defendant caused the witness not to appear, then the witness's statements to the police will be admitted. And hearsay—out-of-court statements—(by anyone) going to why the victim or witness has not appeared may be heard by the judge to make this decision (and this is a decision made by the judge before trial). If witnesses or victims fail to appear, and their statements to police are not admissible as emergency statements, then it becomes critical to learn the reason for their absence, and, if it was caused by the defendant, to prove that point to the judge.

Questions remain on this doctrine, and are being litigated around the country. What if, for example, the victim is unable to testify because the crime for which the defendant is on trial is the murder of the victim, done not to silence the victim, but for some other reason? Whether the defendant is guilty of the crime is for the jury to decide, but can the judge make the same decision before trial, and on the preponderance standard, so as to allow into evidence any relevant statements made by the victim (such as that he or she had previously been threatened by the defendant)? Though the answer is not yet certain, there are strong arguments that forfeiture by wrongdoing is equally applicable in this situation.

Our law states that the prosecution is entitled to everyone's evidence. But where the prosecution is deprived of that evidence by the wrongdoing of the defendant, the Confrontation Clause protection of the defendant is forfeited. The cheater will not be allowed to prosper.

Crawford Watch:

Publish or Perish

The Michigan Court of Appeals has issued a flurry of opinions on the Confrontation Clause in the past months. For its part, the Michigan Supreme Court remanded several cases back to the Court of Appeals for consideration in light of *Davis*, 126 S Ct 2266 (2006), resulting in one published opinion. How Michigan is applying the "primary purpose" test in deciding what is testimonial hearsay is becoming clearer.

911 Calls, Excited Utterances and Statements Made to Responding Officers Begin to Sharpen the Uutlines of the Primary Purpose Test

Just how is the primary purpose test going to work in our most common cases? The Court of Appeals began its answer in *People v. Walker*, 265 Mich App 530; 697 NW2d 159 (2005), vac'd in part and rem'd 477 Mich ___ (#128515, 9/15/06), on remand 273 Mich App 56 (2006). At issue in *Walker* were three sets of hearsay statements: statements made by the victim in the course of a 911 call; a written statement dictated by the victim and written by a neighbor; and statements of the victim made to responding officers. At trial all were admitted as excited utterances. The victim did not testify.

The defendant in *Walker* held the victim hostage for many hours in their bedroom. Over the course of the night, he beat her repeatedly with a stick and threatened her with a handgun. The defendant eventually fell asleep, and the victim jumped from the second story of the house and ran to a neighbor's house. There the neighbor called 911, and the victim made several statements about what happened to her that night. The police responded within minutes, and she made more statements to them about what happened, describing the ordeal with the stick and the gun (both were later found in a search of the home.). The police asked that she write out a statement, but she was too upset to do so. What she was able to do was repeat what happened to her as the neighbor wrote out the statement.

In a fairly straightforward application of the *Davis/Hammon* primary purpose test, the Court of Appeals on remand ruled that the statements made in the course of the 911 call were not testimonial. Looked at objectively, the call was a call for help, and the statements elicited were necessary to resolve the present emergency, rather than to learn what had happened in the past to establish evidence of a crime. The Court of Appeals noted that the 911 operator did ask questions of the victim, which included eliciting details about the assault, the location of the neighbor's home, the circumstances of the beating, the defendant's relationship to the victim, his name, and where he was, and where their child was. The Court held: "As in *Davis*, the circumstances of the 911 operator's questioning 'objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency.'" *Citations omitted.*

The statements to the responding officer, and those recorded in writing by the neighbor, were a different matter. The Court of Appeals held that these statements were more akin to the facts of *Hammon*, where the police interviewed the victim apart from the perpetrator and after the immediate danger had passed, and therefore testimonial. "'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime—which is, of course, precisely

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what the officer[s] *should* have done.' *Davis, supra* at 2278. Accordingly, the victim's written statement and her oral statements to the police are inadmissible."

The Court noted that some of the statements made to the police could be viewed as necessary to assess the present emergency, and therefore not testimonial, but it was "constrained" to rule the opposite on the record before it.

However, acknowledging that some statements to responding officers may not be testimonial also acknowledges the opposite corollary: at some point the primary purpose changes to investigation of a crime. The same is true for 911 calls, about which the Court said: "Although in *Davis* the Court recognized that a 911 call could evolve into testimonial statements and that unduly prejudicial portions of otherwise admissible evidence should be redacted by the trial court, *id*., defendant raised no such argument in this case. On the record before us, we find no error in the admission of the 911 call evidence."

Editor's Note: This case would be entirely unremarkable but for the Court feeling "constrained" to rule that the statements to the responding officers were testimonial. This leaves open the possibility that had the record been developed to support it the Court would have ruled that a portion of the statements were not testimonial. The lesson learned is that facts must be brought to the fore supporting the primary purpose of the interrogation is to resolve an emergency situation and not to investigate a possible crime. An example of how that might look is below.

Excited Utterances to Law Enforcement Redux

Deciding which statements are testimonial is decidedly fact-driven. A compelling case for finding initial inquiries and excited utterances are not testimonial is found in *U.S. v. Arnold,* 486 F.3d. 177 (6th Cir. *en banc, 2006).* At issue in this case were statements made during a 911 call, those made to officers at the scene, and those identifying the defendant when he returned to the scene.

In *Arnold***,** the defendant challenged the admission of the 911 call the victim, Tamica Gordon, made, saying " I need police....Me and my mama's boyfriend got into it, he went in the house and got a pistol, and pulled it out on me. I guess he's fixing to shoot me, so I got in my car and [inaudible] left. I'm right around the corner from the house."

Police arrived within five minutes of the call. When they arrived, the victim got out of her car and went to the police. They described her as "crying," "hysterical" and "visibly shaken." She told them that the defendant was trying to kill her, had pulled a gun on her, described the gun, and described how he pulled the slide back on the gun. These statements were admitted as excited utterances over defendant's objection.

While the police were talking to the victim. The defendant rode up in a car driven by his mother. When he appeared, the victim exclaimed "That's him! That's the guy who pulled a gun on me." That statement was admitted, too, again over the defendant's objection. (A search of the car yielded a black, semi-automatic pistol under the passengers seat. There was a bullet in the chamber.)

One panel of the 6th Circuit overturned Arnold's conviction for felon in possession of a firearm, relying on *Crawford* and holding the three challenged statements were testimonial. The full panel, with some considerable dissent, reversed that decision and affirmed Arnold's conviction.

The Court found the 911 call closely analogous to the call in *Davis,* saying that the "fear that the district court noted in Gordon's voice communicated that she was scarcely concerned with testifying to anything but simply was seeking protection from a man with a gun who had killed before and who had

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threatened to kill again." The primary purpose and effect of the 911 operator's questioning was to resolve the crisis, with the questions and answers coming in spite of, not because of, the possibility of a later criminal trial."

The fact that the victim had left the house and gone to her car parked around the corner did nothing to lessen the exigency of the moment. At the time she made the call she had no reason to know whether Arnold stayed in the house or came out after her with a gun. What she knew was that she had just been threatened by a man with a gun who was still nearby.

In deciding the nature of the statements made upon the arrival of the police, the Court acknowledged that their arrival did not alleviate the emergency nature of the situation. For all anyone on the scene knew, there was still a man with a gun in the house or at least nearby. The victim's first statements to police were volunteered and not in response to any questions. While the *Arnold* opinion leaves open the possibility that even volunteered statement can be testimonial, the fact the statement was unsolicited at least "suggests" that it is not testimonial.

The logic extends to include even statements made in response to police questioning about the gun. The gun's description was necessary information for assessing the emergency. And once they learned who the defendant was and that he was armed, police are "surely permitted" to find out what kind of gun it is and if it is loaded. This is "information that has more to do with preempting the commission of future crimes than with worrying about the prosecution of completed ones. What officers would not want this information—either to measure the threat to the public or to measure the threat to themselves?"

The final statements analyzed in *Arnold* were those made by the victim when the defendant appeared on the scene riding in a car. She identified the defendant as the one who had assaulted her and said he had a gun. These statements, too, were nontestimonial. The Court said there was no doubt that the victim and the police faced a risky situation, and that the victim's statements were an attempt to obtain protection, not statements prepared for court. As the Court said, a witness doesn't go to court to seek help with an emergency. The victim's statements were not a weaker form of trial testimony. They had independent evidentiary value, and were not testimonial.

Editor's Note: This case is a good example of applying the primary purpose test. An important part of the decision deals with the ongoing nature of the emergency, and the fact that the arrival of the police alone did not alleviate the emergency. This stands in contrast to ***Walker****, which suggests that the arrival of the police did alleviate the emergency, even though the armed defendant's whereabouts weren't known.*

Statements to Someone Other than Police Nontestimonial

In a case recently released for publication, the Michigan Court of Appeals decided whether statements made to someone other than a police officer are testimonial. In *People v. Jordan*, COA No. 267152, decided 4/19/2007, rel. for pub. 5/31/2007, the elderly victim ran to a service station just after the crime and pleaded with the owner/operator to call the police. Shortly after that the victim told a friend what had happened to her. The defendant first argued that the owner/operator and friend were acting as agents of the police, an argument soundly rejected by the Court of Appeals. The Court went on to apply the primary purpose test to both the statements:

> We hold that questions necessary to obtaining or providing emergency medical care are nontestimonial. The 73-year-old victim, clothed in her nightgown, was outside in the early morning

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hours yelling for help because she had just been raped and robbed. She had yet to have a police response to her calls for help and was in need of emergency medical treatment. Under the circumstances, "any reasonable listener would recognize that [the victim] was facing an ongoing emergency." *Davis, supra* at 2276. Because all statements by the victim were necessary to resolving the ongoing emergency, the statements were nontestimonial. *Id*.

Editor's Note: This case is most noteworthy for its application of the "primary purpose" test to hearsay statements made to someone other than law enforcement. Although the U.S. Supreme Court has said that "off-hand statements to acquaintances" are less likely to be testimonial, it has never foreclosed the possibility that statements to acquaintances could be testimonial.

Dying Declarations and Police Interrogation

In *People v. Taylor*, __ Mich App ___ (COA No. 265778, 4/5/2007) the victim was shot four times with a shotgun. Police arrived at his side shortly after the shooting. The victim was bleeding profusely. The police asked the victim to identify who shot him. The victim hesitated at first, but when the police told him "he might not make it," the victim identified the shooter by his nickname, "Booger." Emergency medical help arrived within minutes of the shooting, as did another police officer, who told the victim he might not live much longer and asked him again to identify who shot him. Again the victim identified "Booger." After a period of time in an induced coma, the victim died.

The defendant objected to the admission of the identifying statements as a violation of his right to confrontation. The Court of Appeals had no trouble holding the statements were admissible. First, the statements were not testimonial, applying the primary purpose test from *Davis/Hammon:* "When, as here, police officers arrive at the crime scene immediately after a shooting, with a number of people in the house, and where the victim, who is clearly dying of multiple gunshot wounds, identifies his assailant, the identifying statements given to the police are nontestimonial under *Crawford."*

Second, even if testimonial, the statements are dying declarations which are an historical exception to the Confrontation Clause, an argument left unsettled by Justice Scalia in *Crawford***.** In so deciding, the Court relied on a California case, *People v Monterroso,* 34 Cal 4th 743, 764-765; 22 Cal Rptr 3d 1 (2004), which in turn relied on a case from 1722, *King v Reason, 16 How St Tr 1, 24-25 (1722).* The California Court concluded: "Thus, if, as *Crawford* teaches, the confrontation clause 'is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding' *Crawford,* supra at 1365, *[citations omitted],* it follows that the common law pedigree of the exception poses no conflict with the Sixth Amendment."

Editor's Note: This is an important case, not just because of its determination under the primary purpose test, but also because of its find that dying declarations are not in conflict with the Confrontation Clause. In other words, it appears that dying declarations do not run afoul of the Constitution even if they can be characterized as testimonial. Thus, even if the statements are made as a result of police interrogation in a non-emergency situation, say when the declarant is getting treated in the hospital, they will be admissible. Remember, too, that the declarant does not have to die to satisfy MRE 804(b)(2). ***People v. Orr,*** *COA #267189 (rel. for publ. 5/17/2007). However, the declarant does have to be unavailable.*

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Business Records are Not Testimonial

A strange set of facts was considered in *People v. Jambor,* 273 Mich App 477 (2007). Police were called out to the scene of a break-in at a business, and an evidence tech processed the scene for latent prints. The evidence tech passed away before trial. When he lifted the prints at the scene, he attached the tape to a print card, and wrote on the back of *each* card the complaint number, the date, and the location from which the fingerprint was lifted. Some of the cards offered at trial were black, and some were white. The sheriff's deputy who was at the scene testified that he saw the tech use only black cards. The trial court refused to admit the white cards for lack of foundation, and admitted the black cards under MRE 803(8). The Court of Appeals affirmed, and the Supreme Court reversed and remanded the case for consideration of the Confrontation Clause issues.

On remand, the Court of Appeals determined that the print cards were admissible as business records under MRE 803(6) and as public records under MRE 803(8). The Court relied on the routine nature of the fingerprint cards, which were made in a nonadversarial setting. The setting was "nonadversarial" because it was part of routine police investigation done before any suspect had been identified. Since they are admissible as business or public records, the Court held they are not testimonial.

Even if the cards were not admissible as business or public records, the Court would still hold that their admission did not violate *Crawford.* In so holding, the Court said the evidence tech "did not compare the fingerprints he found at the scene of the break-in to any other prints on file....No information recorded by Brien on the cards could be used to assert that any fingerprint found at the scene belonged to the defendant. Any testimony to the effect the print lifted by Brien matched a print belonging to defendant would come from another source, and presumably would be subject to cross-examination. Accordingly, we conclude that admission of the fingerprint cards will not violate *Crawford."*

Editor's Note: This is an odd little case, with an odd rationale, at least at the end. The important lesson is that business records under MRE 803(6) and public records under MRE 803(8) are nontestimonial by their very nature. That part of the decision is in keeping with the primary purpose test, because to be admitted under those exceptions the primary purpose of the record must be something other than preparation for litigation or recording past events as evidence in a criminal case.

Legislation in Brief

The following bills have been introduced. Full text copies of the bills are at www.michiganlegislature.org.

- ☞ SB 103: requires rental agreements to provide for early termination if the the tenant is a victim of domestic violence.

- ☞ SB 144: defines computer spyware and creates the crime of installing or using spyware without authorization, or possessing, selling, or manufacturing spyware with intent that it be used to violate the act.

- ☞ HB 4453: amends MCL 765.6b to allow, after consultation with the vicitm, GPS monitoring of those charged with a crime involving domestic violence. The victim would be given a device to receive information about the defendant's location from the GPS monitoring.

- ☞ HB 4466: amends the felony murder statute to add any felony involving domestic violence as a predicate offense.

Legislature Considers More Changes To CSC Laws

The last legislative session brought significant changes to CSC sentencing, including mandatory minimums and GPS tracking. *(For complete review see the VAW Newsletter, Fall/Winter 2006, available to VAW Project Group members at the Yahoo! Groupsite.)* Further changes may be in the offing with the introduction of SB 386. SB 386 has passed the Senate and has been referred to the House Judiciary Committee. A full text copy is available at http://www.legislature.mi.gov/documents/2007-2008/billengrossed/Senate/pdf/2007-SEBS-0386.pdf.

Expanding the List of Actors

Under MCL 750.520b(1)(b)(iv), a teacher, substitute teacher, or school administrator who engages in sexual penetration with a student between 13 and 16 years old has committed CSC 1st. As passed by the Senate, SB 386 would amend this statute, adding to that list of actors employees, contractual service providers, non-student volunteers, and government employees who provide any service to a school or school district. It also broadens the employment relationship of the actor beyond school employees to include school district and intermediate school district employees. The bill reads:

> The actor is a teacher, substitute teacher, ~~or~~ administrator, employee, or contractual service provider of the public or nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any school in grades K through 12, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public or nonpublic school, school district, or intermediate school district.

The bill also adds new section (I). An actor is guilty of CSC 1st if the actor engages in sexual penetration with another and:

> That other person is at least 16 years old but less than 26 years of age and is receiving special education services, and the actor is a teacher, substitute teacher, administrator, employee, or contractual service provider of the public or nonpublic school, school district, or intermediate school district from which that other person receives the special education services, or is a volunteer who is not a student in any school in grades K through 12, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public or nonpublic school, school district, or intermediate school district.

The bill would also change the corresponding provisions in governing CSC 2nd, expanding the list of actors from teachers and administrators to include employees, volunteers, and contractual service providers. It also adds a new subdivision covering students over 16 who receive special education services.

The bill makes similar changes to both CSC 3rd and CSC 4th. It adds the identical list of actors to MCL 750.520d(1)(e) [sexual penetration with a student 16 and older but less than 18] and MCL 750.520e(1)(f) [sexual contact with a student 16 and older but less than 18].

Some on the House Judiciary Committee have expressed concern about the broad scope of the bill. Changes are likely if it is going to pass.

Michigan Court of Appeals' Unpublished Cases of Note

Substantial and Compelling Reasons to Depart in DV Cases

The defendant appealed his 16-24 month sentence for his conviction of DV 3rd. The trial court departed upward from the guidelines for four reasons: 1) defendant failed to appear at arraignment and lied about it; 2) he didn't complete two previous probation sentences for domestic violence; 3) he received a major misconduct ticket while in prison; and 4) his criminal history revealed that four of his previous twelve offenses were assault crimes. The Court of Appeals affirmed the departure, saying the facts relied on by the sentencing court indicated that defendant was incapable of rehabilitation and unwilling to conform to society's rules. *People v. Terry Allen Neff*, COA No. 262521 (Oct. 26, 2006)

Editor's Note: Domestic Violence doesn't happen in a vacuum. This case highlights the need to dig into a defendant's past conduct, and the need to use it in arguing for appropriate sanction.

Third-Party Contact is Stalking

The defendant appealed his jury conviction for stalking. The defendant was physically abusive and controlling during his marriage to the victim. The victim divorced defendant and was granted a PPO, which defendant repeatedly violated. He went to jail for the violations, and while in jail he called and left a message on the victim's answering machine, and wrote a letter to his oldest son with messages for her. Instead of delivering

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the messages, the son gave the victim the complete letter. Defendant argued that the letter to his son was not "contact" under the statute, and that he did not have the specific intent to stalk his victim. The Court of Appeals held that "any contact" includes indirect contact- the letters, in this case. It also held that stalking is not a specific intent crime. "Willful" in the statute refers to the intent to engage in the required course of conduct, not to bring about the ultimate result of a making the victim feel harassed, frightened or molested. *People v. Richard Joseph Herzberg*, COA No. 265546 (Mar. 20, 2007).

Editor's Note: This is an important case. First, it clarifies that stalking is a general intent crime; one only has to intend to contact the victim. The Court recognized that to hold otherwise would allow continued harassment simply because the defendant genuinely believes continued contact will serve a more noble purpose. Second, it confirms that contact through a third-party is still contact, reinforcing that family members can, wittingly or not, be used to continue criminal behavior.

Interfering with a Report of Crime Requires an Actual Crime to Report

The defendant appealed his conviction for interfering with a crime report under MCL 750.483a(1)(b). During the course of an argument at the victim's home, the defendant went to the kitchen and grabbed a knife. He verbally threatened to harm the victim. When the victim went to call the police the defendant cut the phone cord. He then said, "that's not me" and put the knife down and eventually left the home. The judge acquitted defendant of assault but convicted on the interference charge. The trial judge ruled that it was enough that the victim "perceived" that crime was committed or attempted. The trial judge would have acquitted the defendant of the interference charge if an "actual crime" had to be committed. The Court of Appeals acknowledged that the defendant does not have to be convicted of any crime to be guilty of interfering with the report of a crime. However, it went on to hold that conviction requires proof beyond a reasonable doubt of a "crime committed or attempted." It appeared to the Court of Appeals that defendant's conviction was based on the victim's "mere perception" that a crime was committed, and therefore remanded the case to the trial court to decide whether there was an actual "crime committed or attempted."

Editor's Note: This case borrows the hopeless confusion from felony firearm cases, where juries will sometimes convict on the felony firearm but acquit on the underlying felony charge. This case likely arose because it was a bench trial where the rationale and findings of fact are actually explained. Juries don't have to do that. In felony firearm cases conviction of the underlying offense is not an element, and the jury should not be instructed that it must convict on the underlying felony to convict on the felony firearm. ***People v. Lewis,*** *415 Mich 443 (1982). The same should be argued in interfering with a report of crime case.*

VAW Project Training Schedule

Evidence Updates
A Review of Recent Case Law, Legislation and Emerging Issues

September 5 - Sterling Heights
September 21-Escanaba

Beating the Consent Defense in CSC Cases

August 14 - Muskegon
August 16 - Lansing

Violence Against Women Project

Herb Tanner, Jr., Training Attorney
Jennifer Doerr, Conference Assistant