March 2005

MJI Publication Updates

Adoption Proceedings Benchbook

Michigan Circuit Court Benchbook

Contempt of Court Benchbook (Revised Edition)

Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Revised Edition)

Criminal Procedure Monograph 4—Felony Arraignments in District Court (Revised Edition)

Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Juvenile Justice Benchbook (Revised Edition)

March 2005

Update: Adoption Proceedings Benchbook

CHAPTER 3

Identifying the Father

3.8 The Paternity Act

A. A Child "Begotten and Born to a Woman Who Was Not Married from the Conception to the Date of Birth of the Child"

Insert the following case summary on page 99 immediately before subsection (B):

- ***Numerick v Krull*, ___ Mich App ___ (2005)**

In *Numerick*, the Court held that the Paternity Act does not authorize a paternity action brought by a purported father, except with regard to a child born out of wedlock, even if the paternity action is filed when the mother is unmarried and before the child's birth. The defendant became pregnant with plaintiff's child at a time when she was not married. The plaintiff filed a paternity action. Prior to the birth of the child, the defendant married another man. The trial court dismissed the paternity action because the child was not born out of wedlock. The plaintiff appealed. The Court of Appeals upheld the trial court's dismissal and reiterated its holding in *Spielmaker v Lee*, 205 Mich App 51, 58 (1994): if a woman is "not married" for the entire gestational period, or from conception to the date of the child's birth, then the child is born out of wedlock. Since the defendant was married at the time of birth, the child was not born out of wedlock. Plaintiff's filing a paternity action before the child was born did not alter the fact that the child was not born out of wedlock; therefore, the plaintiff did not have standing.

CHAPTER 3

Identifying the Father

3.8 The Paternity Act

C. Who May Bring a Paternity Action

Insert the following case summary on page 105 after *Spielmaker v Lee*:

*See the March 2005 update to Section 3.8(A) for a detailed discussion of *Numerick*.

- ***Numerick v Krull,* ___ Mich App ___ (2005)***

A purported father does not have standing under the Paternity Act when the child is not born out of wedlock, even if the father files the action before the child's birth and while the mother is unmarried.

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March 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Prior Testimony.

Insert the following text before the last paragraph on page 112:

The transcript of a guilty plea of an unavailable witness is a "testimonial statement" and is not admissible unless the defendant had a prior opportunity for cross-examination. *People v Shepherd*, 236 Mich App 665, 671 (2004).

The United States Court of Appeals for the Sixth Circuit held that testimony from an investigating officer about information from a confidential informant is precluded under *Crawford v Washington,* 541 US 36 (2004). A "statement made knowingly to the authorities that describes criminal activity is almost always testimonial." *United States v Cromer,* 389 F3d 662, 671 (CA 6, 2004).

Crawford v Washington, 541 US 36 (2004), applies retrospectively to cases pending on appeal when *Crawford* was decided. *People v Bell*, 264 Mich App 58, 60 (2004).

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.41 Statement of Co-Defendant or Co-Conspirator

B. Inculpatory Statements

Insert the following text after the quoted paragraph near the middle of page 115:

Crawford v Washington, 541 US 36 (2004), applies retrospectively to cases pending on appeal when *Crawford* was decided. *People v Bell*, 264 Mich App 58, 60 (2004).

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CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.23 Default and Default Judgments

A. Default—MCR 2.603(A)

2. Notice of Default Entry

Effective January 1, 2005, MCR 2.603 was amended. On page 168, replace the first sentence of the second paragraph with the following:

> "Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party."

B. Default Judgments—MCR 2.603(B)

2. Entry of Default Judgment—MCR 2.603(B)(2) and (3)

Effective January 1, 2005, MCR 2.603 was amended. On page 169, add the following sentence after "b) By Court—in all other cases. MCR 2.603(B)":

> "[T]he party entitled to a default judgment must file a motion that asks the court to enter the default judgment." MCR 2.603(B)(3).

C. Setting Aside Default and Default Judgment

1. Timing

Effective January 1, 2005, MCR 2.603 was amended. On page 169, replace the existing text of this sub-subsection with the following:

> A motion to set aside default judgment must be filed within 21 days after the entry of the default judgment. MCR 2.603(D)(2)(b). However, there is no time limit within which a motion to set aside a default must be filed where the default only has been filed. MCR 2.603(D)(2)(a) and *ISB Sales Co v Dave's Cakes,* 258 Mich App 520 (2003).

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.24 Summary Disposition

C. Grounds – MCR 2.116(C)

Insert the following text on page 175 immediately before subsection (D):

Effective January 1, 2005, for a two-year period, Administrative Order No. 2004-5 establishes an expedited appeal track for summary disposition motions. Section (3) of the Administrative Order states:

> "If the trial court concludes that summary disposition is warranted under MCR 2.116(C), the court shall render judgment without delay in an order that specifies the subsection of MCR 2.116(C) under which the judgment is entered."

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CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.33 Case Evaluation

H. Rejecting Party's Liability for Costs – MCR 2.403(O)

2. Actual Costs

On page 202, after the paragraph beginning "Costs are not awarded," add the following text:

Where the parties agree to arbitration and that mediation or case evaluation sanctions shall apply, the arbitration decision need not be unanimous for mediation or case evaluation sanctions to apply. In such a case, the arbitrator's decision is tantamount to a "verdict," and MCR 2.403 does not require a verdict to be unanimous before sanctions may be ordered. *Cusumano v Velger*, 264 Mich App 234, 235-36 (2004).

On page 202 replace the last paragraph before sub-subsection (3) with the following text:

"Actual costs" pursuant to MCR 2.403(O) do not include appellate attorney fees and costs. *Haliw v City of Sterling Heights*, 471 Mich 700, 711 (2005).

CHAPTER 3

Civil Proceedings

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.55 Remittitur and Additur

A. Definition

Insert the following text on page 242 before the paragraph beginning "These same factors":

A remittitur amount must be set at the highest amount the evidence will support. MCR 2.611(E)(1); *Palenkas v Beaumont Hosp*, 432 Mich 527, 531 (1989).

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CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300–3.600)

3.62 Contracts

C. Parol Evidence Rule and Statute of Frauds

2. Statute of Frauds

On page 255 add the following text to the end of the last paragraph in this subsection:

For a discussion of what constitutes a "note or memorandum of the agreement" sufficient to satisfy the Statute of Frauds, see *Kelly-Stehney & Associates, Inc v MacDonald's Industrial Products, Inc*, *(On Remand),* ___ Mich App ___ (2005).

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.4 Attorneys—Right to Counsel—Substitute Counsel

B. Indigence—Waiver of Fees and Court-Appointed Counsel

3. Appointment of Counsel

Insert the following text at the bottom of page 279 immediately before sub-subsection (4):

When ordering a defendant to reimburse the county for the cost of his or her court-appointed attorney, there must be some indication that the trial court considered the defendant's foreseeable ability to repay the amount ordered. *People v Dunbar,* 264 Mich App 240, 255–256 (2004).

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CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.11 Motion to Suppress Defendant's Statement

C. Evidentiary ("*Walker*") Hearing

1. Voluntary, Knowing, and Intelligent Confession

Insert the following case summary before the text at the top of page 300:

A defendant's Fifth Amendment right to counsel is violated when a law enforcement officer interrogates the defendant after he expressed his desire to speak with an attorney and provided the officer with the attorney's name and telephone number. *Abela v Martin*, 380 F3d 915 (CA 6, 2004). Unlike the circumstances in *Davis v United States*, 512 US 452, 462 (1994), where the Supreme Court concluded that the defendant's statement—"Maybe I should talk to a lawyer"—was "not sufficiently clear such that a reasonable police officer in the circumstances would have understood the statement to be a request for an attorney," the defendant in *Abela* "named the specific individual with whom he wanted to speak and then showed [the police officer] the attorney's business card." *Abela, supra* at 925–926.

Under the circumstances in *Abela*, the Sixth Circuit found that a reasonable officer should have recognized that the defendant was making an unequivocal request for counsel. Once a defendant makes such a request, the rule of *Edwards v Arizona*, 451 US 477, 484–485 (1981), prohibited the police from further interrogation until the defendant's counsel was present or the defendant him- or herself initiated further communication with the police. *Abela, supra* at 926–927.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.14 Double Jeopardy

B. Multiple Prosecutions for the Same Offense

Insert the following text on page 316 immediately before the paragraph beginning **"PPOs and Double Jeopardy"**:

A defendant's murder conviction based on alternate theories of felony-murder and first-degree premeditated murder does not offend the prohibition against double jeopardy, but in such a case, the defendant may not also be convicted of and sentenced for the predicate felony on which the felony-murder charge was based. *People v Williams II*, 265 Mich App 68 (2005).

In *Williams II*, the Court noted that it was bound by the special panel's decision in *People v Bigelow*, 229 Mich App 218 (1998), which required that a predicate felony conviction be vacated when a defendant is convicted of felony-murder. *Williams II, supra* at ___. However, the *Williams II* Court suggested that in cases where it could be determined with certainty that the jury could have convicted the defendant based on evidence of premeditation, the defendant's murder conviction would not rest on his or her conviction of a predicate felony. *Williams II, supra* at ___. In those cases, the Court suggested that the defendant could be sentenced for the predicate felony because that conviction is not required to support any other sentence imposed on the defendant. *Williams II, supra* at ___.

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CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

B. Was There a Search or Seizure?

Insert the following text before the sentence beginning "The following instances..." near the bottom of page 334:

When police conduct does not affect a defendant's *legitimate* interest in privacy, the conduct cannot be characterized as a search and therefore, the conduct does not merit Fourth Amendment analysis. *Illinois v Caballes*, 543 US ___ (2005), citing *United States v Jacobsen*, 466 US 109 (1984). Because a defendant can have no legitimate interest in possessing contraband, no legitimate interest is implicated when police conduct reveals only the defendant's possession of contraband. *Caballes*, *supra* at ___, citing *Jacobsen*, *supra* at 123.

An individual who does not submit to an officer's show of authority is not seized, and the Fourth Amendment does not apply to any item the individual abandons during his or her attempt to avoid seizure. *United States v Martin*, ___ F3d ___ (CA 6, 2005). In *Martin*, two police officers saw the defendant trespassing and stopped their patrol car to arrest him. *Martin, supra* at ___. The defendant ran from the officers and as he fled, the defendant discarded a revolver. *Martin*, *supra* at ___. Although the gun resulted from the defendant's conduct after the officers' show of authority, the gun did not result from the defendant's seizure—lawful or unlawful—because the defendant discarded the weapon before submitting to the officers' show of authority. *Martin, supra* at ___.

Add the following bulleted text and the language following it to the bulleted list on page 335:

- A person is "seized" for purposes of the Fourth Amendment when, in light of all the circumstances, a reasonable person believed that he or she was not free to leave. A consensual encounter may escalate to an investigatory stop and seizure of a person when, based on the totality of circumstances, the officer involved has a reasonable suspicion that the person seized was involved in criminal behavior. *People v Jenkins*, 472 Mich 26, 32–35 (2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

4. Investigatory Stop ("*Terry* Stop")

Insert the following text after the first paragraph on page 341:

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. *People v Jenkins*, 472 Mich 26, 32–33 (2005). An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. Evidence discovered as a result of these legal detentions is properly seized at the time the individual citizen is seized. *Jenkins, supra* at 32–35.

Insert the following text on page 341 immediately before the beginning of sub-subsection (5):

See also *People v Dunbar*, 264 Mich App 240, 245–250 (2004) (contraband was properly seized when it was discovered after an officer lawfully stopped the defendant based on information received from a reliable confidential informant).

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CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

1. Good-Faith Exception

Insert the following text before sub-subsection (2) at the top of page 348:

See also *People v Hellstrom*, 264 Mich App 187 (2004) (officers executing a warrant could reasonably rely on affidavits in support of the warrant based on an officer's experience with similar cases; defendants who assault young females in their home "are known to have items of sexual gratification inside their homes, computers, and other devices").

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.22 Automobile Searches

C. Probable Cause to Search an Automobile

Insert the following text after the second paragraph on page 350:

As long as the initial seizure (in this case, a traffic stop) was lawful and police conduct did not prolong the seizure beyond the time reasonably required to process the traffic stop information, an individual's constitutional protection from unreasonable search and seizure is not implicated. *Illinois v Caballes*, 543 US ___ (2005).

Citing to *United States v Jacobsen*, 466 US 109 (1984), the *Cabelles* Court reemphasized that a defendant can have no legitimate interest in possessing contraband. *Cabelles, supra* at ___. As a result, where police conduct reveals only the defendant's possession of contraband, no legitimate interest in privacy is involved. *Cabelles, supra* at ___, citing *Jacobsen, supra* at 123. According to the Court:

> "[C]onducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy." *Cabelles, supra* at ___.

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CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.24 Investigatory Stops

A. "Terry" Stop

Insert the following text after the first paragraph on page 355:

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. *People v Jenkins*, 472 Mich 26, 32–33 (2005). An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. Evidence discovered as a result of these legal detentions is properly seized at the time the individual citizen is seized. *Jenkins, supra* at 32–35. See also *People v Dunbar*, 264 Mich App 240 (2004) (contraband was properly seized when it was discovered after an officer lawfully stopped the defendant based on information received from a reliable confidential informant).

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.27 Rape Shield Law

D. Defendant's Failure to Provide Notice

Insert the following text on page 369 immediately before subsection (E):

A trial court cannot refuse to admit evidence of a victim's past sexual conduct solely on the basis of a defendant's failure to provide notice; an inquiry into the circumstances surrounding the failed notice is necessary to preserve the defendant's Sixth Amendment right of confrontation. *People v Dixon*, 263 Mich App 393, 399–400 (2004). In deciding whether evidence for which notice was not properly filed should nonetheless be admitted, a trial court must determine

> "whether the defendant's timing of the offer to produce such evidence suggests an improper tactical purpose, and whether the probative value of the evidence outweighs its prejudicial effect." *Dixon, supra* at 399–400.

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CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.27 Rape Shield Law

E. Evidence of Victim's Past Sexual Conduct

Insert the following text at the bottom of page 370:

Evidence of past sexual relations between a victim and a defendant is not automatically precluded from admission at trial when a defendant fails to comply with the notice requirements of MCL 750.520j. *People v Lucas (On Remand)*, 193 Mich App 298, 303 (1992). The admissibility of such evidence should be determined by the probative value of the evidence and the timing of the defendant's attempt to introduce it. *People v Dixon*, 263 Mich App 393, 399–400 (2004).

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

E. Standard of Review

Insert the following language near the middle of page 387 immediately before Section 4.32:

The United States Supreme Court reversed the Sixth Circuit's decision in *Tesmer v Granholm* but did not address the constitutionality question because the Court concluded that the plaintiffs lacked standing to challenge Michigan's procedure on behalf of "hypothetical indigents." *Kowalski v Tesmer*, 543 US ___ (2004). However, *Halbert v Michigan,* ___ US ___ (2005), a case in which the Supreme Court granted certiorari, is pending; *Halbert* involves a "real" plaintiff posing the same question raised in *Kowalski*. Until *Halbert* is decided, the controlling rule in Michigan is that set forth in *People v Bulger*, 462 Mich 495 (2000)—Michigan's Constitution does not require that indigent defendants be appointed counsel to pursue discretionary appeals.

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CHAPTER 4
Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

G. Appealing a Guilty Plea

Insert the following after the two lines of text at the top of page 395:

The United States Supreme Court reversed the Sixth Circuit's decision in *Tesmer v Granholm* but did not address the constitutionality question because the Court concluded that the plaintiffs lacked standing to challenge Michigan's procedure on behalf of "hypothetical indigents." *Kowalski v Tesmer*, 543 US ___ (2004). However, *Halbert v Michigan,* ___ US ___ (2005), a case in which the Supreme Court granted certiorari, is pending; *Halbert* involves a "real" plaintiff posing the same question raised in *Kowalski*. Until *Halbert* is decided, the controlling rule in Michigan is that set forth in *People v Bulger*, 462 Mich 495 (2000)—Michigan's Constitution does not require that indigent defendants be appointed counsel to pursue discretionary appeals.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.48 Jury Instructions

C. Instructions on Lesser Included Offenses

1. Necessarily Included Lesser Offenses

Insert the following text in the paragraph before the last paragraph near the bottom of page 433:

Third-degree criminal sexual conduct (CSC-III) is not a necessarily included offense of first-degree criminal sexual conduct (CSC-I) because it is possible to commit CSC-I without first committing CSC-III. *People v Apgar*, 264 Mich App 321, 326–327 (2004). In *Apgar*, the trial court improperly instructed the jury on CSC-III because the defendant was not charged with CSC-III and CSC-III is a *cognate* lesser offense of CSC-I. *Apgar, supra* at 327. However, the error did not require reversal because the defendant was provided adequate notice of the uncharged offense (CSC-III) when all elements of the offense were proved, without objection, at the defendant's preliminary examination and trial. *Apgar, supra* at 327–329.

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CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

F. Appeal Rights

Insert the following text after the partial quote at the top of page 455:

The United States Supreme Court reversed the Sixth Circuit's decision in *Tesmer v Granholm* but did not address the constitutionality question because the Court concluded that the plaintiffs lacked standing to challenge Michigan's procedure on behalf of "hypothetical indigents." *Kowalski v Tesmer*, 543 US ___ (2004). However, *Halbert v Michigan,* ___ US ___ (2005), a case in which the Supreme Court granted certiorari, is pending; *Halbert* involves a "real" plaintiff posing the same question raised in *Kowalski*. Until *Halbert* is decided, the controlling rule in Michigan is that set forth in *People v Bulger*, 462 Mich 495 (2000)—Michigan's Constitution does not require that indigent defendants be appointed counsel to pursue discretionary appeals.

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Appendix

Replace the 14th page of the Appendix with the following list:

FINDINGS OF FACT AND CONCLUSIONS OF LAW – CIVIL

WHEN REQUIRED:

Bench Trial. MCR 2.517(A)(1).

Involuntary Dismissal. MCR 2.504(B)(2).

Non-Standard Jury Instruction. MCR 2.516 (D)(3).

Motion for New Trial or to Amend Judgment. MCR 2.611(F).

WHEN NOT REQUIRED:

Any Motion where not required. MCR 2.517(A)(4).

While always preferable for purposes of appellate review, the trial court is not required to explain its reasoning and state its findings of fact on pretrial motions. People v. Shields, 200 Mich App 554, 558 (1993). See also MCR 2.517(A)(4).

STANDARD OF REVIEW:

A court reviews a trial court's findings of fact for clear error. MCR 2.613(C); In re Stafford, 200 Mich App 41, 42-43 (1993).

A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. Tuttle v. Dep't of State Hwys, 397 Mich 44, 46 (1976).

Michigan Circuit Court Benchbook

Appendix

Replace the 25th page of the Appendix with the following list:

FINDINGS OF FACT AND CONCLUSIONS OF LAW - CRIMINAL

WHEN REQUIRED:

1. Bench Trial. MCR 6.403.
2. Joint Representation of Defendants. MCR 6.005(F)(3).
3. Directed Verdict (reasons required). MCR 6.419(D).
4. Impeachment by Evidence of Conviction of a Crime. MRE 609(b).
5. Sentencing Juvenile. MCR 6.931(E)(5).
6. Probation Revocation. MCR 6.445(E)(2).
7. Post-Appeal Evidentiary Hearing. MCR 6.508(E).

WHEN NOT REQUIRED:

Any motion where not required.

There are motions that require the court to explain its conclusion without specifically requiring findings of fact and conclusions of law. For example, when ruling on a motion for new trial, "[t]he court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record." MCR 6.431(B).

While always preferable for purposes of appellate review, the trial court is not required to explain its reasoning and state its finding of fact on pretrial motions. People v. Shields, 200 Mich App 554, 558 (1993). See also MCR 2.517(A)(4).

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CHAPTER 4

Sanctions for Contempt of Court

4.4 Statutory Exceptions to the General Penalty Provisions of the Revised Judicature Act

C. Failure to Pay Child or Spousal Support

Effective February 28, 2005, 2004 PA 206 amended MCL 552.633 to allow the court to order a parent found in contempt of court to pay a fine of not more than $100.00. On the second page of the June 2003 update to Section 4.4(C), insert the following language after the third quoted paragraph:

> "(g) Except as provided by federal law and regulations, ordering the parent to pay a fine of not more than $100.00. A fine ordered under this subdivision shall be deposited in the friend of the court fund created in . . . MCL 600.2530."

MCL 552.635(1)* provides that the court may find a payer in contempt if the court finds the payer is in arrears and one of the following:

*Effective February 28, 2005. 2004 PA 206.

- The court is satisfied that by the "exercise of diligence" the payer could have the capacity to pay all or some portion of the support ordered and the payer fails or refuses to do so.
- The payer has failed to obtain a source of income and has failed to participate in a work activity after referral by the Friend of the Court.

If the court finds the payer in contempt pursuant to MCL 552.635(1), then pursuant to MCL 552.635(2)(a)–(d),* the court shall, absent good cause to the contrary, immediately order the payer to participate in a work activity and may also enter an order doing one or more of the following:

*Effective February 28, 2005. 2004 PA 206.

> "(a) Commit the payer to the county jail with the privilege of leaving the jail during the hours the court determines, and under

the supervision the court considers, necessary for the purpose of allowing the payer to participate in a work activity.

"(b) If the payer holds an occupational license, driver's license, or recreational or sporting license, condition a suspension of the payer's license, or a combination of the licenses, upon noncompliance with an order for payment of the arrearage in 1 or more scheduled installments of a sum certain. A court shall not order the sanction authorized by this subdivision unless the court finds that the payer has accrued an arrearage of support payments in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.

"(c) If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414.

"(d) Except as provided by federal law and regulations, order the parent to pay a fine of not more than $100.00. A fine ordered under this subdivision shall be deposited in the friend of the court fund created in . . . MCL 600.2530."

CHAPTER 5

Common Forms of Contempt of Court

5.9 Failure to Pay Child or Spousal Support

C. Ability to Pay Support Arrearage and Sanctions

Effective February 28, 2005, 2004 PA 206 amended MCL 552.633 to allow the court to order a parent found in contempt of court to pay a fine of not more than $100.00. On the second page of the June 2003 update to Section 5.9(C), after the first full quoted paragraph, insert the following text:

> "(g) Except as provided by federal law and regulations, ordering the parent to pay a fine of not more than $100.00. A fine ordered under this subdivision shall be deposited in the friend of the court fund created in . . . MCL 600.2530."

After inserting the above paragraph, replace the discussion of MCL 552.635 with the following text:

MCL 552.635(1)* provides that the court may find a payer in contempt if the court finds the payer is in arrears and one of the following:

*Effective February 28, 2005. 2004 PA 206.

- The court is satisfied that by the "exercise of diligence" the payer could have the capacity to pay all or some portion of the support ordered and the payer fails or refuses to do so.
- The payer has failed to obtain a source of income and has failed to participate in a work activity after referral by the Friend of the Court.

If the court finds the payer in contempt pursuant to MCL 552.635(1), then pursuant to MCL 552.635(2)(a)–(d),* the court shall, absent good cause to the contrary, immediately order the payer to participate in a work activity and may also enter an order doing one or more of the following:

*Effective February 28, 2005. 2004 PA 206.

> "(a) Commit the payer to the county jail with the privilege of leaving the jail during the hours the court determines, and under the supervision the court considers, necessary for the purpose of allowing the payer to participate in a work activity.
>
> "(b) If the payer holds an occupational license, driver's license, or recreational or sporting license, condition a suspension of the payer's license, or a combination of the licenses, upon noncompliance with an order for payment of the arrearage in 1 or more scheduled installments of a sum certain. A court shall not order the sanction authorized by this subdivision unless the court

finds that the payer has accrued an arrearage of support payments in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.

"(c) If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414.

"(d) Except as provided by federal law and regulations, order the parent to pay a fine of not more than $100.00. A fine ordered under this subdivision shall be deposited in the friend of the court fund created in . . . MCL 600.2530."

March 2005

Update: Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Revised Edition)

Part A—Commentary on Misdemeanor Arraignments

3.2 Jurisdiction and Venue in District Court

B. Venue

Insert the following text after the October 2004 update to page 5:

Violations of the Identity Theft Protection Act,* MCL 445.71 *et seq*., may be prosecuted in any one of the following jurisdictions:

*2004 PA 452, effective March 1, 2005.

- where the offense occurred.
- where the information used to commit the violation was illegally used.
- where the victim resides. MCL 762.10c(1).

If an individual is charged with multiple violations of the identity theft protection act and the violations could be prosecuted in more than one jurisdiction, all violations may be properly prosecuted in any of the applicable jurisdictions. MCL 762.10c(2).

March 2005

Update: Criminal Procedure Monograph 4—Felony Arraignments in District Court (Revised Edition)

Part A—Commentary on Felony Arraignments

4.2 Jurisdiction and Venue

B. Venue

Insert the following text after the October 2004 update to page 3:

Violations of the Identity Theft Protection Act,* MCL 445.71 *et seq*., may be prosecuted in any one of the following jurisdictions:

*2004 PA 452, effective March 1, 2005.

- where the offense occurred.
- where the information used to commit the violation was illegally used.
- where the victim resides. MCL 762.10c(1).

If an individual is charged with multiple violations of the identity theft protection act and the violations could be prosecuted in more than one jurisdiction, all violations may be properly prosecuted in any of the applicable jurisdictions. MCL 762.10c(2).

March 2005

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.28 Motion to Suppress the Fruits of Illegal Police Conduct

Insert the following text after the February 2004 update to page 65:

The "independent source doctrine" may permit introduction of tainted evidence despite the exclusionary rule if the government can show that the same evidence was subject to discovery on the basis of information completely separate from information obtained unlawfully. *United States v Jenkins*, ___ F3d ___ (CA 6, 2005) (evidence was admissible because information contained in the affidavit was sufficient to show probable cause so that a valid warrant would have issued even without using information obtained in violation of a defendant's Fourth Amendment rights).

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. *People v Jenkins*, 472 Mich 26, 32–33 (2005). In addition, an investigatory stop may lead to an arrest based on other information gained and observations made. Evidence discovered as a result of a lawful arrest is properly seized at the time of the arrest. *Jenkins, supra* at 32–35.

Part 2—Individual Motions

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

2. Searches Incident to Valid Arrest

Insert the following text after the November 2004 update to page 90:

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. *People v Jenkins*, 472 Mich 26, 32–35 (2005). In addition, an investigatory stop may lead to an arrest based on other information gained and observations made. Evidence discovered as a result of a lawful arrest is properly seized at the time of the arrest. *Jenkins, supra*.

In *Jenkins*, police were called to a housing complex in response to some complaints about a party there. When police arrived, they observed a small crowd of people drinking and talking loudly. Two police officers, Geoffrey Spickard and Jeff Lind, approached the defendant, who was seated on a stairwell away from the crowd of people. *Jenkins, supra* at 28.

After determining that the defendant did not live at the housing complex, Spickard asked the defendant for identification. The defendant provided Spickard with his state identification card and Spickard initiated a LEIN check on the defendant's name. Testimony at trial established that as soon as the LEIN check was initiated,

> "[the] defendant's behavior suddenly changed. He became obviously nervous and made furtive gestures toward a large pocket on the side of his pants. He began to walk away, despite the fact that Officer Spickard still held his identification card and was speaking to him [footnotes omitted]." *Jenkins, supra* at 29.

The defendant continued walking away even as both officers followed the defendant and encouraged him to wait until the LEIN information was received. The defendant did not stop walking until Spickard put a hand on his shoulder and told the defendant he was not free to leave. The LEIN information showed an outstanding warrant for the defendant's arrest, and when he was being placed in handcuffs, a gun fell from the defendant's waistband. *Id*.

The defendant claimed the gun should be inadmissible because Officer Spickard seized him without the requisite reasonable suspicion and the discovery of the gun resulted from the unlawful seizure. The Michigan

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Supreme Court disagreed and held that the gun was discovered in the course of effecting a lawful arrest. Specifically, the Court noted that the defendant's and Officer Spickard's initial encounter was consensual. That status changed when, under the totality of circumstances, the encounter escalated to an investigatory stop based on reasonable suspicion that the defendant was involved in criminal activity. The totality of circumstances included the change in the defendant's mood and manner, his nervousness, his willingness to walk away from the officers without his identification card even though the officers requested that he stay until the LEIN check was complete. *Jenkins, supra* at 33–35.

Because the investigatory stop was based on reasonable suspicion and the officers properly arrested the defendant when the LEIN check returned information on the outstanding warrant, the evidence discovered at the time of the arrest was wholly untainted by any police misconduct and therefore, the gun was admissible against the defendant. *Jenkins, supra* at 27–28.

Part 2—Individual Motions

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

3. Seizure of Items in Plain View

Insert the following text after the March 2004 update to page 91:

See also *United States v Bruce*, ___ F3d ___ (CA 6, 2005) (police officers did not exceed the scope of the search warrant authorizing them to search a hotel room for papers showing ownership or control over illegal narcotics when the officers discovered relevant documents in an envelope in a garment bag; officers were authorized to look in any place where the papers named in the warrant might be found).

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Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 7

Pretrial Proceedings in Delinquency Cases

7.9 Raising Alibi or Insanity Defenses

On page 166, before subsection (A), insert the following text:

In *In re JLE*, unpublished opinion per curiam of the Court of Appeals, decided February 8, 2005 (Docket No. 250363), the Court of Appeals held that MCL 330.2050 does not apply to juvenile proceedings. MCL 330.2050 requires the court to "immediately commit any person who is acquitted of a criminal charge by reason of insanity to the custody of the center for forensic psychiatry . . ." to determine whether an order of hospitalization or admission is appropriate. In *JLE*, a juvenile was charged with assault with intent to commit murder and possession of a weapon in a weapon-free school zone. The trial court found the juvenile "'not criminally responsible' because 'he could not conform his actions to the requirements of society.'" The trial court then dismissed the petition and released the juvenile to his father for transport to an inpatient mental health treatment facility in another state. The petitioner appealed, claiming that once the trial court found the juvenile not guilty by reason of insanity, the trial court was required to commit the juvenile to the Center for Forensic Psychiatry pursuant to MCL 330.2050. The Court of Appeals affirmed the trial court's decision and stated:

> "Assuming arguendo that the insanity defense applies to juvenile proceedings, see *In re Ricks*, 167 Mich App 285, 289-293; 421 NW2d 667 (1988), we are not persuaded that MCL 330.2050 also applies. . . .
>
> * * *
>
> "Just as the Court in *In re Carey* held that the Mental Health Code provisions concerning competency evaluations for 'a defendant to a criminal charge' were not binding with respect to juvenile cases, we conclude here that the Mental Health Code provision regarding

> a person 'who is acquitted of a criminal charge' by reason of insanity does not apply to juvenile proceedings."

The Court of Appeals also noted that MCL 330.2050 should not be used as a "guide" in juvenile cases because MCL 330.1498a et seq. apply to hospitalization of "emotionally disturbed minors."

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