Violence Against Women Newsletter

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Private Attorneys For Victims Present Benefits and Challenges

by Prof. Wendy Murphy, New England School of Law

As a former prosecutor, I know first hand the queasy feeling that kicks in when a victim in an active criminal case says : "I have my own attorney". From concerns about cross-examination to loss of control over my witness, I admit it never sat well with me to hear that a victim had retained private counsel.

Now that I'm in the private sector and a significant percentage of my work involves direct representation of victims and witnesses in criminal cases, I have a different perspective - but I always start a new case with due regard for the concerns of prosecutors because the primary concern for me and my client is ensuring that justice is done and the integrity of the criminal case is preserved.

That said, private attorneys can present challenges but having done this work now for many years after starting a volunteer legal organization called the "Victim Advocacy and Research group" in 1992, it has been my experience that the benefits far outweigh the burdens. This is especially true when important victims' rights are threatened because without strong personal advocacy, victims are more likely to suffer gratuitous harm. This can undermine the prosecution's case and discourage victims from staying involved in the criminal case.

Topping of the list of reasons to encourage aggressive involvement by victim attorneys is the protection of privacy rights - such as responding to defense requests for "discovery" of victims' counseling records. These types of motions are commonplace even though the U.S Supreme Court has consistently held that defendants enjoy no constitutional "discovery" rights even as against the government, much less against private third-parties. But because prosecutors lack proper standing to represent the interests of third-parties, gratuitous intrusion into victims' privacy rights is routine; a problem difficult to measure given that victims are not formal parties to criminal cases which means violations often occur without so much as notification to the victim of the legal process that caused the intrusion.

Protecting victim privacay tops the list of reasons to encourage participation by victim Attorneys

Even if prosecutors could stand in the shoes of third-parties for certain limited purposes, they can never advocate for victims' personal rights as zealously as a private attorney.

Private counsel is not only better situated to ensure that a victim's rights

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are protected, he or she can more easily obtain judicial review of an adverse ruling because prosecutors are often restricted by rules that limit their ability to pursue interlocutory appeals. And prosecutors have valid concerns about the cost of such appeals, especially in states such as Massachusetts where, even if a judge's ruling is obviously wrong and the state prevails on appeal, the prosecutor is obligated not only to bear their own costs but to pay the costs of the defense. For these and other reasons, prosecutors are understandably disinclined to appeal erroneous judicial decisions that violate victims' privacy rights. Private victim attorneys bear no similar financial burdens. By assuming full responsibility for the appeal, the victims' attorney protects the prosecutor's budget while providing an important service of protecting the victim from intimidation tactics and encouraging her to stay committed to the case.

As an added benefit, by increasing the possibility of judicial review, the involvement of a private attorney for the victim means that judges concerned about systemic efficiency and reversals of defendants' convictions on appeal will no longer have a disproportionate incentive to rule against the interest of unrepresented victims. Simply put, judges worried about avoiding reversal by an appellate court will render fairer decisions if they believe both sides will appeal an erroneous ruling.

Third-party lawyers can also help with things like enforcement of "no-contact" orders, especially in the post-conviction probationary period when prosecutors have only limited voice and probation or parole officials typically represent the public interest. For victims and other intended beneficiaries of "no-contact" orders (e.g., "all children under age 16"), third-party lawyers can serve an important function by advocating for the victim of the violation, thus giving added force to a probation condition the enforcement of which the prosecutor cares about but cannot control.

And, private attorneys can represent victims in restraining order hearings as well as other collateral civil matters and housing and employment disputes. All these issues present serious risks to the integrity of the criminal case, yet the prosecutor is without authority to act on the victim's behalf. For example, battered women are sometimes sued by the batterer for libel, slander and abuse of process — after which the batterer's attorney will offer to drop the lawsuit in exchange for the victim's refusal to testify in the criminal case. Clearly, the prosecutor's case is threatened by such a lawsuit, but the prosecutor is not in a position to represent the victim or otherwise assist her in dealing with such intimidation tactics. Private attorneys can easily cause these types of lawsuits to be dismissed by filing anti-SLAPP motions ("strategic litigation against public participation") or other pleadings that punish defense counsel for misusing the legal system for strategic gain.

Victim lawyers are essential in high profile cases where misinformation is often leaked

Finally, it is worth noting that because a private attorney is not bound by the special ethical constraints that bind prosecutors' ability to speak publicly, third-party victim lawyers are essential in high profile cases where misinformation is often leaked about the victim (e.g., the absolutely false but nevertheless widely disseminated claim that the victim in the Kobe Bryant case had "sex with three men in three days") but the prosecutor is unable to respond.

A private attorney can speak more freely to the media and even file lawsuits and ethical complaints against

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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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defense counsel if necessary to deter wrongful behavior.

Having a private attorney available to at least make corrective statements in a high profile case shields the victim from undue stress and helps the prosecutor by protecting against one-sided tainting of the jury pool. In the event the victim's private attorney makes a mistake, the judge cannot suppress evidence or otherwise "punish" the prosecutor because the victim's personal attorney is not an agent of the government.

Finally, although there are many more examples of things private attorneys can do to help victims in criminal cases while doing no harm to the prosecution, (I leave for another day the explanation of how I teach victim lawyers to file motions to intervene in criminal cases to screen jurors for things like gender bias) one of the most important and untapped roles for victim lawyers is the development of a better body of criminal common law. In my fifteen years of representing victims in criminal cases, I have had the opportunity to identify and/or redress many criminal common law doctrines in need of repair; doctrines that can not easily be redressed without the proactive efforts of private victim attorneys because prosecutors are not in the best position to bring about change. Unlike defense counsel who can argue: "the facts are X, the law is Y — the law SHOULD be Z", prosecutors are essentially stuck with arguing "the facts are X, the law is Y, the result must be Z". Because of this disparity, when the common law develops to the unfair disadvantage of victims, a private attorney is in a better position to take steps to repair the problem.

For example, in many states, a common law doctrine exists that allows defense counsel to ask a rape victim whether she has ever made a "false allegation of rape". Robbery victims can't be asked about false robbery allegations and rape victims can't be asked about false robbery charges — just rape victims and rape allegations. Clearly an arcane myth about women's credibility lies at the core of this irrational doctrine but unlike prosecutors, private attorneys can aggressively do something about it. Here's how. A victim can be instructed by her private counsel to refuse to answer a question about prior false rape allegations on the grounds she is being denied equal protection because the question is not asked of other types of victims. When she does this, she will likely be held in contempt by a judge who believes she is obligated to respond in light of the existing common law doctrine. Upon imposition of the contempt judgment, the victim - assisted by private counsel — can file an appeal, thus setting in motion a challenge to the legitimacy of the underlying rule. Unlike most appeals in criminal cases, the victim as contemnor will have the benefit of formal party status because the contempt ruling creates its own legal and final judgment, distinct from the criminal case.

I have been using contempt proceedings since 1992 to challenge rulings that impose on victims' rights and it was clear to me early on that this is a profoundly impactful strategy not only because I've managed to cause the reversal of harmful common law doctrines but because in several cases the defense attorney actually made the accused plead guilty in an attempt to moot my client's appeal; a process I suspect is unethical but in any event strongly suggests that the defense bar believes these types of reparative contempt proceedings can make a real

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Thank You....

MICHIGAN DOMESTIC VIOLENCE PREVENTION & TREATMENT BOARD

The VAW Project is a collaboration of the Michigan Domestic Violence Prevention Treatment Baord and the Prosecuting Attornys Association of Michigan. PAAM wishies to thank the MDVPTB for thier financial support of this project.

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difference in the criminal common law.

Some victim lawyers and advocacy organizations are unable to represent victims in way. In fact, most can do no more than hand-holding because as government funded entities they risk losing essential resources if they engage in advocacy that challenges the status quo. Certainly some hand-holding is fine but it's important for prosecutors to recognize the difference and ensure that when important rights are at stake or systemic repair work is needed, these types of organizations are NOT selected to represent the interests of victims.

Unfortunately, some victim advocacy organizations are only too happy to serve as the means by which victims are co-opted into accepting violations of their rights and other forms of revictimization as necessary evils. It doesn't take a cynic to see how not fighting for meaningful reform actually ensures a sustained need for their very existence. Clearly, this is a difficult conflict to resolve in a brief article but an apt ending to a piece aimed at stirring up dust in the hope that when the dust settles, a few new ideas might spring up; ideas that challenge all of us to not only think outside the box but consider ignoring the box altogether every once in a while. With thirty years of relatively ineffective reforms behind us, it would be unconscionable to waste any more time NOT confronting old ways of thinking even if it means literally embracing ideas that may well put some of us out of business.

As it should be.

Who is Wendy Murphy?

Wendy is an adjunct professor at the New England School of Law in Boston where she teaches a seminar on sexual violence and manages two projects in conjunction with the school's Center on Law and Social Responsibility. The "Sexual Violence Legal News" project is an internet-based alert service that distributes appellate cases of interest related to sexual and gender based violence. The "Judicial Language Project" is a linguistic and social science based analysis of gender-biased language in appellate court decisional law.

She was a Visiting Scholar at Harvard Law School from 2002-2003 where her work focused on the status of women in the criminal justice system. Wendy previously taught "Reproductive Rights and Technologies" at the Massachusetts Institute of Technology and served as the Mary Joe Frug Visiting Assistant Professor of Law at the New England School of Law in 2002 where she taught a sexual violence seminar and constitutional criminal procedure.

She is a trial attorney specializing in the representation of crime victims, women, children and victim service providers and she is the founder and director of the Victim Advocacy & Research Group, a volunteer legal advocacy organization that has provided free legal services to victims and other third-parties in the criminal justice system since 1992.

Wendy is a former child abuse and sex crimes prosecutor who sits on many boards and serves on the Massachusetts Governor's Commission

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against Sexual and Domestic Violence. She consults with victims' and women's organizations around the country on matters of litigation and legal policy and she writes and lectures widely on women's, victims' and children's rights and the criminal justice system.

Wendy is also an "impact litigator", having brought numerous test cases to change the law to better protect the rights of women and children victims of violence and she has written many amicus briefs in appellate court cases around the country since 1993.

She planned and brought the first test case in the country using an anti-SLAPP statute law to win the dismissal of a retaliatory lawsuit against a domestic violence victim.

She has litigated numerous test cases since 1992 to change the law and improve privacy rights for women victims of violence in criminal litigation.

She planned and brought the first federal test case in the aftermath of the Supreme Court's decision in Jaffee v. Redmond, to establish that the federal common law privilege of confidentialtiy for licensed social workers extends also to nonlicensed volunteer rape crisis counselors.

Wendy planned and brought the first test case in the country to establish that crime victims have a right to be heard in criminal proceedings and may directly address the court, with their own private attorney, to advance their rights under victims' "Bill of Rights" laws.

She planned and brought the first test case using Title IX and civil rights injunction laws to force a public school to provide special protection for a female student who received an internet death threat. School administrators were ordered by the court to restrain the freedom of the male student who made the threats and to take specific steps to ensure the victim's safety.

She used Title IX to initiate first-ever legal action at the Office for Civil Rights with the Department of Education against Harvard University on behalf of female students after the college instituted a new policy requiring sexual assault victims to produce "sufficient independent corroboration". The case led to the recision of the corroboration policy.

She is a legal analyst with CBS News and appears regularly on the O'Reilly Factor as well as other network and cable news programs including CNN, Fox News, MSNBC, ABC, Court TV and NPR.

Legislation in Brief

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

☞ HB 4431 adds requirement that law enforcement officers provide a copy of incident report to DHS when domestic violence incident occurrs in home where child resides, or if between individuals with minor child in common.

☞ HB 5267 mandates joint custody unless clear and convincing evidence presented that parent is unfit or child's school schedule is disrupted by a move out of the school district

Coverage of 'School Shootings' Avoids the Central Issue

by Jackson Katz

In the many hours devoted to analyzing the recent school shootings, once again we see that as a society we seem constitutionally unable, or unwilling, to acknowledge a simple but disturbing fact: these shootings are an extreme manifestation of one of contemporary American society's biggest problems — the ongoing crisis of men's violence against women.

October is Domestic Violence Awareness Month, so let's take a good hard look at these latest horrific cases of violence on the domestic front. On September 27, a heavily armed 53-year-old man walked into a Colorado high school classroom, forced male students to leave, and took a group of girls hostage. He then proceeded to terrorize the girls for several hours, killing one and allegedly sexually assaulting some or all of the others before killing himself.

The shootings are hate crimes perpetrated by angry white men against defenseless young girls

Less than a week later, a heavily armed 32-year-old man walked into an Amish schoolhouse in Pennsylvania and ordered about 15 boys to leave the room, along with a pregnant woman and three women with infants. He forced the remaining girls, aged 6 to 13, to line up against a blackboard, where he tied their feet together. He then methodically executed five of the girls with shots to the head and critically wounded several others before taking his own life.

Just after the Amish schoolhouse massacre, Pennsylvania Police Commissioner Jeffrey B. Miller said in an emotional press conference, "It seems as though (the perpetrator) wanted to attack young, female victims."

How did mainstream media cover these unspeakable acts of gender violence? The New York Times ran an editorial that identified the "most important" cause as the easy access to guns in our society. NPR did a show which focused on problems in rural America. Forensic psychologists and criminal profilers filled the airwaves with talk about how difficult it is to predict when a "person" will snap. And countless exasperated commentators — from fundamentalist preachers to secular social critics — abandoned any pretense toward logic and reason in their rush to weigh in with metaphysical musings on the incomprehensibility of "evil."

Incredibly, few if any prominent voices in the broadcast or print media have called the incidents what they are: hate crimes perpetrated by angry white men against defenseless young girls, who – whatever the twisted motives of the shooters — were targeted for sexual assault and murder precisely because they are girls.

What is it going to take for our society to deal honestly with the extent and depth of this problem? How many more young girls have to die before decision-makers in media and other influential institutions stop averting their eyes from the lethal mix of deep misogyny and violent masculinity at work here? In response to the recent spate of shootings, the White House announced plans to bring together experts in education and law enforcement. The goal was to discuss "the nature of the problem" and federal action that can assist com-

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munities with violence prevention. This approach is misdirected. Instead of convening a group of experts on "school safety," the president should catalyze a long-overdue national conversation about sexism, masculinity, and men's violence against women.

For us to have any hope of truly preventing not only extreme acts of gender violence, but also the incidents of rape, sexual abuse and domestic violence that are a daily part of millions of women's and girls' lives, we need to have this conversation. And we need many more men to participate. Men from every level of society need to recognize that violence against women is a men's issue.

A similar incident to the Amish schoolhouse massacre took place in Canada in 1989. A heavily armed 25-year-old man walked into a classroom at the University of Montreal. He forced the men out of the classroom at gunpoint, and then opened fire on the women. He killed fourteen women and injured many more, before committing suicide.

In response to this atrocity, in 1991 a number of Canadian men created the White Ribbon Campaign. The idea was for men to wear a white ribbon as a way of making a visible and public pledge "never to commit, condone, nor remain silent about violence against women." The White Ribbon Campaign has since become a part of Canadian culture, and it has been adapted in dozens of countries.

After the horrors in this country over the past two weeks, the challenge for American men is clear: will we respond to these recent tragedies by averting our eyes and pretending that none of this happened? Or will we at long last break our complicit silence and work together with women to turn these tragedies into a transformative cultural moment?

Jackson Katz is the author of "The Macho Paradox: Why Some Men Hurt Women and How All Men Can Help" (Sourcebooks, 2006).

Dramatic Changes Made In CSC Sentencing

Life without parole; lifetime GPS monitoring; mandatory and lengthy prison terms; all of these changes and more became effective this summer, dramatically changing CSC sentencing.

These sweeping changes came in a series of bills passed in response to the horrific Florida case in which Jessica Lundford was kidnapped and killed by a convicted sex offender. The bills became 2006 PA 165-172, effective August 28, 2006.

Prior to the enactment of these changes, CSC 1st was a life with possibility of parole offense. As of August, however, any violation committed by an actor 17-years-old or older against a victim who is less than 13-years-old is subject to a mandatory minimum term of 25 years. The maximum remains any term up to life in prison. MCL 750.520b(2)(b).

If that same person was previously convicted of any degree of CSC against a victim less than 13-years-old, or of assault with intent to commit CSC, or the laws of the U.S. or another state or political subdivision substantially corresponding to CSC, he is subject to a mandatory sentence of life **without parole**. MCL 750.520b(2)(c).

In addition, anyone convicted of CSC 1st shall be sentenced to lifetime monitoring. The new law does not restrict lifetime monitoring to only those who rape victims under the age of 13, or to second offenders. MCL 750.520b(2)(d).

One final change, the new law gives the court discretion to order that the sentence for CSC 1st be served consecutively to any other sentence imposed for any other criminal offense "arising from the same transaction."

A Lifetime of Being Watched

The length of parole has been changed for those sentenced under MCL 750.520b(2)(b) [actor over 17 years of age and victim under the age of 13]. Those who are paroled must be under parole supervision for life. The Parole Board has no discretion to parole for any other term.

The legislature jumped on the electronic monitoring bandwagon by amending both the CSC 1st and CSC 2nd sentencing schemes. A defendant convicted of CSC 1st shall be sentenced to lifetime electronic monitoring under new section MCL 750.520n.

A defendant convicted of CSC 2nd shall be sentenced to lifetime monitoring if he is 17-years-old or older and the victim is under 13 years of age. MCL 750.520c(2)(b); MCL 750.520n.

It's important to note the difference in the lifetime monitoring sentences. *All* those convicted of CSC 1st, regardless of the ages of the actor or victim, shall be sentenced to lifetime monitoring. Only those 17 years old or older who are convicted of CSC 2nd against a child under the age of 13 will be subject to lifetime monitoring.

It is also important to note that lifetime monitoring will apply to those who have "maxed out" on their sentence and are released without parole. A sex offender can no longer avoid oversight by maxing out.

Finally, while electronic monitoring is required for some, the Parole Board was given discretion to order it for anyone convicted of CSC 1st or 2nd. MCL 791.236(15).

Coming Soon!

The new and updated "Domestic Violence Trial Manual" available Spring of '07

Discovery Limited to MCR 6.201

In this felony drunk driving case, the defendant served the prosecutor with a discovery request, demanding an opportunity to view "any videotape" of the incident, including any tape of the chemical test. The prosecutor tried to comply by requesting any in-car video, but did not request any tape of the chemical test because she didn't know one existed. Indeed, the arresting agency didn't know of the existence of the tape as the chemical test was not done at their agency. The district court ordered the prosecutor produce the tape, and it was discovered that it had been automatically overwritten by the taping system. The defendant asked both the district and circuit courts for an order suppressing the datamaster results because of the prosecution's "violation" of the discovery order, and both courts did so.

The Court of Appeals overruled both courts. In doing so, the Court strongly reinforced that discovery in a criminal case is governed solely by MCR 6.201. The object of discovery must either explicitly set forth in the rule, or the party seeking discovery must show good cause why the trial court should grant discovery. A failure to comply with a discovery request or order is not "good cause" to permit discovery not otherwise permitted by MCR 6.201.

The videotape at issue is not specifically listed as subject to mandatory discovery in 6.201(A). The tape wasn't subject to discovery under 6.201(B), which encompasses the due process requirement to turn over exculpatory information, because the defendant didn't show that it contained anything exculpatory.

On the issue of "good cause," the Court pointed out that the defendant "learned" that a tape "might exist" and complained that the prosecutor had not produced it pursuant to the defendant's discovery "request." The Court found it "axiomatic" that failure to produce evidence that is not discoverable does not constitute good cause, and the district court's order compelling production was an error.

As a final error, both the district and circuit court excluded the chemical test results because of the alleged violation of discovery. The Court found the suppression an abuse of discretion, and elaborated on the many remedies available to a trial court short of this extreme sanction in those cases where the prosecution actually violates MCR 6.201. Prosecutors take note: requests for privileged or non-discoverable material are routine; know what you have and what must be turned over. *People v. Greenfield*, 271 Mich App 442 (2006).

Michigan Court of Appeals' Unpublished Cases of Note

OV 1 When is a weapon implied?

In this unarmed robbery case, the defendant entered a store and said he would use a gun if the clerks did not give him the money from the cash register. Understandably, the clerks complied. At sentencing for unarmed robbery, the trial court scored five points for Offense Variable 1, aggravated use of a weapon. The directions for scoring this variable say that five points should be assessed when a weapon is "displayed or implied." Defendant argued that a weapon can only be "implied" by using an object, like a finger in a jacket pocket extended to suggest a pistol. The Court disagreed, holding that defendant's threat alone was sufficient evidence to score five points, the threat being sufficient to imply that defendant is armed. *People v. Ray Edward Barry*, COA No. 259435 (June 22, 2006).

Editor's note: The defendant tried to analogize to the armed robbery statute, MCL 750.529, and caselaw that words or threats alone were insufficient to prove the "armed" element in armed robbery. Unfortunately for defendant, the Court found the whole argument unpersuasive, especially in light of the fact that the armed robbery statute was amended in 2004 to add one who "represents orally or otherwise" that they are armed under the definition of armed robbery.

OV 7's definition of "sadism" includes humiliation

The defendant was charged with multiple counts of CSC 1st and 2nd, and attempted CSC 2nd. He was convicted on a total of nine counts. On appeal, the defendant objected to scoring 50 points for offense variable 7 based on a finding that he treated his victims with "sadism." "Sadism" is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." Actual physical abuse is not required, and emotional or psychological abuse leading to humiliation will suffice. The Court found ample record evidence to support the scoring in the extended period of the sexual abuse by defendant, their stepfather; the fact that the abuse began at an early age; they were told to keep the rapes secret for many years; and, with regard to one victim, the fact that the defendant used numerous objects to penetrate, degrade and humiliate her, all of which were done to provide the defendant gratification. *People v. Timothy Bodman*, COA No. 259970 (June 22, 2006).

Editor's note: This case illustrates well how an aggressive strategy of arguing for appropriate scoring can result in a long sentence. "Humiliation" is a sex offender's stock-in-trade, and opportunities to argue for 50 points will be present in many cases. This case also discussed the prosecutor's use of leading questions, and the court's questioning of an expert witness to clarify testimony.

No due process right to additional DNA testing

The defendant was convicted by a jury of CSC 1st and home invasion 1st degree after he entered the victim's home and raped her. The defendant originally delayed the trial for DNA testing of swabs taken from the victim's body. Unfortunately for the defendant, the results of those tests demonstrated that his DNA was on the victim's face and breasts, where she said he kissed her. Understandably, the defendant changed

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his theory of defense to one of consent, arguing at trial that the victim consented to the sexual penetration in exchange for drugs. Prior to trial, the defendant asked for a second delay to conduct DNA tests on a condom, a stain on the mattress, and his fingernails, claiming that the results would exonerate him. In upholding the trial court's refusal to delay the trial again, the Court of Appeals reinforced that there is no due process requirement that the prosecution find exculpatory evidence or test evidence for a defendant's benefit. Moreover, the Court found that any DNA test results would have only "speculative value" as the defense was now consent. *People v. Steven Emerson*, COA No. 260355 (September 14, 2006).

Editor's note: Because the evidence was overwhelming, including three other victims who testified that the defendant raped them in an identical manner, this was a fairly easy case to decide. Nevertheless, it nicely reinforces the need to assess the requested DNA testing in light of relevancy, especially where the testing is designed to lead to evidence of prior sexual activity of the victim. In cases of consent, this kind of testing will usually be irrelevant and should be challenged.

Lay witness testimony to effects of battering permitted

The defendant was convicted of CSC 2nd and felonious assault after the jury heard evidence that he used a knife to carve a swastika and obscenities into the victim's breast and chest. The defense was consent. A friend of the victim testified that the victim was afraid of the defendant. When asked how she knew, the witness responded "I've been there, I could tell." On follow-up the witness testified that she had been a victim of domestic violence and recognized the fear in her friend. She also testified that the victim showed her the knife wounds and said she was afraid defendant would kill her if she could not get the knife away from him. Not content to leave well enough alone, defense counsel asked the witness why she thought the victim stayed with the defendant and didn't run away when she had the chance. The witness said that the victim was afraid that defendant would catch her and that the violence would be worse when he did. The prosecution developed the testimony further by having the witness explain on redirect that her personal experience with domestic violence led her to believe that the police would not help and that running away was foolish. The Court upheld the admission of the testimony, because it was based on the witnesses perception and helpful to the jury. MRE 701. The Court upheld the testimony on redirect by the prosecutor largely because the testimony was relevant to issues, credibility chief among them, raised by the defendant. *People v. Donald Smith*, COA No. 258568 (March 14, 2006).

Editor's note: This case is interesting not only for its reinforcement of the kind of "door opening" done by many DV defendants, but for its explicit judgment that a lay witness's experience with domestic violence and his or her perception of situation or victim is an appropriate basis upon which to base opinion testimony, just as MRE 701 allows.

Got an Issue on Fire? VAW Project Can Help!

The VAW Project offers technical assistance, research and drafting help to prosecutors in need. Don't wait until it's on fire. Call Herb Tanner, at 517-334-6060 ext. 829. Or email him at tannerh2@michigan.gov.

Guns on Scene! Anatomy of a Gun Purchase

by Herb Tanner, Jr., VAW Project Traning Attorney

In June of 2004, Paulette Litzan was killed by her son's father, who subsequently killed himself. This same tragedy plays out across America probably every day. And besides sharing the common theme of murder and suicide, many share another all too common feature: the killer uses a firearm.

Congress recognized the extraordinary risk posed by batterers who own or possess firearms when it enacted the Brady Handgun Violence Control Act in 1994, and in 1996 when it enacted what is known as the Lautenberg Amendment.

In a nutshell, Section 922(g)(8), 18 U.S.C. 922(g)(9) prohibits possession of a firearm or ammunition while one is subject to a protection order, as defined in the law. Section 922(g)(9) prohibits the possession of a firearm by anyone convicted of a misdemeanor crime of domestic violence, as that term is defined in the statute. Additionally, Section 922(d)(8) and (d)(9) make it illegal in many instances to transfer a firearm or ammunition to a person subject to a qualifying protection or order or one convicted of misdemeanor domestic violence.

There are many parts of the Federal law that are beyond the scope of this article, such as what is a qualifying order of protection or a qualifying misdemeanor conviction. For more on those, see *Making the Federal Case Against Domestic Violence* in the Fall-Winter 2003 edition of *The Violence Against Women Newsletter*. This article concerns how the law works to keep track of those who are not supposed to have guns, either because they have been convicted of a misdemeanor crime of domestic violence or a subject to a qualifying protective order, or PPO.

Guns and Domestic Violence: The Series

This is the last of a series of articles on DV and firearms. It explores how those who are prohibited under federal law from owning, purchasing or possessing a gun are tracked. It also describes how a federaly licensed firearm dealer accesses the information in the section headed "Anatomy of a Gun Purchase." Previous articles explored Michigan's response to firearms, and how other states have enacted laws to guide law enforcement when guns are on the scene of domestic violence.

The National Crime Information Center

The National Crime Information Center, or NCIC, is a computerized database of criminal justice information maintained by the FBI. A host of information important to law enforcement is included in the database, including records of stolen property, wanted fugitives, or those who are subject to a protective order.

The information is available to law enforcement agencies nationwide. As an example, a police officer on a traffic stop can query NCIS to find out if the driver is a wanted person, driving a stolen car, or subject to an Order of Protection that he may be violating.

The National Instant Criminal Background Check System

While information from NCIS is available to law enforcement, it is not

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available to federally licensed firearms dealers who must check the backgrounds of those wishing to purchase a firearm from them. The Brady Act mandated the creation of the National Instant Criminal Background Check System, or NICS, to provide nearly instantaneous criminal background checks to federally licensed firearms dealers.

The NICS database has information similar to that of the NCIC, but is more tailored to information necessary to determine if the potential buyer is allowed to purchase a firearm. Disqualifying criteria includes, among others, those convicted of felonies, fugitives, one who

OMB NO. 1512-0129

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
FIREARMS TRANSACTION RECORD PART I - OVER-THE-COUNTER

Transferor's Transaction Serial Number

WARNING: You may not receive a firearm if prohibited by Federal or State Law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm.
Prepare in original only. All entries must be in ink. Read the Important Notices, Instructions and Definitions on this form.

Section A - Must Be Completed Personally By Transferee (Buyer)

1. Transferee's Full Name *(Last, First, Middle)*
2. Residence Address *(No., Street, City, County, State, ZIP Code; cannot be a post office box)*
3. Place of Birth *(City, State or foreign country)*
4. Height ____ Weight ____
5. ☐ Male ☐ Female
6. Birth Date Month ____ Day ____ Year ____
7. Social Security Number *(**Optional**, but will help prevent misidentification.)*
8. Race *(Ethnicity) (Check one or more boxes)*

☐ American Indian or Alaska Native ☐ Black or African American ☐ Native Hawaiian or Other Pacific Islander
☐ Hispanic or Latino ☐ Asian ☐ White

9 What is your State of residence *(if any)*? ____ *(See Definition 5. If you are not a citizen of the United States, you have a State of residence only if you have resided in a State for at least 90 days prior to the date of this sale.)*

10 What is your country of citizenship? *(List more than one, if applicable.)* ____

11 If you are not a citizen of the United States, what is your INS-issued alien number or admission number? ____

Certification Of Transferee

12. Answer questions 12a through 12l by writing *"yes"* or *"no"* in the boxes to the right of the questions.

a.	Are you the actual buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.** *(See Important Notice 1 for actual buyer definition and examples.)*	
b.	Are you under indictment or information in any court for a **felony**, or any other crime, for which the judge could imprison you for more than one year? *(An information is a formal accusation of a crime by a prosecutor. See Definition 3.)*	
c.	Have you been convicted in any court of a **felony**, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? *(See Important Notice 6, Exception 1.)*	
d.	Are you a fugitive from justice?	
e.	Are you an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance?	
f.	Have you ever been adjudicated mentally defective *(which includes having been adjudicated incompetent to manage your own affairs)* or have you ever been committed to a mental institution?	
g.	Have you been discharged from the Armed Forces under **dishonorable** conditions?	
h.	Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? *(See Important Notice 7.)*	
i.	Have you been convicted in any court of a misdemeanor crime of domestic violence? *(See Important Notice 6, Exception 1 and Definition 4.)*	
j.	Have you ever renounced your United States citizenship?	
k.	Are you an alien **illegally** in the United States?	
l.	Are you a nonimmigrant alien? *(See Definition 6.)*	

13 If you are a nonimmigrant alien, do you fall within any of the exceptions set forth in Important Notice 6, Exception 2?
Yes ☐ No ☐ Not applicable ☐ ***(If "yes," the licensee must complete question 18c.)***

SAMPLE

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is unlawfully in the US, one who was dishonorably discharged, and most importantly, those subject to a protective order or convicted of a misdemeanor crime of domestic violence

The Anatomy of a Firearm Purchase

How is this supposed to work? When a person goes to a local federally licensed firearm dealer, the dealer will have the purchaser fill out ATF Form 4473 (a portion of which is pictured below), which includes descriptive identifying information like name, date of birth, and social security number.

The firearms dealer will then contact the NICS either by telephone or the internet using the E-Check System. The dealer gives the identifying information, the NICS database (which includes the NCIC database) is checked, and if no records match the descriptive information, the dealer is advised to go ahead with the sale. If the database check reveals that there is a match with the descriptive information provided, the dealer is advised that the transaction is delayed. The call is then transferred to an FBI NICS Legal Instruments Examiner. The NICS examiner has greater access to information than does the person answering the first call. The NICS examiner reviews the database to determine if the purchaser is actually a match with the individual in the database, and if so, if they are prohibited from purchasing a firearm. If there is no match, the purchaser is not the individual in the database, or if purchaser is not prohibited from purchasing a firearm, the sale can be completed.

If the FBI examiner determines that the prospective purchaser is prohibited from purchasing a firearm, the examiner will tell the dealer to deny the transaction. If the examiner can't tell, but the purchase may potentially be prohibited, the examiner will tell the dealer to further delay the transaction.

The examiner then conducts research to determine if the potentially prohibited transaction is actually contrary to federal law. That research may include contacting local, state and federal law enforcement agencies and courts to get current record information. The examiner calls the dealer back to tell him the results of that research; either go ahead with the sale or deny the sale.

Obviously, the research could take some time. After three days, the examiner must call the dealer and let him or her know that the dealer has the discretion to proceed with the sale or not. Regardless of the dealer's decision, the NICS examiner will continue the research to get complete information.

Gaps in Protection

It's easy to see that there are gaps in the NCIC and NICS systems. Like any database, they are only as useful as the accuracy and completeness of the information stored in them. Not every state provides up-to-date and complete information on those subject to PPO's or convicted of domestic violence.

Of course, even accurate information will be of little use if not timely entered into the database. There have been cases where one who is prohibited from purchasing a firearm has made it to the dealer before the prohibiting order is entered in the NICS system. This gap, at least, can be quickly closed. NICS will accept orders for inclusion in the database on an emergency basis from anyone. If law enforcement, the prosecutor or the court believes that the respondent presents an immediate threat of purchasing a firearm, any one of them can include the order in the NICS database.

Whether the PPO actually qualifies as a "protection order" under federal law (see sidebar) creates a gap in protection as well. Federal law requires that to qualify the order must be entered after hearing of which the defendant had actual notice and an opportunity to be heard. The vast majority of PPO's in Michigan are entered *ex parte*, and therefore do not trigger the disqualification under federal law.

What is a protective order under Federal Law?

An order qualifies as a "order of protection" if:

1. It's entered after a hearing of which respondent had actual notice and opportunity to respond;

2. It restrains from concuct that would place another in reasonable fear of bodily harm;

3. Includes a finding of a credible threat OR expressly prohibits the use of force against protected party or child; and,

4. Meets relationship requirement of spouse or former spouse, cohabitation, child in common, or respondent's child or child of intimate partner.

Crawford Watch:

Clear as Mud?

Lower court decisions after *Davis v. Washington*, 126 S.Ct. 2266 (2006) continue to struggle with the concept of testimonial hearsay. How, and even whether, the "primary purpose" test from *Davis* should be used to determine if a statement is testimonial will likely be the subject of many cases yet to come.

Statement in Forensic Interview are Testimonial, but Opportunity to Cross Examine Afforded

Are statements made in the course of a forensic interview of a child victim testimonial? Does the "objective declarant" test survive *Davis*? These are two of the questions confronting the Texas Court of Appeals in *Rangel v. Texas*, No. 2-04-514-CR (Tx. COA, 2nd Dist., July 25, 2006).

Rodolfo Rangel was charged with sexually abusing his two biological and two stepchildren. At trial, the videotaped statement of one of the victims was admitted after the trial court determined that the witness was unavailable because live testimony would be too traumatic.

The prosecution relied on the Texas statute (Tex. Code Crim. Proc. Ann. article 38.071), which allows for the admission of a recording of an oral statement of a child victim, taken in a "detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter." In this case, the neutral individual was a CPS investigator with experience conducting approximately 250 videotaped interviews.

After deciding that the trial court's findings of unavailability of the witness and neutrality of the interview were not an abuse of decision, the Court of Appeals squarely addressed whether the victim's videotaped statement was testimonial. If it was testimonial, the Court had to then decide whether there was sufficient opportunity to cross examine afforded the defendant under the Texas statute.

The State argued that the victim's statement was not testimonial because the victim, at six years old, did not appreciate the nature of a trial. Thus, the statements were not made "under circumstances that would lead an objective witness reasonably to believe that the statement would be used at trial.

The Court decided to duck addressing the issue squarely, find the statement testimonial "on other grounds." Relying on *Davis's* primary purpose test, the Court ruled that the child's statement were testimonial. The Court held that this case was clearly distinguishable from *Davis* and more similar to the facts of *Crawford*.

Unlike *Davis*, the victim in this case was describing past events and not events as they happened. There was no ongoing emergency when the victim was interviewed. She had been removed from the defendant's home, placed in foster care, and was getting counseling. Looked at objectively, the statement was made to learn about what had already happened. The victim, like in *Crawford*, was responding calmly, in a place of safety, to a series of questions, with her answers videotaped. This structure, said the Court, was "more akin to the types of *ex parte* examination discussed and condemned in *Crawford* than a 'casual remark to an acquaintance' or even to initial statements made to a police officer responding to a call."

On the issue of what the victim

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understood, the Court noted that the interviewer told the victim she was asking questions to make sure that "it" didn't happen again. The Court concluded that regardless whether the victim understood that her answers would be used as testimony in a criminal trial "we believe under a subjective standard or an objective standard, that a four-year-old child would be able to perceive this as meaning that her words would be used to establish or prove some fact-i.e., that he sexually assaulted her-and that the establishment of that fact was necessary so that a person in authority...would make appellant stop."

Finally, the Court returned to the "primary purpose" test, noting that the statute itself contemplates that the victim's statement would function as testimony in a criminal case. "Thus, regardless of what [the victim] thought her statements would be used for, they were clearly admitted at trial to function as testimony against the appellant." The videotaped statement was, for these reasons, testimonial.

The Court then shifted its attention to whether the Texas statute affords a sufficient opportunity to cross-examine the declarant victim. The Court held that it did, by providing a procedure for submitting written questions that are to be asked, if possible, by the same person who did the initial interview, and recorded under the same or similar circumstances. Since the defendant did not move for permission to ask written questions, he has effectively waived his right to allege a Confrontation Clause error.

Editor's note: Much is still undecided under Davis v. Washington. Whether the "objective declarant" test actually survives the case is one of the most important undecided issue. The U.S. Supreme Court denied cert on a leading pre-Davis case holding that forensic interviews do not produce testimonial statements because a child does not understand that the statements would be used at a later trial (State v. Bobadilla, 709 NW2d 243 (Minn. 2006)). It is tempting to argue that this denial of cert, hard on the heels of Davis, is proof that the "objective declarant" test remains viable. However, the denial of cert is not precedential, and may be better viewed as expressing the Court's desire that Davis be allowed to percolate to present a case more ripe for review. Such a case would be one that squarely holds that the "objective declarant" test should be applied to forensic interviews, distinguishing Davis and its application of the "primary purpose" test.

The Texas Court's judgement on whether the written interrogatory procedure is adequate opportunity to cross-examine gives pause. Justice Scalia, for one, has indicated that the right of confrontation is just that: the right to look the witness in the eye. See, Coy v. Iowa, 487 US 1027 (1988). The Court has been willing to deviate from face-to-face confrontation in cases involving closed-circuit tv testimony (Maryland v. Craig, 497 US 836 91990)) but written questions have not been reviewed.

Ohio Adopts "objective declarant" Test Finding Statements to SANE Non-Testimonial

In *State v. Stahl*, 111 Ohio St3d 186 (2006), the defendant was charged with rape and kidnapping. The victim reported the rape to police, and the investigating officer took the victim to the local SANE program. The SANE did a medico-legal examination, but before doing so had the victim sign a consent form, advising the victim that her signature authorizes the release of "evidence, information (including protected health information), clothing, colposcope photos, and photography documentation of injuries to a law enforcement agency for use only in the investigation and prosecution of this crime." During the course of the exam, the examiner took a complete history which included the identification of the defendant and what he did to her. The investigating officer, who had already

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taken a statement from the victim, remained in the exam room during the history and examination.

Prior to trial, the victim died from cause unrelated to the rape and kidnapping. The prosecutor gave notice of his intent to admit the medical records, and the defendant objected. The trial court sustained the objection. The prosecutor appealed and won. The defendant then appealed to the Supreme Court of Ohio.

The defendant argued that the SANE is an agent of the prosecution because it retains evidence and receives funding from the Ohio Attorney General. Second, he argued that the consent form was proof of the victim's reasonable expectation that her statements to the SANE would be used by the prosecution. Third, he argued that a reasonable person in the victim's position would believe that her statement would be used in a later prosecution.

The Court first distinguished the facts in *Crawford,* an interrogation by police officers, from the statements at issue which came "to a medical professional in the ordinary course of conducting a medical examination...." The Court expressly declined to expand the specific examples of what is testimonial (prior testimony at hearing, grand jury or former trial, and police interrogation) to include statements to medical professionals for the purpose of receiving medical treatment or diagnosis.

The Court went on to analyze the statements according to its interpretation of the objective witness "test" from *Crawford.* In doing so, the Court mentions the *Davis* and *Hammon* cases, distinguishing both from this case because this case deals with statements to "a medical professional at a medical facility for the *primary* purpose of receiving medical treatment and not investigating past event related to criminal prosecution." However, the Court clearly did not feel it could stop there, making the distinction that *Davis/Hammon* dealt with excited utterances and this case does not.

From there, the Court analyzed a number of decisions from state and federal courts, finally concluding that the appropriate test is one that focuses on the expectation of the declarant. The intent of the questioner is relevant only if it could affect a reasonable declarant's expectation. As the Court said: "Given our review of the foregoing authority we adopt the 'objective witness' test in Ohio."

The defendant argued that the SANE program's mission statement mentioning the program's mission to aid prosecution, the fact that it receives government reimbursement, and that the investigating officer asked the examiner if a rape-kit would be "useful" all prove that the statements are inherently testimonial. The Court rejected all of them, saying that there was no evidence that these facts were known to the victim and had any role in forming her expectations.

The defendant also argued that the consent form's authorization for the release of information was proof the statements were testimonial. In rejecting that argument, the Court noted that the victim had already given a statement to police, and it is reasonable to conclude that repeating the statement to the SANE served only a medical purpose and would not cause a reasonable belief that the statement would be used at a later trial.

Editor's note: There is much to taken from this case. The Ohio Court is fairly strong in its conclusions that the primary purpose of the SANE examination is medical diagnosis and treatment. Equally strong is the conclusion that the fact that the state pays for the exam, or that the exam includes the collection of physical evidence, does not change the inherent nature of the SANE exam as a medical examination. Even if the Ohio Court's distinction of Davis/Hammon, and adoption of the "objective declarant" test, proves to be less than convincing to future courts, its judgement on the nature of the exam should withstand scrutiny.

VAW Project Training Schedule

Sexual Offender Sentencing Advocacy

March 20 and 21, 2007
Romulus

DV Grad School Part 1: Identifying, Investigating and Trying the Strangulation Case

April 17, 2007
Bay City

DV Grad School Part 2: Understanding Batterer Behavior at the Scene, In Court, and After Sentencing

May 15, 2007
Chelsea

For information on these and other training opportunities contact Jennifer Doerr at doerrj@michigan.gov

Violence Against Women Project

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