

Criminal Defense Newsletter



February - March, 2010
Volume 33, Numbers 5 - 6

Selected Post Crawford Michigan Decisions

Confrontation, co-Defendant Confession. People v Taylor, 482 Mich 368; 759 NW2d 361 (2008). The Court held 5-2 that a murder co-defendant's out-of-court statements to an acquaintance that the co-defendant and defendants had kidnapped victim, and that defendant had shot the victim once in each leg, causing him to bleed to death, did not implicate Confrontation Clause, since the co-defendant's statements were nontestimonial, and therefore admissibility of the statements was governed solely by hearsay exception for statements against declarant's penal interest. The co-defendant's statements were non-testimonial, because they were made informally to an acquaintance, not during police interrogation or other formal proceeding, or under circumstances indicating that their primary purpose was to establish or prove past events potentially relevant to later criminal prosecution; abrogating. The decision was issued *per curiam*, and Taylor was *pro se*. Justice Cavanagh dissented, on the grounds that the Court's interpretation of MRE 804(b)(3) in People v Poole, 444 Mich 151, 506 NW2d 505 (1993) should be reexamined in light of the later decision in Williamson v US, 512 US 594, 600-601, 114 SCt 2431, 129 LEd2d 476 (1994), where the Supreme Court held that the identical federal rule does not allow introduction of a co-defendant's confession, because the rule only allows admission of those remarks within the confession that are individually self-inculpatory, not a broader narrative. Ironically, the Poole majority had relied on the Commentary to FRE 804(b)(3) to justify its decision.

Features

Amended MDOC Policy Directive.....	9
<u>Crawford</u> Flow-chart.....	5
Post- <u>Crawford</u> Michigan Decisions.....	1
Update on <u>Duncan, et al</u>	10

Departments

DUI Defense Column.....	11
From Other States.....	15
Public Defense Updates.....	7
Spotlight On: William Maze.....	6
Surveillance News.....	13
Reports and Studies.....	13
Technical Tips.....	12
Training Calendar.....	32
Training Events.....	22
Trial Court Successes.....	10

Appellate Courts

Michigan Court of Appeals	
Published Opinion Summaries.....	29
Unpublished Opinion Summaries.....	30
Michigan Supreme Court	
Leave Granted Summary.....	29
Opinion Summaries.....	
Order Summaries.....	28
United States Supreme Court	
Certiorari Granted Summaries.....	22
Opinion Summaries.....	24
Order Summaries.....	24



Please describe your practice.

I am one of only a few lawyers in Michigan who has taken the risk of exclusively practicing drunk driving defense. Although I have been licensed since 1996, I was unhappy during the first eight years of my solo career. Handling a variety of criminal and civil matters, including family law cases, I was miserable, even though my practice was growing increasingly stable.

In early 2004, I started to market a DUI practice. Prior to this, I had handled several drunk driving cases, including a couple of jury trials. When I won a case, I was ecstatic, but when I lost a case, I was crushed. And I usually lost. But I quickly learned that I loved trying cases to juries, and there was a market for lawyers skilled in defending these cases.

Around the country, specialized firms exclusively defend drunk driving cases. At various times, the lawyers from these firms have won stunning victories. They have literally shut down breath testing, resulting in thousands of dismissals in DUI cases. They have challenged and overturned their state's implied consent statutes. They have challenged field sobriety tests, compelled the police to install videos in patrol cars, and caught toxicologists fabricating tests. Meanwhile, these attorneys have helped establish powerful defense organizations in their respective states, raising a greater understanding of the complex issues involved in drunk driving litigation, inspiring other lawyers to raise additional bold challenges.

Why do you consider being a DUI defense lawyer a risk?

Michigan police officers rank very poorly on the national level, and our state's enforcement is extremely lax. Over the last holiday, Michigan reported 300 drunk driving arrests over a 12-day "crackdown" period. California officers made 2,600 drunk driving arrests in Los Angeles County alone during the same number of days. A statewide crackdown in Colorado netted 444 drunk drivers in half the number of days, even though Colorado's population is far less than half that of Michigan.

With the relatively low number of drunk driving arrests in Michigan, the demand for lawyers who

exclusively practice DUI defense is relatively limited. With a number of general practitioners advertising in this area, it can be difficult to effectively market a drunk driving defense firm. Worse still, drunk driving cases are hard to win, so many motorists accused of driving drunk simply want to resolve the case through a simple plea rather than risk going to trial.

How did you find yourself handling only drunk driving cases?

When I first thought about limiting my practice, some thought I was crazy to limit my cases to contested DUI cases. I spoke to Don Ramsell out of Illinois and Tim Huey from Ohio, both of whom are top drunk driving defense lawyers in their respective states, as well as our own Patrick Barone, who regularly contributes to this Newsletter, and I found that these lawyers successfully limited their practices to contested DUI cases. I decided to follow their steps, modeling my practice on what they had already accomplished. But it was not easy.

I joined the National College for DUI Defense (NCDD) in 2004 and began attending that organization's training sessions and really learned a lot, especially about trying DUI cases and bringing pretrial challenges through specific motions. But it became clear to me that lawyers in this field need to have a thorough knowledge of breath testing machines, toxicology, and blood testing procedures, so I started going to more specialized training at various seminars across the country. Around the same time, I started to learn more about trial practice skills through CDAM's Trial Practice College as well as a similar program in Macon, Georgia.

What advice do you have for other lawyers?

If you want to win drunk driving cases, creative arguments, expert witnesses, and juries are your three most important tools. Underlying these three important tools, you also need to obtain the evidence that might be favorable to your client, including all videos and complete access to the underlying scientific information regarding the chemical test. You also need to know how to interpret the information you receive, never accepting the government's interpretation as undisputable.

Creative arguments have led me to challenge the drunk driving forfeiture laws, raising a successful double jeopardy argument against a felony drunk driving charge, as well as fighting the unfair non-

promulgation of “rules-that-are-not-rules” contained in Michigan’s Breath Test Operator Handbook. Expert witnesses, particularly Ron Henson from Illinois and Mary McMurray from Wisconsin, have repeatedly exposed that our state’s toxicologists use shortcuts and bad science to support a prosecutor’s position, while a retired police officer, Tony Corroto from Atlanta, Georgia, has consistently helped my firm expose weaknesses in field sobriety testing.

What trends do you currently see in drunk driving cases?

The trend in Michigan is to plea a case down based upon the chemical test results. This accepts the government’s interpretation of the facts in a case, which will almost always be accepted by the bench. The most important key to winning a DUI case rests with the jury and how you present the facts to that jury. I have won more than one blood case over the legal limit, including a .19 case complete with videos and the officer’s sworn conclusion that the driver was

intoxicated. I have also had cases involving high breath scores that resulted in not guilty verdicts. My personal best was a .34 following an accident where the client could not stand, which resulted in a 2-4 hung verdict and a subsequent reckless plea on a second offense.

With the skills and knowledge that I have taken from the generosity of other lawyers, I have learned how to win DUI cases consistently. I do not win all of my cases, and losing still crushes me. But I want other attorneys to understand that drunk driving cases should never be treated as routine traffic cases. The consequences are too serious, and the opportunity to challenge the case is always hiding around the next corner.

Mr. Maze’s websites: <http://www.michigan-drunk-driving.com/> and <http://www.owiddefenselaw.com/>

**by Neil Leithauser
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Public Defense Updates

As activity continues to mount on reform of Michigan’s public defense system, we will continue to provide updates to our readers. These updates will include those addressing attorney fees.

The new year is well underway and the Campaign for Justice has picked up in 2010 right where it left off in 2009. Much is happening on the legislative front and our grassroots coalition continues to grow. The *Detroit News* placed public defense reform on its legislative “To Do” list for the year, and this month’s update includes a Q and A on House Bill 5676 (the Public Defense Act). You may be interested in a separate message also included in this newsletter from the team working on the *Duncan* litigation. Read on.

State House Plans Work on Public Defense Act

As noted in the January update, the State House Judiciary committee took a first look at House Bill 5676, the Public Defense Act, at a public hearing in Detroit on December 14, 2009. It was an impressive showing of support for the legislation, with more than a dozen groups and individuals testifying in favor of reform.

At the conclusion of the hearing, Chairman Mark Meadows (D-East Lansing) made clear his intentions to hold additional hearings early in 2010 and work toward a vote on the legislation this winter. This was very encouraging news, and the Campaign and its

partners are preparing to assist Chairman Meadows and his colleagues as they continue their review and begin to address questions regarding funding a new system.

As of this writing, the next hearing on the legislation has yet to be announced, however, the Campaign and its legislative team continue to meet and work with House members to answer their questions and discuss the goals of the proposed legislation. A Q and A section on House Bill 5676 is below.

Please, keep an eye on mijustice.org for the latest notices of legislative hearings and activity, and, if you haven’t already, visit the campaign’s online Legislative Action Center at which you can send easily send a message to your legislator.

**Answering Your Questions –
House Bill 5676 and Other State Systems**

Throughout the course of the campaign, we’ve tried to use this space, provided us by SADO, to answer, to the best of our ability, questions asked about how public defense reform may impact defense attorneys. In the past, answers to questions have been focused on other states’ reform experience and public defense systems. We’ve also talked with experts in Michigan for information.