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PROSECUTORIAL OVERCHARGING

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This research memo was prepared for the Legal Resources Project in the Summer of 1979 by Mr. Bennett, an Assistant Defender at the State Appellate Defender Office. An abridged version appears in the August and September 1979 issues of the Criminal Defense Newsletter.

INTRODUCTION

Quite often a single criminal transaction will apparently be a violation of several distinct penal statutes. For example, if a defendant commits a robbery using a pistol, the defendant is apparently guilty of both an armed robbery and a felonious assault. He is also guilty of committing a felony while in possession of a firearm. Can the defendant be charged, tried, convicted, and sentenced for all three violations of the penal code, just two of them, or only one? This problem of multiple charges arising from a single incident will be referred to in this article as horizontal overcharging.

A related problem is that of vertical overcharging. Suppose that two or more similar penal statutes apparently are applicable to a single transaction and suppose that the statutes carry disparate possible sentences. If the defendant can only be convicted of violating one of these similar statutes, which one can it be? This second problem will be referred to as vertical overcharging.

For an example of vertical overcharging, take the situation where a defendant forges an endorsement to a state -issued income tax refund warrant. His forgery apparently is proscribed both by the general forgery statute, MCL 750.248; MSA 28.445, and the forgery statute dealing with state-issued instruments, MCL 750.250; MSA 28.447. The former statute carries a maximum sentence of fourteen years and the latter carries a maximum sentence of seven years. Under which statute may the defendant be punished?

This article will deal with both horizontal and vertical overcharging. Part I will discuss why prosecutors bring such overcharges. Part II, which will appear in next month's edition of the Newsletter, will discuss what legal attacks defense attorneys can use to reduce the number and severity of convictions to which defendants are subject.

REASONS FOR AND IMPROPRIETY OF OVERCHARGING

In general, the prosecutor's discretion in selection of the charge and in methods of plea negotiation are beyond the scope of judicial supervision. Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 683-684 (1972). However, prosecutorial discretion is not unlimited and is subject to review for abuse. Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115, 121 (1974); People v LaRose, 87 Mich App 298, 302 (1978); People v Birmingham, 13 Mich App 402, 406-407 (1968). Perhaps the most common abuse by prosecutors of their charging discretion is the practice of overcharging.

Not all overcharges are the result of the prosecutor's deliberate abuse of charging discretion. The prosecutor may simply be mistaken on the law or the facts in bringing more or higher charges than are justified. Another possibility is that the law concerning a particular fact situation may be unclear. The prosecutor then resolves the ambiguity in his own favor and leaves it to the courts to say whether he was wrong.

Innocent reasons are probably involved in only a minority of the cases. The most common reason for overcharging is prosecutorial overreaching, usually to coerce guilty pleas:

> "One of the major criticisms of plea bargaining that must be faced squarely by prosecutors is the asserted practice known as 'overcharging.' Overcharging may work in two ways. The prosecutor or police may inflate the initial charge, which is a sort of vertical overcharging. Or, the prosecutor or police may multiply unreasonably the number of accusations against the defendant, resulting in a horizontal overcharging. Both of these practices of overcharge lead to a situation where the defendant is faced with a threat of false conviction. The charges are multiplied or inflated in an effort to induce the defendant to plead guilty to a few of the charges or a lesser charge. Where the practice exists it may be the case that the charge or charges finally pled to are the only charges that could be sustained by the prosecution and thus the only proper charges in the first instance." Manak, Plea Bargaining, The Prosecutor's Perspective, National District Attorneys Association, Chicago, 1974, p 3.

In a well known article, Albert W. Alschuler discussed overcharging in depth. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U Chi L Rev 50, 85-105 (1968). From his interviews with prosecutors and defense attorneys in ten metropolitan jurisdictions, Alschuler extracted numerous illustrations of the basic themes of vertical and horizontal overcharging and their respective variations. According to Alschuler, the most common example of vertical overcharging is the universal habit of charging first degree murder in all homicides except those involving negligent use of an automobile. Other examples follow similar patterns of charging the highest relevant offense when the evidence supports only a lesser degree, e.g., charging robbery instead of larceny from a person, or assault with intent to commit murder instead of felonious assault.

Horizontal overcharging takes two forms. One is the charging of separate counts for every similar offense, as when an embezzler is charged with fifty counts for having made fifty false entries in his employer's books. The second is the fragmenting of a single criminal transaction into numerous component parts, as when a "bad check artist" is charged with forgery, uttering and publishing, and larceny by false pretenses all for passing a single check.

After discussing the motives for overcharging and its effect on defendants, Alschuler concludes:

> "Whatever its dangers, most defense attorneys concede that overcharging serves its basic purpose. Defendants are encouraged to plead guilty, and judicial and prosecutorial responses are thereby conserved." Alschuler, supra, at 104.

See Parker, Plea Bargaining, 1 Am J Crim Law 187 (1972); Newman and NeMoyer, Issues of Propriety in Negotiated Justice, 47 Denver L J 367 (1970); Freedman, The Professional Responsibility of the Prosecuting Attorney, 55 Geo L Rev 1030 (1967).

Overcharging has been expressly disapproved by the developers of professional standards both nationally and in Michigan. The ABA Standards Relating to the Prosecution Function state:

> "3.9 Discretion in the charging decision.
>
> (a) It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that charges are not supported by probable cause.
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> * * *
>
> (e) The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial."

The Criminal Justice Goals and Standards for the State of Michigan, prepared by the Michigan Advisory Commission on Law Enforcement (1975), are even more explicit. The commentary, which advocates elimination of all negotiated pleas, states, at page 95:

> "All prosecutors, of course, should be absolutely prohibited from any overcharging or threatening to overcharge a defendant in order to obtain a plea of guilty. Accord, Disciplinary Rule 7-103 (B) of the Code of Professional Conduct. Cf., Mich. Gen. Ct. R. 785.7(2); People v Johnson, 386 Mich 305 (1972); MCLA 768.35."

Standard 62.7 states:

> "No prosecutor should, in connection with plea negotiations, engage in, perform, or condone any of the following:
>
> a. Charging or threatening to charge the defendant with offenses for which the admissible evidence available to the prosecutor is insufficient to support a guilty verdict;
>
> b. Charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct allegedly engaged in by the defendant. . . ."

There are relatively few cases where the issue of overcharging has been discussed. The Supreme Court alluded to the issue in Brady v United States, 397 US 742, 751, n8; 90 SCt 1463; 25 LEd2d 747 (1970), but did not have to deal with it:

> "We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty. In Brady's case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty."

In the case of Scott v United States, 135 US App DC 377; 419 F2d 264, 276 (1969), Chief Judge Bazelon confronted the problem directly:

> "[T]he prosecutor clearly cannot have carte blanche to apply whatever tactics he wishes to induce a guilty plea. A policy of deliberately overcharging defendants with no intention of prosecuting on all counts simply in order to have chips at the bargaining table would, for example, constitute improper harrassment of the defendant." See People v White, 390 Mich 245, 258-259 (1973).

The inequities of such harrassment are numerous. First of all, it has a chilling effect on the exercise of the constitutional right to trial. Although this effect may benefit the criminal justice system in terms of saving resource and expense requirements, the cost of honoring a constitutional right cannot justify making the exercise of that right detrimental to the individual. Even innocent defendants may be so overwhelmed by the degree or number of the charges against them that they will forego the risks of trial for the certainty of a guilty plea.

A second consequence of overcharging is the effect that the original charges may have upon sentencing judges, probation officers and parole boards, even if they are dismissed as part of the plea agreement. Although the defendant stands convicted of Count B, Count A stands on his record, implying that his real offense was more serious than his "deal" reflects. When Count A was unjustified and Count B was in truth the only charge warranted, inaccurate presumptions about Count A may be used unjustifiably to lengthen the defendant's sentence. See People v Byrd, 12 Mich App 186, 222, n 48 (1968) (Levin, J., concurring); Alschuler, supra, at 95-96.

In broadest terms, the true horror of overcharging is that citizens are being charged not on the basis of the evidence against them, but on the basis of pragmatic considerations in the prosecutor's office. See People v Byrd, supra, 12 Mich App at 199. When the desire to secure pleas, gain convictions, and move the docket leads to the unethical bartering of people's lives, the criminal "justice" system has become a sham.

The most notorious practitioner of overcharging in Michigan was the former Bay County Prosecutor, now a Circuit Judge. Typical examples of this prosecutor's tactics are provided by the two cases involving defendant Joel David Feldman. In the first Feldman case (Circuit Court No. 8378, Court of Appeals No. 27266, Supreme Court No. 62842), the defendant and two accomplices allegedly broke into four parking meters. The prosecutor filed a ten count information which contained one count of possession of burglary tools, MCL 750.116; MSA 28.311, one count of possessing a device adapted for breaking into a parking meter, MCL 752.811; MSA 28.643(101), four counts of insertion of an instrument into a parking meter, MCL 752.811; MSA 28.643(101), and four counts of forcibly entering a parking meter, MCL 752.811; MSA 28.643(101). The defendant went to trial, and he was convicted and sentenced on all ten counts.

In the second Feldman case (Circuit Court No. 8619, Court of Appeals No. 28947, Supreme Court No. 60600), the defendant allegedly broke into the laundry room of an apartment building and then broke into the coin boxes of two of the dryers in the room. He was charged in an eight count information with one count of breaking and entering with intent to commit larceny, MCL 750.110; MSA 28.305, two counts of bank, safe, and vault robbery, MCL 750.531; MSA 28.799, one count of possession of a device adapted for breaking into a vending machine, MCL 752.811; MSA 28.643(101), two counts of insertion of a device into a vending machine, MCL 752.811; MSA 28.643(101), and two counts of entering a vending machine, MCL 752.811; MSA 28.643(101).

The prosecutor offered to let Feldman plead guilty to one count of entering a vending machine in exchange for dismissal of the remaining seven counts and for not charging him as an habitual offender. Considering that he already learned that he could be tried, convicted, and sentenced for ten separate counts for breaking into four parking meters, it is not suprising that the defendant accepted the bargain and pled guilty to the one count.

On appeal, Feldman claimed that because of overcharging his guilty plea was involuntary both as a matter of law and as a matter of fact. The Court of Appeals affirmed in an unpublished per curiam opinion and the Supreme Court denied leave. People v Feldman, 403 Mich 834 (1978).

While appeal of Feldman's other case was still pending, the Court of Appeals issued an opinion which directly and forcefully criticized the Bay County Prosecutor's predilection for overcharging. In People v Carmichael, 86 Mich App 418 (1978), the defendant had pled guilty to two counts of larceny in a building after originally having been charged with four such counts. The Court, after finding that the trial judge had improperly denied Carmichael's motion to withdraw his plea, chose to comment at length on the charging decision in the case:

> "We will not address defendant's other allegations of error regarding the denial of his motion. However, we will comment upon the practice which gave rise to many of defendant's other claims. What we refer to is the Bay County Prosecutor's penchant for overcharging defendant. We see problems in this case both as to the prosecutor's (1) charging of this defendant under the habitual offender statute and (2) his original charging on the larceny incidents where they should have been simple larceny charges. It was not the intent of the Legislature to have the larceny in a building statute applicable in shoplifting cases.
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> * * *
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> What became of charges for simple larceny with a maximum of 90 days county jail time? Why the compelling need in a case such as the present for charges involving four years maximum imprisonment for shoplifting against a person whose record clearly indicates acute alcoholism and mental problems? This Court suspects an abuse of process, and an abuse of discretion, on the part of the Bay County Prosecutor in this matter." People v Carmichael, supra, 86 Mich App at 421-422.

One month later, the Court of Appeals decided the first Feldman case. People v Feldman, 87 Mich App 157 (1978). Feldman's ten convictions were reversed on an instructional issue but the Court commented on the double jeopardy aspect of the case to avoid recurrence of error on retrial. The Court held that on retrial the defendant could only be charged once for each act of breaking. In the context of this ruling, the Court cited Carmichael, supra, and again spoke about the prosecutor's practice of overcharging:

> "We are at a loss to understand why the Bay County Prosecutor has undertaken a policy of 'shotgun' charges. The presentation of proofs, the instructions to the jury on the elements of each charge and the instructions on the various verdicts they could return must have caused them much confusion. There is no doubt that this practice would lead to longer trials, a situation most circuits do not need. We do have a suspicion that the multiple-charge policy is for the possible extraction of more pleas, although there is nothing on this record to prove this point." Feldman, supra, 87 Mich App at 161-162, n 2.

For other Bay County overcharging cases, see People v Bergevin, 406 Mich 307 (1979); People v Jankowski, 403 Mich 817 (1978); People v Risher, 78 Mich App 431 (1977).

POSSIBLE ATTACKS ON OVERCHARGING

The possible attacks on overcharging seem to fall into six basic categories which overlap to some extent. Even in situations where they do not overlap, some cases confuse the categories in their discussion and make it unclear just what is the basis for the decision. Also, the applicability of each attack varies according to whether the case is at the trial level or on appeal. The relative applicability of the six attacks should be clear from the following discussions of each category, and no attempt will be made to specifically separate the discussion into trial level and appeal level.

DOUBLE JEOPARDY

The prohibition against double jeopardy is guaranteed under both the state and federal constitutions. Const 1963, Art 1, §15; US Const Am V, Am XIV; Benton v Maryland, 395 US 784, 89 SCt 2056 , 23 LEd2d 707 (1969). The prohibition involves three separate protections: (1) protection against subsequent prosecution for the same offense after acquittal; (2) protection against subsequent prosecution for the same offense after conviction; and (3) protection against multiple punishment for the same offense. North Carolina v Pearce, 395 US 711, 717; 89 SCt 2072; 23 LEd2d 656 (1969); People v Stewart (On Rehearing), 400 Mich 540, 549 (1977); People v Martin, 398 Mich 303, 309 (1976). The protection with which we are mainly concerned in overcharging cases is the third.

It has been stated that the double jeopardy guarantee serves principally as a restraint on the courts and prosecutors. Brown v Ohio, 432 US 161; 97 SCt 2221; 53 LEd2d 187 (1977). As Justice Brennan has pointed out, the Double Jeopardy Clause "stands as a constitutional barrier against possible tyranny by the overzealous prosecutor." Ashe v Swenson, 397 US 436, 456; 90 SCt 1189; 25 LEd2d 469 (1970) [Brennan, J., concurring].

The United States Supreme Court has stated the following rule to be used to determine if two convictions are for the same offense:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. . ." Brown v Ohio, 432 US 161; 97 SCt 2221; 53 LEd2d 187 (1977); Blockburger v United States, 284 US 299, 304; 52 SCt 180; 76 LEd2d 306 (1932).

Thus, the federal double jeopardy clause prohibits convictions for both a greater and lesser included offense. See Harris v Oklahoma, 433 US 682; 97 SCt 2912; 53 LEd2d 1054 (1977); Brown v Ohio, supra.

The Michigan Supreme Court has said that "[t]he scope of the law of jeopardy is apparently the same under both the Michigan and United States Constitutions." People v Alvin Johnson, 396 Mich 424, 430, n2 (1976). However, even though the two clauses are substantially identical, the Michigan double jeopardy clause has been interpreted by the Michigan Supreme Court to give rise to standards more protective than those compelled by the federal constitution. People v Gary Hughes, 85 Mich App 674, 694 (1978) [Walsh, J., dissenting]. Compare People v White, 390 Mich 245 (1973), with Brown v Ohio, 432 US 161; 97 SCt 2221; 53 LEd2d 187 (1977), and Abbate v United States, 359 US 187; 79 SCt 666; 3 LEd2d 729 (1959). This article is not the place to discuss in detail the differences between the two double jeopardy provisions. Suffice it to say, though, that even if the federal clause is not applicable in an overcharging case, defense counsel may wish to argue that under the Michigan clause a charge is an improper overcharge.

In People v Martin and People v Stewart, supra, the defendants were convicted for both selling and possessing heroin. In both cases the heroin sold was the same heroin possessed, and in both cases the Michigan Supreme Court reversed on double jeopardy grounds. In Stewart, the Court said:

> "There is dispute in the instant case that the same heroin was allegedly possessed and sold by the defendant in a single continuous transaction. There was no evidence of possession distinct and apart from the overall sale sequence.
>
> The opinion of the Court of Appeals is correct in its determination that possession and sale of narcotics are separate crimes which may be separately charged. People v Stewart, supra. In a given case, sale may be found without possession. Likewise, possession may be determined without sale.
>
> However, depending upon the facts developed at trial, when the circumstance of possession is not severable or apart from a sale and the jury concludes the defendant is guilty of sale,then the possession blends together with the sale so as to constitute one single wrongful act.
>
> Therefore, from the evidence adduced at this trial, the illegal possession of heroin was obviously a lesser included offense of the illegal sale of heroin. When the jury in the case at bar found the defendant guilty of the illegal sale of this heroin, they necessarily found him guilty of possession of the same heroin." Stewart, supra, 400 Mich at 547-548.

The rule of law promulgated in Stewart and Martin is that where facts underlying two crimes were part of one continuous transaction or sequence, and where the commission of one of those crimes was factually necessary and incident to the commission of the other, a defendant may not be convicted of both, despite the fact that they may constitute separate crimes under another legal test. This rule has been limited recently in the Supreme Court's felony-firearm decision. Wayne County Prosecutor v Recorder's Court Judge, 406 Mich 374 (1979). In Wayne County Prosecutor, the Court restricted the Martin/Stewart analysis to cases "where the Legislature has not clearly authorized multiple convictions and cumulative punishments." 406 Mich at 402. In cases where the Legislature clearly intended to authorize multiple convictions, such as the felony-firearm cases, multiple convictions will be allowed.

EQUAL PROTECTION

Under the Michigan and United States Constitutions, no person shall be denied the equal protection of the laws. Const 1963, Art 1, §2; US Const, Am XIV. Although there are other important attacks to be made on charges under the equal protection clauses, the particular aspect of equal protection with which we are concerned here is the proscription against discriminatory enforcement of the law.

The equal protection clause guarantees like treatment for all persons within a class and all persons in like circumstances. Yick Wo v Hopkins, 118 US 356, 367-368; 6 SCt 1064; 30 LEd 220 (1886). The Supreme Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." United States v Batchelder, __US__ ; 99 SCt 2198, 2204; 60 LEd2d 755 (1979). Thus, the equal protection clauses prohibit selective enforcement "based upon an unjustifiable

standard such as race, religion, or other arbitrary classification." United States v Batchelder, supra, 99 SCt at 2204, n9; Oyler v Boles, 368 US 448, 456; 82 SCt 501; 7 LEd2d 446 (1962).

The occasion for an equal protection attack on overcharging will not occur often, but defense counsel should be aware of the possibility. One obvious example of an equal protection overcharging issue is a prosecutor's practice of charging black shoplifters with the four year felony of larceny in a building, MCL 750.360, MSA 28.592; MCL 750.503, MSA 28.771, while only charging white shoplifters with the ninety day misdemeanor of larceny under $100, MCL 750.356, MSA 28.588; MCL 750.504, MSA 28.772.

IMPROPER EVIDENCE OR LACK OF EVIDENCE

This possible attack is the simplest and requires little discussion here. Prosecutors will often bring charges for which there is no proper evidence and which defense counsel should immediately move to have dismissed. An obvious example is one to which Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U Chi L Rev 50 (1968), referred; the practice of charging first degree murder in most homicides, whether the charge is justified or not.

Another common situation involves the corpus delicti rule that there must be evidence of each element of the charged offense in addition to the defendant's confession:

> "It is a long-standing rule of law in Michigan that the corpus delicti of an offense must be established by evidence independent of the confession of the accused." People v Wells, 87 Mich App 402, 406 (1978).

The corpus delicti rule applies to all offenses, but its most common application is to first degree murder charges, where there must be evidence of the alleged felony or of premeditation and deliberation aliunde the defendant's statement. People v Allen, 390 Mich 383 (1973), adopting Justice (then Judge) Levin's dissenting opinion in the Court of Appeals, 39 Mich App 483, 494 (1972); People v Germain, 91 Mich App 154 (1979); People v Hawkins, 80 Mich App 481 (1978). If there is no evidence on a charge except the defendant's confession, then defense counsel should move for dismissal of the charge.

A third common example concerns habitual offender charges. If the prosecutor charges or threatens to charge the defendant under a supplemental information, the supplement may be an improper overcharge. It will be improper if the defendant does not actually have prior convictions or if the alleged prior convictions were obtained in violation of the defendant's right to counsel or his Boykin/Jaworski rights. United States v Tucker, 404 US 443; 92 SCt 589; 30 LEd2d 592 (1972); People v Moore, 391 Mich 426 (1974); People v Watroba, 89 Mich App 718 (1979); People v Roderick Johnson, 86 Mich App 77 (1978); People v Jones,83 Mich App 559 (1978); see Boykin v Alabama, 395 US 238; 89 SCt 1709; 23 LEd2d 274 (1969); People v Jaworski, 387 Mich 21 (1972).

STATUTORY INTERPRETATION

The Court of Appeals recently stated some of the general principles of statutory construction in People v Gilbert, 88 Mich App 764, 768 (1979):

> "The primary rule of statutory construction is to determine and implement the legislative intent. . . . In doing so, it is not our role to rule upon the wisdom of the statute. . . . The statutory language should be given a reasonable construction considering the purposes of the statute and the object sought to be accomplished. . . . Although penal statutes are to be strictly construed . . . , in so doing one should construe the language according to the 'common and approved usage of the language' " [Citations omitted].

Quite a number of cases have relied on statutory interpretation to reverse "overcharged" convictions. The two most recent Supreme Court cases are People v Johnson, 406 Mich 320 (1979), and People v Bergevin, 406 Mich 307 (1979). In Bergevin the defendant was convicted of multiple counts of kidnapping where there was only one person kidnapped. MCL 750.349; MSA 28.581. In Johnson, the defendants were convicted of multiple counts of first degree criminal sexual conduct even though there was only one sexual penetration. MCL 750.520b; MSA 28.788(2).

In both Bergevin and Johnson, the prosecutors relied on the alternative definitions of the crime contained in each statute to transform a single criminal incident into multiple convictions. The Supreme Court ruled that the Legislature had not intended that multiple convictions could result where a defendant abducted only one person or committed only one sexual penetration, even though the circumstances fulfilled "two or more of the alternative definitions of the crime contained in the statute." People v Bergevin, supra, 406 Mich at 311. As a result of its interpretation, the Court found it unnecessary to address the obvious double jeopardy issues. People v Bergevin, supra, 406 Mich at 312; People v Johnson, supra, 406 Mich at 232.

In Bergevin, the Supreme Court mentioned the relationship of the rule of lenity to the interpretation of the ambiguous statutes:

> "We do not believe that in enacting MCL 750.349; MSA 28.581 the Legislature intended that each of the alternative definitions contained in the statute constitute a separate and distinct crime for purposes of trial, conviction and sentencing. Rather, we perceive that it was the intent of the Legislature to delineate within the statute the possible alternative ways in which the crime of kidnapping could be committed.
>
> We find the statute facially unabiguous. However, were we presented with an ambiguous statute, the rule of lenity would dictate the same conclusion in the absence of legislative history clearly indicating the contrary. See Bell v United States, 349 US 81, 83; 75 SCt 620; 99 LEd 905 (1955), wherein it was stated:
>
> > 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.' " People v Bergevin, supra, 406 Mich at 311-312.
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> "It is a basic rule of statutory construction that a statute specific in language and enacted subsequent to a general statute covering the same subject matter constitutes an exception to the general statute if there appears to be a conflict between the two statutes. . . .
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> * * *
>
> It was clearly the Legislature's intent, in enacting the insufficient funds statute, to carve out an exception to the false pretenses statute and to provide for a lesser penalty for the particular type of false pretense involved in presentation of an insufficient funds check. . . . The crime described in MCL 750.131;MSA 28.326 carries a substantially lower maximum penalty than that set forth in MCL 750.218; MSA 28.415. . . . The prosecutor was bound to charge defendant under the statute which fit the particular facts and not under the more general statute." People v LaRose, supra, 87 Mich App at 303-304.

Bergevin and Johnson are cases of horizontal overcharging. For a case in which statutory interpretation was relied upon to find an improper vertical overcharging, see People v LaRose, 87 Mich App 298 (1978). In LaRose, the defendant pled guilty to obtaining money over $100 by false pretenses. MCL 750.218; MSA 28.415. At the guilty plea, LaRose admitted that he had cashed a check at a bank when he knew he did not have enough money in his account to cover the check and that he intended to defraud the bank. LaRose, supra, 87 Mich App at 301. The Court of Appeals reversed and held that LaRose was convicted under the wrong statute. He should have been prosecuted for delivering an insufficient funds check with intent to defraud, MCL 750.131; MSA 28.326, rather than false pretenses:

> It was clearly the Legislature's intent, in enacting the insufficient funds statute, to carve out an exception to the false pretenses statute and to provide for a lesser penalty for the particular type of false pretense involved in presentation of an insufficient funds check. . . . The crime described in MCL 750.131;MSA 28.326 carries a substantially lower maximum penalty than that set forth in MCL 750.218; MSA 28.415. . . . The prosecutor was bound to charge defendant under the statute which fit the particular facts and not under the more general statute." People v LaRose, supra, 87 Mich App at 303-304.

For cases in addition to those cited above in which statutory interpretation is the ground for finding that a charge is an improper overcharge, see Simpson v United States, 435 US 6; 98 SCt 909; 55 LEd2d 70 (1978); People v Beckner, __ Mich App__ (No. 78-3248; July 26, 1979) [uttering and publishing]; People v Hanna, 85 Mich App 516, 525-526 (1978) [forgery]; People v Shears, 84 Mich App 175 (1978) [forgery and uttering and publishing]; People v Finley, 54 Mich App 259 (1974) [uttering and publishing]. In addition, see People v Kyllonen, 402 Mich 135 (1978) [receiving or concealing]; People v Carmichael, 86 Mich App 418,422 (1978).

POLICY GROUNDS

For reasons of judicial policy a charge may be viewed as an improper overcharge. In People v McMiller, 389 Mich 425, 434 (1973), the Supreme Court held that:

> ". . . upon the acceptance of a plea of guilty, as a matter of policy, the state may not thereafter charge a higher offense arising out of the same transaction.
>
> If the prescribed guilty plea procedure is observed in taking the plea, the conviction will stand. If the procedure is not observed, the conviction will be set aside and the defendant ordered tried on the charge to which the plea was offered."

In explaining the policy reasons for its decision, the Court pointed out that allowing trial on a higher charge after reversal of a plea-based conviction of a lesser offense would (1) discourage defendants from exercising their right to appeal, and (2) tend to insulate from appellate scrutiny non-compliance with the guilty plea procedure established by statute and court rule. McMiller, supra, 389 Mich at 432; [for a thorough analysis of McMiller, see "McMiller Protection," Criminal Defense Newsletter; Vol. 1, No. 6; May, 1978].

The policy arguments that can be made are limited only by the defense attorney's imagination. One possible argument that a charge is an improper overcharge concerns cases of multiple violations of one statute in the same transaction. An example is the first Feldman case, People v Feldman, 87 Mich App 157 (1978), where the defendant and his accomplices simply walked down the street, breaking into four parking meters in succession. Should Feldman be subject to four counts of entering a parking meter, MCL 752.811; MSA 28.643(101), or just one count?

Allowing four counts results in prosecutorial overkill and tends to coerce guilty pleas, as was amply shown in Feldman's case. If Feldman went to trial and were convicted of four counts, one for each parking meter, his sentences would have to be served concurrently. Browning v Michigan Department of Corrections, 385 Mich 179, 186-187 (1971); In re Carey, 372 Mich 378, 380 (1964); People v Glenn Jones, 82 Mich App 403, 406 (1978). If Feldman were to commit a subsequent crime and be charged as an habitual offender, his four parking meter convictions would only count as one conviction for supplementation purposes. People v Lowenstein, 309 Mich 94, 100-101 (1944); People v Ross,84 Mich App 218, 223 (1978). Thus four convictions seem to have most of the same ultimate legal effects as would one conviction that includes the entry of all four meters. The only differences in effect between allowing one count and four counts are improper effects; the tendency to coerce guilty pleas and the inundation of juries with multiple counts to confuse them and to convince them how incorrigible and deserving of conviction the defendants are. See Alschuler, supra, at 98-99.

Under current law, a defendant who robs six victims of their wallets in one transaction can be convicted of six counts of robbery. See Ashe v Swenson, 397 US 436, 446; 90 SCt 1189; 25 LEd2d 469 (1970). Also, a defendant who fires a pistol at one person, missing him but inadvertently hitting another, can be convicted of two counts of assault with intent to do great bodily harm less than murder. People v Lovett, 90 Mich App 159 (1979). However, the multiple convictions in these two examples involve crimes against people, and courts have traditionally viewed such crimes more punitively than crimes against property.

A recent unpublished Court of Appeals opinion took a more liberal view on the issue of multiple convictions for crimes against property. People v James Hunter and Lynn S. Poole, Nos. 77-2055, 77-2056; June 7, 1979. In Hunter the defendants were convicted of two counts of receiving or concealing stolen property, MCL 750.535; MSA 28.803, for receiving radios that were stolen in two separate transaction from two separate owners. The Hunter Court adopted the reasoning of the California Supreme Court in People v Smith, 26 Cal2d 854; 161 P2d 941 (1945), and held that because the two radios had been received in one transaction, only one receiving or concealing conviction could result. In view of the improper use prosecutors make of multiple counts of the same crime arising out of one transaction, the purview of Hunter should be expanded to the maximum extent possible, particularly with respect to property crimes. See Bell v United States, 349 US 81; 75 SCt 620; 99 LEd 905 (1955).

DUE PROCESS

Even if a charge applies to the facts of the crime and would otherwise be valid, the charge may be a violation of due process if prosecutorial vindictiveness is involved in bringing it:

> "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' . . . But in the 'give and take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Bordenkircher v Hayes, 434 US 357, 363; 98 SCt 663; 54 LEd2d 604 (1978).

Under Bordenkircher, it is not a violation of due process for a prosecutor to threaten to file an habitual offender charge against a defendant if he refuses to plead guilty to the original charge. However, the habitual offender charge must be a proper one.

There are many situations outside the plea-bargaining context where an otherwise valid charge will be an improper overcharge. Because of the "realistic likelihood of 'vindictiveness,'" a prosecutor cannot reindict a convicted misdemeanant on a felony charge after the defendant has invoked his appellate right to a trial de novo. Blackledge v Perry, 417 US 21, 27; 94 SCt 2098; 40 LEd2d 628 (1974); Bordenkircher, supra, 434 US at 362. For other cases of possible prosecutorial vindictiveness, see United States v Ruesga-Martinez, 534 F2d 1367 (CA 9, 1976); United States v Groves, 571 F2d 450 (CA 9, 1978); United States v Andrews, 444 FSupp 1238 (ED Mich, 1978); Wynn v United States, 386 A2d 695 (DC, 1978).

A due process challenge may also be made where a defendant is originally overcharged and then ultimately convicted on only the correct charge. One of the major reasons for prosecutors to overcharge is to prevent giving up anything in the plea bargain. By charging a defendant with more or higher charges than are justified, the prosecutor can then plea bargain the defendant into pleading guilty to what the defendant actually did in exchange for dismissal of the other charges. The system works well for the prosecutor because he can obtain convictions without having to go through the bothersome formality of a trial. He can rationalize his practice by reasoning that the defendant has not been convicted for anything the defendant did not actually do. The disadvantages to the defendant are obvious: he has been coerced into giving up his constitutional right to trial and has received nothing in return to which he was not entitled anyway. Also, as has been mentioned before, innocent defendants may be coerced into pleading guilty.

In the situation where the defendant has pled down to what is arguably the correct charge, he should attack the overcharge as having coerced his guilty plea and having made his plea involuntary. Const 1963, Art 1, §17; US Const, Am XIV. In Brady v United States, 397 US 742, 755; 90 SCt 1463; 25 LEd2d 747 (1970), a voluntary plea of guilty was described as follows:

> "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." [Emphasis added].

Certain types of prosecutorial conduct in the context of plea bargaining are objectively improper, or improper per se. In such situations, there is no need for a further subjective inquiry into the mind of the defendant in order to determine the factual voluntariness of the plea. In short, the plea is rendered or deemed involuntary/coerced as a matter of law.

Guilty pleas coerced by threats of improper additional or higher charges are involuntary as a matter of law. People v Goins, 54 Mich App 456 (1974); People v Hoerle, 3 Mich App 693 (1966); see People v Roderick Johnson, 86 Mich App 77 (1978).

In Hoerle, supra, the defendant pled guilty to second degree murder in exchange for dismissal of a charge of first degree murder. However, the trial court did not have the jurisdiction on the first degree murder charge because jurisdiction had been waived by juvenile court only on second degree murder. The Court of Appeals held that the defendant's plea to second degree murder was involuntary, and the Court reversed. Hoerle, supra, 3 Mich App at 699.

In People v Goins, supra, the defendant pled guilty to carrying a concealed weapon in order to avoid being prosecuted for a sale of marijuana. As the sale charge had been reinstated in violation of People v McMiller, 389 Mich 425 (1973), the reinstated charge was a coercive misrepresentation of prosecutorial overcharging authority, entitling the defendant to a new trial.

Other types of prosecutorial overcharging, while not rendering a plea involuntary/coerced as a matter of law, may render it involuntary/coerced as a matter of fact. Note, for example, People v James, 393 Mich 807 (1975) [promise of leniency to a relative]:

> "While a promise of leniency for a relative does not in itself amount to coercion so as to make a guilty plea involuntary as a matter of law, we recognize that it may render a plea involuntary as a matter of fact. *** The trial judge shall determine after an evidentiary hearing whether the promise of leniency to defendant-appellant's wife in this case rendered the defendant-appellant's plea involuntary in fact." (Citations omitted).

The typical situation of involuntariness in fact in overcharging cases is presented by the second Feldman case, supra, where the defendant pled guilty to only one charge in exchange for having all the other charges dropped. If the defendant pled guilty under the assumption that he could be convicted and sentenced on all eight original charges, then his plea was involuntary because he was not aware of the actual value of the commitments made to him.

In this latter situation, involuntariness as a matter of fact, an evidentiary hearing is required in order to make a testimonial/evidentiary record in support of the defendant's claim. Where the defendant's claim, if true, would entitle him to a new trial, he cannot be denied the opportunity for an evidentiary hearing on the question of voluntariness. People v Freddie Harris, 394 Mich 841 (1975); People v James, supra; People v Johnson, 386 Mich 305, 310-315 (1971).

Analogous principles apply when the defendant is overcharged but elects to go to trial. Even if the jury finds the defendant guilty for a proper charge and acquits him of the overcharge, the defendant has been harmed by the overcharge. Without the overcharge,the jury may not have convicted him at all or may have returned a lower verdict. The overcharge made the defendant look like more of a bad man and in addition increased the possibilities for compromise verdicts. Thus, outright reversal is the required remedy:

> "Perhaps the best explanation for the logic of this rule is found in People v Gessinger, 238 Mich 625, 628 (1927), where Justice Bird, writing for the majority, stated:
>
> 'I think it is evident to most practioners of experience that it would be much easier to

> secure an acquittal if the defendant were only charged with the lesser offense than it would be were he charged with all three offenses. The tendency of jurors is to compromise their differences. Where there is only one charge they are obliged to meet the question squarely by yes or no, or disagree, but where the charges are three, the jurors who think that a conviction should be had of the greater offense are quite liable to agree upon a conviction of the lesser offense."

> Thus where a jury is permitted consideration of a charge unwarranted by the proofs there is always prejudice because a defendant's chances of acquittal on any valid charge is substantially decreased by the possibility of a compromise verdict. For this reason it is reversible error for a trial judge to refuse a directed verdict of acquittal on any charge where the prosecution has failed to present evidence from which the jury could find all elements of the crime charged." People v Vail, 393 Mich 460, 463-464 (1975); accord, People v Wells, 87 Mich App 402, 410-411 (1978); People v Gill, 43 Mich App 598, 607 (1972).

NON-WAIVER OF OVERCHARGE ISSUES

There are cases that refer to an overcharge issue having been preserved by objection at trial level; e.g., People v Shears, 84 Mich App 175, 176 (1978). However, language such as that in Shears is surplusage. Overcharge claims are ordinarily not waived by the defense attorney's failure to raise them before the defendant is convicted.

Most cases discussing overcharge issues do not even mention the necessity for objection. They simply assume that objection is unnecessary and proceed to discuss the issue on the merits. See, People v Johnson, 406 Mich 320 (1979); People v Bergevin, 406 Mich 307 (1979); People v Stewart (On Rehearing), 400 Mich 540 (1977); People v Martin, 398 Mich 303 (1976); People v LaRose, 87 Mich App 298 (1978); but see People v Jones, 83 Mich App 559, 569 (1978).

For a case where the Supreme Court specifically considered the issue of waiver of a double jeopardy claim for failure to object at the trial, see People v Cooper, 398 Mich 450, 454-456 (1976). The Court held that the claim was not waived because there was no "intentional decision to abandon the protection of the constitutional right." Cooper, supra, 398 Mich at 455-456.

The entry of a guilty plea also is not a waiver of the overcharge claim. People v Beckner, 92 Mich App 166 (1979). A guilty plea generally waives all nonjurisdictional defects, but a defendant "may always challenge whether the state had a right to bring the prosecution in the first place." People v Alvin Johnson, 396 Mich 424, 442 (1976); see Manna v New York, 423 US 61; 96 SCt 241; 46 LEd2d 195 (1975); Blackledge v Perry, 417 US 21, 30-31; 94 SCt 2098; 40 LEd2d 628 (1974). The Alvin Johnson Court went on to say that:

> "Certainly it is true that those rights which might provide a complete defense to a criminal prosecution, those which undercut the state's interest in punishing the defendant, or the state's authority or ability to proceed with the trial may never be waived by guilty plea." 396 Mich at 444; [footnotes omitted.]

A caveat is in order here. The above discussion assumes that there is an adequate record below to support the overcharge claim on appeal. If the record is inadequate when the case reaches the Court of Appeals, then a remand to the trial court for an evidentiary hearing will be necessary to establish the issue. GCR 1963, 817.6(1). Failure to establish an adequate record below will preclude appellate review. People v Ginther, 390 Mich 436, 443-444 (1973); People v Saylor, 88 Mich App 270 (1979).

In most overcharge issues, the trial court record will be sufficient as it stands. However, in some cases an evidentiary hearing will be necessary. One example that immediately comes to mind is the factual voluntariness issue of the second Feldman case, which was discussed above. In order to show that the guilty plea was involuntary as a matter of fact (as distinguished from as a matter of law), a hearing would be necessary at which the defendant and any other available witness would testify that the plea was involuntary in fact. People v James, 393 Mich 807 (1975).

PRACTICE NOTE

In vertical overcharge cases, trial counsel should obviously move to dismiss the overcharge as soon as possible. After the judge has ruled on the motion, whether granting or denying it, counsel is much more knowledgeable in plea bargaining and conducting his defense in front of the jury. If the motion is granted, counsel may keep knowledge of the higher charge from the jury altogether, or at the least, keep the jury from deliberating on the charge.

In horizontal overcharging cases, all the charges may be valid. It is only that the defendant cannot be convicted and sentenced on all the charges. E.g., People v Johnson, 406 Mich 320 (1979); Pople v Bergevin, 406 Mich 307 (1979); People v Kyllonen, 402 Mich 135 (1978). Counsel should request the trial judge to instruct the jury that the charges are alternative bases for liability contained in one count or that the charges are alternatives, Johnson, supra, 406 Mich at 331; Bergevin, supra, 406 Mich at 312; Kyllonen, supra, 402 Mich at 150. Otherwise, counsel may end up with a client who has been convicted of two counts of criminal sexual conduct for only one penetration, Johnson, supra, three counts of kidnapping for only one abduction, Bergevin, supra, or ten counts of possession of burglary tools and entering parking meters for breaking into four parking meters, People v Feldman, 87 Mich App 157 (1978).

The failure to request an instruction that the charges are alternative bases for liability will sometimes not harm the defendant. The remedy on appeal will simply be to vacate the extra convictions. Bergevin, supra; Johnson, supra; People v Ramsey, 89 Mich App 260, 267 (1979). However, the failure to request the instruction will be harmful when the jury gains the impression that the prosecutor must be right in charging the defendant and the defendant must be a bad man because of all the charges against him and when there is a possibility of a compromise verdict. See Alschuler, The Prosecutor's Role in Plea Bargaining, supra, at 98-99.

For an example of this last point, take the situation of a defendant charged with involuntary manslaughter for inadvertently shooting a neighbor. MCL 750.329, MSA 28.561; MCL 750.321, MSA 28.553. If the jury is instructed on the possible verdicts of involuntary manslaughter and reckless discharge of a firearm causing death, MCL 752.861; MSA 28.436(21), but not given any guidance on the relation of the verdicts, the jury may convict on both. Because of confusion or compromise, a jury instructed that reckless discharge is an alternative and lesser verdict of involuntary manslaughter may return a verdict of reckless discharge. See People v Ora Jones, 395 Mich 379 (1975). The jury will not know the consequences of its lesser verdict, but the difference to the defendant is tremendous: the difference between a fifteen year felony and a two year misdemeanor.

EXAMPLES OF CASES INVOLVING OVERCHARGES

The examples which follow are divided into six categories: drugs, firearms, homicide, assault, larceny and fraud. The categories are arbitrary, and the example cases are not by any means all-inclusive. However, the examples should give the reader a grasp of many overcharge fact situations, a knowledge of how the overcharge arguments fared in court, and some ideas for future overcharge arguments of his or her own. Also, one other note is in order here: no attempt has been made in these examples to discuss the merits of the cases. It will quickly be apparent to any reader that some of the cases are absurd and are the consequences of result-oriented courts rather than law-oriented courts.

DRUGS

In People v Stewart (On Rehearing), 400 Mich 540 (1977), and People v Martin, 398 Mich 303 (1976), the defendants were convicted for both selling and possessing heroin. In both cases the heroin sold was the same heroin possessed, and in both cases the Michigan Supreme Court reversed on double jeopardy grounds. The Court stated that:

> "In a given case, sale may be found without possession. Likewise, possession may be determined without sale. However, depending upon the facts developed at trial, when the circumstance of possession is not severable or

> guilty of sale, then the possession blends together with the sale so as to constitute one single wrongful act." Stewart, supra, 400 Mich at 548.

Since possession of the heroin was factually necessary and incident to the sale, the defendants could not be convicted of both offenses.

In contrast to Martin and Stewart, two Court of Appeals cases have recently stated that it is not a violation of double jeopardy to convict a defendant for both conspiracy to deliver heroin and delivery of heroin for a single act of delivery. MCL 750.157a(a), MSA 28.534(1)(a); MSA 335.341(1)(a), MSA 18.1070(41)(1)(a); People v Flores, 89 Mich App 687, 692 (1979); People v Gonzales, 86 Mich App 166, 170-171 (1978). It is interesting to note, however, that when the defendant in Gonzales applied for leave to appeal, the Supreme Court reversed his conviction for conspiracy because of insufficient evidence. People v Gonzales, 406 Mich 943 (1979).

FIREARMS

In Wayne County Prosecutor v Recorder's Court Judge, 406 Mich 374 (1979), the Supreme Court decided the felony-firearm cases. The Court held that it is not a violation of double jeopardy to convict a defendant for both possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and for the underlying felony. The Court discussed Martin and Stewart, supra, and their prohibition of convictions for two offenses where the commission of one was factually necessary and incident to the commission of the other. The Court restricted the Martin/Stewart analysis to cases "where the Legislature has not clearly authorized multiple convictions and cumulative punishments." 406 Mich at 402. In cases where the Legislature clearly intended to authorize multiple convictions, such as the felony-firearm cases, multiple convictions will be allowed.

The Supreme Court has not yet spoken on the issue of whether the defendant must personally possess the firearm during the commission of the felony in order to be convicted under the felony firearm statute. The Court of Appeals has gone both ways on the issue, with two panels requiring personal possession and one panel saying that possession by an accomplice is sufficient. Compare People v Powell, 90 Mich App 273, 274-275 (1979); and People v Walter Johnson, 85 Mich App 654, 658-659 (1978); with People v Tavolacci, 88 Mich App 470, 473-475 (1979).

United States v Batchelder, __US__; 99 SCt 2198; 60 LEd2d 755 (1979), involved a defendant who was convicted under a statute which prohibited convicted felons from receiving firearms that had travelled in interstate commerce. 18 USC 922 (h). However, another statute which had the same elements only authorized a two year maximum imprisonment. 18 USC App 1202(a). The United States Supreme Court held that it was neither a violation of due process nor of equal protection to convict the defendant under the five year statute, even though another statute prohibited the same conduct but only carried a two year sentence.

In People v Davenport, 89 Mich App 678 (1979), the Court of Appeals upheld convictions for both carrying a firearm with unlawful intent, MCL 750.226; MSA 28.423, and carrying a concealed weapon, MCL 750.227; MSA 28.424. The Court decided that even though one element of the two offenses was the same, i.e., possession of a pistol, the two statutes involved had different purposes and were not cognate offenses. Each statute required proof of a fact that the other did not, and conviction of both offenses did not violate double jeopardy. Davenport, supra, 89 Mich App at 685.

HOMICIDE

Where there has been only one homicide, there has been only one murder. Therefore, it is a violation of double jeopardy to convict the defendant of both first degree premediated murder and first degree felony murder. People v William Ramsey, 89 Mich App 260, 267 (1979); People v Sparks, 82 Mich App 44, 53 (1978).

It is also a violation of double jeopardy to convict a defendant for both felony murder and the underlying felony, because the felony is a necessarily included offense of the murder. People v Wilder, 82 Mich App 358, 364 (1978), lv grt'd, 403 Mich 816 (1978); People v Anderson, 62 Mich App 475, 482-483 (1975); see Harris v Oklahoma, 433 US 682; 97 SCt 2912; 53 LEd2d 1054 (1977). However, where the defendant was originally charged with felony murder and armed robbery, there was no violation of double jeopardy for the defendant to be convicted and sentenced for both manslaughter and armed robbery:

> "[T]here is nothing constitutionally impermissible about convictions of manslaughter and armed robbery. The two crimes have different elements and different statutory purposes, and neither crime is a lesser included offense of the other. See People v Ora Jones, 395 Mich 379, 389-390 (1975)." People v Hicks, 88 Mich App 675, 678 (1979).

ASSAULT

In People v Anderson, 83 Mich App 744 (1978), the defendant was charged with assaulting a police officer, MCL 750.479; MSA 28.747, and attempting to break jail through the use of violence, MCL 750.197c; MSA 28.394(3). The Court of Appeals held that on the facts of the case, the defendant could not be convicted of both crimes because the only evidence of any use of violence was the assault of the police officer. Hence, it would be a violation of double jeopardy to convict on both charhes because it was necessary on the facts of the case to find the defendant guilty of assault in order to find him guilty of attempting to break jail through the use of violence. Anderson, supra, 83 Mich App at 749-750. In addition, see People v Fossey, 41 Mich App 174, 183-185 (1972); remanded for resentencing, 390 Mich 757 (1973).

In People v Terry Alexander, 82 Mich App 621 (1978), the defendant was charged and convicted for assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1), and also with second degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). Both charges arose out of a single incident. The Court of Appeals discussed Martin and Stewart, supra, but then held that the convictions were not a violation of double jeopardy:

> "The assault with intent offense requires proof of an element not found in second-degree criminal sexual conduct: the specific intent to commit criminal sexual conduct involving sexual penetration. Second-degree criminal sexual conduct requires proof of an element not required for assault with intent, namely, "sexual contact". On the facts of this case, the jury did not necessarily find defendant guilty of one crime in finding him guilty of the other." Terry Alexander, supra, 82 Mich App at 625, emphasis in original.

Two recent Supreme Court cases dealt with multiple convictions under one statute for one incident involving one victim. People v Johnson, 406 Mich 320 (1979); People v Bergevin, 406 Mich 307 (1979). In Bergevin, the defendant was convicted of multiple counts of kidnapping where there was only one person abducted. MCL 750.349; MSA 28.581. In Johnson, the defendants were convicted of multiple counts of first degree criminal sexual conduct even though there was only one sexual penetration. MCL 750.520b; MSA 28.788(2).

In both Bergevin and Johnson, the prosecutors relied on the alternative definitions of the crime to transform a single criminal incident into multiple convictions for the same offense. The Supreme Court ruled that the Legislature had not intended that multiple convictions could result where a defendant abducted only one person or committed only one sexual penetration, even though the circumstances fulfilled "two or more of the alternative definitions of the crime contained in the statute." People v Bergevin, supra, 406 Mich at 311. As a result of its interpretation, the Court found it unnecessary to address the obvious double jeopardy issues. People v Bergevin, supra, 406 Mich at 312; People v Johnson, supra, 406 Mich at 323.

The Court of Appeals recently held that a defendant who fires a pistol at one person, missing him but inadvertently hitting another, can be convicted of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. People v Lovett, 90 Mich App 169 (1979). The Court said that:

> "Where crimes against persons are involved we believe a separate interest of society has been invaded with each victim and that, therefore, where two persons are assaulted, there are two separate offenses." Lovett, supra, 90 Mich App at 174.

In kidnapping cases, either asportation or some corresponding non-movement element such as secret confinement is an essential element of the crime. People v Adams, 389 Mich 222, 238 (1973). In many cases involving allegations of crimes other than kidnapping, the prosecutor will try to raise the ante by charging kidnapping because the victim was moved during the course of the crime. The charge of kidnapping is a powerful tool for the prosecutor since kidnapping carries a possible life sentence. MCL 750.349; MSA 28.581. However, the movement element of kidnapping must not be merely incidental to the commission of another crime; i.e., the movement must be incidental to the kidnapping itself. Adams, supra, 389 Mich at 236. This Adams rule is applicable whether the underlying crime carries a possible life sentence or some lesser sentence. People v Barker, 90 Mich App 151 (1979); People v White, 89 Mich App 726 (1979); contra, People v Hardesty, 67 Mich App 376 (1976).

In People v Risher, 78 Mich App 431, 433-434 (1977), one of the defendants pled guilty to an added charge of assault with intent to rob while armed. MCL 750.89; MSA 28.284.

> "As part of the plea bargain, the prosecutor dismissed the original five-count information which had charged armed robbery, MCL 750.529; MSA 28.797; larceny in a service station, MCL 750.360; MSA 28.592; carrying a pistol with intent to use use the same unlawfully, MCL 750.226; MSA 28.423; carrying a concealed weapon, MCL 750.227; MSA 28.424; and larceny over $100, MCL 750.356; MSA 28.588." People v Risher, supra, 78 Mich App at 434.

On appeal, the defendant argued that his plea was involuntary and unknowing because it was motivated by the promise to dismiss the original five charges, even though he could not have been convicted on all five after a trial. The Court of Appeals discussed Martin and Stewart, supra. The Court admitted that the five offenses were cognates. However, the Court refused to hold that it would be a violation of double jeopardy to convict the defendant on all five charges and thus affirmed the conviction.

LARCENY

In People v Kyllonen, 402 Mich 135 (1978), the Supreme Court considered the relationship of the larceny and the receiving or concealing stolen property statutes. MCL 750.356, MSA 28.588; MCL 750.535, MSA 28.803. The Court examined the history and legislative intent behind the passing of the receiving or concealing statute and concluded that:

> "[T]he statute should be strictly construed to exclude thieves who conceal property they have stolen. Under the Michigan statutory scheme, theives are to be punished for larceny. Persons who help theives or others conceal stolen property are to be punished for aiding in the concealment of stolen property." Kyllonen, supra, 402 Mich at 148; [footnote omitted.]

In People v Carmichael, 86 Mich App 418 (1978), the defendant had plead guilty to two counts of larceny in a building after originally having been charged with four such counts. MCL 750.360; MSA 28.592. After finding that the trial judge had improperly denied Carmichael's motion to withdraw his plea, the Court of Appeals referred to the relationship between shoplifting cases and the larceny in a building statute:

> "It was not the intent of the Legislature to have the larceny in a building statute applicable in shoplifting cases." Carmichael, supra, 86 Mich App at 422.

The court implied that the larceny statute was the proper statute in shoplifting cases. MCL 750.356; MSA 28.588.

The defendant had been convicted of both larceny in a building and larceny over $100 in People v Longuemire, 77 Mich App 17 (1977). The Court of Appeals rejected the issues raised by the defendant on appeal, but sua sponte the Court took notice that on the facts of the case, the conviction for larceny over $100 necessarily included the conviction for larceny in a building. The Court held the two convictions to be a violation of double jeopardy and vacated the larceny in a building conviction. Longuemire, supra, 77 Mich App at 24. In addition, see People v Jankowski, 403 Mich 317 (1978).

FRAUD

The Court of Appeals relied on statutory interpretation to find an improper vertical overcharge in People v LaRose, 87 Mich App 298 (1978). In LaRose, the defendant pled guilty to obtaining money over $100 by false pretenses. MCL 750.218; MSA 28.415. At the guilty plea, LaRose admitted that he had cashed a check at a bank when he knew he did not have enough money in his account to cover the check and that he had intended to defraud the bank. LaRose, supra, 87 Mich App at 301. The Court of Appeals reversed and held that LaRose was convicted under the wrong statute. He should have been prosecuted for delivering an insufficient funds check with intent to defraud, MCL 750.131; MSA 28.326, rather than false pretenses.

> "It was clearly the Legislature's intent, in enacting the insufficient funds statute, to carve out an exception to the false pretenses statute and to provide for a lesser penalty for the particular type of false pretense involved in presentation of an insufficient funds check." People v LaRose, supra, 87 Mich App at 304.

In addition, see People v Hodgins, 85 Mich App 62 (1978) [forgery]; People v Finley, 54 Mich App 259 (1974) [uttering and publishing].

In People v Shears, 84 Mich App 175 (1978), the defendant forged and cashed a state-issued ADC check. He was charged and convicted under the general forgery and uttering and publishing statutes. MCL 750.248; MSA 28.445; MCL 750.249, MSA 28.446. The Court of Appeals held that the defendant had been convicted under the wrong statute and reversed. The proper statutes were the more specific forgery and uttering and publishing statues concerning state-issued instruments, which carry lower penalties than the general statutes. MCL 750.250; MSA 28.447; MCL 750.253, MSA 28.450.

Since Shears, the Court of Appeals has held that the specific, state-issued instrument statutes apply not only to instruments drawn on the state treasurer, such as warrants. The statutes also apply to instruments issued by the state (or its political subdivisons), even if the instruments are drawn on a bank. People v Beckner, 92 Mich App 166 (1979).

CONCLUSION

If the attorney thinks his client has been overcharged, then he should start objecting as soon as possible to get the number and level of charges reduced. In horizontal overcharging cases, the attorney may not be able to keep all the overcharges from going to the jury, but he can attempt to have the jury instructed that the possible guilty verdicts are alternatives and that the defendant may not be found guilty on more than one count.

In a horizontal overcharging case, difficult problems arise when the prosecutor offers to let the defendant plead guilty to one count and drop the rest of the counts. The defense attorney will have to determine just how many of the counts the defendant could actually be convicted on at trial, and advise the defendant accordingly. The decision whether to accept the bargain can then be made knowingly, rather than through ignorance.

Because of unsettled law, the defense attorney may not be able to determine just which and how many of the counts for which the defendant may be convicted. In that situation, the attorney will obviously have to discuss the unclarity with the defendant. If the defendant decides to accept the plea bargain, then perhaps as part of the guilty plea the attorney should state on the record just what legal assumptions underlie the decision. That is, which and how many of the counts do the attorney and the defendant assume may result in valid guilty verdicts at trial?

The underlying fact situations of criminal cases are potentially infinite in variety, and as a result the possibilities for overcharging are also infinite. The defensae attorney should be conscious of possible overcharging whenever his client is charged with more than one count as a result of a single incident or is charged under a statute carrying a high penalty where there also seems to be another statute carrying a lower penalty which covers the same facts. The attorney can then act accordingly to protect his client from convictions that are unjustified either in number or severity.