MICHIGAN CRIMINAL CASE LAW UPDATE

~ covering cases between ~

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PRETRIAL PROCEDURE

Remand for Continuation of Preliminary Exam

Abuse of discretion

In denying defendant's motion to quash, the circuit court found that there was probable cause to support the bindover decision. However, the court did grant defendants' motion to remand for a continuation of the prelim based on evidence that was not available during the original exam. The circuit court's announced purpose for the remand was to permit defendants "an opportunity to engage in 'meaningful cross-examination' at the preliminary examination in the event that witnesses became unavailable at trial." This was an abuse of discretion. The circuit court's power to remand for a preliminary exam is limited to: 1) where the court determines that probable cause was not established and remands to give the prosecutor an opportunity to "remedy the shortcomings", 2) where defendant has waived the prelim and the court determines that there was a defect in the waiver, and 3) where the prosecutor seeks to add a charge in circuit court on which the defendant did not have a preliminary exam.

People v. Taylor, ___ Mich App ___ (Nos. 330497, 330499, decided 6/21/16)

Competence to Stand Trial

Charges improperly dismissed

Two months after defendant was declared incompetent to stand trial, the trial court dismissed the charges. An expert had testified at the initial competency hearing that defendant could likely be rendered competent within the 15-month statutory period. Following that hearing, defendant sat in the jail for two months awaiting placement in an appropriate facility. After being informed that it would be six to eight more weeks before a bed would become available, the trial court dismissed the charges finding that defendant would not be restored to competence within the allotted 15 months. This was error for two reasons: the court failed to hold a full hearing on the issue and dismissal is not authorized under the statute until the full 15 months has elapsed.

People v. Davis, 310 Mich App 276 (2015)

Blood Testing

No defense right to retesting

The trial court has no discretion in an OWI case to order the state police to retest a blood sample that they have already tested unless the defendant can show suppression of evidence, intentional misconduct, or bad faith. The trial court erred in granting defendant's pre-trial motion to order the MSP to retest the same sample.

People v. Green, 310 Mich App 249 (2015)

Jury Selection

Batson challenge

During jury selection, defense counsel raised a *Batson* challenge when the prosecutor peremptorily excused two African-American jurors. The prosecutor responded that he excused the jurors because of their "demeanor." The trial court accepted the prosecutor's response without further inquiry. This was error. The court failed to comply with the two of the *Batson* requirements: the court did not give the defense an opportunity to rebut the prosecutor's reason for the peremptory challenges and the court failed to conduct a hearing and make factual findings on the legitimacy of the prosecutor's stated reasons. Remanded for an evidentiary hearing for the court to conduct the complete *Batson* analysis.

People v. Tennille, ___ Mich App ___ (Nos. 323059, 323314, decided 4/14/16)

Failure to Properly Swear-in the Jury

Reversal not required

After the jury was selected, the clerk swore in the jury using the oath given to prospective jurors before *voir dire*. Although this was error, it was unpreserved. The majority rejected Court of Appeals precedent classifying this error as "structural" and upheld defendant's conviction. The failure to give the correct oath "*in this case* did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings." The majority held that the error was not a manifest injustice.

People v. Cain, 498 Mich 108 (2015)

TRIAL PROCEDURE

Judicial Impartiality

Violated by judge's questions

The trial court "pierced the veil of judicial impartiality" by its questioning of the defendant's expert witness. Despite defense counsel's objections, the court questioned the expert in a way that demonstrated a bias toward the defense. The unanimous court reversed and announced a new standard for reviewing claims of judicial partiality: the court's conduct violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party.

People v. Stevens, 498 Mich 162 (2015)

Jury Instructions

Negligence not an element of moving violation causing serious bodily impairment

The trial court erred in agreeing to give defendant's proposed instruction that would require the jury to find defendant negligent in the operation of his vehicle in order to find him guilty of moving violation causing serious bodily injury. The offense is strict liability requiring only a finding that defendant committed a moving violation and in doing so, caused a serious bodily impairment to another.

People v. Pace, 311 Mich App 1 (2015)

First-degree home invasion – special instruction

Before trial on defendant's charge of first-degree home invasion, the prosecutor requested a special instruction for the situation where a defendant lawfully gains access to a home but then uses force to enter a room within the home. The court agreed to give the following instruction: "Where a[d]efendant [g]ains access to a building without breaking, but has no right to enter an inner portion of that building, the defendant's use of force to gain entry into that inner portion is a breaking." The Court of Appeals granted defendant's interlocutory appeal and reversed the trial court. The requested instruction covers a situation not included in the CJI2d and "such a fact pattern does not fall within proscribed conduct under the plain language of MCL 750.110a(2)."

People v. Bush, ___ Mich App ___ (No. 326658, decided 4/21/16)

Second and third-degree home invasion

The trial court erred in instructing the jury on third-degree home invasion as a lesser offense of second-degree home invasion. Third-degree home invasion is a necessarily included offense of second-degree home invasion when, as in this case, the latter is charged with larceny as its predicate offense. However, there was no evidence to support the instruction in this case as defendant's only purpose in the home invasion was to commit larceny. The error did not require reversal. Defense counsel requested that the lesser offense instruction be given and the error did not affect defendant's substantial rights. The Court finds that the erroneous instruction "…aided defendant by allowing him a chance to be convicted of a lesser offense based on a predicate offense that would have supported a higher charge."

People v. Jackson (On Reconsideration), ___ Mich App ___ (No.322350, decided 12/3/15)

Witnesses

Use of support animal

In a question of first impression in Michigan, the Court of Appeals approved of the use of support animals in the courtroom. Michigan statues only allow the use of a support person in the courtroom, MCL 600.2163a(4), and the Court conceded that the dog, Mr. Weebers, was not a person. However, the trial court has broad discretion to control its courtroom and the manner in which witnesses are interrogated. The use of a support animal to assist a youthful victim in a difficult situation is within that discretion. Although it would be good practice for the trial court to give reasons on the record for allowing the use of a support animal, the failure of the court to do so here was harmless as the youthfulness of the 6-year-old complainant was certainly a sufficient reason.

People v. Johnson, ___ Mich App ___ (No. 325857, decided 4/19/16)

Jury Misconduct

Unauthorized reenactment

After the verdict was read, one of defendant's jurors admitted that he had reenacted the crime at home before the deliberations were complete. He did not disclose his actions to the other jurors. The trial court did not abuse its discretion in denying defendant's motion for new trial. The juror's private experiment was based on his own memory of the evidence and was not an extraneous influence on the jury.

People v. Stokes, 312 Mich App 181 (2015); held in abeyance, ___ Mich ___ (No. 152500, 5/25/16)

Prosecutorial Misconduct (or Error)

"Grisly" and "hyperbolic" prosecutor argument

In closing argument, the prosecutor argued that defendant could be convicted as an aider and abettor based on a "team theory" and analogized to a sports team where all the members of the team celebrate a victory. The prosecutor also referred to the homicide victim as having been transformed from a "Wayne State University football player into a piece of meat sitting on a slab." Finally, the prosecutor used a biblical reference in his closing to portray the victim as someone who was simply trying to make peace the night he was killed. Although the Court characterized the latter two arguments as "grisly" and "hyperbolic", the prosecutor's conduct did not deny defendant a fair trial.

People v. Blevins, ___ Mich App ___ (No. 315774, decided 2/11/16)

Denigration of defense counsel

The prosecutor's argument referring to defense counsel as a "mudslinger" who "pulls things out of people and muddies up the water" was improper. It suggested that defense counsel was trying to distract the jurors from the truth. The issue was not preserved and any prejudice was cured by the trial court's instruction that the attorneys' arguments were not evidence.

People v. Schrauben, ___ Mich App ___ (No. 323170, decided 1/26/16)

EVIDENCE

MRE 401

Intoxication of victim irrelevant

The trial court did not abuse its discretion in prohibiting defendant from introducing evidence that the decedent, the driver of the truck struck by defendant, had alcohol and marijuana in his system. Although such evidence may be relevant to show that the victim was the cause of the accident, the evidence here "clearly established" that defendant was the sole cause by crossing the center line and striking the decedent's truck. There was no evidence showing that the behavior of the victim contributed in any way.

People v. Bergman, ___ Mich App ___ (No. 320975, decided 9/29/15).

MRE 404(b)

No *res gestae* exception

At defendant's trial on charges of CSC with a minor, the complainant's aunt testified that the defendant had previously sexually touched both the aunt and another woman. The trial court denied defendant's motion for mistrial finding that the testimony was not within the limitations of MRE 404(b) because it was not evidence of prior sexual misconduct with a minor (the aunt was above the age of consent at the time of her relationship with defendant). The Court of Appeals held that the evidence was within 404(b) but it was admissible as part of the *res gestae* exception. The Supreme Court agreed that this evidence was governed by 404(b) but held that there is no *res gestae* exception to that rule. The Court nevertheless affirmed defendant's convictions. The evidence would have been properly admitted if the court had used a 404(b) analysis. For the same reasons, and because defendant failed to show any "arguments would have been availing, or would have affected the scope of testimony ultimately presented to the jury", the failure of the prosecutor to give notice of the testimony was also harmless error.

People v. Jackson, 498 Mich 246 (2015)

Prior acts admissible to show malice

Defendant was charged with second-degree murder among other offenses for causing a fatal crash while under the influence of muscle relaxants, oxycodone, and amphetamine. The trial court did not abuse its discretion in admitting evidence of seven prior incidents in which defendant drove erratically, was passed out in her vehicle, or struck another vehicle while impaired or under the influence of prescription substances, or was in possession of pills, such as Vicodin or Soma. These prior acts were relevant to the issue of malice as they tended to show that defendant was aware of the danger to human life if she drove with these drugs in her system.

People v. Bergman, 312 Mich App 471 (2015).

MRE 702

Police officer as expert

The trial court abused its discretion by allowing a police officer to give an opinion that a person in a surveillance video was defendant. The officer's testimony was lay opinion testimony which improperly invaded the province of the jury. But in this case, the identity of the assailants was not in question and defendant confessed to his participation. The error was harmless.

People v. Perkins, ___ Mich App ___ (Nos. 323454, 323876, 325741, decided 1/19/16)

MRE 801

Impeachment with extrinsic evidence

The trial court erred in permitting the prosecutor to impeach a witness's testimony that he did not recall making a statement to the police with extrinsic evidence of the substance of the statement. If a witness does not remember or denies making a statement, the witness may be impeached with the time, place, circumstances, and subject matter of the statement but not its contents. The substance of the statement as recounted by a police officer witness was inadmissible hearsay. The error was not harmless as the hearsay statement buttressed the complainant's testimony.

People v. Shaw, ___ Mich App ___ (No. 313786, 6/14/16)

Appointment of Defense Expert

Abuse of discretion to deny computer expert

The prosecutor in defendant's child porn case relied on an expert at the preliminary exam to obtain a bindover. Prior to trial, defense counsel requested the court to appoint Larry Dalman to investigate defendant's claim that the child porn found on his computer had been inadvertently downloaded. Counsel advised the court that he was not sophisticated in computer technology and needed the expert's assistance to prepare for trial and effectively rebut the prosecutor's expert. The court denied the motion finding an insufficient connection between the specifics of defendant's case and the need for an expert. The Court of Appeals held that the denial was an abuse of discretion. The defense established a sufficient nexus to justify the need for an expert. In response to the prosecutor's argument that defendant has to show that his expert's conclusions would be different from the prosecutor's expert, the Court responded: "We are troubled with the logic that a defendant who admits technical ignorance and who has no resources from which to acquire technical resources is asked to present evidence of what evidence an expert would offer in order to garner public funds to hire the expert."

People v. Agar, ___ Mich App ___ (No. 321243, 2/2/16, approved for publication 3/22/16)

MCL 257.625a – PBT Results

Admissible in non-drunk driving cases

The trial court erred in suppressing the PBT results at defendant's trial for possession of a weapon under the influence. The statutory limitation on admissibility of PBT results only applies to drunk driving cases.

People v. Booker, ___ Mich App ___ (No. 329055, decided 2/18/16)

MCL 768.27a

Evidence erroneously suppressed

The trial court erred in granting defendant's pretrial motion to suppress evidence of a prior sexual touching of his minor daughter where defendant was charged with sexual penetration of his other daughter. The evidence was properly admissible under MCL 768.27a. According to the Court, evidence is admissible under the statute if it is relevant, it is a listed offense under MCL 768.27a, and its probative value is not substantially outweighed by its prejudicial impact (MRE 403). Here the evidence was relevant to show propensity as the statute "mandates the admission of propensity evidence." The prior act was a listed offense because it involved the sexual touching of a minor. Finally, its probative value was not substantially outweighed by the prejudice. The trial court's finding that the evidence was inadmissible under MRE 403 because it was dissimilar from the charged offense was an abuse of discretion. Dissimilarity of the prior act and the charged offense "does not matter" under a 403 analysis. NOTE: The Supreme Court ordered briefing and oral argument on "whether the Eaton Circuit Court abused its discretion in denying the admission of testimony offered under MCL 768.27a and whether the Court of Appeals properly applied *People v. Watkins,* 491 Mich. 450, 818 N.W.2d 296 (2012), in reversing the circuit court." 498 Mich 893 (2015).

People v. Uribe, 310 Mich App 467 (2015)

Application of MRE 403

At defendant's trial for sexually abusing his three minor nieces, the trial court permitted the prosecutor to introduce evidence that defendant had sexually abused his own children. Although the trial court erred in not conducting an analysis under MRE 403 to determine if the evidence was substantially more prejudicial than probative, the error was harmless. Neither trial counsel not appellate counsel identified any unfair prejudice arising from "the indisputably probative evidence."

People v. Masroor, 313 Mich App 358 (2015); lv. gt'd, 499 Mich. 934 (2016)

Disclosures by Law Enforcement Officers Act

False statements to internal affairs investigation

Under the DLEOA, a police officer's false statements during an internal affairs investigation cannot be used against the officer at a subsequent criminal proceeding. The plain language of the statute establishes a legislative intent to prohibit at a criminal trial the use of all statements made in response to an internal affairs investigation whether true or not. The trial court's dismissal of obstruction of justice charges against three police officers is affirmed.

People v. Harris, ___ Mich ___ (Nos. 149872, 149873, 150042, decided 6/22/16)

PLEA PROCEDURE

Advice of Rights

Not substantial compliance

Defendant entered a plea of guilty in district court to a charge of domestic violence. Before appearing in court, defendant signed a "pretrial conference summary" that detailed his plea and contained a list of rights he was waiving. During the plea procedure, the district court merely asked defendant if he was giving up his constitutional rights to a trial by a judge or jury. This was insufficient. Both the constitution and the court rules require that the court personally advise the defendant of more than just his right to a jury trial. The omitted rights, particularly the right to remain silent at trial and the right to compulsory process, resulted in a defective plea which entitles defendant to withdraw his plea. The district court abused its discretion in denying defendant's timely motion to withdraw the plea.

People v. Al-Shara, 311 Mich App 560 (2015).

POST-CONVICTION REMEDIES

Post-Conviction DNA Testing

Materiality

The prosecutor at trial presented evidence that defendant's type O blood was not consistent any of the bloodstains found at the scene of the homicide. The court denied defendant's post-conviction motion for DNA testing, finding that because biological evidence (the ABO exclusion) was presented to the jury, a potential DNA exclusion would not be material to defendant's identity as the perpetrator. The Court of Appeals reversed and ordered DNA testing. DNA typing is much more sophisticated than ABO typing. A result could show not only that defendant's biological material was not found at the scene but also that the blood found belonged to a particular person other than defendant or the victim. This evidence would certainly be "material to defendant's identity as the perpetrator, where the DNA testing could point to another specific individual as the perpetrator."

People v. Poole, ___ Mich App ___ (No. 315982, decided 7/7/15)

Secretary of State Driving Records

Court cannot order change in driving record following dismissal of OUIL

Defendant pled guilty to OUIL and was given a delayed sentence. The court sent an abstract of the plea to the SOS. Subsequently, defendant withdrew his plea and the charge was dismissed. The court sent an amended abstract to the SOS but the now-dismissed OUIL conviction remained on defendant's driving record. The court then ordered the SOS to remove the OUIL from the record. The Court of Appeals reversed the order. The trial court has no power to order the SOS to change its records. "Although a trial judge has discretion to delay sentencing or otherwise exercise leniency following a guilty plea, see MCL 771.1, the Vehicle Code regards the plea at issue as a conviction. MCL 257.8a."

People v. McCann, ___ Mich App ___ (No. 325281, decided 3/22/16)

SENTENCING*

SORA

Habitual offender

A defendant convicted of failure to comply with SORA as a second offender can also have his sentence supplemented under the habitual offender act. Nothing in either of the statutes "precludes a sentencing court from enhancing the maximum sentence provided for SORA–2 by the applicable habitual-offender statute."

People v. Allen, ___ Mich ___ (No. 151843, decided 6/15/16)

Sentencing Guidelines

OV 7

OV 7 is to be scored at 50 points when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The trial court scored OV 7 at 50 points at sentencing for defendant's conviction for one count of CSC 1 involving a minor. The scoring was based on information in the presentence report that in the past defendant had pointed a BB gun at the complainant's head and had beaten and threatened her. The court erred in scoring OV 7. While the described acts could easily fit the types of behavior described in OV 7, the record does not support the conclusion that these acts occurred during the convicted offense. Remanded for resentencing.

People v. Thompson, ___ Mich App ___ (No. 318128, decided 3/29/16)

OV 10

It is error to score the offense variables based solely on the co-defendant's conduct unless the instructions for the particular offense variable states otherwise. Defendant was convicted of armed robbery for his role as the getaway driver. After defendant dropped his two co-defendants off at a store "to get some money," the two co-defendants selected a vulnerable victim (an older woman walking alone) and robbed her. The trial court assessed 15 points for OV 10 because the co-defendants went looking for an appropriate victim after defendant dropped them off. The trial court's statements establish that he was basing the scoring of OV 10 in defendant's case exclusively on the actions of the co-defendants. Since the OV 10 instructions do not explicitly permit the court to rely on the conduct of other co-perpetrators, this was error.

People v. Gloster, ___ Mich ___ (No. 151048, decided 5/24/16)

OV 19

Defendant was convicted of possession of methamphetamine. Because defendant was on parole for at the time of the offense, the trial court determined that defendant had interfered with the administration of justice and scored OV 19 at 10 points. This was error. OV 19 is generally limited to conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense even if that conduct is the sentencing offense. The mere fact that defendant violated his parole is insufficient to justify scoring OV 19.

People v. Sours, ___ Mich App ___ (No. 326291, decided 5/10/16)

PRV scoring – PRV 5 and the "10-year gap" rule

Prior misdemeanor convictions that cannot be scored under PRV 5 can still be counted in determining whether there has been a 10-year gap since a defendant's last conviction. Defendant here had an extensive criminal record, most of which occurred before 2001. The only conviction between 2001 and 2012 was a misdemeanor for providing false information to the police. Per the instruction in PRV 5, that conviction did not qualify as a scoreable prior misdemeanor. The Court of Appeals held that the limitations on prior misdemeanors under PRV 5 did not apply to the application of the 10-year gap rule. The trial court correctly utilized all of defendant's pre-2001 criminal record. The result led to a guidelines recommendation of 29 to 57 months instead of 12 to 24 months.

People v. Butler, ___ Mich App ___ (No. 327430, decided 6/2/16)

Consecutive Sentencing

Federal supervised release is not equivalent to parole

Defendant was arrested for delivery of cocaine and possession of marijuana while he was on supervised release from a federal conviction. At sentencing, the presentence report stated that defendant was on parole status at the time of the offense and defendant admitted that he was on parole. Accordingly, the trial court sentenced defendant to a prison term to begin at the conclusion of the sentence for the crime for which defendant was on parole. The Court of Appeals found that both the court and defendant were incorrect because technically defendant was not on parole but on federal supervised release. The remaining question was whether the supervised release can be treated the same as parole for consecutive sentencing purposes. The Court held that the two are not the same. Supervised release can be more like probation while parole necessarily requires that defendant serve a prison sentence. The court refused to "amend" the statute by reading supervised release into it. The trial court had no authority to impose consecutive sentences. Remanded for resentencing.

People v. Clark, ___ Mich App ___ (No. 322852, decided 4/19/16)

CRIMES

Armed Robbery

Representation of possession of a dangerous weapon

Defendant was convicted of armed robbery for demanding money from a Halo Burger employee while his hands were in the pockets of his hoodie, "bulging forward." Defendant never said he had a weapon and the employee was not sure what was in his pockets but she "wasn't taking any chances" so she gave him money. This evidence was sufficient to support an armed robbery conviction. The Court of Appeals rejected defendant's argument that the victim never had a reasonable belief that defendant had a weapon. The statute does not require that defendant actually possess a weapon. Nor does it require that a victim reasonably believe there is a weapon. Defendant here satisfied the statutory requirement that he "represented orally *or otherwise* that he or she was in possession of a dangerous weapon."

People v. Henry, ___ Mich App ___ (No. 325144, decided 4/19/16)

Carrying a Concealed Weapon

Inoperability not a defense

The prosecutor charged defendant with CCW for possessing a handgun that lacked a firing pin. The trial court agreed with defendant that the gun was inoperable and granted his motion to dismiss the charge. The Court of Appeals reversed. The fact that the weapon is currently inoperable is no longer a defense. The Court adopted the definition of firearm in *People v. Peals*, 476 Mich 636 (2006): the weapon (must) be of a type that is designed or intended to propel a dangerous projectile.

People v. Humphrey, 312 Mich App 309 (2015)

Self-defense

The common law defense of self-defense is available to a defendant charged with CCW when the defendant conceals an instrument that becomes a dangerous weapon only when it is used as a weapon. Defendant here pulled out a utility knife and used it to defend himself from a physical attack. The trial court instructed the jury that self-defense only applied to defendant's felonious assault charge and not his CCW charge. The jury acquitted defendant of FA but convicted on the CCW. The Supreme Court reversed and remanded the CCW conviction.

People v. Triplett, 499 Mich 52 (2016)

Carrying a Weapon with Unlawful Intent

Possession of a BB gun not sufficient

Defendant and others robbed a pizza delivery person using a BB gun. He was subsequently convicted of a number of offenses including carrying a weapon with unlawful intent. The Court of Appeals vacated that conviction. The statute, MCL 750.226 requires that defendant be armed with a firearm or "any other dangerous or deadly weapon." The Court held that a BB gun is not within the statutory definition.

People v. Ackah-Essien, 311 Mich App 13 (2015)

Conspiracy to Commit a Legal Act in an Illegal Manner

Sufficient evidence to bind over

Defendant was charged with conspiring with another to commit a legal act in an illegal manner. The co-conspirators worked for Congressman McCotter and were responsible for filing McCotter's petitions for re-election. When they discovered at the last minute that the actual circulators had not signed the petitions as required, the defendants agreed to falsely signed their own names as circulators. They did so and filed the petitions with the State Board of Canvassers. The trial court granted defendant's motion to quash finding that the defendants did not agree to commit a *legal* act because the act, filing false petitions, was an illegal act. The Court of Appeals agreed but the Supreme Court reversed. Defendant here in fact agreed to commit a legal act – filing re-election petitions – in an illegal manner – by falsely signing them. Remanded for reinstatement of the district court's bindover decision.

People v. Seewald, 499 Mich 111 (2016)

Criminal Contempt

Valid for violation of bond condition

Defendant was convicted of criminal attempt for violating a condition of his bond for an OUIL arrest that prohibited him from using alcohol. He argued on appeal that he could not be convicted of contempt for violating a bond condition because it is not an order of the court as required by the contempt statute. The Court of Appeals rejected that argument and affirmed defendant's contempt conviction.

People v. Mysliwiek, ___ Mich App ___ (No. 326423, decided 5/24/16)

Criminal Sexual Conduct - CSC2

Touching for a sexual purpose

Defendant, a medical doctor, was convicted of CSC2 for "cupping" the breast of a 12-year-old female patient while he was checking her throat with a tongue depressor. Defendant argued that the evidence was insufficient to establish that the touching of the breast was for a sexual purpose. The Court of Appeals disagreed. A medical expert testified that there was no medical reason to touch a patient's breast while examining her throat. This testimony was sufficient to establish a sexual purpose.

People v. Hallak, 310 Mich App 555 (2015)

CSC3

Position of authority

Defendant, a CPS worker, was convicted of three counts of CSC3 and one count of CSC4 involving force or coercion for engaging in sexual penetration and contact with two women while defendant was investigating allegations of abuse or neglect against both women. D argued that he did not engage in any act that would constitute force or coercion under the statute. The Court agreed that there is no statutory language explicitly covering a CPS worker who uses his position to coerce sex. However, the examples of force or coercion listed in the statute are not exhaustive and can encompass any act that "induces a victim to reasonably believe that the victim has no practical choice." The complainants here were in a vulnerable position with respect to defendant and his conduct was "unprofessional, irresponsible, and an abuse of authority."

People v. Green, ___ Mich App ___ (No. 321669, decided 10/20/15, approved for publication 12/10/15)

Failure to Pay Child Support

Impermissible collateral attack

Attacks on the amount of child support ordered and the determination of defendant's income cannot be raised as defenses to failure to pay child support. Defendant's argument here that his veteran's disability benefits were not income and should not have been considered in setting the child support, were impermissible collateral attacks on the child support order.

People v. Ianucci, ___ Mich App ___ (No. 323604, decided 1/19/16, approved for publication 3/8/16)

Felony Murder

Aiding and abetting

There was sufficient evidence to support defendant's conviction for felony murder. The evidence established that defendant held the victim during a robbery attempt while a co-defendant shot the victim. Defendant then ran away after which the victim was shot two more times. Defendant argued that he left the scene and reached a point of safety before the fatal shots were fired. The Court rejected this argument for two reasons. It was not clear which shot caused the victim's death so it could have been the first shot while defendant was holding the victim. Even if the first shot did not cause death, based on the evidence that defendant was a willing participant in the armed robbery, he is responsible for the natural and probable consequences even if he is no longer present.

People v. Perkins, ___ Mich App ___ (Nos. 323454, 323876, 325741, decided 1/19/16)

Forgery

Falsely signing nominating petitions

Defendant was charged with forgery under the Michigan Election Law for signing false signatures on a nominating petition. MCL 168.937. The forgery provision of the election law is a felony with a 5-year maximum. Defendant argued successfully in the trial court that he could only have been charged with the misdemeanor of "signing names other than his… own." MCL 168.544c. The Court of Appeals affirmed on the prosecutor's interlocutory appeal but the Supreme Court reversed and remanded for trial on the felony charge. Contrary to the lower court rulings, there is no inherent conflict between the two provisions. Defendant's acts violated both statutes and the prosecutor has discretion to charge either.

People v. Hall, ___ Mich ___ (No. 150677, decided 6/29/16)

Larceny

Removal of fixtures from home during redemption period

Defendant's father owned a home for which he granted defendant full power of attorney after the father went into assisted living. Defendant and his father stopped paying on the mortgage causing the lender to foreclose. Another person purchased the home at a sheriff's sale. On the date of the sale, a statutory 6-month redemption period began giving defendant or his father the right to void the sale if they paid the purchase price to the buyer. They failed to redeem the property. The day after the redemption period ended, the purchaser inspected the house and found that many of the fixtures including the furnace, air conditioner, and duct work had been removed. Police eventually determined that defendant had gone into the house during the redemption period and taken the fixtures. The Supreme Court held that defendant cannot be charged with larceny for his act of taking the fixtures. At common law and under Michigan's statute, to be guilty of larceny, defendant must take the property of another. "Another" must be someone who has the right to possess the property to the exclusion of the defendant. That element was not met in this cases as defendant had a right to possess the property during the redemption period while the purchaser's right to possession of the property did not vest until the end of the redemption period.

People v. March, ___ Mich ___ (No. 151342, decided 6/23/16)

Medical Marijuana Act

§4 Immunity

Immunity under §4 of the MMMA is a legal question that must be decided by the judge before trial. In order to get immunity, a defendant must prove (1) possession of a valid registry identification card, (2) compliance with the requisite volume limitations of § 4(a) and § 4(b), (3) that any marijuana and plants were stored in an enclosed, locked facility, and (4) defendant was engaged in the medical use of marijuana. Proof on the first two requirements raises a presumption for both a caregiver and a patient that the patient was engaged in the medical use of marijuana. A defendant may claim immunity for each separate offense. The prosecutor must be given the opportunity to rebut immunity but the court must consider immunity on a "charge-by-charge basis" unless the prosecutor can show a "nexus exists between the non-MMMA-compliant conduct and the otherwise MMMA-compliant conduct." The trial courts and the COA erred by concluding that the defendants should have known which conditions their patients suffered from, the amount of marijuana each patient needed, and the identities of their physicians.

People v. Hartwick and Tuttle, 498 Mich 192 (2015)

§8 affirmative defense

To raise an affirmative defense under §8 of the MMMA, a defendant must show (1) a bona fide doctor patient relationship in which the doctor has conducted a full exam and determined that the patient has a debilitating condition and will likely benefit from marijuana, (2) the defendant had no more marijuana than necessary to treat the condition, and (3) the use or transfer of marijuana was for a medical purpose. The defendant must show each of these requirements by a preponderance of the evidence. Possession of a valid MMMA registration card does not alone satisfy the burden. The trial court and Court of Appeals did not err in denying these defendants the opportunity to present a §8 defense. Hartwick failed to provide evidence of a bona fide physician-patient relationship for himself, as a patient, and his connected patients, and Tuttle failed to provide evidence of the actual amount of marijuana needed to treat his patients.

People v. Hartwick and Tuttle, 498 Mich 192 (2015)

A defendant who is not formally connected with a caregiver or patient under the registration process, can raise a §8 defense if he proves that he is a patient or primary caregiver as defined by the MMA. No patient may have more than one caregiver and no caregiver can have more than five patients. Also, the MMA does not permit a caregiver to provide or cultivate marijuana for another caregiver's patient. Defendants in this combined appeal may not raise §8 defenses as neither of them can satisfy the above requirements.

People v. Bylsma, ___ Mich App ___ (Nos. 317904, 321556, decided 5/17/16)

Private place

Defendant, a licensed medical marijuana user, was charged with possession for smoking a joint in his parked car at the Soaring Eagle Casino. The trial court dismissed the charge finding that defendant was immune from prosecution because he was in a "private place" in his parked car. Court of Appeals reversed. The parking lot is a public place even if the defendant is inside a private car. The use of a private car does not transform the public lot into a private place.

People v. Carlton, 313 Mich App 339 (2015)

OWI

Personal electric scooter

A personal electric scooter used by a disabled man in lieu of a wheelchair is a vehicle for purposes of the Motor Vehicle Code. Defendant's act of driving his scooter in the curb lane of a public road while intoxicated (and with a can of beer in his hand) can be the basis of an OWI charge.

People v. Lyon, 310 Mich App 515 (2015)

Highway or other place open to the general public or generally accessible to motor vehicles

Defendant was arrested for OWI for backing out of his garage and stopping in his driveway while still in his back or side yard. The trial court correctly dismissed the charge. Defendant drove while intoxicated but only in a private place not open to the general public.

People v. Rea, ___ Mich App ___ (No. 324728, decided 4/19/16)

Prison Escape

Escape as a parole violation

Defendant violated parole and, as a result of that violation, was continued on parole and placed in a secure facility run by the Department of Corrections as a new condition of parole. Defendant escaped from that facility and was charged with prison escape. The trial court dismissed the escape charge pursuant to MCL 750.193(3) which provides that a person cannot be charged with prison escape for violating a condition of parole. The Court of Appeals reversed and interpreted the statute to only prohibit an escape charge based solely on a parole violation. If, as in this case, the prosecutor can establish the elements of prison escape without relying on the fact that the escape was also a parole violation, a prison escape charge is appropriate.

People v. McKerchie, 311 Mich App 465 (2015)

Racketeering

Pattern of criminal activity

The Court upheld defendant's racketeering conviction based on two prior convictions for false pretenses and evidence that she had defrauded nine more victims in identical mortgage modification scams. The prosecutor showed a pattern of criminal activity within the past ten years. There is no requirement that the prosecutor show that the crimes were committed on separate dates. The Court also rejected defendant's argument that the prosecutor failed to prove a pattern of felonies as required by the statute. Even though each of defendant's alleged acts of false pretenses fell below the $1,000 felony threshold, the statute permits the prosecutor to aggregate the separate incidents to meet the felony threshold. Here the prosecutor properly aggregated 18 separate acts into five felony violations.

People v. Raisbeck, 312 Mich App 759 (2015)

Resisting and Obstructing

Reserve officer

Defendant allegedly refused the command of a reserve police officer which resulted in a charge of resisting and obstructing a police officer. The trial court dismissed the charge and the Court of Appeals affirmed. The Supreme Court reversed and remanded to the Court of Appeals for consideration of other issues. Both lower courts erred in concluding that the R&O statute did not apply to reserve officers. Read broadly, the statute prohibits resisting or obstructing any officer "(1) trained and (2) entrusted by a government to (3) maintain public peace and order, enforce laws, and prevent and detect crime." A reserve police officer meets that definition.

People v. Feeley, ___ Mich ___ (No. 152534, decided 6/29/16)

CONSTITUTIONAL ISSUES

Due Process

Prosecutor's failure to correct false testimony

A paid informant/witness testified at trial that he was not paid anything for his cooperation in this case. The prosecutor failed to correct this testimony even though the prosecutor was present at a pretrial hearing where a FBI Special Agent testified that the informant *was paid* for his cooperation in the case against defendant. This was a violation of defendant's due process right to have the jury informed of all incentives underlying the testimony of the witnesses against him. The majority ordered a reversal of defendant's felony murder and armed robbery convictions because this particular witness was critical to the prosecutor's case and because there was very little other evidence connecting defendant to the offense.

People v. Smith, 498 Mich 466 (2015)

Prosecutor's use of perjured testimony

At a motion for new trial, the defense established that the prosecution's complaining witness likely committed perjury at trial. The trial court found no evidence that the prosecutor was aware of the perjury during trial. The Court of Appeals did not disturb this finding but held that "the focus 'must be on the fairness of the trial, not on the prosecutor's or the court's culpability'." Although the evidence presented at the motion hearing "cast doubt" on the witness's trial testimony, it was not enough to warrant a new trial in light of the other evidence of defendant's guilt.

People v. Schrauben, ___ Mich App ___ (No. 323170, decided 1/26/16)

Notice of charges

The prosecution's failure to specify on the information exact dates of the charged offenses did not violate defendant's due process right to notice or to present a defense. The minor complainants in this CSC case alleged that abuse took place over a number of years. Thus, it was not possible for them to specify exact dates and times of each offense. Due process does not require such specific notice in cases like this where it is "conceivable that specific dates would not stick out in [the complainant's] mind[s]."

People v. Bailey, 310 Mich App 703 (2015)

Suggestive identification procedures

The witnesses' identifications of defendant were not the product of unduly suggestive procedures. The out-of-court identifications were based on a pretrial photo lineup where defendant's picture was placed first in the array. The Court could find "no reason' why placing defendant's photo first in the array was suggestive. The Court also rejected defendant's argument that the photo ID was unduly suggestive because the police did not use a "double blind" method.

People v. Blevins, ___ Mich App ___ (No. 315774, decided 2/11/16)

Failure to appoint a defense expert

Defendant was denied due process when the trial court denied his request for an appointed expert witness. The trial court's refusal to appoint a computer expert for the defense prevented the defense from challenging the conclusions reached by the prosecutor's expert and hindered the defense cross-examination. The result was an impairment of the defense that violated due process.

People v. Agar, ___ Mich App ___ (No. 321243, 2/2/16, approved for publication 3/22/16)

Search and Seizure

Knock and talk

Seven police officers went to the two defendants' homes at 4 a.m. and 5:30 a.m. respectively to conduct a "knock and talk" and try to obtain consent to search. The officers obtained consent and searched both homes resulting in the seizure of marijuana butter used to charge the defendants with controlled substance offenses. The trial court denied the motion to suppress, finding that the officers did not conduct searches of the homes until after they obtained voluntary consent. Following defendants' guilty pleas, the Court of Appeals denied leave to appeal. The Supreme Court remanded back to the Court of Appeals for a determination of whether the officers violated the 4th Amendment under *Florida v. Jardines*, 133 S.Ct. 1409 (2013). The Court of Appeals affirmed. The majority said that the only issue under *Jardines* is whether the knock and talk procedures amounted a search. The Court then held: 1) the officers' actions were not searches because their purpose was to just talk with the suspects to obtain consent and, 2) conducting the operation in the early morning hours was not unreasonable under the 4th Amendment.

People v. Frederick, ___ Mich App ___ (Nos. 323642-3, decided 12/8/15); oral argument ordered on defendant's application for leave to appeal, ___ Mich ___ (Nos. 153115, 153117, order issued 6/10/16)

Traffic stop

Police pulled over defendant because they believed he was in violation of MCL 257.225(2) which requires that the vehicle's license plate be "clearly visible" and "maintained free from foreign materials that obscure or partially obscure the registration information and in a clearly legible condition." The stop led to the discovery of contraband in defendant's truck. In fact, the only thing that partially obstructed the officers' view of the license plate was the towing ball attached to the rear of the car. In 2014, the Court of Appeals reversed the trial court's denial of defendant's motion to suppress, holding that defendant's towing ball did not violate the statute and the officers had no reason to believe that defendant was in violation of that statute or any other traffic law. The Supreme Court reversed the Court of Appeals. The placement of the towing ball in relation to the plate rendered the plate not "clearly visible" as required by the statute. The Court noted that its decision might lead to "harsh consequences" for "Michiganders [whose] vehicles commonly have items such as trailer hitches and bicycle racks attached to them." But this fact does not permit the court to interpret the statute contrary to its clear language.

People v. Dunbar, 499 Mich 60 (2016)

Confessions

Voluntariness

During custodial interrogation, the interrogating officer told defendant at the beginning that he would never lie to him and then lied to defendant, telling him that the police had "video, DNA, and fingerprint evidence" implicating defendant in the murder. Defendant then gave an inculpatory statement. Considering the totality of the circumstances, the statement was not involuntary. Police deception does not alone render a confession involuntary.

People v. Perkins, ___ Mich App ___ (Nos. 323454, 323876, 325741, decided 1/19/16)

Ineffective Assistance of Counsel

Failure to obtain an expert

Defendant was denied the right to the effective assistance of counsel where his attorney failed to obtain a single expert to rebut the prosecutor's "shaken baby" theory and failed to attempt to obtain an expert to support the defense theory of the case. Trial counsel had been told by a forensic pathologist that there was a deep divide in the medical community on shaken baby syndrome but that he was "not the best person" for the defense. The pathologist referred counsel to another expert in the field but counsel never attempted to contact that person. In light of evidence of the shaken baby syndrome controversy and the paucity of other evidence of defendant's guilt, "counsel's failure to prepare or show up for the battle sufficiently 'undermine[s our] confidence in the outcome' of this case to entitle the defendant to relief."

People v. Ackley, 497 Mich 381 (2015)

Failure to call expert on ID testimony

Trial counsel was not ineffective for failing to present an expert witness on the problems with identification evidence where this case hinged solely on ID testimony. Counsel's strategy was to cross-examine the eyewitnesses to show that defendant had been merely present. While an ID expert may have been helpful, "the facts that counsel could conceivably have done more or that a particular trial strategy failed do not mean counsel's performance was deficient."

People v. Blevins, ___ Mich App ___ (No. 315774, decided 2/11/16)

Failure to object to multiple hearsay statements and failure to discover and present evidence favorable to the defense

Trial counsel was ineffective for failing to object to multiple hearsay statements in which the complainant was the declarant. Counsel also failed to discover and present evidence that would have undermined the prosecutor's case. The 23-year-old complainant alleged that defendant, her stepfather, had sexually molested her when she was between the ages of 8 to 16. The complainant's out of court statements, which the prosecutor on appeal conceded were hearsay, bolstered the complainant's testimony in what was essentially a one-on-one credibility contest. The evidence defense counsel failed to present evidence would have provided an alternative explanation for the medical testimony regarding complainant's hymenal changes and anal fissures.

People v. Shaw, ___ Mich App ___ (No. 313786, 6/14/16)

Right of Self-Representation

Untimely requests can be denied without further inquiry

Defendant, a prison inmate, was convicted of assault of a prison employee. Throughout the pretrial proceedings, defendant filed a number of motions *in pro per* and asked the court twice to appoint new counsel. The court on at least two occasions asked defendant if he wanted to represent himself and defendant declined, saying that he was only seeking an "effective" attorney. The court appointed a third attorney and the case was set for trial After jury selection, defendant requested that he be allowed to represent himself. The court declined the motion as untimely but did not otherwise conduct an inquiry to determine whether the request was unequivocal and to advise defendant of the dangers of self-representation. This was not error. If the court finds that the request is untimely, the court can deny the motion without conducting any further inquiry. And while the courts have never set a clear rule on whether a request is timely, certainly a request after the trial begins can be properly viewed as untimely.

People v. Richards, ___ Mich App ___ (No. 325192, decided 4/26/16, approved for publication 6/7/16)

Right of Self-Representation/ Right to Present a Defense

Restriction on cross-exam

The trial court did not violate defendant's right of self-representation or his right to present a defense by prohibiting defendant from directly questioning the complainants (defendant's minor daughters). Although defendant was representing himself with standby counsel, his right to self-representation does not include the right to personally cross-examine the victims of his crimes. Defendant's rights were protected by the cross-examination conducted by standby counsel with defendant's consultation.

People v. Daniels, 311 Mich App 257 (2015)

Right of Confrontation

Use of complainant's prelim testimony

Defendant was charged with child sexually abusive activity and CSC2 for acts involving his minor daughter. Although the child, then 7 years-old, testified at the preliminary exam, she claimed at trial to have no memory of the events. The prosecutor unsuccessfully attempted to refresh her recollection as the complainant was "adamant that she could not remember the events giving rise to the charges." The trial court ruled that the child was unavailable due to her lack of memory and permitted the prosecutor to use her prelim testimony as substantive evidence. The Court of Appeals held that this procedure did not violate defendant's right of confrontation. The child's claimed lack of memory rendered her unavailable per MRE 804(a)(2), (3), and/or (4) and the defendant had a full and fair opportunity to cross-examine the child at the prelim. That cross-examination, while limited, was "not significantly limited in scope or duration" so as to cause confrontation problems. Finally, the fact that the child was never sworn in by oath or affirmation at the prelim did not require reversal. While there was no formal oath administered, the child on a number of occasions promised to tell the truth and the defense never objected to the failure to administer the oath. Any error was forfeited and did not affect defendant's substantial rights.

People v. Sardy, ___ Mich App ___ (No. 319227, decided 12/29/15)

Right to Present a Defense

Restriction on closing argument

The trial court abused its discretion by prohibiting defense counsel from arguing that defendant's brother committed the offense. There was evidence to support defendant's theory. But the error did not prevent defendant from presenting a meaningful defense. The jury heard evidence that possibly implicated defendant's brother as the lone carjacker and defendant's attorney argued that the evidence did not establish that defendant was the carjacker. Apparently this was good enough for the Court of Appeals.

People v. Stokes, 312 Mich App 181 (2015); held in abeyance, ___ Mich ___ (No. 152500, 5/25/16)

Witness exercising 5th amendment right

The trial court did not deny defendant the right to present a defense by permitting a witness to exercise his right to remain silent. The court correctly found that the witness's exercise of his 5th amendment right was valid: Defendant had told the police that defendant was merely present when the witness committed the offense and the witness's attorney advised the court that he had advised his client that he should exercise his right not to testify because of the potentially dangerous nature of his testimony.

People v. Steanhouse, 313 Mich App 1 (2015); lv. gt'd. 499 Mich. 934 (2016)

Double Jeopardy

Legislative intent

Convictions for both OWI and OWI causing serious injury based on the same act violate double jeopardy. The Court reviewed MCL 257.625 as a whole and determined that the Legislature clearly did not intend multiple punishments for these two offenses.

People v. Miller, 498 Mich 13 (2015)

Same offense test

Convictions for two counts each of second-degree murder, OUIL causing death, and driving while license suspended causing death for two homicides did not violate double jeopardy. The three offenses enforce distinct societal norms and have distinctive elements.

People v. Bergman, ___ Mich App ___ (No. 320975, decided 9/29/15).

Vagueness

Child sexually abusive activity

The term masturbation in the CSAA statute is not unconstitutionally vague. The term is very clearly defined in the statute "and gives fair notice as to the illegal nature of the proscribed conduct in the context of a CSAA prosecution."

People v. Sardy, ___ Mich App ___ (No. 319227, decided 12/29/15)

Grand Rapids noise ordinance

Defendants, owners and employees of the Tip Top Deluxe Bar in Grand Rapids, were charged with violation of the noise ordinance following neighborhood complaints about live music at the bar. The ordinance prohibits any person from using property under their care or control to "destroy the peace and tranquility of the surrounding neighborhood." The Court of Appeals held that the ordinance was unconstitutionally vague. It failed to provide sufficient notice of what conduct was proscribed and encouraged arbitrary and discriminatory enforcement.

People of the City of Grand Rapids v. Gasper, ___ Mich App ___ (Nos. 324150, 324152, 328165, decided 3/8/16)

Resisting and obstructing

The resisting and obstructing statute is neither unconstitutionally overbroad nor vague. The failure of the statue to define the terms "resisted", "obstructed", or "opposed" is not fatal. The Supreme Court defined the terms in *People v. Vasquez*, 465 Mich. 83 (2001). The Court adopted those definitions and held that the statute "is designed to protect persons in the identified occupations * * * who are lawfully engaged in conducting the duties of their occupations, from physical interference, or the threat of physical interference." The statute is not vague because "a person of ordinary intelligence would know that an individual using some form of force to prevent a police officer from performing an official and lawful duty is in violation…"

People v. Morris, ___ Mich App ___ (No. 323762, decided 2/11/16)

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

Advanced Criminal Defense Practice Conference

MICHIGAN SENTENCING GUIDELINES, MITIGATION & *LOCKRIDGE* UPDATE

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SPRING, 2016

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SENTENCING LAW UPDATES

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

March 12,2016

Anne Yantus

FROM THE UNITED STATES SUPREME COURT

Full Retroactivity of Miller v Alabama

On January 25, 2016, the United States Supreme Court held the rule of *Miller v Alabama*, 132 S Ct 2455 (2012), is a substantive rule of federal constitutional law that is fully retroactive to cases on collateral review in the state and federal courts. The premise that "children are constitutionally different" creates a rule that eliminates life without parole for the class of juvenile offenders whose crimes reflect transient immaturity. It will only be the rare case where a juvenile's crime reflects permanent or irreparable incorrigibility for which a sentence of life without parole may be imposed. The sentence of life without parole for juveniles whose crimes reflect transient immaturity, i.e., the vast majority of juvenile offenders, is excessive and precluded under the Eighth Amendment. *Montgomery v Louisiana*, ___ S Ct ___ (Docket No. 14-280, 1/25/16).

While the Supreme Court concluded its opinion with the announcement that resentencings are not necessarily required, and the state may remedy the error by permitting juvenile homicide offenders to be considered for parole, slip op at 21, the Michigan statute sets forth a procedure that requires resentencing where the options are limited to a term of years (minimum term between 25 and 40 years, maximum term 60 years) or a sentence of life without parole. MCL 769.25a. The prosecutor has 30 days to provide a list of defendants who must be resentenced to the chief circuit judge of that county (viz. by March 28, 2016). The prosecutor has 180 days to file a motion for resentencing in cases where a sentence of life without parole is requested (viz. by August 24, 2016). If the prosecutor does not file a motion for resentencing, the defendant must be resentenced to a term of years within the limits specified above. The timing requirements run from the date the decision in *Montgomery v Louisiana* becomes final. MCL 769.25a.

> Note, a panel of the Seventh Circuit Court of Appeals recently concluded that the "children are different" passage in *Miller v Alabama* requires a state sentencing judge to consider the juvenile's age when imposing a discretionary sentence that amounts to a ***de facto life sentence*** (viz., two consecutive terms of 50 years). The panel distinguished an earlier decision of the Seventh Circuit that held that *Miller* did not apply to discretionary life sentences, finding the earlier decision did not consider the "children are different" language of *Miller*. *McKinley v Butler*, ___ F3d ___ (CA 7, 1/4/16).
>
> Open questions: Are de facto life sentences treated the same as LWOP for juveniles? Are ***mandatory sentences***, including mandatory lifetime sex offender registration, precluded for the juvenile offender?

GPS Monitoring of Sex offenders

On March 30, 2015, the United States Supreme Court concluded that lifetime electronic monitoring is a search under the Fourth Amendment. The Court remanded to the North Carolina Supreme Court to decide whether the monitoring was an unreasonable search. *Grady v North Carolina*, 575 US ___; 135 S Ct 1368 (2015).

> Under Michigan law, mandatory lifetime electronic monitoring of an individual convicted of second-degree criminal sexual conduct involving a victim under the age of 13 is *not* an unconstitutional search, and does not constitute cruel or unusual punishment. There is likewise no double jeopardy violation where the legislature provides for imprisonment and lifetime monitoring as punishment for a crime. *People v Hallak*, 310 Mich App 555 (Docket 317863, 5/28/15).
>
> On January 29, 2016, the Seventh Circuit reversed a district court opinion from a federal judge in Wisconsin which had held that lifetime monitoring is punishment and violates the Ex Post Facto Clause when applied to an offender whose crime was committed before enactment of the law. The federal district judge also found a Fourth Amendment violation where monitoring was ordered for a 72 year old offender who had finished his sentence as well as post-sentence civil commitment, and the government had neither a warrant nor probable cause. The Seventh Circuit reversed, concluding that electronic monitoring is *not* punishment and there was no Fourth Amendment violation. "The plaintiff argues that monitoring a person's movements requires a search warrant. That's absurd." *Belleau v Wall*, ___ F3d ___ (No. 15-3225, 1/29/16), reversing ___ F Supp 3d ___ (ED Wisc, 2015).
>
> However, both the Michigan Supreme Court and Michigan Court of Appeals have concluded that lifetime monitoring *is* punishment. *People v Cole*, 491 Mich 325, 336; 817 NW2d 497 (2012); *Hallak, supra.* Recently, the Michigan Court of Appeals concluded that lifetime monitoring is precluded by the Ex Post Facto Clause where the crime was committed before the Michigan Legislature enacted the lifetime monitoring provisions. *People v Mathis*, unpublished opinion per curiam of the Court of Appeals, issued January 14, 2016 (Docket No. 323821).
>
> Where the trial court failed to order mandatory lifetime monitoring at the time of sentencing, it may correct the sentence at any time through the resentencing process. A sentence that requires lifetime monitoring is invalid without it. *People v Comer*, ___ Mich App ___ (Docket No. 318854, 10/8/15). See also *People v Harris*, 224 Mich App 597; 569 NW2d 525 (1997) (trial court may correct invalid sentence at any time; trial court properly resentenced defendant when it learned of his true identity, prior record, escape status and the requirement of mandatory consecutive sentencing).

FROM THE MICHIGAN LEGISLATURE

Firearm Definition: Effective July 1, 2015, the statutory definition of "firearm" now includes only those weapons that propel by explosive (not by gas or air). According to the new version of MCL 8.3t, "the word 'firearm,' unless otherwise specifically defined in statute, includes any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive." The previous version of MCL 8.3t referred to "any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 calibre by means of spring, gas or air." 2015 PA 22, amending MCL 8.3t.

Pneumatic Weapons: Effective July 1, 2015, pneumatic guns (those that expel a BB or pellet by spring, gas or air) *are* included within the felony-firearm statute, and it is illegal to be armed with a pneumatic weapon with intent to use the same unlawfully against another person. 2015 PA 26, amending MCL 750.227b and MCL 750.226. Further, it is illegal to transport or possess a loaded pneumatic gun that expels a metallic BB or pellet greater than .177 caliber in a vehicle, aircraft or motorboat. 2015 PA 26, amending MCL 750.227c.

OV 7: This variable was amended effective January 5, 2016, to provide for an assessment of points when "[a] victim was treated with sadism, torture, excessive brutality *or similarly egregious conduct* designed to substantially increase the fear and anxiety a victim suffered during the offense." 2015 PA 137, amending MCL 777.37 (amended language in italics).

Fine or Imprisonment: MCL 769.5 was amended effective March 14, 2016, to clarify that when a statute provides for a fine and imprisonment, the court may impose imprisonment without the fine or a fine without imprisonment. If a statute provides for a fine or imprisonment, the court may impose both in its discretion. The Legislature also repealed MCL 769.2, effective March 14, 2016, to remove the sentencing court's authority to order a state prisoner or county jail inmate to serve the sentence in solitary confinement or at hard labor. 2015 PA 216, amending MCL 769.5 and MCL 769.2.

Prostitution: Soliciting an individual under 18 for Profit – a Class E felony with a maximum penalty of 5 years and/or $10,000, and a Tier I SORA offense. 2014 PA 326-328, amending MCL 750.449a and 750.451 (eff. 1-14-15).

Expungement: Significant amendments took effect January 12, 2015. See MCL 780.621 *et seq*.

HYTA: Significant amendments took effect August 18, 2015. See MCL 762.11 *et seq.* A summary of the changes is attached to this handout.

PENDING IN THE MICHIGAN SUPREME COURT

SORA, HYTA and Punishment: The Supreme Court has granted leave to determine whether (1) SORA requirements constitute punishment, (2) whether SORA is punishment as applied to an

individual who successfully completes HYTA, (3) whether sufficient due process is afforded by the SORA statutory definition of "conviction" to include HYTA matters,(4) if SORA is not punishment, does the Act nevertheless violate due process, (5) is there an ex post facto violation where subsequent requirements such as the public registry are applied to individuals already on the registry, and (6) is there cruel and/or unusual punishment under SORA? *People v Temelkoski*, ___ Mich ___; 872 NW2d 219 (12/18/15).

***Scoring Errors After* Lockridge:** In an order dated October 30, 2014, the Michigan Supreme Court granted mini oral argument on two questions: "(1) whether a defendant can be afforded relief from an unpreserved meritorious challenge to the scoring of offense variables through a claim of ineffective assistance of counsel, see *People v Francisco*, 474 Mich 82, 89 n 8 (2006); and (2) the scope of relief, if any, to which a defendant is entitled when the defendant raises a meritorious challenge to the scoring of an offense variable, whether preserved or unpreserved, and the error changes the applicable guidelines range, whether the defendant's sentence falls within the corrected range or not. See *id.* at 89-90; see also *People v Kimble*, 470 Mich 305, 310 (2004)." *People v Douglas*, ___ Mich ___; 870 NW2d 730 (10/30/15).

OV 8 and Incidental Movement of Victim: The Supreme Court grants mini oral argument to determine whether the Court of Appeals erred in finding movement that was only incidental to the crime and therefore not scorable under OV 8. The case appears to involve as argument as to whether movement that would support an assessment of points for asportation cannot be movement that is inherent in the sentencing offense, in this case operating while intoxicated second offense with a passenger under the age of 16. The Court of Appeals concluded that the movement was merely incidental and not scorable, but Judge Murray dissented believing the "merely incidental" exception found in the case law is not found in the statute. *People v Abrego*, ___ Mich ___; 871 NW2d 211 (11/25/15).

OV 10 and Predatory Conduct: The Supreme Court has granted mini oral argument to address whether 15 points may be scored for predatory conduct where (1) defendant acted as the getaway driver while the co-offender stood outside a market and ignored several possible robbery targets until he saw a lone woman wearing a visible necklace, and (2) whether this variable may be scored for the actions of the co-offender or must focus on the defendant's conduct alone. *People v Gloster*, 498 Mich 910; 870 NW2d 730 (10/30/15).

Double Enhancement - SORA and Habitual: The Supreme Court has granted leave to address "whether the second-offense habitual-offender enhancement set forth under MCL 769.10 may be applied to the sentence prescribed under MCL 28.729(1)(b)." The Court of Appeals had previously concluded that a sentence enhanced as a second violation of the SORA statutes under MCL 28.729(1)(b) could not also be enhanced under the second habitual offender statute based on the same prior felony conviction. *People v Allen*, 310 Mich App 328 (2015), lv gtd 498 Mich 910; 870 NW2d 923 (11/4/15).

Restitution and People v McKinley: The Supreme Court is showing interest in restitution orders that include dismissed charges or otherwise extend the rule of *People v McKinley*, 496 Mich 410 (2014) (restitution improper for uncharged conduct). In two recent cases, the Supreme Court asked prosecutors to answer the defendant's application as it relates to restitution and *McKinley*.

People v Perna, ___ Mich __; 871 NW2d 174 (2015) (Crawford County); *People v Prince*, __ Mich ___ (Docket No. 152200, order of 2/2/16) (Alcona County).

NEW MICHIGAN CASE LAW

Timeliness of Habitual Offender Notice: The Supreme Court earlier granted mini oral argument to address whether the habitual offender notice was timely filed where defendant acknowledged receiving the felony complaint with the habitual offender notice in the district court, but notice was not timely served on defendant and his attorney in the circuit court. *People v Muhammad*, 497 Mich 988; 860 NW2d 926 (2015) (prosecutor's appeal). Following oral argument, the Supreme Court vacated the opinion of the Court of Appeals (which found harmless error) and remanded for a determination of whether the trial court's order dismissing the habitual offender notice was erroneous, noting that the prosecutor had conceded it did not timely serve the notice under MCL 769.13. The Supreme Court added that the Court of Appeals should "determine whether the trial court erred by concluding that the proper remedy for the prosecutor's statutory violation was dismissal of the habitual offender notice[,]" and directed the Court of Appeals to consider the case of *In re Forfeiture of Bail Bond*, 496 Mich 320; 852 NW2d 747 (2014). *People v Muhammad*, 498 Mich 909; 870 NW2d 729 (2015). In an unpublished opinion dated December 22, 2015, the Court of Appeals affirmed the trial court's dismissal of the habitual offender notice. The Court of Appeals reasoned that the habitual offender statute states that the prosecutor "shall" file the notice within a specified time period, and the Supreme Court concluded in the *Forfeiture of Bail Bond* case that "[w]here a statute provides that a public officer 'shall' do something within a specified period of time and that time period is provided to safeguard someone's rights or the public interest, . . . it is mandatory, and the public officer is prohibited from proceeding as if he or she with the statutory notice period." *In re Forfeiture of Bail Bond*, 496 Mich at 339. For this reason, the Court of Appeals concluded that the remedy of dismissal was appropriate. *People v Muhammad (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2015 (Docket No. 317054).

Consecutive Sentencing for "Same Transaction" Offenses: In an order that provides little guidance for other cases, the Supreme Court disagreed with the Court of Appeals that it could not be concluded that the two separate assaults constituted the "same transaction" for purposes of consecutive sentencing under the first-degree CSC statute, but remanded for the sentencing judge to identify specific evidence from which one could conclude that consecutive sentencing was warranted or, if lacking that evidence, to impose concurrent sentences. *People v Harper*, ___ Mich ___ (Docket No. 152114, 1/29/16).

Consecutive Sentencing for Same Transaction Offenses: There is no authority for consecutive sentencing where defendant was convicted of four counts of first-degree CSC, but it did not appear that the four acts involving three different complainants and somewhat different time periods (although there were some overlap in time periods) arose out of the "same transaction." The Court of Appeals also could not find that the two counts involving one complainant referred to "several distinct acts of penetration sufficient to constitute the same transaction." The Court articulated a rule that "[f]or multiple penetrations to be considered as part of the same

transaction, they must be part of a 'continuous time sequence[,]' not merely part of a continuous course of conduct." *People v Bailey*, 310 Mich App 703; ___ NW2d ___ (2015).

Consecutive Sentences for Same Transaction Offenses: In a similar case involving conviction of two counts of first-degree CSC, the Supreme Court found no support in the record for consecutive sentencing and remanded to the trial court for an explanation of why the two offenses arose from the same transaction or resentencing. In the unpublished Court of Appeals decision reversed by the Supreme Court, two judges believed the facts supposed a conclusion that the defendant abused "S: before she left for school and abused "T" sometime after "S" left for school, and therefore the events occurred "occurred during a continuous time sequences" and had a sufficient connective relationship to support a conclusion that they arose out of the "same transaction". In a dissenting opinion, Judge Shapiro disputed the factual conclusion that the events occurred on the same day and could find no basis for consecutive sentencing, *People c Cummings*, 498 Mich 895; 870 NW2d 66 (2015), reversing unpublished opinion of Court of Appeals dated August 5, 2014 (Docket No. 312583).

Alleyne and CSC First Mandatory Minimum Term: While the Michigan Supreme Court denied leave to appeal in this case involving two convictions of CSC first-degree with a victim under 13 years of age, a defendant 17 or older, and sentences of *23* to 50 years imprisonment (rather than the mandatory minimum term of 25 years), Justice Markman wrote a long concurring opinion pointing out the questionable plea bargain that amended the charge to delete the defendant's age from the felony information in order to avoid the mandatory minimum term. He concurred in the denial of leave to appeal, however, because under *Alleyne v United States*, 133 S Ct 2151 (2013), the defendant's age was an element of the offense and had to be alleged in the information in order to support the mandatory minimum term. *People v Keefe*, 872 NW2d 688 (2015). See also *People v Gardner*, unpublished opinion per curiam of the Court of Appeals, issued December 29, 2015 (Docket No. 323883) (defendant's age of 17 or older is an element of the crime that must be submitted to the jury in order to support the 25-year mandatory minimum term for CSC first degree with victim under the age of 13).

Parole Consideration via Mandamus: Defendant-Petitioner was convicted of armed robbery and sentenced as a habitual offender in 1996. With disciplinary credits, he was eligible to be considered for parole in 2013, but the parole board refused to consider him because the sentencing judge had not granted written approval for parole as required for individuals sentenced as habitual offenders under the old system of disciplinary credits. See MCL 769.12(4)(a). The defendant sued for a writ of mandamus. The Court of Appeals agreed the parole board had a duty to consider the defendant for parole, noting the defendant had a right to a parole eligibility report and parole interview under MCL 791.234 and 791.235. In this setting, and once the parole board's consideration is complete and parole has been deemed proper for the individual, the board must obtain the sentencing judge's approval before granting parole (rather than vice versa where the sentencing judge grants approval before preparation of the parole eligibility report and the parole interview). *Hayes v Parole Board*, ___ Mich App ___ (Docket No. 321547, 10/20/15).

Presumptive Parole: HB 4138 passed the House on October 1, 2015, and is now in the Senate Government Operations Committee where it faces strong challenge from Attorney General Bill Schuette.

Juvenile Offenders and Jury Sentencing: There is a Sixth Amendment right to jury trial to determine whether a juvenile offender should be sentenced to life without parole for first-degree murder. The default sentence for a juvenile convicted of first-degree murder in Michigan is a term of years. See MCL 769.25. Additional fact finding to support a sentence of life without parole violates the Sixth Amendment if made by the judge alone, absent waiver by the defendant. In order to enhance a sentence to life without parole for a juvenile offender, the jury must make findings based on the *Miller* factors and other relevant considerations under MCL 769.25(6), and must conclude that the juvenile's crime reflects "irreparable corruption" beyond a reasonable doubt. This hearing may occur in front of the original jury or the trial court may impanel a new jury. *People v Skinner*, ___ Mich App __ (Docket No. 317892, 8/20/15) (Majority: Borrello and Hoekstra; Dissent: Sawyer).

Disagreeing with the *Skinner* decision, another panel of the Court of Appeals would hold that there is no right to jury trial in the context of a juvenile life without parole sentence because the jury's verdict of first degree murder authorized the sentence and the sentencing judge did not determine facts not already determined by the jury's verdict. The panel nevertheless followed *Skinner* and remanded for resentencing "so that a jury may determine whether he should receive life in prison without the possibility of parole." The panel also noted in a footnote that while it was declaring a conflict, the defendant in *Skinner* had filed an application for leave to appeal with the Michigan Supreme Court (i.e., the issue might become moot if resolved by a higher court). *People v Perkins*, ___ Mich App ___ (Docket No. 323454, 323876, 325741; 1/19/16) (Judges K.F. Kelly, Talbot and Cavanagh).

On February 12, 2016, the Court of Appeals VACATED the above portion of the Perkins decision and granted a special conflict panel to resolve the dispute. *People v Perkins*, order of February 12, 2016.

SORA and HYTA Offenders: The Michigan Sex Offender Registration Act (SORA) "does not violate the Ex Post Facto Clause or amount to cruel or unusual punishment because it does not impose punishment[,]" and therefore the trial court erred when it found to the contrary as applied to a 19-year old offender who successfully completed HYTA for a charge of CSC second-degree involving a 12-year old girl. *People v Temelkoski*, 307 Mich App 241; 859 NW2d 743 (2014), lv gtd 872 NW2d 219 (2015).

SORA and Recapture Provision: The recapture provision of MCL 28.723(1)(e), which requires registration of an individual previously convicted of a listed offense who did not have to register but who is convicted of a new felony offense on or after July 1, 2011, is not an unconstitutional ex post facto law as applied to an individual whose earlier conviction and sentence preceded the creation of Michigan's SORA in 1995. The recapture provision enhances the consequences of the new conviction, not the old one. There is likewise no cruel or unusual punishment, despite the court's acknowledgment that student safety zone laws impose affirmative restraints, resemble banishment and promote deterrence, because the laws are rationally connected to a nonpunitive purpose of protecting public safety and are not excessive. In the same vein, in-person reporting requirements, while they impose affirmative restraints and arguably resemble conditions of probation and supervised release, are not punishment as they are

rationally connected to ensuring public safety and are not excessive. *People v Tucker*, ___ Mich App ___ (Docket No. 322151, 10/15/15).

SORA and Romeo and Juliet: Age Difference: When a defendant is even one day past the age differential set forth in MCL 28.728(14)(a)(ii) for removal from SORA for consensual sex in a Romeo and Juliet relationship (i.e., not more than four years older than the victim), the defendant is ineligible for removal. Here, the defendant was four years and 23 days older than the victim, and thus was more than four years older than the victim. Judges Donofrio and Boonstra constituted the majority, while Judge Gleicher wrote a dissent. *People v Costner*, 309 Mich App 220; 870 NW2d 582 (2015).

SORA and Strict Liability Offenses: The defendant's failure to register (i.e., failure to report within the quarter for a person subject to lifetime reporting) under MCL 28.729(2) is a strict liability crime and does not include an element of willfulness. The Court notes that the term "willful" appears in other SORA statutes, but not in this subsection. *People v McFall*, _309 Mich App 377; 873 NW2d 112 (2015).

Presentence Report Challenges*:* A defendant may challenge the victim impact statement where it goes beyond the victim's subjective opinions about the impact of the crime and includes factual allegations of uncharged crimes. *People v Maben*, ___ Mich App ___ (Docket No. 321732, 12/10/15).

Restitution: Where defendant's racketeering conviction included 18 named victims, the trial court erred in ordering restitution for an additional 20 unnamed victims. *People v Raisbeck*, ___ Mich App ___ (Docket No. 321722, 10/20/15).

Restitution: The *McKinley* rule precludes restitution for charged and **dismissed** offenses as well as uncharged conduct. *People v Corbin*, ___ Mich App ___ (Docket No. 319122, 9/22/15).

Restitution: Judicial fact-finding in the order of restitution does not violate the Sixth Amendment right to jury trial. *People v Corbin*, ___ Mich App ___ (Docket NO. 319122, 9/22/15).

Restitution: Restitution must be based on losses that are a direct result of the crime using a factual and proximate cause analysis. The Crime Victims Rights Act, MCL 780.766 *et seq*, permits restitution "only for losses factually and proximately caused by the defendant's offense . . . ." *People v Corbin*, ___ Mich App ___ (Docket No. 319122 , 9/22/15).

Restitution: Although the restitution statutes permit restitution for lost wages, "lost earning capacity" is not the same as "income loss" and the restitution for lost earning capacity is not permitted *People v Corbin*, ___ Mich App ___ (Docket No. 319122, 9/22/15).

Restitution: When calculating restitution for medical and related professional services that are "reasonably expected to be incurred relating to physical and psychological care," the standard is one of "reasonableness." The statutory language does not require absolute precision in the calculation, but "speculative or conjectural losses are not reasonably expected to be incurred."

Restitution for future damages may require "reasonable certainty" that the future consequence will occur. "An informed guess as to the victim's future psychological therapy costs does not equate with an amount 'reasonably expected to be incurred.'" *People v Corbin,* ___ Mich App ___ (Docket No. 319122, 9/22/15).

Restitution: The Michigan restitution statutes require full restitution that is not limited by a civil judgment that found no right to damages due to the bank's full credit bid on mortgaged property. *People v Lee,* ___ Mich App ___ (Docket No. 322154, 2/2/16)

Restitution: The trial court did not err in holding defendant and his co-defendants jointly and severally liable for restitution where defendant acted in concert with three others in a scheme that caused financial loss to the bank. *People v Lee,* ___ Mich App ___ (Docket No. 322154, 2/2/16).

Costs: The amended version of MCL 769.1k, which now authorizes costs, does not violate the separation of powers clause and does not violate equal protection or due process rights. Retroactive application also does not violate the Ex Post Facto Clause. *People v Konopka,* 309 Mich App 345; 869 NW2d 651 (2015).

Unauthorized Fee: The trial court had no statutory authority to assess a separate "probation enhancement fee" that was set at a flat rate of $100 and was designed to fund various probation costs that were not otherwise covered by statute. (Note, this was not the probation supervision fee.) *People v Juntikka,* 310 Mich App 306; 871 NW2d 555 (2015).

Unauthorized Fine: Following the rule of *People v Cunnigham*, 496 Mich 145 (2014), that there must be express statutory authority for an award of costs, the Court of Appeals likewise concluded that there must be express statutory authority for the imposition of a criminal fine. Where the crime of assault with intent to commit sexual penetration does not authorize the imposition of a fine, the trial court erred in ordering a fine. *People v Johnson,* ___ Mich App __ (Docket No. 324768, 2/18/16).

> **Unauthorized Fine (Not Part of Sentence Agreement)**: In an unpublished decision, the Court of Appeals recently applied the rule of *People v Morse*, 480 Mich 1074 (2008), that a fine imposed as a condition of probation must be vacated where it was not an express term of the sentence agreement. *People v Cook*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2015 (Docket No. 32206).

Jail Credit: A defendant who is convicted of racketeering in part based on conduct that led to two earlier convictions of false pretenses is not entitled to jail credit for the 360 days she served in jail for the false pretenses convictions as the time spent in jail was for the earlier convictions and not as a result of the subsequent racketeering charge. *People v Raisbeck,* ___ Mich App ___ (Docket No. 321722, 10/20/15).

Drug Court and Departures from Sentencing Guidelines: Where the prosecutor has not approved drug court placement in a situation that would constitute a departure from the sentencing guidelines range, the trial court may not admit the defendant into the drug court

treatment program. The Court finds that the prosecutor did not approve the defendant's placement in the program despite the prosecutor's signature on the referral form and failure to object at the first sentencing hearing where the prosecutor did object at the final sentencing hearing. *People v Baldes,* 309 Mich App 651; 873 NW2d 338 (2015).

MICHIGAN SENTENCING GUIDELINES

PREPARATION OF MULTIPLE SIRS: If multiple convictions may or must result in consecutive sentencing, the guidelines must be scored for each individual conviction. MCL 771.14(2)(e). The Michigan Supreme Court remanded for resentencing (on the lesser offense only) in a case where the probation department did not prepare separate sentencing guidelines for defendant's conviction of second-degree CSC where defendant was also convicted of first-degree CSC and there was authority for consecutive sentencing as the offenses arose out of the same transaction. *People v Alfaro,* 497 Mich 1024; 863 NW2d 39 (2015).

RESENTENCING WHEN RANGE CHANGES: Following the well established rule of *People v Francisco*, 474 Mich 82 (2006), the Supreme Court remands for resentencing where error in the scoring of the guidelines changes the range from 87 to 145 months to 84 to 140 months. *People v Clark*, 498 Mich 858; 865 NW2d 32 (2015).

RESENTENCING WHEN RANGE CHANGES: In a post-*Lockridge* decision, the Court of Appeals explains in a footnote that the *Francisco* rule must still be followed for preserved scoring errors that change the range. In the case before it, however, the error was not properly preserved where counsel objected to the same variable on slightly different grounds at sentencing. Resentencing was nevertheless required as the error would cause the sentence to be a departure, and the Court of Appeals may review an unpreserved scoring error that leads to a departure under *People v Kimble*, 470 Mich 305 (2004). *People v Thompson*, ___ Mich App ___ (Docket No. 318128, 8/25/15) (see footnote 4 of opinion).

SCORING ERROR WITH DEPARTURE SENTENCE: The Supreme Court remands by order to the Wayne Circuit Court due to error in the scoring of OV 1 and OV 2. The trial court had earlier departed downward from the guidelines, and did not score OV 1 or OV 2. The Court of Appeals reversed both the scoring of the variables and the downward departure. The Michigan Supreme Court agrees the two variables were misscored. Rather than remanding for resentencing, the Supreme Court remanded to the trial court for that court to determine whether it would have imposed a materially different sentence under the procedure described in *Lockridge*. If the trial court would have imposed the same sentence, it must state reasons for departing fro the range. In other words, the Supreme Court has imposed the *Lockridge* remedy for error in the scoring of a variable where there is a departure. This is not a case involving unconstitutional judicial fact-finding in the scoring. *People v Naccarato*, ___ Mich ___; 871 NW2d 195 (2015).

> *Note: The relief afforded in* Naccarato *is consistent with an earlier case called* People v Mutchie*, 468 Mich 50 (2003). In* Mutchie*, the Supreme Court affirmed the sentence where there was purported scoring error under OV 11, but the trial court had stated its intention to impose the same sentence even if the variable was misscored and had also*

given substantial and compelling reasons for the departure. The Supreme Court apparently was satisfied with the reasons given for the departure and found no reason to consider the merits of the alleged scoring error.

PRV 5: A misdemeanor conviction for malicious use of a telecommunications device is a scorable misdemeanor as it would appear to be a crime against the person. *People v Maben,* ___ Mich App ___ (Docket No. 321732, 12/10/15).

PRV 7: Where defendant had no concurrent felony convictions and no subsequent felony convictions, it was error to assess ten points under PRV 7. *People v Allen*, 310 Mich App 328; 872 NW2d 21 (2015), lv gtd on other grds 498 Mich 910 (2015).

PRV 7: This variable may be scored 20 points despite the requirement of mandatory consecutive sentencing between a felony-firearm sentence and one sentence for assault with intent to do great bodily harm where defendant had additional contemporaneous felony convictions that required concurrent sentencing for assault with intent to do great bodily harm, resisting and obstructing and felon in possession of a weapon. *People v Terrell,* ___ Mich App ___ (Docket No. 321573, 9/29/15).

OV 1: Where defendant and two accomplices threatened the minor boys with an electric circular saw that was placed at the throat of one boy and later turned on in the vicinity of another boy who was restrained by duct tape, the trial court properly scored 15 points under OV 1. *People v Bosca,* 310 Mich App 1; 871 NW2d 307 (2015).

OV 2: The trial court properly scored 5 points for a cutting or stabbing weapon where defendant used a circular saw to instill fear and other co-defendant had a firearm which he displayed and yet another co-defendant had a hatchet and sheathed samurai sword. *People v Bosca*, 310 Mich App 1; 871 NW2d 307 (2015).

OV 3: The trial court properly scored ten points where two minor boys went to the hospital after being held hostage and threatened. *People v Bosca,* 310 Mich App 1; 871 NW2d 307 (2015).

OV 3: The trial court did not err in scoring 10 points where the victim was choked by his brother to the point of losing consciousness or nearly losing consciousness, he defecated in his pants, suffered a red neck and sore throat and told police officers that he intended to seek medical treatment. *People v Maben,* ___ Mich App ___ (Docket No. 321732, 12/10/15).

OV 4: Ten points properly scored where one minor boy was in counseling for PTSD and was experiencing increased anger and memory problems, and another boy had consulted a therapist. *People v Bosca,* 310 Mich App 1; 871 NW2d 307 (2015).

OV 4: Where the victim was described as "visibly shaken" by officers responding to the scene of a robbery, but there was no evidence in the record or through a victim impact statement regarding her psychological state, there was not a preponderance of the evidence to support a score of ten points for serious psychological injury. *People v McChester,* 310 Mich App 354; __ NW2d __ (2015).

OV 5: There was sufficient evidence to score this variable for serious psychological injury to the victim's parents where (1) the trial testimony demonstrated the "traumatic nature" of the incident which involved the defendant, who was believed to be a friend of the victim, slashing the victim's throat in the basement while the victim's parents were home upstairs, (2) the trial court was able to observe the demeanor of the parents when they testified at trial, and (3) the victim testified that his parents were "deeply affected" by the incident and in the process of seeking professional help. *People v Steanhouse*, ___ Mich App ___ (Docket No. 318329, 10/22/15).

OV 6: The trial court's finding of premeditation following the jury verdict of assault with intent to murder was not clearly erroneous and was supported by a preponderance of the evidence where defendant struck his friend in the head and slashed his throat while the friend was high in the basement, defendant waited for the friend to return to the basement before committing the assault, made no effort to help the victim after the assaulted, and the assault was apparently unprovoked as there had been no earlier altercation or argument. *People v Steanhouse*, ___ Mich App ___ (Docket No. 318329, 10/22/15).

OV 7: This variable was amended effective January 5, 2016, to provide an assessment of points when "[a] victim was treated with sadism, torture, excessive brutality *or similarly egregious conduct* designed to substantially increase the fear and anxiety a victim suffered during the offense." 2015 PA 137, amending MCL 777.37.

OV 7: OV 7 is a *McGraw* variable. The scoring of is limited to the facts of the sentencing offense and may not consider conduct that occurs before or after the sentencing offense. The trial court erred in assessing 50 points for conduct that occurred before the sentencing offense although it involved on-going sexual abuse of the same victim by the defendant. *People v Thompson*, ___ Mich App ___ (Docket No. 318128, 8/25/15).

OV 7: Fifty points properly assessed for conduct designed to substantially increase the fear and anxiety where the victims were blindfolded and duct-taped, threatened with the sound of a running circular saw, and threatened that their toes and fingers would be severed, and some victims were struck with fists, a hatchet and a sheathed sword. The Court of Appeals concludes the sound of a running circular saw was akin to the racking of a shotgun [as in *People v Hardy*, 494 Mich 430 (2013)]. *People v Bosca*, 310 Mich App 1; 871 NW2d 307 (2015).

OV 8: Where the minor victims were moved to the basement where egress was prevented, and there was also physical restraint and threats, the trial court properly scored 15 points. *People v Bosca*, 310 Mich App 1; 871 NW2d 307 (2015).

OV 10: This variable was amended effective October 17, 2014, to add an undercover officer to the definition of victim for purposes of **predatory conduct** only: "Predatory conduct means pre-offense conduct directed at a victim, or a law enforcement officer posing as a potential victim, for the primary purpose of victimization." 2014 PA 350, amending MCL 777.40.

OV 10: Fifteen points properly scored for predatory conduct where four young men lured a pizza delivery man to a dark and abandoned house where he was jumped and robbed at gunpoint (a BB gun was used). *People v Ackah-Essien*, 311 Mich App 13; ___ NW2d ___ (2015).

OV 10: The trial court properly found abuse of authority status where defendant was an adult and parent and the victims were all juveniles. *People v Bosca*, 310 Mich App 1; 871 NW2d 307 (2015).

> **Unpublished:** OV 10 considers only the offender's conduct and not that of co-defendants; error to score where only pre-offense conduct by this defendant was run of the mill planning. *People v Cotto,* unpublished opinion per curiam of the Court of Appeals, issued October 13 2015.

OV 12: The trial court erred in scoring this variable where defendant was convicted of all charged crimes and there were no other acts, but the error was harmless as it did not change the range. *People v Bosca*, 310 Mich App 1; 871 NW2d 307 (2015).

> **Unpublished:** The trial court erred in scoring ten points for three contemporaneous acts for the crimes of kidnapping, felon in possession and CCW. The crime of kidnapping is a crime against the Person, and it cannot be counted as an "other" crime for purposes of the ten point assessment for "[t]here or more contemporaneous felonious crime acts involving other crimes were committed" under MCL 777.42(1)(c). *People v Jackson*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2015 (Docket No. 322858). But see *People v Wiggins*, 289 Mich App 126; 795 NW2d 232 (2010) (without addressing the argument, affirms ten points for two Public Order offenses and one crime against the Person).

OV 13: The Supreme Court reverses a decision of the Court of Appeals that affirmed the assessment of points under both OV 13 and OV 12 for the same acts of resisting an officer. The Court of Appeals erroneously concluded that the acts were related to membership in an organized criminal group or gang-related. The Court of Appeals had initially concluded that there was an organized criminal group because there was a group of offenders who preplanned the robbery, and the defendant's subsequent act of resisting the police was "related" to membership in an organized criminal group because defendant was in the home with other members of the group when the police were searching for the armed robbers. The Supreme Court disagreed. *People v Marshall*, 497 Mich 986; 861 NW2d 47 (2015).

OV 13: The Supreme Court makes clear that OV 13 cannot be based on out-of-state charges or accusations without a preponderance of the evidence that the crimes occurred, that defendant committed them, that they were classified as "crimes against a person" and they occurred within five years of the sentencing offense. *People v Butler*, ___ Mich ___; 865 NW2d 29 (2015).

OV 14: Ten points properly scored for leadership where defendant was the first to suggest the idea of a robbery, he spoke of previous home delivery robberies he had committed, he persuaded a reluctant co-defendant to participate, he selected the pizza restaurant, directed a female friend to place the order, initiated the robbery via verbal signal and then held a BB gun to the victim's face. *People v Ackah-Essien*, 311 Mich App 13; ___ NW2d ___ (2015)

OV 17: OV 17 is a *McGraw* variable. Where the operation of the vehicle occurred after completion of the larceny from a person, and larceny from a person was the sentencing offense, the trial court erred in assessing 5 points under OV 17. *People v Siders*, 497 Mich 985; 861 NW2d 43 (2015).

OV 19:

> **Unpublished:** An assessment of 10 points under OV 19 is "not appropriate solely because of defendant's general denial of wrongdoing to law enforcement officers." *People v Witkowski*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2016 (Docket No. 323706).
>
> **Unpublished:** Defendant's failure to cooperate with the presentence investigator cannot be scored under OV 19 as defendant has a right to remain silent at this stage. *People v Thompson*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2015 (Docket No. 318694).

HYTA STATUTORY AMENDMENTS
EFFECTIVE 8-18-15

AGE LIMITATION

Old Rule: Eligible if offense occurred after 14th birthday (if waived to circuit court) and before 21st birthday.

New Rule: Eligible if offense occurred after 14th birthday (if waived) and before 24th birthday, but prosecutor *must consent* between ages 21-23 years. MCL 762.11 (1); MCL 762.15.

OFFENSE LIMITATION

Old Rule: Ineligible for LIFE maximum offense, major controlled substance offense, traffic offenses and most sex crimes.

New Rule: Same. MCL 762.11(2).

AVAILABLE DISPOSITIONS

Old Rule: Three years prison, three years of probation or one year jail.

New Rule: Two years prison, three years of probation or one year jail. * May also include up to one year probation AFTER prison or jail. MCL 762.13(1)(a)(-(d).

***A prison sentence is not available for the following listed offenses:**

Drug offense under MCL 333.7101 to 333.7545
Breaking and Entering Building
Home Invasion Third Degree
Financial Transaction Device (most violations)
CCW
Larceny
Larceny from the Person
Unlawfully Driving Away Automobile
Unarmed Robbery
Receiving and Concealing (only subsections 3 and 7 of MCL 750.535)

MCL 762.13(2)

[Note, for misdemeanor offenses, the only available disposition is not more than two years of probation, MCL 762.13(3)).]

MANDATORY REVOCATION FOR

Old Rule: Conviction of willful violation of SORA.

New Rule: Conviction of or guilty plea to any of the following:

Willful Violation of SORA

Life Maximum Felony

Major Controlled Substance Offense

Assault with Dangerous Weapon; Assault with Intent GBH or Strangulation; Assault with Intent Unarmed Robbery

Home Invasion (all)

Felon in Possession of Weapon; Carrying Weapon with Unlawful Intent; CCW; Unlawful Possession of Pistol by Licensee; Felony-Firearm

CSC 1st , 2nd, 3rd, 4th degree, except MCL 750.520d(1)(a) and 750.520e(1)(a)

Assault with Intent to Commit CSC (including conspiracies and attempts) If Intent Is to Commit CSC 1st, 2nd, 3rd or 4th Degree, excluding violations of MCL 750.520d(1)(a) and 750.520e(1)(a)

Carjacking

Unarmed robbery

Crime "involving a firearm" (as firearm is defined in MCL 28.421) "whether or not the possession, use transportation or concealment of a firearm is an element of the crime." "Firearm" is defined under MCL 28.421(1)(b) as "any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive."

MCL 762.12(2)&(3).

NEW DISCRETIONARY CONDITIONS

Court may require employment or continued education as part of HYTA. MCL 762.11(4).

Court may include electronic monitoring as condition of probation if offense occurred on or after offender's 21st birthday. MCL 762.11(5)

Lockridge **and Advisory Sentencing Guidelines**

By: Anne Yantus[1] and Brett DeGroff[2]

In *People v Lockridge*, 498 Mich 358 (2015), the Michigan Supreme Court concluded that the Michigan sentencing guidelines create a mandatory minimum term. Therefore, judicial fact-finding in the scoring of the offense variables violates the Sixth and Fourteenth Amendments of the United States Constitution. The Court severed or struck down portions of MCL 769.34(2) and (3) to the extent they provided that a sentence must fall within the applicable guidelines range and the sentencing court may only depart above or below the range for substantial and compelling reasons. The Court also provided a remedy of advisory guidelines to cure the constitutional error.

1. ***Hybrid System?*** There has been some debate about whether *Lockridge* created a "hybrid" model where the sentencing guidelines are advisory in most, but not all circumstances. The Michigan Supreme Court rendered the sentencing guidelines advisory by substituting the word "may" for "shall" in MCL 769.34(2) ("the minimum sentence . . . shall be within the appropriate sentence range"), and by severing the language in MCL 769.34(3) that a trial court could only depart from the recommended range for a " substantial and compelling" reason. *Lockridge*, 498 Mich at 391. Severance is a tool provided to the court by MCL 8.5 which states in part that "If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application." The argument for a hybrid system flows from the fact that judicial fact-finding does not violate the right to jury trial if it does not result in an increase in the low end of the sentencing range. In that case, there has been no mandatory increase in the floor of the sentencing range, and no *Alleyne* violation. Therefore, in those instances MCL 8.5 would not confer the power to sever the statute, and MCL 769.34 would remain fully operative. Thus, a sentencing range would be mandatory when judicial fact-finding did not increase the low end of the sentencing range, and advisory only when it did.

However, *Lockridge* does not specifically mention any sort of hybrid system, but says that the solution is to "*Booker*-ize" the sentencing guidelines, and says it is using the "same remedy adopted by the United States Supreme Court in *Booker*." *Lockridge*, at 391. In *United States v Booker,* 543 US 220 (2005), the Court rendered the federal sentencing guidelines advisory in all cases, not on a case-by-case basis. Further, the *Lockridge* Court said "we sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a 'substantial and

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compelling reason' to depart from the guidelines range in MCL 769.34(3)" without further qualification.

2. ***Unpreserved Error***: In *Lockridge*, the Court concluded that an unpreserved Sixth Amendment challenge to judicial fact-finding was subject to the plain error test. 498 Mich at 392-393. For cases involving no judicial fact-finding in the scoring of the guidelines, the defendant cannot show plain where there is no prejudice. *Id.*, at 394-395. For cases with judicial fact-finding that changed the recommended range and did not involve an upward departure, the defendant is entitled to remand to the trial court for a decision by the trial judge as to whether the sentence would change knowing the guidelines range is now advisory. *Id.*, at 395-397. The trial judge must consider "'only the circumstances existing at the time of the original sentence'" when making this initial decision. *Id.*, at 398, quoting *United States v Crosby*, 397 F3d 103, 117 (CA 2, 2005). If the trial judge concludes that the sentence would have been materially different (i.e., there would be more than a nontrivial difference), the defendant has shown plain error and is entitled to resentencing. *Id.*, at 397. For cases involving judicial fact-finding that changed the recommended range and also involved an upward departure, there is no entitlement to relief on Sixth Amendment grounds as the defendant cannot show plain error as a matter of law. *Id.*, at 394.

3. ***Preserved Error***: The *Crosby* remand procedure identified in *Lockridge* applies to preserved as well as unpreserved Sixth Amendment error. A defendant is eligible for the remand procedure identified in *Crosby* if there is judicial fact-finding that changes the applicable range. The defendant may opt out of the remand procedure as provided in *Lockridge*. The trial judge must consider whether to grant resentencing without consideration of new information. At resentencing, the trial judge may consider new information to justify an increased sentence. *People v Stokes*, ___ Mich App ___ (Docket No. 321303, 9/8/15).

4. ***Preserved Error***: Apparently disagreeing with the *Stokes* opinion without mentioning *Stokes*, a two-judge majority of the Court of Appeals recently remanded for *resentencing* in a case where the trial judge scored OV 5 based on judicial fact-finding at sentencing and the range subsequently changed. It would appear this was a pre-*Lockridge* case given the lower court docket number and the 2011 offense date supplied in the dissenting opinion. The majority noted that the error was preserved – which it observed was "a scenario *Lockridge* predicted would be rare"- and remanded for resentencing without addressing the need for a *Crosby* remand hearing. At least two possible interpretations of the opinion are as follows: (1) the majority believed the sentencing judge should have considered mandatory sentencing guidelines that did not include judicial fact-finding, or (2) there was insufficient evidence to support the scoring of OV 5 and resentencing was required for this reason. *People v Blevins*, ___ Mich App ___ (Docket No. 315774, 1/12/16).[3] **[*Note, this opinion was subsequently VACATED and replaced with an opinion that changes the remedy to a***

[3] There is similar "blending" of the Sixth Amendment argument and a sentencing guidelines scoring challenge in the recent unpublished case of *People v Walker*, unpublished opinion per curiam of the Court of Appeals, issued January 7, 2016 (Docket No. 322133) (in response to a challenge to the scoring of OV 19 based on judicial fact finding, the panel concludes that there was improper fact finding and notes further that "the possible reduction of ten points may have reduced defendant's minimum sentencing guidelines range . . . ," before remanding to the trial court for a determination whether the trial court would have imposed "the same sentence absent the unconstitutional constraint on its discretion.")

***remand for a Crosby hearing. People v Blevins, ___ Mich App ___ (Docket No. 315774, 2/22/16).*]**

5. ***Issue Preservation****:* Defendant properly preserved his *Lockridge* claim by filing a post-conviction motion to correct the sentence. Defense counsel's agreement to the scoring at sentencing did not constitute an admission since counsel was merely agreeing that the facts supported the scoring under a preponderance of the evidence standard. *People v Terrell*, ___ Mich App ___ (Docket No. 321573, 9/29/15).

5a. ***Issue Preservation:*** There is no issue preservation requirement for appellate review of a departure sentence. *People v Smith*, 482 Mich 292, 300 (2008) (departure from legislative guidelines); *People v Cain*, 238 Mich App 95, 129 (1999) (departure from judicial guidelines).

6. ***No Change in Range, but Remand Due to Compulsory Use of Guidelines***: Where there is judicial fact-finding in the scoring of the guidelines, even if the fact-finding does not change the range, defendant is entitled to the *Crosby* hearing because "the trial court's compulsory use of the guidelines was erroneous in light of *Lockridge.*" *Terrell, supra.*

7. ***No Change in Range Brings No Relief***: Judicial fact-finding that does not change the range does *not* entitle defendant to a *Crosby* remand hearing as the *Lockridge* plain error test cannot be satisfied. *People v Jackson (On Reconsideration)*, ___ Mich App___ (Docket No 322350, 12/3/15).

8. ***Jury Verdict Supported Scoring***: In the *Terrell* case above, the Court of Appeals concluded that the jury verdict supported the assessment of ten points under OV 9 for multiple victims as the jury found defendant guilty of assaulting three police officers. *Terrell, supra.*

9. ***Jury Verdict Supported Scoring***: Another panel of the Court of Appeals similarly concluded that the scoring of OV 3 (50 points for drunk driving causing death) and OV 9 (100 points for multiple deaths) was supported by the jury's verdict of two counts second degree murder and two counts OUIL Causing Death. Because this placed the defendant in the highest offense severity level, defendant could not show a recommended range that was *enhanced* by improper judicial fact-finding *People v Bergman*, ___ Mich App ___ (Docket No. 320975, 9/29/15).

9a. ***Defendant Admitted Prior Convictions for OV 13 Scoring***: Where defendant pled guilty to two prior offenses, thus admitting them, and defense counsel in the instant matter stipulated to the existence of the two prior convictions, the defendant could not show improper judicial fact-finding under OV 13. *Jackson, supra*.

10. ***Review of Departure Sentence for Reasonableness***: With respect to unconstitutional judicial fact-finding in the scoring, the Court of Appeals finds no plain error as the trial court departed above the recommended range and presumably was not influenced by the guidelines range. See *Lockridge* at 394, 395 n 31. However, when reviewing the length of the sentence under the new "reasonableness" standard set forth in *Lockridge*, the Court of Appeals concludes that the old standard from *People v Milbourn*, 435 Mich 630, 651 (1990), applies. The sentence must be proportionate to the seriousness of the offense and the circumstances of the offender. A short list of factors previously approved for consideration under *Milbourn* and now appropriate for review under

a reasonableness test includes: (1) the seriousness of the offense, (2) factors not considered by the guidelines, (3) defendant's misconduct while in custody, (4) expressions of remorse, (5) potential for rehabilitation, and (6) factors inadequately considered by the guidelines. As noted in *Milbourn*, a sentence outside the recommended range that is not justified by factors not adequately reflected in the guidelines range will alert the appellate court to a possible violation of the principle of proportionality. 435 Mich at 659-660. Even in cases where there are reasons not adequately reflected in the guidelines range, the appellate court must review the *extent* of the deviation. *Id.* As the trial court did not sentence using the appropriate standard, the Court of Appeals remands to the trial court for reconsideration of its sentence. The reconsideration process must include an opportunity for the defendant to avoid resentencing. *People v Steanhouse*, ___ Mich App ___ (Docket No. 318329, 10/22/15).[4]

11. ***Review of Departure Sentence for Reasonableness***: Following *Steanhouse*, a split panel of the Court of Appeals remanded for a *Crosby* hearing in a case where the trial judge found substantial and compelling reasons to depart from the sentencing guidelines range, but the judge did not have

[4] In the wake of the September 11, 1990 *Milbourn* decision, the Michigan Supreme Court remanded a number of cases to the Court of Appeals for "reconsideration in light of *Milbourn*." See e.g., *People v Clark*, 436 Mich 883 (1990) (one of six orders remanding for reconsidering in light of *Milbourn* on October 30, 1990); *People v Clay*, 437 Mich 852 (1990) (same, one of two orders dated November 6, 1990); *People v Crockett*, 437 Mich 860 (1990) (same, one of sixteen orders dated November 16, 1990). The Court of Appeals varied in its handling of post-*Milbourn* cases, sometimes reviewing for proportionality on the existing record, and sometimes remanding to the trial court for resentencing with reconsideration in light of *Milbourn*. See *People v Murph*, 185 Mich App 476 (1990) (addendum to opinion indicating sentence did not violate the new principle of proportionality); *People v Schnepp*, 185 Mich App 767 (1990) (sentence shocks the conscience and violates the principle of proportionality); *People v Edgley*, 187 Mich App 211 (1990) (no abuse of discretion under *Milbourn* standard); *People v Duprey*, 186 Mich App 313 (1990) ("our first inclination" would be to remand for resentencing in light of *Milbourn*, but the reasons for departure are easily susceptible to appellate review on this record and sentence was proportionate); *People v Krajenka*, 188 Mich App 661 (1990) ("defendant's sentence was imposed without an opportunity for the sentencing court to apply the principle of proportionality . . . [a]ccordingly, we vacate defendant's sentence and remand for resentencing consistent with the considerations set forth in *Milbourn*."); *People v Cross*, 186 Mich App 216 (1990) (same); *People v Todd*, 186 Mich App 625 (1990) (same); *People v Armendarez*, 188 Mich App 61, 75 (1991) (because trial court did not have the benefit of *Milbourn* and we are unable to apply the new standard of appellate review to the defendants' sentences, cases remanded for resentencing "consistent" with the principle of proportionality).

Judge Shepherd, writing on behalf of one panel, offered a three-part test for application of the *Milbourn* standard on resentencing: (1) where within the range should the sentence fall, if the range is found sufficient, (2) what unique facts not considered by the guidelines would justify a departure and why, and (3) if there is to be a departure, what should be its magnitude and justification? *People v Harris*, 190 Mich App 652, 668-669 (1991).

At least two Michigan Supreme Court justices grumbled in 1991 about the continued remands for resentencing in light of *Milbourn*, see *People v Randles*, 437 Mich 1003 (1991), but the Supreme Court did not stop the process until a year later when it entered a series of orders in July of 1992 that modified the judgment of the Court of Appeals to remand for "reconsideration" in light of *Milbourn* rather than "resentencing." See *People v Martin*, 440 Mich 868 (1992); *People v Herron*, 440 Mich 868 (1992); *People v Austin*, 440 Mich 886 (1992).

the benefit of the new *Lockridge* decision which makes the guidelines range advisory. The court noted that the sentence might be more severe on remand, but the defendant could opt out of the hearing. In dissent, one judge disagreed that any hearing would be necessary under *Lockridge* and opined that *Steanhouse* was wrongly decided although there would be no cause for convening a conflict panel as the Court of Appeals is bound to follow the *Lockridge* case. *People v Shank*, ___ Mich App ___ (Docket No. 321534, 11/17/15).

12. ***Review of Departure Sentence for Reasonableness***: In another decision disagreeing with *Steanhouse* and calling for a conflict panel, two judges expressed the opinion that they would not have remanded for a *Crosby* hearing where the trial court imposed a sentence above the sentencing guidelines range before *Lockridge*. The two judges would have found the sentence reasonable and supported by a sufficient articulation of reasons by the trial judge. The third judge concurred in the result only. The panel nevertheless followed *Steanhouse* and remanded for *resentencing* (although indicating in a footnote that it was not an automatic resentencing) with a *Crosby*–type reconsideration of the sentence after offering a 24-page opinion discussing the reasonableness standard under federal law. *People v Masroor*, ___ Mich App ___ (Docket No. 322280, 11/24/15).[5]

13. ***Intermediate Sanctions and Affirmance of Guidelines Sentence***: A three-judge panel recently affirmed a minimum prison sentence of 16 months where the sentencing guidelines range was 0 to 17 months. Rather than treating the sentence as a departure and reviewing for reasonableness under the now-advisory sentencing guidelines scheme, the panel concluded that the sentence falls "within the appropriate range authorized by law" given the discretionary nature of an intermediate sanction range. Further, the Court of Appeals concluded that it "must" affirm the sentence under MCL 769.34(10) because the sentence falls within the applicable range and there was no scoring error or the consideration of inaccurate information. *People v Schrauben*, ___ Mich App ___ (Docket No. 323170, 1/26/16).[6]

14. ***Cert Denied***: The State's petition for certiorari in the *Lockridge* case was denied on December 7, 2015. *Michigan v Lockridge*, 136 S Ct 590 (2015) (petition filed by Oakland County Prosecutor). A subsequent petition filed by the Michigan Attorney General on January 25, 2016, is still pending in the case of *Michigan v Sidney Edwards*. In the *Edwards* case, the State asks "Whether the Sixth Amendment requires a state to impanel a jury to find facts relating to a determination of parole eligibility?" The State argues that the Supreme Court has "never required that a jury determine facts relating to the parole eligibility date of an indeterminate

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[5] On a similar note, a panel recently remanded for a *Crosby* hearing and *resentencing* in an unpublished opinion where the panel found judicial fact-finding that increased the recommended range. *People v Haymer*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2016 (Docket No. 323612).

[6] Note, the Michigan Supreme Court continues to refer to a sentence that falls outside the recommended sentencing guidelines range as a "departure." *Lockridge*, 498 Mich 365, 391-392; *People v Nacarrato*, ___ Mich ___; 871 NW2d 195 (11-24-15). The statutory definition of a "departure" refers to a sentence "that is not within the appropriate minimum sentence range. . . ." MCL 769.31(a). The statutory definition of an intermediate sanction cell refers to a range that authorizes a jail sentence of up to 12 months, but not a prison sentence. MCL 769.31(b); MCL 769.34(4)(a). See also *People v Stauffer*, 465 Mich 633; 640 NW2d 869 (2002) (prison sentence of 16 to 24 months does not fall within sentencing guidelines range that has a top number of 17 months).

sentence." [The *Edwards* argument appears similar to the one advanced by Justices Markman and Zahra in the *Lockridge* dissent.]

15. ***Retroactivity***: Michigan appellate courts have not yet ruled on whether *Lockridge* will have retroactive effect. Under *Teague v Lane*, 489 US 288 (1989), a new rule is given retroactive effect only if it is "substantive" or a "watershed rul[e] of criminal procedure." *Teague*, 489 US at 311. The decision in *Apprendi v New Jersey*, 530 US 466 (2000), was held not retroactive, see *Blakely v Washington*¸ 542 US 296, (2004) (". . . despite the fact that we hold in *Schriro v. Summerlin*, . . . that *Ring* (and a fortiori *Apprendi*) does not apply retroactively . . ."), and every federal court appellate court which has reached the question has held *Alleyne* is not retroactive, see *Hughes v United States*, 770 F3d 814 (CA 9, 2014); *In re Mazzio*, 756 F3d 487, 489-91 (CA 6, 2014); *Owens v United States*, 598 Fed Appx 736, 737 (CA 11, 2015) (collecting cases).

16. Crosby ***Remand Procedure***: According to the *Lockridge* decision, the sentencing judge must determine whether it "would have imposed a materially different sentence but for the constitutional error." *Lockridge*, 498 Mich at 396. The Court did not specify whether the sentencing judge should consider an advisory sentencing guidelines range with judicial fact-finding or a mandatory range without judicial fact-finding. In a footnote, however, the Court quoted language from a Seventh Circuit case that spoke of appellate review following the sentencing judge's determination that the sentence would have been different "had he known that the guidelines were merely advisory." *Id.*, at 396 n 34, quoting *United States v Coles*, 365 US App DC 280, 286; 403 F 3d 764 (2005), quoting *United States v Paladino*, 401 F3d 471, 484 (CA 7, 2005). The Court of Appeals has assumed the same, arguably in dicta as the case did not involve judicial fact-finding that necessitated a *Crosby* remand. See *People v Jackson (On Reconsideration)*, ___ Mich App ___ (Docket No. 322350, 12/3/15) ("If the answer is "no," then a remand to the trial court is required to allow it to determine whether, now aware of the advisory nature of the guidelines, the court would have imposed a materially different sentence.")

17. ***Materially Different Sentence***: The Court of Appeals has not explored what it means for a trial court to conclude that it would have imposed a "materially different sentence." The Michigan Supreme Court adopted with approval language found in the *Crosby* decision that refers to a sentence that differs in "a nontrivial manner" from the original sentence and is not "essentially the same." *Lockridge*, 498 Mich at 396, quoting *Crosby*, 397 F3d at 118.

As a practical matter, a single sentence may consist of multiple components: fines, costs, jail credit, consecutive sentencing, the length of jail or prison incarceration, etc. The definition of a "materially different sentence" may or may not be satisfied when the amount of a criminal fine is changed by $1. On the other hand, a "materially different sentence" should arguably be found when there is *any* change in the length of incarceration. In the related context of ineffective assistance of counsel claims, the Michigan Supreme Court said that "[a]ny amount of additional prison time imposed as a result of an attorney's deficient performance has Sixth Amendment significance." *People v Gardner*, 482 Mich 41, 50 n 11 (2008). The United States Supreme Court has held the same: "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice [for ineffective assistance of counsel claims]. Quite to the

contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." *Glover v United States*, 531 US 198, 203 (2001).]

18. ***Appellate Review of Scoring Errors After Lockridge***: The Court of Appeals applies the existing standard of review for sentencing guidelines scoring challenges as set forth in *People v Hardy*, 494 Mich 430 (2013). *People v Steanhouse*, ___ Mich App ___ (Docket No. 318329, 10/22/15).

19. ***Remedy for Pure Scoring Errors After Lockridge***: In an order dated October 30, 2015, the Michigan Supreme Court granted mini oral argument on two questions: "(1) whether a defendant can be afforded relief from an unpreserved meritorious challenge to the scoring of offense variables through a claim of ineffective assistance of counsel, see *People v Francisco*, 474 Mich 82, 89 n 8 (2006); and (2) the scope of relief, if any, to which a defendant is entitled when the defendant raises a meritorious challenge to the scoring of an offense variable, whether preserved or unpreserved, and the error changes the applicable guidelines range, whether the defendant's sentence falls within the corrected range or not. See *id.* at 89-90; see also *People v Kimble*, 470 Mich 305, 310 (2004)." *People v Douglas*, ___ Mich ___; 870 NW2d 730 (2015).

Douglas involves a challenge to the scoring of the sentencing guidelines that would appear to be meritorious, but neither trial nor appellate counsel properly preserved the challenge by one of the three methods specified in MCL 769.34(10) (at sentencing, by proper post-conviction motion, or by proper motion to remand). The first question asked by the Supreme Court relates to the availability of a claim of ineffective assistance of counsel to raise an unpreserved but otherwise meritorious guidelines challenge. The second question appears to ask whether the rule of *People v Mitchell*, 454 Mich 145 (1997) (claim of miscalculated sentencing guidelines variable is not a reviewable claim of legal error as the judicial sentencing guidelines do not have the force of law), applies to challenges to the now-advisory but legislatively-enacted sentencing guidelines.

20. ***Juvenile LWOP and Jury Fact-Finding*****:** There is a Sixth Amendment right to jury trial to determine whether a juvenile offender should be sentenced to life without parole for first-degree murder. The default sentence for a juvenile convicted of first-degree murder in Michigan is a term of years. See MCL 769.25. Additional fact finding to support a sentence of life without parole violates the Sixth Amendment if made by the judge alone, absent waiver by the defendant. In order to enhance a sentence to life without parole for a juvenile offender, the jury must make findings based on the *Miller* factors and other relevant considerations under MCL 769.25(6), and must conclude that the juvenile's crime reflects "irreparable corruption" beyond a reasonable doubt. This hearing may occur in front of the original jury or the trial court may impanel a new jury. *People v Skinner*, ___ Mich App __ (Docket No. 317892, 8/20/15).

21. ***Juvenile LWOP and Jury Fact-Finding***: Disagreeing with the *Skinner* decision, another panel of the Court of Appeals would hold that there is no right to jury trial in the context of a juvenile life without parole sentence because the jury's verdict of first degree murder authorized the sentence and the sentencing judge did not determine facts not already determined by the jury's verdict. The panel nevertheless followed *Skinner* and remanded for resentencing "so that a jury may determine whether he should receive life in prison without the possibility of parole." The panel also noted in a footnote that while it was declaring a conflict, the defendant in *Skinner*

had filed an application for leave to appeal with the Michigan Supreme Court (i.e., the issue might become moot if resolved by a higher court). *People v Perkins*, ___ Mich App ___ (Docket No. 323454, 323876, 325741; 1/19/16). [***Note, this portion of the opinion was subsequently VACATED as the Court voted to convene a special conflict panel on 2-12-16.***]

22. ***Alleyne and CSC First Mandatory Minimum Term***: While the Michigan Supreme Court denied leave to appeal in this case involving two convictions of CSC first-degree with a victim under 13 years of age, a defendant 17 or older, and sentences of *23* to 50 years imprisonment (rather than the mandatory minimum term of 25 years), Justice Markman wrote a long concurring opinion pointing out the questionable plea bargain that amended the charge to delete the defendant's age from the felony information in order to avoid the mandatory minimum term. He concurred in the denial of leave to appeal, however, because under *Alleyne v United States*, 133 S Ct 2151 (2013), the defendant's age was an element of the offense and had to be alleged in the information in order to support the mandatory minimum term. *People v Keefe*, 872 NW2d 688 (2015). See also *People v Gardner*, unpublished opinion per curiam of the Court of Appeals, issued December 29, 2015 (Docket No. 323883) (defendant's age of 17 or older is an element of the crime that must be submitted to the jury in order to support the 25-year mandatory minimum term for CSC first degree with victim under the age of 13).

23. ***Appeal following* Crosby *Remand***: This question has not been addressed by the Michigan appellate courts.

Trial judges would be wise to advise a defendant of his or her appellate rights at the conclusion of the *Crosby* remand hearing, and arguably should provide a copy of the Notice of Right to Appeal form. Under MCR 7.202(6)(b)(iv), the trial court's decision on remand from the Court of Appeals in a case involving an appeal of right is considered a "final order" that is once again subject to review as an appeal by right: "'final judgment ' or 'final order' means: . . . (iv) a sentence imposed, *or order entered*, by the trial court following a remand from an appellate court in a prior appeal by right." See also MCR 7.203(a)(1) (jurisdiction of Court of Appeals includes appeal of right from final judgment or order of the circuit court that is not on appeal from any other court or tribunal and does not follow a conviction based on a plea of guilty or nolo contendere; appeal from order described in MCR 7.202(6)(a)(iii)-(v) "is limited to the portion of the order with respect to which there is an appeal of right.")

In a case involving remand from the Court of Appeals where the original appeal was pursued by leave to appeal rather than by right, it would appear there is another opportunity to file an application for leave to appeal following the *Crosby* remand decision. See MCR 7.203(B)(1) (Court of Appeals may grant leave to appeal from "1) a judgment or order of the circuit court and court of claims that is not a final judgment appealable of right[.]")]