CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

Advanced Criminal Defense Practice Conference

RECENT DEVELOPMENTS IN MICHIGAN CRIMINAL LAW

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CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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A. Fourth Amendment.

DNA Collection on Arrest. *Maryland v King*, __ US __, 133 S Ct 1958 (2013)**(june'13).** The Court, in a 5-4 decision, held that Maryland's practice of collecting DNA samples from those arrested for serious offenses, without judicial authorization, was permissible under the Fourth Amendment. Justice Scalia authored a four-justice dissent, stating that this "general warrant" flies in the face of the Fourth Amendment's clear proscription of "searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence."

Detention of Persons during Search of Premises. *Bailey v United States*, __ US __, 133 S Ct 1031 (2013)**(feb'13).** While preparing to execute a search at an apartment, police saw two men leave the premises to be searched, and followed their vehicle for a mile before stopping them and finding evidence connecting one of the men, Bailey, to the apartment where a gun and drugs were found. Bailey moved to suppress but the federal district court found his detention proper as incident to the execution of a search warrant under *Michigan v Summers*, 452 US 692 (1981). After the 2d Circuit affirmed the denial of the suppression motion, the United States Supreme Court, in a 6-3 decision, reversed. The majority closely examined *Summers* and found that the three reasons allowing detention at the scene of the search limit such a detention to the immediate vicinity of the premises to be searched. They do not apply where police detained Bailey a mile away from the searched apartment. The issue of whether the detention of Bailey was lawful in that it was supported by reasonable suspicion under *Terry v Ohio*, 392 US 1 (1968) was left open for resolution on remand.

Drunk Driving, Warrantless Blood Draw. *Missouri v McNeely*, __ US __, 133 S Ct 1552 (2013)**(april'13).** Defendant was pulled over in Missouri for driving under the influence, refused a preliminary breath test, and was taken to a hospital for a non-consensual blood draw. No warrant was obtained. In this case the state sought a per se rule that exigency exists, eliminating the need for a search warrant, whenever an officer has probable cause to believe a person has been driving under the influence. A divided Court first analyzed its earlier decision in *Schmerber v California*, 384 US 757 (1966) where a warrantless blood test was upheld because, after examining the particular circumstances in that case, the Court was convinced that the officer might reasonably have believed he was confronted with an emergency (issues of delay in that case may well have threatened destruction of the evidence according to the Court). Here the question was whether the natural metabolization of alcohol alone allows for a per se rule of exigency that justifies an exception to the Fourth Amendment's warrant requirement in all drunk driving cases. A majority of the Court found that it does not and "exigency in this context must be determined case by base based on the totality of the circumstances."

Entry of Home by Police, Community Caretaker Exception. *People v Hill*, 299 Mich App 402; 829 NW2d 908 (2013)**(feb'13).** Defendant was charged with manufacturing marijuana when police found plants under a grow light after entering without a warrant after a discussion with one of Defendant's neighbors who was worried about his well-being. The court of appeals reversed the dismissal of charges by the lower courts based

on warrantless entry and found the community caretaker exception applicable since the police investigation and entry were based solely on the neighbor's concerns (primarily based on neighbor's failure to see Defendant for several days) and were not for purposes of investigating criminal activity. Even if the community caretaker exception did not apply, the majority would find the warrantless entry saved by the good faith exception as police entered Defendant's home "in a good-faith effort to check on the welfare of a citizen." Judge Markey dissented as, in her view, there was simply no factual showing of any type of emergency that allowed police to enter without a warrant.

Entry of Home by Police, Community Caretaker Exception. *People v Lemons,* 299 Mich App 541; 830 NW2d 794 (2013)**(feb'13).** As in *Hill*, above, the trial court found an illegal search and dismissed the case but the court of appeals reversed based on the community caretaker exception to the warrant requirement. In this case the fact that the door to Defendant's condominium was open and "blowing in the wind" was sufficient to justify police entry.

Entry of Home by Police, Revocation of Consent. *City of Westland v Kodlowski,* 298 Mich App 647; 828 NW2d 67 (2012)**(dec'12).** After being called to Defendant's home due to a marital dispute, Defendant gave consent to police entry of his home. At one point this consent was revoked but the court held that "a co-occupant's withdrawal of his consent to the presence of the police does not preclude officers from continuing to investigate cases of potential domestic violence."

Search of Home Without Warrant, Drug Sniffing Dog on Porch. *Florida v Jardines,* __ US __, 133 S Ct 1409 (2013)**(march'13).** Acting on an unverified tip, officers approached Jardines' home with a drug dog. After the dog "alerted" on Jardines' front porch a warrant was obtained and the subsequent search of the home revealed marijuana plants. Jardines moved to suppress the marijuana plants and ultimately the Florida Supreme Court agreed with the trial court's grant of the motion, finding that the use of the drug dog to investigate Jardines' home was a Fourth Amendment search without probable cause. Because there was no warrant the drug dog search was improper, making the subsequent warrant supported search of the home invalid as well. In a 5-4 decision, the United States Supreme Court upheld this result, finding that the front porch of a home is a constitutionally protected area and bringing a drug dog to that area to gather information is "conduct not explicitly or implicitly permitted by the homeowner."

Vehicle Search, Probable Cause, Drug Dog Reliability. *Florida v Harris,* __ US __, 133 S Ct 1050 (2013)**(feb'13).** Defendant was pulled over for an expired tag and the officer noted nervousness and an open beer can, leading to a request that Harris consent to a search of the vehicle. When Harris refused, Aldo, a trained drug dog, was used to do a "free air sniff" and "alerted" on Harris's vehicle. A subsequent search turned up no drugs Aldo was trained to find, but did reveal illegal ingredients for making methamphetamine, for which Harris was prosecuted. The Florida Supreme Court held that probable cause to search was lacking as Aldo did not present evidence of his performance history, a critical piece in assessing the reliability issue. A unanimous United States Supreme Court, in an opinion authored by Justice Kagan, reversed, finding that the standards for probable cause in this case set by the Florida Supreme Court, particularly as to the strict need for "an exhaustive set of records, including a log of the

dog's performance in the field" was inconsistent with the flexible standard for assessing probable cause using a totality of the circumstances approach under *Illinois v Gates*, 462 US 213 (1983).

Vehicle Stop, Obstruction of Driver's View. *People v Dillon,* 296 Mich App 506; 822 NW2d 611 (2012)**(may '12).** Defendant was bound over in an Oakland County District Court on a charge of possession of less than 25 grams of heroin – the circuit court suppressed the narcotics recovered in the search and dismissed on the basis that the police officer had no probable cause for the traffic stop. The police officer alleged that he stopped the defendant because his air freshener, hanging from his rear view mirror, was obstructing the driver's view – a violation under MCL 257.709(1)(c). The court analyzes the circumstances surrounding a stop from a totality of the circumstances, common sense standpoint, and the intent of the officer is irrelevant. *People v Jenkins*, 472 Mich 26; 691 NW2d 759 (2005). An officer must have reasonable suspicion to warrant a traffic stop – the court found that because of the defendant's dangling air freshener, the officer had suspicion to think that the obstructed vision statute was being violated. When making his valid stop, the officer than observed the defendant throw an object out of the window of the vehicle – giving him probable cause to prolong the stop and investigate further. Finding the stop valid, and that the statute for an obstruction of driver's view was not unduly vague, the court reversed the lower court's suppression and remanded.

Warrant Unnecessary for Probation Violation Arrest. *People v Glenn-Powers,* 296 Mich App 494; 823 NW2d 127 (2012)**(may '12).** Defendant was on probation in Washtenaw County. He violated his probation by not informing his agent of a change of address, failing to meet the requirement that he be enrolled in some sort of schooling, and committing an assault. His agent requested an arrest warrant, using a standard form that included the motion, an affidavit, and bench warrant. The next time that the defendant reported to probation he was placed under arrest and a search incident to arrest revealed over 30 packets of heroin. The defendant argued that the search was invalid because the affidavit accompanying the arrest warrant was not sworn under oath, which he argued is a Fourth Amendment requirement. MCL 764,15(1)(g) establishes that an arrest warrant is not necessary for a probation violation when a "peace officer has reasonable cause to believe the person ... has violated 1 or more conditions of a ... probation order imposed by a court of this state...." A warrant is not required under the Constitution to arrest for a probation violation, so whether the warrant was properly executed is irrelevant as long as the required probable cause for the probation violation exists. Because the arrest was lawful the search was as well.

B. Other Pretrial Matters.

Confession, *Miranda*, Functional Equivalent to Questioning. *People v White*, 493 Mich 187; 828 NW2d 329 (2013)**(feb'13).** Defendant was charged with 1st degree felony murder, armed robbery, and possession of a firearm during the commission of a felony.

After Defendant invoked his right to counsel, the interrogating officer continued to make statements to Defendant suggesting that he was putting the public at risk if he did not tell him where the gun was. In response, Defendant eventually made incriminating remarks. The trial court held that the officer's statements were the functional equivalent of questioning and suppressed the resulting statements. The prosecution appealed. Using the test announced in *Rhode Island v Innis*, 446 US 291 (1980), the court of appeals, in a 2-1 decision, held that "(1) there was no evidence suggesting the police were aware that respondent was peculiarly susceptible to an appeal to his conscience or that respondent was unusually disoriented or upset at the time, (2) the conversation consisted of only a few short remarks, (3) there was not a "lengthy harangue" in the presence of the respondent and (4) the comments were not particularly evocative, the officers should not have known that the respondent would have been moved to make a self-incriminating statement. Thus the COA held that the trial court erred in suppressing defendant's statements and reversed and remanded. *People v White*, 294 Mich App 622 (2011). The supreme court, in a 3-2 decision, agreed with the court of appeals, finding that the officer's statements did not constitute an interrogation under *Miranda*, and the resulting "confession" here was voluntary.

Confession, *Miranda* Warnings for Juvenile Defendants. *People v Eliason,* 300 Mich App 293; __ NW2d __ (2013)**(april'13).** Defendant appealed his convictions for first-degree premeditated murder and possession of a firearm during the commission of a felony. Defendant shot his step-grandfather while he slept. Michigan State Police responded to the scene and arrested Defendant. A trooper initially interviewed Defendant at the home; she read Defendant his *Miranda* warnings and Defendant agreed to waive his rights and to speak to her without having a parent present. Defendant then confessed to the crime. The voluntariness of a *Miranda* waiver is evaluated under a totality of the circumstances test, but also includes **additional safeguards for juveniles**, which requires consideration of the following factors: (1) whether the requirements of *Miranda* have been met and the Defendant clearly understands and waives those rights, (2) the degree of police compliance with juvenile statutes and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the juvenile's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. The COA held that Defendant, who was a 14 year-old juvenile, voluntarily waived his *Miranda* rights before speaking with law enforcement officers. The court reasoned that the juvenile's father was present during the interview with police, and although he was not present during Defendant's interview with the first officer, that was at the juvenile's request, Defendant was intelligent and articulate, and earned mostly A's and B's in school, and neither the detention nor the questioning was prolonged.

Confession, *Miranda* Warnings while Defendant is Incarcerated. *People v Cortez,* 299 Mich App 679; __ NW2d __ (2013)**(mar'13).** Defendant was an inmate with MDOC when weapons were found in his cell. Defendant was then questioned by an MDOC officer. Before trial, defendant moved to suppress his confession on the basis that he was not given *Miranda* warnings. At the suppression hearing, Lieutenant Vashaw explained that his purpose in questioning Defendant was to obtain information about ongoing prison gang activity. The trial court denied Defendant's motion to suppress the confession and overruled his objections to playing the recording for the jury. Defendant then appealed his convictions of two counts of being a prisoner in possession of a weapon. In a previous opinion, the COA affirmed Defendant's convictions. *People v Cortez*, 294 Mich App 481, 811 NW2d 25 (2011), vacated in part and remanded 491 Mich 925, 813 NW2d 293 (2012). Shortly after the COA decided their previous opinion, the United States Supreme Court decided *Howes v Fields*, 565 U.S. ——, 132 SCt 1181 (2012). The MSC directed the COA on remand to reconsider in light of *Fields* Defendant's challenge under *Miranda* to the use of his confession at trial. The *Fields* Court held that, when a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted. "An inmate who is removed from the general prison population for questioning and is thereafter ... subjected to treatment in connection with the interrogation that renders him "in custody" for practical purposes ... will be entitled to the full panoply of protections prescribed by *Miranda*." The issue then becomes whether Cortez was "in custody" during his questioning. The COA held that he was not because defendant's interview lasted only 15 minutes, the questioning officer testified that Defendant did not hesitate to discuss the matter, Defendant's sleep schedule was not interrupted, the interviewing officer testified that he never threatened Defendant, and the trial court found the lieutenant to be credible.

Confession, to Parole Officer. *People v Elliott,* __ Mich __; __ NW2d __ (No. 144983, 2013 WL 3198007, decided June 25, 2013)**(june'13).** Defendant was charged with armed robbery and after police provided *Miranda* warnings he requested an attorney, causing police questioning to cease. Later, Defendant's parole officer visited him at the jail and obtained a confession without again providing *Miranda* warnings. The court of appeals held that the parole officer was a law enforcement officer, Defendant was in custody when the parole officer interrogated him and therefore, since Defendant had earlier requested counsel, his statements to the parole officer were inadmissible and prejudicial and a new trial was required. The supreme court reversed, holding that the key issue was not whether the parole officer was a law enforcement officer, but whether the questioning by the parole officer was custodial interrogation. Citing the United States Supreme Court' decision in *Howes v Fields*, __ US __, 132 S Ct 1181 (2012), the majority found that "custody" for *Miranda* purposes was not solely a question of incarceration, but was a term of art defining "circumstances that are thought generally to present a serious danger of coercion." Despite the fact that Defendant was in jail when he was interviewed by his parole officer, the totality of circumstances of the interview did not present this serious danger of coercion, and therefore the interview was not custodial. Justice McCormack, joined by Justice Cavanagh, dissented, finding that the questioning by the parole officer was custodial.

Double Jeopardy. *People v Franklin,* 298 Mich App 539; 828 NW2d 61 (2012)**(july'12).** Considering the "multiple punishment" aspect of jeopardy rather than the successive trial component, the court held that convictions for both aggravated indecent exposure and indecent exposure are not permissible, because "the offense of indecent exposure does not contain any elements that are distinct from the offense of aggravated indecent exposure." Similarly, in another case, the court held that convictions for both assault with intent to rob while armed and armed robbery violate double jeopardy. *People v Gibbs and Henderson,* 299 Mich App 473; 830 NW2d 821 (2013)**(feb'13).**

Double Jeopardy, Retrial Barred after Erroneous Judicial Acquittal. *Evans v Michigan,* __ US __; 133 S Ct 1069 (2013)**(feb'13).** Evans was tried for arson of "other real property" (MCL 750.73) and at the close of the state's case the trial court granted a directed verdict after being persuaded that it was an element of the offense that the burned property was not a dwelling house. In this case Evans was charged with burning an unoccupied dwelling. The Michigan Supreme Court ultimately decided to permit a retrial because the trial court's decision was based on an error of law – there was no such element in the statute. In an 8-1 decision, the United States Supreme Court reversed the Michigan Supreme Court and held that Double Jeopardy barred retrial here. The Michigan court's claim that retrial could proceed because the state trial court granted the motion for directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense was not supported by applicable SCOTUS precedent. Acquittals are substantive rulings that the state has not put forward sufficient proof to establish criminal liability for an offense, and even when issued erroneously, such rulings bar retrial.

Double Jeopardy, Retrial after Hung Jury Mistrial. *Blueford v Arkansas,* __ US __; 132 S Ct 2044 (2012)**(may'12).** This case arose when Blueford was charged with capital murder for the death of his girlfriend's child. Before the jury concluded deliberations, it reported to the trial court that it unanimously agreed that Blueford was innocent of both capitol and 1st degree murder, but that it was deadlocked on manslaughter, and had not voted on negligent homicide. The trial court told the jury to continue to deliberate. Ultimately, the jury could not reach a verdict, and the trial court declared a mistrial. The issue was whether double jeopardy protection bars the state from retrying a defendant on charges after a jury reported to the trial court that it had voted unanimously against some charges, but were deadlocked on others eventually leading to a mistrial. The Arkansas Supreme Court held that double jeopardy did not attach in this instance. In a 6-3 decision, the SCOTUS held that the jury in this case did not convict defendant of any offense, but it did not acquit him of any either. When the jury was unable to return a verdict, the trial court properly declared a mistrial and discharged the jury. As a result, double jeopardy did not stand in the way of a second trial on the same offenses.

Habitual Offender Charge, Timing. *People v Siterlet,* 299 Mich app 180; 829 NW2d 285 (2012)**(dec'12).** In this drunk driving case, the court of appeals agreed with Defendant that the prosecutor improperly amended the felony information to increase the

habitual offender level to fourth-offense since this was done after the 21 day period following arraignment provided for by MCL 769.13(1). However, since there was no objection the court affirmed finding that this was not plain error and did not "affect the fairness, integrity, or public reputation of the judicial proceedings."

Speedy trial, 180 day rule. *People v Rivera,* __ Mich App __ ; __ NW2d __ (2013 WL 2278025, No. 309570, decided May 23, 2013)**(may'13).** The prosecution appealed the trial court's order dismissing various charges because that court held that defendant's constitutional right to a speedy trial had been violated, and the COA reversed and remanded. The prosecution argued that they never received a certified letter from the MDOC, which is required by MCL 780.131(1) (provides that the MDOC must send written notice, by certified mail, to the prosecutor to trigger the 180 day requirement). While the trial court held that the prosecution in this case received enough documentation in this case to trigger the 180 day requirement, the COA focused on the certified mail requirement. The COA also held that the defendant could not prove that he was prejudiced by the delay, which is required if the delay is less than 18 months.

Venue, Jurisdiction, Crime on Indian Territory. *People v Collins,* 298 Mich App 166; 826 NW2d 175 (2012)**(oct'12).** Two defendants, Collins and Mason, were charged with drug crimes committed at an Indian casino. Neither defendant was of Indian heritage, so the trial court dismissed charges on the ground that there was no state jurisdiction. The court of appeals reversed, holding that courts in Michigan have jurisdiction in criminal prosecutions for "victimless" offenses committed by non-Indians on Indian land.

C. Confrontation, Counsel, and Other Trial Issues.

Confrontation, DNA Lab Report. *Williams v. Illinois,* 567 US __; 132 S Ct 2221; (2012)**(june'12).** Cellmark, an accredited DNA laboratory, provided police with a DNA profile from swabs taken from the complainant in a criminal sexual conduct case. The issue in this case was whether *Crawford v Washington,* 541 US 36 (2004), bars an expert from expressing an opinion based on facts about a case that were made known to the expert but about which the expert could not testify. Here the expert, called to testify in a bench trial, claimed that the DNA profile produced by Cellmark matched a profile produced by the state police lab using Defendant Williams' blood. In an opinion by Justice Alito, joined by The Chief Justice and Justices Kennedy and Breyer, the Court held that the Cellmark report was an out-of-court statement not offered for its truth, but solely for the purpose of the state's expert in explaining assumptions upon which his opinion rested. Therefore the Cellmark report fell outside the scope of the Confrontation Clause. Justice Alito also found that even if the Cellmark report had been admitted, there would not be a Confrontation Clause violation because, given that the report was not sought for use against Defendant Williams, who was not under suspicion at the time, "it was "very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was

originally understood to reach." Justice Thomas concurred in the result, while Justice Kagan, joined by Justices Scalia, Ginsburg and Sotomayor, dissented, holding that "[f]orensic evidence is reliable only when properly produced, and the Confrontation Clause prescribes a particular method for determining whether that has happened."

Confrontation, DWLS, Certificate of Mailing, Notice of Suspension. *People v Nunley*, 491 Mich 686; 821 NW2d 642 (2012)**(july'12)**. In a published 2-1 decision issued in October (Saad, J. dissenting) the court of appeals had upheld the circuit court's partial affirmance of the district court's denial of the prosecutor's motion in limine to allow a secretary of state "certificate" showing that defendant had been notified of the suspension of his driver's license, a necessary element to prosecution under MCL 257.904(1), driving with a suspended or revoked license. The court of appeals' majority agreed with the circuit court, and held that because the certification at issue was not merely documenting the authenticity of records but was in fact "attesting to a required element of the charge," the Confrontation Clause would be violated if the author of the certification did not appear at trial, citing the recent United States Supreme Court ruling in *Melendez-Diaz v Massachusetts*, __ US __; 129 S Ct 2527 (2009). *People v Nunley*, 294 Mich App 274; __ NW2d __ (2011). In a unanimous opinion (Hathaway, J., concurring in result only), the supreme court reversed the court of appeals on this point, finding that the certificate of mailing was not testimonial as it was not generated in preparation for prosecution. The act of creating the certificate "is a function of the legislatively authorized administrative role of the DOS independent from any investigatory or prosecutorial purpose."

Confrontation, Two-Way Interactive Video Technology, Waiver. *People v Buie,* 491 Mich 294; 817 NW2d 33 (2012)**(may'12).** Defendant was convicted of 1st degree CSC, victim under the age of 13, partly due to the testimony of two doctors who were allowed to testify by way of two-way, interactive video technology. Defendant argued that allowing this violated his constitutional right of confrontation. The COA first heard the case in August of 2009, when it held that a trial court may allow video-conferencing if it either makes case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation, or if the case meets the following three-prong test: (1) the defendant is either present in the courtroom or has waived the right to be present, (2) there is a showing of good cause, and (3) the parties consent. The court remanded this case to the trial court to address these issues. At the evidentiary hearing it was stipulated that both witnesses would have testified in person if video-conferencing had not been available. The prosecution conceded that it "presented no specific state interest invoked for having [the doctors] testify via video rather than in person. Rather, it was done for convenience, but only after an agreement was reached with defense counsel..." The COA held that there was no public policy or state interest at issue in this case important enough to outweigh defendant's right of confrontation. The COA also held that the three elements listed above were not met. The court focused on the third element – consent. The COA held that a defense counsel may waive a defendant's right of confrontation, but may only do so if the waiver is a legitimate trial tactic or strategy **and the defendant does not object to the decision.** At the evidentiary hearing, defendant testified that defense

counsel informed him of the video testimony immediately before it took place. Defendant told counsel that it "didn't feel right" to have witnesses testify from outside of the courtroom, and requested that she object. In response to his request, counsel made a statement regarding defendant questioning the veracity of the proceedings. Finally, the COA held that having allowed the video procedure cannot be deemed harmless error and vacated defendant's conviction. The supreme court reversed, holding that the right of confrontation may be waived by counsel so long as a defendant does not object. No personal waiver by a criminal defendant is required. Under these facts, the majority concluded there was no objection, and therefore defendant's confrontation rights were waived. In dissent Justice Cavanagh, joined by Justice Kelly, concluded that defendant did indeed personally object to the confrontation denial.

Counsel, Ineffective Assistance, Collateral Estoppel, Failure to Investigate. *People v Trakhtenberg*, 493 Mich 38; 826 NW2d 136 (2012)**(dec'12).** A pivotal issue in this complex litigation was whether a finding in favor of trial defense counsel after Defendant brought a civil suit for attorney malpractice would estop a finding of ineffective assistance of counsel in the criminal litigation. The court of appeals answered affirmatively but the supreme court reversed, holding that Defendant did not have a full and fair opportunity to litigate his ineffective assistance of counsel claim in the civil malpractice case. Moving on to the issue of whether trial defense counsel was effective, the supreme court, in a 4-2 decision (Justice Hathaway did not participate), found that "counsel failed to exercise reasonable professional judgment when deciding to forgo particular investigations relevant to the defense" and was therefore ineffective, requiring the grant of a new trial.

Counsel, Ineffective Assistance, Failure to Call Expert. *People v Eliason*, 300 Mich App 293; __ NW2d __ (2013)**(april'13).** Defendant appealed his convictions for first-degree premeditated murder and possession of a firearm during the commission of a felony. Defendant, who was 14 years old at the time he committed these crimes, was sentenced to mandatory life in prison without the possibility of parole for his first-degree murder conviction and two years' imprisonment for his felony-firearm conviction. Defendant shot his step-grandfather while he slept. Defendant then confessed to the crime. Defendant first argued that he was denied the effective assistance of trial counsel because his trial counsel should have presented an expert witness to rebut testimony offered by the prosecution that he lacked remorse after the shooting. The COA, however, held that defense counsel's decision not to call an expert witness was a matter of reasonable trial strategy, and, thus, was not ineffective assistance. Defense counsel had consulted with three mental health experts before trial, none of whom concluded that defendant's lack of remorse was caused by dissociation with reality, and, thus, it was reasonable that he did not seek out a fourth expert witness when the first three he consulted did not indicate that defendant suffered from an underlying mental health condition that caused him to appear to lack remorse for his actions. Next, Defendant argued that his defense counsel was ineffective for failure to object to the prosecution's references to Charles Manson during questioning and closing arguments. The COA held that, while these comments were improper, Defendant's trial counsel's performance did not fall below an objective standard of reasonableness due to his failure to raise an

objection. The court noted that "declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." The COA added that, even if trial counsel acted in an objectively unreasonable manner by failing to object to this evidence, Defendant would not be entitled to relief because he could not demonstrate prejudice.

Counsel, Ineffective Assistance, Failure to Move to Suppress under *Miranda*. *People v Comella*, 296 Mich App 643; 823 NW2d 138 (2012)**(may'12).** In order to establish IAC for failure to move to suppress un-*Mirandized* statements, a defendant must show he would have prevailed had the issue been raised. In this case, as in *People v Mayes (Aft Rem)*, 202 Mich App 181, 191; 508 NW2d 161 (1993), there were factors supporting a finding of a custodial environment and factors negating such a conclusion. Therefore it is "unclear whether defendant would have prevailed on this issue" and therefore it cannot be determined that defendant was denied effective counsel. The court also refused to find counsel ineffective for failing to object to prosecutorial misconduct, finding that there was in fact no prosecutorial misconduct to object to.

Counsel, Ineffective Assistance, Failure to Produce Witness. *People v Russell III*, 297 Mich App 707; 825 NW2d 623 (2012)**(sep'12).** Defendant was jury convicted of Assault with Intent to do Great Bodily Harm Less than Murder and Reckless Driving after he crashed his vehicle into one of two people who had accosted him while seeking to take a computer from his vehicle. After a *Ginther* hearing the trial court granted a new trial due to defense counsel's failure to produce a witness who observed the events at issue and contradicted the prosecution's proofs. The court of appeals majority reversed the grant of a new trial on this basis, stating that the witness in question, who was never contacted by defense counsel (counsel did review her police statement), gave testimony at the hearing conflicting with the defense theory, and therefore it was permissibly strategic to fail to call her. Judge Krause, in dissent, would have upheld the trial court's determination as the facts suggested to her that, while not likely, the witness's account could have been seen as consistent with the theory of defense and the physical evidence. Judge Krause, using the appropriate deferential standard, determined that in her view the trial court did not commit clear error.

Defenses, Withdrawal, Burden of Proof. *Smith v United States*, __ US __, 133 S Ct 714 (2013)**(jan'13).** Smith was charged with conspiracy for his role in an illegal drug business,and claimed that prosecution was barred by a five year statute of limitations as he had withdrawn outside that limit. The federal district court instructed the jury that the defense had the burden of proof as to the affirmative defense of withdrawal from a conspiracy by a preponderance of the evidence. After the D.C. Circuit affirmed, the United States Supreme Court, in a unanimous opinion, agreed.

Evidence, Cleric-Congregant Privilege. *People v Bragg*, 296 Mich App 433; 824 NW2d 170 (2012)**(may'12).** Defendant was bound over on first-degree criminal sexual conduct in a Wayne County district court. At the preliminary examination, his pastor testified that Defendant had admitted to him that he sexually assaulted his nine year old cousin. When the case reached the circuit court the judge threw out Defendant's

admission to the pastor based on cleric-congregant privilege. The prosecution filed an appeal, alleging that the statements were not privileged and therefore admissible. The complainant in this case was Defendant's younger cousin – both families went to the same church and the pastor knew them both. After the alleged victim's parents told the pastor about the allegations, he called Defendant's mother and asked them to come in to see him. Defendant was 15 when the alleged assault occurred but 17 at the time the complainant reported and he was questioned by the pastor. In front of Defendant's mother the pastor elicited an admission from Defendant. After admitting his actions Defendant was counseled by the pastor and they prayed together. The pastor then told the complainant's family, and they reported the statement to the police. The police then obtained a written statement from the pastor. The prosecution argued that because Defendant's mother was present, the privilege was non existent. Defendant claimed that because he was a minor his mother's presence was required, and did not eliminate the privilege. The prosecution also pointed out that the pastor had asked Defendant to come see him – Defendant had not gone to him seeking out religious counseling. To help it parse through this situation, the court used MCL 767.5a(2) because it, "is a more recent enactment and more specifically governs the evidentiary use of a 'privileged and confidential' communication." The court found that Defendant's statements to his pastor were privileged because the exchange required the pastor to act as a pastor, and Defendant had communicated with him because he was a pastor in the Baptist Church. The court stated that if the pastor had been a normal citizen the exchange would not have occurred. The court also held that under 767.5a(2) it is irrelevant whether the exchange between pastor and penitent was a confession or merely a conversation, and that it does not matter which party started the communication. The presence of Defendant's mother did not waive the privilege according to the court, because the presence of a relative does not automatically abolish it. The gauge is what the speaker intended by allowing the third party to hear the communication – because Defendant here still believed the communication was confidential, the fact that his mother was there did not negate that. The fact that he was a minor only strengthens this argument. Because of all of these variables the court found that the defendant's statement to his pastor was privileged and confidential.

Evidence, CSC, Other Acts, MCL 768.27a versus MRE 404(b). *People v Watkins, People v Pullen*, 491 Mich 450; 818 NW2d 296 (2012)**(june'12).** These consolidated cases involve MCL 768.27a(1), which provides in relevant part that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." Defendants were convicted of CSC. Evidence was admitted against them under MCL 768.27a(1). Both Defendants appealed, arguing that that MCL 768.27a conflicts with MRE 404(b), and the rule of evidence prevails over the statute. They further argued that the witness testimony should have been excluded under both MRE 404(b) and MRE 403, which their respective trial courts failed to consider. The COA affirmed Defendants' convictions. After granting leave to appeal, the MSC held that that MCL 768.27a does indeed conflict with MRE 404(b), but that the statute prevails over the court rule because it does not impermissibly infringe on the MSC's authority regarding rules of practice and procedure

under Const 1963, art 6 § 5. The MSC further held that evidence admissible under MCL 768.27a remains subject to MRE 403, which provides that a court may exclude relevant evidence if the danger of unfair prejudice, among other considerations, outweighs the evidence's probative value. The court instructed that, when applying the balancing test in MRE 403 to evidence admissible under MCL 768.27a, however, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. The court ultimately affirmed Watkins' convictions, and remanded Pullen's case to the trial court for further proceedings consistent with the court's opinion. Justice Kelly wrote a dissenting opinion which was joined by Justices Cavanagh and Hathaway. In her opinion, Kelly agreed with the majority that MCL 768.27a and MRE 404(b) irreconcilably conflict. However, she would hold that MCL 768.27a is an unconstitutional legislative intrusion into the power of the judiciary.

Evidence, Denial of the Right to Present a Defense. *People v Martz*, __ Mich App __ ; __ NW2d __ (2013 WL 2361003, No. 307916, decided May 30, 2013)**(may'13).** Defendant was convicted of CSC I, unlawful imprisonment, and resisting arrest. This case arises out of a long, controlling, and abusive relationship between the complainant, Stephanie, her mother, Karen, and Defendant. Defendant claimed to be Stephanie's husband based on a few contracts he had written over the years. The trial court held that these "contracts" were inadmissible and Defendant appealed. The COA held that the trial court did not abuse its discretion by declaring the documents inadmissible because, even in engaging in the presumption that any of the documents were themselves executed consensually by Stephanie, the most they could show would be that Defendant and Stephanie believed themselves married to each other, that Defendant had assumed the right to make decisions regarding Stephanie's medical care and contractual arrangements, and that Stephanie had issues with hallucinations while on certain medications. Absolutely none of those things conferred upon Defendant a right to have nonconsensual sex with Stephanie. Furthermore, none of those things in any way disproved a coercive relationship between the two of them.

Evidence, Domestic Violence, Other Acts, MCL 768.27b versus MRE 404(b). *People v Mack*, 493 Mich 1; 825 NW2d 541 (2012)**(dec'12).** In a brief Memorandum Opinion, the Court, 4-3, utilized the same logic outlined above in relation to the *Watkins* case, to conclude that MCL 768.27b, which trumps MRE 404(b) and allows evidence of previous domestic violence to come in without analysis in domestic violence trials, does not infringe on the court's rule-making authority.

Evidence, Expert Testimony, Exclusion. *People v Kowalski*, 492 Mich 106; 821 NW2d 14 (2012)**(july'12)**. In this interlocutory appeal, the trial court and a court of appeals majority ruled that, under MRE 702 and MRE 403, defendant's proffered expert testimony from a social psychologist and a clinical and forensic psychologist regarding the occurrence of false confessions considering police tactics, and the psychological characteristics of defendant, could not be introduced at trial. The court, as a preliminary matter, disagreed with the court of appeals finding that the phenomenon of false confessions was within the common knowledge of laypersons, and hence not subject to expert interpretation at trial. The court held that "a purported false

confession…constitutes counterintuitive behavior that is not within the ordinary person's common understanding, and thus expert assistance can help jurors understand how and why a defendant might confess falsely." Any expert testimony is subject to other limitations under MRE 702, and after analyzing the social psychologist's proffered testimony, the court upheld the trial court's exclusion due to problems with the data and methods underlying the studies relied upon. However, the court found that the decision of the trial court and the court of appeals to exclude the forensic psychologist's testimony concerning the "specific study of defendant himself" was in error, as that evidence was independent of the unreliable false confession literature, and the lower courts erred in assessing admissibility under MRE 702 and MRE 403. The case was remanded to the circuit court for a proper assessment of the forensic psychologist's evidence under the rules of evidence.

Evidence, Hearsay, Forfeiture by Wrongdoing. *People v Burns,* __ Mich __; __ NW2d __ (No. 146504, 2013 WL 3020917, decided June 18, 2013)**(june'13).** In the first criminal decision authored by Justice McCormack the supreme court unanimously upheld the court of appeals' reversal of Defendant's conviction. The trial court, under the doctrine of forfeiture by wrongdoing, had admitted hearsay testimony. The court of appeals and the supreme court found that this was error "because the prosecution failed to demonstrate that defendant had the specific intent to, and in fact did, cause the unavailability of the declarant as a witness." The underage complainant's claim that during the alleged sexual act Defendant told her not to tell anyone because she would get in trouble was not enough to constitute forfeiture by wrongdoing. The circumstances of Defendant's claimed statement to complainant, including the timing, simply do not support a finding that the statement was made with the intent to cause the complainant's unavailability as a witness.

Evidence, Hearsay, Forfeiture by Wrongdoing. *People v McDade,* __ Mich App __; __ NW2d __ (No. 307597, 2013 WL 3020686, decided June 18, 2013)**(june'13).** A decision by the court of appeals, released the same day as *Burns*, above, held that the admission of hearsay (the hearsay violation was obviated by a finding that the note in question, allegedly penned by Defendant, was an admission by a party opponent under MRE 801(d)(2)) in violation of the confrontation clause was excused by the doctrine of forfeiture by wrongdoing under MRE 804(b)(6). The note was passed to a witness (Stafford) in the jail and "did reflect an effort specifically designed to prevent Stafford from testifying."

Evidence, Lay Opinion Testimony. *People v Fomby,* 300 Mich App 46; __ NW2d __ (2013)**(mar'13).** Defendant appeals his convictions for first-degree felony murder, armed robbery, and carjacking. Defendant argued that the testimony of a certified video forensic technician regarding the identity of individuals in still photos and surveillance footage was lay opinion testimony. Defendant contends that his identity was at issue and this testimony was irrelevant and superfluous because conclusions and opinions regarding the identity of individuals in the still photos and in the surveillance footage could have been drawn by the jury. Therefore, Defendant contends, this testimony invaded the province of the jury, and the trial court's admission of this evidence was error warranting reversal.

The first issue was whether the technician's testimony constituted expert testimony or lay opinion testimony. The COA held that it was lay opinion testimony. The COA then held that the technician's testimony was properly admitted by the trial court as lay opinion testimony under MRE 701 because the testimony was (1) based on his perception, (2) intended to provide a clearer understanding about relevant facts at issue in the case and (3) did not invade the province of the jury.

Evidence, Police Statements during Interrogation Commenting on Witness Credibility. *People v Musser*, __ Mich __; __ NW2d __ (No. 145237, 2013 WL __, decided July 12, 2013)**(july'13).** At issue in this case were police "statements" supporting the credibility of witnesses against Defendant made during interrogation of Defendant and admitted at trial. The supreme court unanimously, in an opinion by Justice Cavanagh, ruled that there was no need "at this juncture" for a bright-line rule of inadmissibility of such statements. However, applying existing evidence rules, such statements must be relevant for the intended purpose of providing "context" for a defendant's statements during interrogation. Even if the statements survive that test they should be excluded under MRE 403 if they are more prejudicial than probative. In this case it was error under existing evidence rules to admit the statements of police during interrogation of Defendant as most of the statements were irrelevant to the goal of providing context for Defendant's statements.

Fifth Amendment, Use of Defendant's Silence at Trial. *Salinas v Texas*, __ US __; 133 S Ct 2174 (2013)**(june'13).** Defendant engaged in an hour-long, non-custodial "interview" with police without *Miranda* warnings, in relation to a Houston murder. When asked whether ballistic tests would link his shotgun to casings at the murder scene, Defendant was silent, a fact that was used by the prosecutor at Defendant's trial on the murder charges to prove his guilt. In a 5-4 decision, the Court found this permissible because Defendant never invoked his 5th Amendment privilege (three justices) or because, whether the privilege was invoked or not, the 5th Amendment does not protect against adverse comments on Defendant's silence during police questioning (two justices).

Fifth Amendment, Use of Defendant's Silence at Trial. *People v Clary*, __ Mich __; __ NW2d __ (No. 144696, 2013 WL 3198070, decided June 25, 3013)**(june'13).** Citing decisions of the United States Supreme Court the Michigan Supreme Court, reversing the court of appeals on this point, determined that it was not error to impeach Defendant, testifying at his second trial, with his silence at his first trial. However, the supreme court left intact the remedy of reversal because, again disagreeing with the court of appeals, the majority found that the prosecutor erred in using Defendant's post-Miranda silence to police against him at his second trial.

Identification, Sufficiency of the Evidence. *People v Ratcliff*, 299 Mich App 625; 831 NW2d 474 (2013)**(mar'13).** Two men were arrested in a stolen car following a robbery. One of the men admitted to being involved in the robbery, but Defendant maintained that he was not. The other man arrested with Defendant indicated that there was a third man who was the one who had helped him commit the crime. The owner of the robbed store,

however, identified Defendant in a corporeal lineup. Defendant presented evidence at trial that he bore a close resemblance to the "third" robber, and this is why he was identified. Defendant argued on appeal that the evidence against him was insufficient because the only evidence that Defendant was the second robber was the store owner's identification. Defendant relied significantly on the owner's uncertainty regarding whether a photograph of Defendant that he was shown at trial revealed the robber, as well as the owner's concession that the photograph of the possible third robber could also have depicted the robber. The COA affirmed the conviction finding that the store owner testified that the photographs were more limited than real life, and that the owner further stated that his identification of Defendant as the robber at a corporeal lineup was partly because of a characteristic hand-twitching movement that he observed the robber and Defendant make. The COA added that the store owner's identification was not the only evidence supporting defendant's identity as the second robber. The police observed Defendant in the stolen vehicle mere hours after the robbery and carjacking, Defendant fled from the police, the police recovered from the passenger seat of the stolen car a handgun that was consistent with the store owner's description of Defendant's handgun, and no other person was observed to be present or identified as the allegedly true perpetrator at the time.

Impeachment with prior conviction. *People v Snyder*, __ Mich App __ ; __ NW2d __ (2013 WL 2221575, No. 310208, decided May 21, 2013)**(may'13).** Defendant was convicted by a jury of larceny in a building. The key issue was whether a prior conviction for larceny from a building could be used to impeach the Defendant, who had testified at trial. The trial court allowed this prior conviction to be used by the prosecution without supporting its holding. The COA had previously remanded this case to the trial court so that the court could articulate its reasoning for its holding. The trial court again failed to adequately address the issue. Therefore the COA concluded that Defendant's prior conviction was inadmissible because it was not of "significant" probative value on the issue of his credibility, and therefore failed to meet the requirements for admissibility under MRE 609(a)(2)(B). The COA went on to conclude that, even assuming arguendo that Defendant's prior conviction was of significant probative value, its probative value was outweighed by its prejudicial effect. The COA went on to conclude that this error was not harmless, and reversed Defendant's conviction.

Instructions, Lesser Included Offenses. *People v Heft*, 299 Mich App 69; 829 NW2d 266 (2012)**(dec'12).** Defendant was convicted of entering with intent to commit a felony (MCL 750.111) after his request for a lesser included offense instruction on entering without breaking without permission (MCL 750.115(1)) was denied by the trial court. The court of appeals affirmed, holding that entering without permission is not a lesser included offense of entering with intent to commit a larceny since there is an additional element of entering without permission of the owner in the first offense, and therefore it is not subsumed by the greater offense.

Instructions, Voluntary Manslaughter, Self-Defense. *People v Mitchell*, __ Mich App __ ; __ NW2d __ (2013 WL 2451344, No. 311360, decided June 6, 2013)**(june'13).** Defendant was convicted of second-degree murder and carrying a weapon with unlawful

intent which resulted from an extended argument with the victim over five dollars. Though admitting to being involved in a physical altercation with the victim, Mitchell maintained throughout that he struck the victim in self-defense. On appeal, Defendant argued that the trial court erred by denying his request for a voluntary manslaughter instruction. The Court agreed, holding that when a defendant is charged with murder, the trial court must give an instruction on voluntary manslaughter if the instruction is "supported by a rational view of the evidence." The Court found that there was ample evidence in this case to support such a view. The Court further held that there was insufficient evidence to support Defendant's weapons conviction.

Jury Selection, Venire, Systemic Exclusion. *People v Bryant*, 491 Mich 575; 822 NW2d 124 (2012)**(june'12).** Defendant was convicted of 1st degree CSC in Kent County. There was only one African-American in the jury venire of 42 people. The Michigan court of appeals earlier remanded for a hearing on this issue. The trial court concluded that systemic exclusion had not been proven. Defendant again appealed to the COA, and the panel reversed his conviction, holding that representation of African-Americans on Defendant's panel was unfair and unreasonable, and that defendant had established systemic exclusion. Evidence was offered on all three measurement tests discussed by the U.S. Supreme Court in *Berghuis v Smith*, __ US __; 130 S Ct 1382 (2010), the absolute disparity test, the comparative disparity test, and the standard deviation test. The COA panel held that the comparative disparity test was the best measure of underrepresentation in this case, and there was a sufficient comparative disparity to conclude that the representation of African-Americans on Defendant's panel was unfair and unreasonable. The state appealed and the MSC granted leave. The MSC held that a court must apply all the relevant tests for evaluating the representation data, and not just the comparative disparity test. Furthermore, a court must examine the composition of jury pools, or venires, over time using the most reliable data available to determine whether representation of a distinct group is fair and reasonable. After considering the results of those tests using the most reliable data set, which included the composition of jury pools or venires over a three-month period, the MSC concluded that defendant failed to show that the representation of African–Americans was not fair and reasonable. Accordingly, the court reversed the judgment of the COA and reinstated defendant's convictions and sentences. Justices Cavanagh and Kelly dissented. Justice Cavanagh argued that, "[w]hen the showing of underrepresentation is close, or none of the methods of analysis are particularly well-suited to a case, I believe courts should 'glance ahead' to the third prong of the *Duren* test and consider a defendant's evidence of systematic exclusion. Under this approach, if the jury-selection process appears likely to systematically exclude a distinctive group, that is, the jury-selection process bears the mark of a nonbenign influence, a court may give a defendant the benefit of the doubt on underrepresentation. Applying this approach to the facts of this case, I agree with Justice Kelly's conclusion that the Court of Appeals did not clearly err by holding that defendant is entitled to a new trial." (citations omitted).

Jury, Swearing In. *People v Allan*, 299 Mich App 205; 829 NW2d 319 (2013)**(jan'13).** In this case the trial court neglected to swear in the jury. Concluding that this was required by court rule and statute to protect the right to fair trial by an impartial jury, the

court of appeals found this to be plain error requiring reversal of Defendant's conviction of conspiracy to commit extortion.

Prosecutorial Misconduct; *Brady* Violations. *People v Gratsch*, 299 Mich App 604; 831 NW2d 462 (2013)**(feb'13).** Defendant appeals his conviction of possessing a weapon in jail. The COA initially granted Defendant's motion toremand "to allow Defendant to have an evidentiary hearing on his claims of prosecutorial misconduct and to bring a motion for a new trial in the trial court based on those claims." Following a hearing, the trial court denied Defendant's motion for a new trial. Defendant argued that the trial court abused its discretion by not granting his motion for a new trial. Defendant argues that the prosecutor denied him a fair trial by (1) not correcting the false testimony of a jailhouse snitch and (2) not disclosing a prior plea agreement with the inmate. The COA affirmed holding that the snitch's testimony was likely true in light of the evidence presented at trial. As to number (2), the COA held that the plea agreement the inmate procured had no bearing on this case because it had been entered approximately six months before the crime was committed. Moreover, it was a readily accessible part of the trial court's records. The COA held that there was no *Brady* violation for failure to notify the defense of the prior plea agreement.

Prosecutorial Misconduct, Closing Argument. *People v Marshall*, 298 Mich App 607; 830 NW2d 414 (2012)**(oct'12).** In this assault with intent to murder case the prosecutor argued, without evidence to support it, that witnesses were intimidated by a large number of spectators in the courtroom and that Defendant intended to kill the victim because there were children living in the vicinity of where the Defendant fired his gun. The court of appeals approved these arguments but that portion of their opinion was later vacated by the supreme court in *People v Marshall*, 493 Mich 1020; 829 NW2d 876 (2013)**(may'13).** The supreme court found the arguments improper but agreed with the result as there was insufficient prejudice to disturb the conviction where the issue was not preserved.

Prosecutorial Misconduct, Closing Argument. *People v Cain*, 299 Mich App 27; 829 NW2d 37 (2012)**(dec'12).** Defendant was convicted of carjacking and other crimes after the complainant picked him out of a photographic lineup. The prosecutor told the jury, in rebuttal closing, that she did not think the complainant "would come in here and lie" and that the complainant was brave to testify and "very honest about everything." The court of appeals affirmed and found these arguments to be a proper response to the defense's general attack on the complainant's credibility. The court noted that the prosecutor's comments "did not imply that she had special knowledge about Spires's truthfulness."

Public Trial, Jury Voir Dire. *People v Vaughn*, 491 Mich 642; 821 NW2d 288 (2012)**(july'12)**. A court officer cleared the courtroom during jury voir dire. There was no objection. The court held that while the court of appeals erred when it held that failure to assert his public trial right foreclosed later relief, the failure to object makes the right to public trial subject to the forfeiture rule stated in *People v Carines*, 460 Mich 750 (2012). Although error in excluding the public is structural, it is still subject to plain error analysis. This was plain error affecting substantial rights, but the court found

defendant was not actually innocent and defendant failed to show that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." The 3-justice concurrence found fault with the extent of the majority opinion's reliance on the presence of the venire, who are members of the public, in making this assessment. Citing *Vaughn*, the court of appeals reached a similar result in *People v Gibbs*, 299 Mich App 473; 830 NW2d 821 (2013)**(feb'13).**

Voir Dire, Defendant's Presence. *People v Buie*, 298 Mich App 50; 825 NW2d 361 (2012**(oct'12).** On remand from the Michigan Supreme Court for consideration of remaining issues after that court reversed the court of appeals on the two-way interactive video confrontation issue (see above), the court of appeals considered Defendant Buie's absence from a portion of the voir dire. Considering Defendant's absence as an unpreserved constitutional error, the court held that even though Mr. Buie did not voluntarily waive his right to be present, and did not provide grounds for removal, he failed to show that his absence was prejudicial.

D. Crimes and Offenses, Sufficiency

Armed Robbery, Actual Taking Not Needed Under Course of Conduct Theory. *People v Williams*, 491 Mich 164; 814 NW2d 270 (2012)**(may'12).** Defendant pled guilty to armed robbery and nolo contendere to a second count of armed robbery even though he did not obtain any cash or merchandise during the "robbery." Defendant filed a motion to withdraw his pleas, which was denied by the trial court. Defendant appealed, arguing that, because he failed to take or remove any actual property from the intended target of his robbery, there was not a sufficient factual basis to support his guilty plea to armed robbery. The COA majority disagreed and affirmed. After granting leave, the MSC also affirmed Defendant's convictions in 4-3 opinion, with the majority holding that the facts elicited at Defendant's plea allocution were sufficient to sustain his conviction for armed robbery, even though he was unsuccessful in obtaining money when he attempted to rob the tobacco shop. More specifically the court held that when the legislature revised the robbery statute, MCL 750.530, to encompass a "course of conduct" theory of robbery, it specifically included "an attempt to commit the larceny" as sufficient to sustain a conviction for robbery itself. The MSC majority concluded that this amendment effectuated a substantive change in the law governing robbery in Michigan such that a completed larceny is no longer necessary to sustain a conviction for the crime of robbery or armed robbery.

Bear Hunting, Aiding and Abetting. *People v Levigne*, 297 Mich App 278; 823 NW2d 429 (2012)**(july'12)**. Defendants were convicted of a misdemeanor violation of the Natural Resources and Environmental Protection Act (NREPA) for using a hunting dog to assist a Native American hunter in killing a bear outside of hunting season. A Wildlife Conservation Order (WCO) identified the period in 2010 when it was lawful to hunt bear in Michigan using a firearm as September 17-September 25. The Native American friend of Defendants had a permit to hunt outside of season until October 26, 2010, and

therefore he was within his rights to be hunting bear, but Defendants did not possess such a permit. The district court held that they violated NREPA by assisting in the hunt – Defendants argued that they could take part in a hunt of bear out of season – they just could not kill the bear. The circuit court affirmed the district court's decision – the Michigan Court of Appeals disagreed. The disagreement arises out of the definition of "taking" that is required for a violation. Defendants argued that helping to hunt down the bear using their hunting dog did not constitute a taking as defined by the law. The state disagreed. The higher court looked to the language of the statute and reasoned that if the legislature had intended a taking to mean simply aiding/abetting in a hunt they would not have used such specific language when drafting the law. The court held, "The statutory provision and the DNR order at issue do not prohibit an unarmed individual from assisting someone with the lawful taking of a bear, nor do they prohibit someone from taking a bear *without* a firearm, crossbow or bow and arrow. Had the legislature or DNR intended to prohibit such behavior, the unambiguous language of those bodies would exhibit that intent."

Carjacking, Sufficiency, Presence of Complainant. *People v Jones*, 297 Mich App 80; 823 NW2d 312 (2012)**(june'12).** Defendant was charged with a multitude of crimes, and was also charged and sentenced as a habitual offender, third offense. Defendant argued that his carjacking conviction was erroneous because the police officer was not present inside the police vehicle when Defendant took it. The court found that to be irrelevant since the legislature had previously amended the carjacking statute and removed presence as an element of the offense.

Child Abuse, Sufficiency of the Evidence. *People v Nix*, __ Mich App __ ; __ NW2d __ (2013 WL 2278028, No. 311102, decided May 23, 2013)**(may'13).** A jury convicted Defendant of two counts of 2nd degree child abuse and one count of fleeing and eluding. Defendant's convictions stem from a high-speed chase with several deputies instigated by Defendant's flight. Defendant's infant son and four-year-old stepson were in the vehicle at the time and were not restrained by either seatbelts or legally mandated child safety seats. On appeal, Defendant contends that the prosecution presented insufficient evidence that the high-speed chase was "likely" to cause serious physical or mental harm to a child. The focus of the COA's opinion was on the definition of likely. The court held that likely in this context is synonymous with "probably." The court then found that there was sufficient evidence based on that standard.

Constitutionality of MSU Ordinance. *People v Rapp*, 492 Mich 67; 821 NW2d 452 (2012)**(july'12)**. In a 5-2 decision the Michigan Supreme Court ruled that a Michigan State University Ordinance making it an offense to "disrupt the normal activity" of a protected person is facially overbroad under the ruling of the United States Supreme Court in *City of Houston, Texas v Hill*, 482 US 451; 107 S Ct 2502; 96 L Ed 2d 398 (1987). Defendant confronted an MSU parking enforcement employee who had ticketed Defendant in an MSU parking structure. Because the ordinance in question would allow for verbal disruptions of university employees, it is clearly overbroad and infringes on First Amendment rights.

Controlled Substances, Aggregation of Amounts. *People v Collins*, 298 Mich App 458; 828 NW2d 392 (2012)**(nov'12).** Defendant was convicted of delivering over 50 but less than 450 grams of heroin. The court vacated this conviction and ordered resentencing, holding that the trial court improperly allowed the prosecution to aggregate numerous smaller deliveries into one charge.

Criminal Sexual Conduct, First Degree, Blood or Affinity. *People v Zajaczkowski*, 493 Mich 6; 825 NW2d 554 (2012)**(dec'12).** Defendant pled to first degree CSC conditioned on his ability to raise the issue of whether he was related to the 15-year-old complainant to the fourth degree by blood or affinity. If answered negatively he could only be convicted of third degree CSC. At the time the facts underpinning the conviction arose, Defendant was 30 and the complainant was 15. They had a common father but genetic testing proved that this man was not the natural father of Defendant, and this man and Defendant's mother were divorced two years after Defendant was born. The court of appeals had employed statutory construction to determine that despite these facts, Defendant and the complainant had a common father through marriage, and thus were related through blood and affinity to the fourth degree due to presumptions and, irrespective of that, Defendant had no standing to challenge paternity, or the "presumption of legitimacy." The supreme court disagreed in a unanimous opinion authored by Justice Hathaway, holding that because there was no blood relationship between Defendant and the complainant it was improper to convict Defendant of first degree CSC.

Criminal Sexual Conduct, Minors. *In re Tiemann*, 297 Mich App 250; 823 NW2d 440 (2012)**(may'12).** The 15-year-old Defendant had sex with a 14-year-old girl and challenged the plea-based order of adjudication on multiple grounds. The court held that prosecution of Tiemann did not violate public policy, and MCL 750.520d was not ambiguous as applied to two teenagers under 16. The court further ruled that prosecution of one individual under the age of 16 while not prosecuting the other is permissible, as there was no equal protection violation due to the fact that the male minor was prosecuted while the female minor was not charged. There was no evidence Tiemann was charged based on his gender, and there was evidence he was charged due to his aggressive behavior.

Defenses, Entrapment. *People v Akhmedov*, 297 Mich App 745; 825 NW2d 688 (2012)**(july'12).** The court rejected Defendant's claim of entrapment because the misconduct of a police informant could not be attributed to the police. At the time of the drug crimes at issue there was an insufficient agency relationship between the informant and the police.

Defenses, Imperfect Self-Defense. *People v Reese*, 491 Mich 127; 815 NW2d 85 (2012)**(may'12)**. Following a bench trial, the defendant was convicted of voluntary manslaughter in Wayne County Circuit Court. Defendant urged that the evidence was insufficient to support a finding of voluntary manslaughter – pointing to the doctrine of imperfect self-defense. Defendant and the deceased had a disagreement, and engaged in a shooting match on a Detroit street. The deceased died from two gunshot wounds and

Defendant sustained one gunshot wound to his leg. At trial, Defendant argued that he shot the deceased in self-defense. The circuit court judge found that Defendant was initial aggressor and fired the first shot, causing the deceased to pull out his weapon, which resulted in a shootout. The Michigan Supreme Court agreed with the circuit court, finding that there was sufficient evidence to support Defendant's conviction – Defendant participated in a shootout, which requires the intent to create a high risk of great bodily harm. The court further found that Michigan law does not recognize the doctrine of imperfect self-defense as an independent theory that automatically mitigates criminal liability for a homicide from murder to voluntary manslaughter. Instead, facts which could have supported a theory of imperfect self-defense can serve to separate murder from manslaughter. "However, the element distinguishing murder from manslaughter – malice – is negated by the presence of provocation and heat of passion." (citing from *People v Mendoza*, 468 Mich at 540). Applying the common law definitions to these facts, the court concluded that the trial court appropriately convicted Defendant of manslaughter, finding that he was the initial aggressor. Judge Kelly, joined by Cavanagh and Hathaway, concurred and dissented, agreeing with the reinstatement of the manslaughter verdict but finding that the pronouncements on imperfect self-defense were unnecessary to the decision here.

Defenses, Self-Defense, Justification for Felon to Possess Firearm. *People v Guajardo Jr.*, 300 Mich App 26; __ NW2d __ (2013)**(mar'13).** The COA held that Defendant, a felon who had illegally possessed a firearm during the shooting at issue, was not entitled to assert self-defense under the Self–Defense Act (SDA) as a defense to a second degree murder charge. The court found that there was no evidence that would have allowed a jury to find that Defendant's criminal possession of the rifle was justified by an honest and reasonable belief that it was necessary for him to use deadly force to prevent imminent death or great bodily harm to himself or to another. Defendant had testified that he feared for his life after having several confrontations with the victim during which the victim made threatening statements. However, at the time of shooting, the victim had retreated into his room and closed the door. The Defendant then went to the victim's room, offered him food to coax him to open the door, and then shot him.

Driving While License Suspended, Elements, Mexican National. *People v Acosta-Baustista*, 296 Mich App 404; 821 NW2d 169 (2012)**(may'12).** Defendant was a Mexican National who possessed a driver's license from Mexico that expired on May 2, 2009. An accident Defendant was involved in on September 3, 2009 resulted in the death of the other driver. The police determined that Defendant was not at fault in the accident, but he was charged with a violation of MCL 257.904(4) – operating a motor vehicle without a license, or with a suspended or revoked license, causing death. Mexico and the United States both honor the licenses of each other, a fact that was established by the 1943 Convention on the Regulation of Inter–American Automotive Traffic. The court found that because the language of MCL 257.904 did not account for someone driving with an expired license, and Defendant was driving with an expired Mexican license, MCL 257.904 was not applicable. The court noted that someone who has never been fit to drive, or someone who has lost the privilege to drive, are substantively different from someone who has been fit to drive but just failed to maintain the proper paperwork. The

court also noted that the fact that the defendant was a Mexican National was irrelevant here because Michigan honors Mexican licenses.

Extortion, Hobbs Act, Sufficiency. *Sekhar v United States,* __ US __ (No. 12-357, 2013 WL 3196929, decided June 26, 2013)**(june'13).** Threats to the general counsel of a New York State pension fund with regard to recommending certain investments were traced to the computer of Sekhar. The general counsel was threatened with revelation of an alleged affair if he did not do as asked. The Court unanimously held that this did not constitute extortion as the crime requires obtaining items of value from the victim and nothing transferrable was sought or received. This was coercion, not extortion, and is not punishable through the Hobbs Act.

Felony Murder, Adult Abuse as Predicate. *People v Comella Jr.,* 296 Mich App 643; 823 NW2d 138(2012)**(may '12).** Defendant's elderly wife was admitted to the hospital a number of times for various injuries before the last incident where EMS workers responded to Defendant's home because his wife was unconscious – she died two days later from a subdural hematoma. The ME determined homicide was the cause of death. Defendant was convicted of felony murder with vulnerable adult abuse second degree being the underlying felony. Defendant appealed arguing that the state is required to prove both vulnerable adult abuse in the first and second degree for it to be used as a predicate to felony murder. Similarly, Defendant argued that his trial counsel was ineffective for not asking for a jury instruction that stated both first and second degree must be proved by the state. The Court of Appeals disagreed, and held that the felony murder statute requires either first OR second degree to be proven – not both. The language of MCL 750.316(1)(b) states, "vulnerable adult abuse in the first and second degree under section 145n," as being a possible predicate felony for felony murder. The defendant claims that because the statute uses "and" instead of "or" as it does in other instances, the legislature must have meant that both degrees of vulnerable adult abuse must be proven. The court chose to not take the use of "and" literally – pointing out that both first and second degree vulnerable adult abuse cannot be charged for one act as one requires intent while the other requires recklessness.

Felony Nonsupport, Impossibility to Pay. *People v Likine, Parks, Harris,* 492 Mich 367; 823 NW2d 50 (2012)**(july'12)**. The majority in this 4-3 split adopted the common law defense of impossibility to pay for defendants in nonsupport cases as opposed to the inability to pay defense advocated by the dissent and in place in the 49 other states. The majority found this result mandated by the legislative construct surrounding the area of nonsupport which requires parents "to have done everything possible to provide for their child and to have arranged their finances in a way that prioritized their parental responsibility so that the child does not become a public charge." In *People v Adams*, 262 Mich App 89; 683 NW2d 729 (2004), the court held that inability to pay is not a defense to a violation of MCL 750.165 as felony nonsupport is, as of legislative changes in 1999, a strict liability offense. The majority agreed with this holding, and adopted an "impossibility" defense based in the notion that involuntary actions can eliminate the *actus reus* element of an offense. In order to establish an impossibility defense a defendant must show "that he or she acted in good faith and made *all reasonable efforts*

to comply wiith the family court order, but could not do so through no fault of his or her own." These reasonable efforts include borrowing money and efforts to seek employment. A "non-exhaustive" list of factors to be considered include "whether the defendant has taken reasonable precautions to guard against financial misfortune and has arranged his or her financial affairs with future contingencies in mind, in accordance with one's parental responsibility to one's child."

Firearms, Possession, Under the Influence. *People v Deroche*, 299 Mich App 301; 829 NW2d 891 (2013)**(jan'13).** MCL 750.237(1) prohibits possession of a firearm when under the influence of liquor or controlled substances (for alcohol, more than .08 BAC). In this case, where police found a firearm hidden by Defendant's mother-in-law in the laundry room of their home, and Defendant was in the upstairs area of the home and clearly under the influence, the court of appeals found the statute unconstitutional as applied to convict Defendant under the Second Amendment. The Second Amendment protects the right to keep guns in one's home. In this case Defendant was not in physical possession of the weapon and to allow the conviction to stand would force citizens to choose between keeping a weapon in their home and consuming alcohol. The court found that this infringement on Defendant's rights under the Second Amendment was not substantially related to the governmental objective of preventing intoxicated persons from committing crimes involving handguns.

Forgery and Uttering and Publishing, Sufficiency of the Evidence. *People v Johnson-El*, 299 Mich App 648; __ NW2d __ (2013)**(mar'13).** Following a bench trial, the circuit court convicted Defendant of forgery, uttering and publishing, and encumbering real property without lawful cause based on an "Affidavit of Allodial Title" that he authored, signed, and recorded with the Wayne County Register of Deeds for a parcel of property in which he had no ownership or other interest. The COA held that the prosecution presented sufficient evidence to establish that the affidavit was false and forged and that Defendant was aware of the affidavit's falsity when he authored and recorded it, and affirmed the convictions. In the affidavit, Defendant swore that he owned the property and had secured a $100 billion bond over the property. Yet, Defendant admitted at trial that he never purchased the property or took ownership through an interest transferred by a previous owner or security-interest holder. Rather, Defendant admitted that he drove past the property, saw that the windows were boarded up and the door was padlocked, and then decided to simply take the property as his own by authoring and recording the affidavit.

Home Invasion, Second Degree, Right to Enter. *People v Dunigan*, 299 Mich App 579; 831 NW2d 243 (2013)**(feb'13).** Defendant argued that since he was dating the victim he had a right to be in her home and therefore could not be convicted of home invasion. The court of appeals disagreed and held that "the fact that a person is in a dating relationship in no way entitles that person to be present in his or her partner's dwelling at will."

Larceny from a Person, Elements. *People v Smith-Anthony*, 296 Mich App 413; 821 NW2d 172 (2012)**(may '12).** The court found that when Defendant shoplifted perfume

from a mall and then fought with a security guard who tried to stop her, she was not committing larceny from a person. MCL 750.357 requires that a defendant steal from another person to be charged with larceny from a person, and here Defendant was not stealing from the security guard but from the store – there was no proof that the perfume was ever possessed by the guard or even in close proximity to him. The larceny from a person charge differs from simple larceny because it requires the added element of "invasion of the person and the presence of the victim" which was not present here.

Parental Rights, Statutory Interpretation. *People v Wambar,* 300 Mich App 121; __ NW2d __ (2013)**(mar'13).** Defendant appealed his conviction for the attempted unlawful taking of his biological child, for whom his parental rights had been terminated. Defendant argued that his conviction must be reversed because he could not be convicted of attempting to take his biological child. MCL 750.350 is the statute at issue. Section (1) sets out the elements of the crime while section (2) states that "[a]n adoptive or natural parent of the child shall not be charged with and convicted for a violation of this section." Defendant argued that "natural parent" would encompass him as the biological father. However the COA held that that a person may cease to be a parent for certain purposes under the law if that person's status as a parent has been terminated in a legal proceeding. Here, Defendant's status as a parent was indeed terminated in a legal proceeding.

Possession of Tasers, Constitutionality of Ban. *People v Yanna,* 297 Mich App 137; 824 NW2d 241 (2012)**(june'12)**. Consolidating cases involving MCL 750.224a "Possession or Sale of a Taser" arising out of Bay and Muskegon Circuit Courts, the Michigan Court of Appeals held that the state and federal constitutions prevent the state from completely prohibiting the possession and use of tasers by private citizens. The statute states that no one besides law enforcement may sell or possess, "a portable device or weapon from which an electrical current, impulse, wave, or beam may be directed, which current, impulse, wave, or beam is designed to incapacitate temporarily, injure, or kill." In both lower court cases, Defendants had possession of a taser or stun gun – one while working behind the counter at a party store, and the other in his own home. Both parties argued that the 2nd Amendment allowed them to carry these "weapons" and their rights were violated by charges under MCL 750.224a. The court, looking to *DC v Heller*, 554 US 570; 128 S Ct 2783; 171 Led2d 637(2008), declared that tasers are protected arms because they do not fit into any of the *Heller* exceptions. Because tasers are protected arms, it would be unconstitutional to ban them from private citizens' homes. The court used the Second Amendment to decipher whether or not private citizens could open carry tasers as protection outside of their homes. The court surmised that total prohibition on open carrying of a taser or a stun gun would go against the Second Amendment's declaration that citizens can carry and keep arms and the Michigan Constitution's declaration that citizens may "bear" arms for self-defense.

Racketeering, Elements. *People v Kloosterman,* 296 Mich App 636; 823 NW2d 134(2012)**(may '12).** Defendant was convicted of racketeering in Kent County. He was allegedly returning items to Home Depot using different forms of identification, receiving new products in exchange, and then listing them on Craigslist for sale. There was video

surveillance of the defendant using the ID's to make the returns as well as an in court identification by a cashier. MCL 750.159i(1) states, "[a] person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity." The defendant argued that because he was one individual, his actions did not fit the description of racketeering required by the statute – there needed to be a criminal enterprise he was acting on behalf of to qualify. The court defined the terms "associate" and "employ" since the statute itself failed to do so. Reversing the lower court and finding the evidence here insufficient to convict the court stated: "[A] defendant, acting alone, cannot be *both* the person *and* the enterprise. To "associate," a person must necessarily align or partner with *another* person or entity. Indeed, the meaning of the word is not ordinarily interpreted to mean that a person associates with him or herself, and it would stretch the meaning of the word beyond reason to conclude that the Legislature intended such an unusual usage. Similarly, to "employ" requires that a person be engaged or hired by some other entity; an individual would not generally find him or herself in a situation calling for hiring one's self or engaging one's own services."

E. Sentencing

***Apprendi*, Enhancement by Facts Not Found by Jury, Fines.** *Southern Union Co. v United States*, 567 US __; 132 S Ct 2344 (2012)**(june'12).** The Southern Union Company was convicted of one count of violating the Resource Conservation and Recovery Act for storing mercury without a permit between September 19, 2002 and October 19, 2004. A maximum fine was computed for that period, based on a one-day fine of $50,000.00, at 38.1 million, and the company was actually fined 6 million with a 12 million "community service obligation." In a 6-3 opinion the majority disagreed with the government and the First Circuit, holding that *Apprendi v New Jersey*, 530 US 466 (2000), does in fact apply to fines which are substantial enough to trigger the Sixth Amendment's jury-trial guarantee. Therefore, in cases where the amount of a potential fine implicates the right to trial by jury, the determination of any fact that increases a criminal defendant's maximum potential sentence (other than the fact of a prior conviction) is reserved to the jury, even where that sentence is a fine and not a term of imprisonment or death.

***Apprendi*, Enhancement by Facts Not Found by Jury, Mandatory Minimum.** *Alleyne v. United States*, __ US __; 133 S Ct 2151 (2013)**(june'13).** Defendant was charged with using/carrying a firearm in relation to a crime of violene under 18 USC §924(C)(1)(A). This crime carries a mandatory 5 year minimum which increases to a mandatory 7 year minimum if the weapon is "brandished." Overruling *Harris v United States*, 536 US 545 (2002), the Court held that the logic of *Apprendi v New Jersey*, 530 US 466 (2000) demanded that facts impacting the mandatory minimum of a sentence range, like facts increasing the maximum sentence, are "elements" of the crime charged and must be determined by a jury. Because Alleyne's jury did not find that he brandished a weapon in this case, it was error for the district court to add 2 years to the mandatory

minimum for this conduct. While the Court repeatedly referenced the mandatory minimum aspect here, there is language in the four-justice plurality, and in a three-justice concurrence, that suggests facts that alter a statutory range (as in Michigan's guidelines) may have to be determined by a jury. However the 5th vote to overrule *Harris* was reluctantly cast by Justice Breyer who underscored the mandatory nature of the increase in the floor of the permissible sentencing range as pivotal to his decision.

Correction of Error in Judgment of Sentence. *People v Howell*, __ Mich App __ ; __ NW2d __ (2013 WL 1775992, No. 300405, decided April 25, 2013)**(april'13).** Defendant appealed the trial court's order denying his motion for relief from judgment after the trial court amended the judgment of sentence to indicate that he must serve his new sentences consecutive to a previous parole sentence. The COA concluded that the trial court's failure to address Defendant's parole status in the original judgments of sentence was a mistake arising from an omission under MCR 6.435(A) because the trial court was required to specify that Defendant's new sentences were to be served consecutively with the sentence for which he was on parole, but it entirely failed to do so. As such, the COA held the trial court was correct in making the change and affirmed.

Costs, General Maintenance of Governmental Agencies. *People v Cunningham*, __ Mich App __ ; __ NW2d __ (2013 WL 2320763, No. 309277, decided May 28, 2013)**(may'13).** This matter returned to the COA after a remand to the sentencing court to determine whether the $1,000 in court costs imposed with Defendant's sentence was reasonable for felony cases in Allegan Circuit Court. Defendant's sentence arose from his guilty plea to obtaining a controlled substance by fraud. Defendant argued that the fine was improper because the sentencing court erred by (1) including in its calculation the general expenses associated with maintaining governmental agencies; and (2) failing to calculate the particular costs incurred in this case. The COA upheld the assessment, holding that state law does not preclude a sentencing court from considering overhead costs when determining the amount of costs to impose, and that a sentencing court does not have an obligation to calculate particularized court costs in every case. Judge Shapiro dissented, arguing that in *People v Dilworth*, 291 Mich App 399; 804 NW2d 788 (2011), the COA considered whether "overhead" charges, i.e., the costs of operating a court system regardless of the filing of the single case at issue, could be assessed as court costs incurred in prosecuting a defendant, and held that such an assessment was improper.

Costs, No Need for Precise Measurement. *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012)**(may'12).** Defendant pled to delivery of heroin, less than 50 grams, second offense, and was sentenced to prison. He challenged the imposition of $1,000.00 in "costs" that were general, and not specific to defendant's case. Defendant agreed that costs could be imposed, but argued that the trial court must provide a more precise basis for costs. The court of appeals disagreed that the cost most be calculated for each individual case, but did hold that the trial court must provide "a more concrete basis for the general cost figure utilized." Despite language suggesting a bar in older cases, the court held that the statute allowing costs does not bar reasonable "overhead costs" of the court. The case was remanded so that the trial court could provide an adequate explanation for the reasonableness of $1,000.00 in costs and so that defendant could

challenge that determination if he so desires. The cost amount can be a flat fee, and there is no need to particularize the cost fee to an individual case. After remand the court issued a second published decision in October of 2012, *People v Sanders*, 298 Mich App 105; 825 NW2d 376 (2012)**(oct'12).** In that opinion the court noted that on remand the Berrien County trial court concluded after a hearing that the actual cost per case in that county far exceeded the $1,000 imposition here and upheld the imposition of costs. The court of appeals declined Defendant Sanders' invitation to consider a lesser cost for plea cases as the court did not want to create a financial incentive for a defendant to plead guilty.

Crime Victim Rights Assessment, Ex Post Facto. *People v Jones; People v Anderson,* __ Mich App __ ; __ NW2d __ (2013 WL 1775985, Nos. 309303 and 310314, decided April 25, 2013)**(april'13).** Both Defendants in this consolidated case were assessed crime victim rights assessments. On appeal both argue that it violated constitutional prohibitions on ex post facto laws. The issue arose because the crime victim assessment was $60 when the Defendants had committed their crimes, but was increased by amendment before sentencing to $130. Both Defendants were assessed $130. Citing *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012), the COA held that the imposition of the increased assessment to offenses committed before that law's effective date "is not a violation of the ex post facto constitutional clauses." The COA held that the imposition of this fine was not intended as punishment. . On March 20, 2013 the Michigan Supreme Court granted leave in *Earl* on this issue.

Cruel or Unusual Punishment. *People v Bowling,* 299 Mich App 552; 830 NW2d 800 (2013)**(feb'13).** Defendant's 100-year minimum sentence for second degree murder, which was within the guidelines range, was not cruel or unusual. This case involved the death of a police officer and Defendant incorrectly assumed he is entitled to eligibility for parole.

Federal Drug Sentences, Retroactivity of Fair Sentencing Act. *Dorsey v United States,* 567 US __; 132 S Ct 2321(2012)**(june'12).** The Fair Sentencing Act, effective August 3, 2010, modified drug sentences under the Anti-Drug Abuse Act of 1986, reducing the cocaine crack/powder disparity from 100-1 to 18-1. The result was that the 5-year minimum was triggered by 28 grams of crack (instead of 5) while the 10-year minimum required 280 grams (formerly 50). The powder levels remain. The Court, construing the amending statute, determined that the new levels applied to conduct occurring prior to the effective date (8/3/10) in cases where sentencing occurred after the effective date.

Guidelines Departure. *People v Akhmedov,* 297 Mich App 745; 825 NW2d 688 (2012)**(july'12).** The trial court departed from the guidelines because he felt that if he gave Defendant more than 363 days in jail Defendant would be unable to cancel deportation proceedings. The court of appeals, in this appeal by the prosecution, remanded for resentencing. The court held that the trial court erred in departing from the guidelines as the departure was based on a misreading of the federal law regarding immigration issues.

Guidelines Departure. *People v Anderson,* 298 Mich App 178; 825 NW2d 678 (2012)**(oct'12).** The court of appeals assessed six different reasons given by the trial court for an upward departure, and though finding several inappropriate, ultimately upheld the sentence given. Defendant's mental state during the criminal activity was improperly utilized to depart as it could not be confirmed.

Guidelines Departure. *People v Portellos,* 298 Mich App 431; 827 NW2d 725 (2012)**(nov'12).** Defendant, who was learning-disabled, was convicted of second degree murder in the death of her newborn child. The trial court departed downward from the minimum sentence range of 162-270 months and issued a sentence of 10 (120 months) to 20 years. The prosecutor argued that the trial court erred in departing downward. The court departed based on Defendant's family and community support, her lack of a criminal record and good job history, her cooperation with police, and her learning disability which hindered her ability to make decisions under pressure. The court held that these factors were objective and verifiable and supported by the evidence, and thus properly enabled downward departure. The case was remanded for resentencing, however, due to guidelines scoring errors which changed the minimum sentence range.

Guidelines, Changes After Date of Offense, Ex Post Facto. *Peugh v United States,* __ US __; 133 S Ct 2072 (2013)**(june'13).** A bank fraud defendant was sentenced in federal district court under recent and more severe guidelines than those in effect at the time he committed his criminal acts. In a 5-4 decision the Court ruled that sentencing under guidelines promulgated after a defendant's criminal acts violated the *Ex Post Facto* Clause.

Habitual Offender Application when Defendant Sentenced as Juvenile. *People v Jones,* 297 Mich App 80; 823 NW2d 312 (2012)**(june'12).** Defendant was charged with a multitude of crimes, and was also charged and sentenced as a habitual offender, third offense. Defendant argued that he was not a habitual offender third, but a habitual offender second, because one of his prior felonies was a conviction in circuit court, and he was subsequently sentenced as a juvenile. The court focused on the statutory language of MCL 769.11(1), which provides for an enhancement based on a defendant's prior felony record. The court, deciding a question of first impression, found the habitual offender act simply requires a felony conviction, and such a conviction can be used for enhancement even if a defendant was ultimately sentenced as a juvenile.

Juveniles, Mandatory Life Without Parole, Cruel and Unusual. *Miller v Alabama,* 567 US __; 132 S Ct 2455 (2012)**(june'12).** The 8th Amendment to the federal constitution prohibits cruel and unusual penalties, or sentences that subject defendants to "excessive sanctions." In a 5-4 decision the Court, through a majority opinion authored by Justice Kagan, determined that two lines of cases contributed to the conclusion that mandated sentences of death in prison for juveniles is impermissible. The first line bans sentencing practices that reflect a mismatch between the culpability of a class of offenders and the severity of a penalty. An example is the Court's ban on the death penalty for children. The second line demands that the sentencing authority consider offender characteristics and the circumstances surrounding the offense before issuing the

ultimate penalty of death. The majority held that these two lines prohibit automatic sentencing of juveniles to life without parole even in homicide cases.

Juveniles, Mandatory Life Without Parole, Cruel and Unusual. *People v Eliason,* 300 Mich App 293; __ NW2d __ (2013)**(april'13).** Defendant argues that his mandatory sentence of life imprisonment without the possibility of parole is cruel and unusual punishment. Defendant was 14 years old when he shot his step-grandfather. In *Miller v Alabama*, 567 US ___, 132 S Ct 2455, 2469 (2012), the United States Supreme Court ruled "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." The *Miller* Court noted that juveniles and adults are different for purposes of sentencing, and explained that sentencing schemes that mandate life without parole for juveniles convicted of homicide offenses do not take into account a juvenile's individual characteristics and thus are unconstitutional. The Michigan COA here held that the appropriate remedy for a juvenile whose mandatory life sentence without the possibility of parole violated the Eighth Amendment's prohibition against cruel and unusual punishment was to remand the matter for a trial court assessment of the juvenile's case to determine whether he should be sentenced to life imprisonment without the possibility of parole or life imprisonment with the possibility of parole. The COA added that, in deciding whether to impose a life sentence with or without the possibility of parole on a juvenile, the trial court is to be guided by the following nonexclusive list of factors: (1) the character and record of the individual offender and the circumstances of the offense, (2) the chronological age of the minor, (3) the background and mental and emotional development of a youthful defendant, (4) the family and home environment, (5) the circumstances of the homicide offense, including the extent of participation in the conduct and the way familial and peer pressure may have affected the juvenile, (6) whether the juvenile might have been charged with and convicted of a lesser offense if not for incompetencies associated with youth, and (7) the potential for rehabilitation. Judge Gleicher dissented on this point, opining that the "Michigan Constitution forbids the trial court from resentencing [defendant] to imprisonment for life without the possibility of parole. Furthermore, because Michigan's parole guidelines do not take into account [defendant's] youth at the time he committed the crime, I believe that both the United States and Michigan Constitutions mandate that the trial court consider sentencing [defendant] to a term of years that affords him a realistic opportunity for release." See also *People v McDade,* __ Mich App __; __ NW2d __ (No. 307597, 2013 WL 3020686, decided June 18, 2013)**(june'13),** where the court remanded a case that was pending on direct appeal when Miller was decided for resentencing "in a manner consistent with *Miller* and *Carp*."

Juveniles, Mandatory Life Without Parole, Retroactivity of *Miller*. *People v Carp,* 298 Mich App 472; 828 NW2d 685 (2012)**(nov'12).** Defendant Carp was 15 years of age when he committed the act for which he was convicted of first degree murder and sentenced to mandatory, non-parolable life. The issue was whether *Miller v Alabama,* 567 US __; 132 S Ct 2455 (2012)**(june'12),** prohibiting this sentence for juveniles, should be retroactively applied to require resentencing for Carp**.** The court, after reviewing a series of landmark decisions in the area of sentencing, including *Roper v Simmons*, 543 US 551 (2005) which prohibited imposition of the death penalty on

juveniles, held that Carp's direct appeal had expired and *Miller* is not retroactive to cases on collateral review. This decision was based on the conclusion that the *Miller* decision was procedural, rather than substantive, and did not comprise a watershed ruling. **As of July, 2013, an application for leave to appeal was pending in the Michigan Supreme Court.**

Lifetime Electronic Monitoring. *People v King*, 297 Mich App 465; 824 NW2d 258 (2012)**(july'12).** MCL 750.520n(1) provides for lifetime electronic monitoring for defendants convicted of CSC 1 or 2 if defendant is 17 or older and the complainant is less than 13. However, a section of the CSC 1 statutory scheme (MCL 750.20b) appears to mandate lifetime monitoring without noting any age restriction. The court in *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012)**(may'12)** earlier held that this section demands lifetime monitoring of all those convicted of CSC 1, regardless of the ages of the defendant or the complainant. The majority in *King* disagreed and called for a conflict panel under MCR 7.215(J)(2) & (3). The court of appeals later refused to convene a conflicts panel and to date the supreme court has not granted leave on this issue. In October, in *People v Johnson*, 298 Mich App 128; 826 NW2d 170 (2012)**(oct'12),** another panel of the Court of Appeals followed *Brantley*.

OV 1, Aggravated Use of Weapon, Heroin. *People v Ball*, 297 Mich App 121; 823 NW2d 150 (2012)**(june'12).** Defendant was convicted of delivery of heroin. It was an ordinary drug transaction. The prosecutor requested that OV 1 be scored at 20 points, arguing that defendant subjected the purchaser of the heroin to a harmful substance, that being the heroin itself. The trial court agreed. The court of appeals reversed, holding that while heroin is in fact a harmful substance and could be used as a weapon, there was no indication that it was used as a weapon in this case.

OV 3, Physical Injury to Victim, Co-perpetrator. *People v Laidler*, 491 Mich 339; 817 NW2d 517 (2012)**(may'12).** Defendant and his co-perpetrator staged a home invasion during which the co-perpetrator was shot and killed by the homeowner. In sentencing defendant to 4-20 years for home invasion, the trial court scored 100 points for OV 3 for "injury to a victim." In a published opinion (291 Mich App 199, 204), the court of appeals ordered resentencing, holding, 2-1, that the co-perpetrator should not be considered a "victim" for OV 3 scoring purposes. The supreme court, in a 4-3 ruling, concluded that the court of appeals erred in determining that defendant did not cause the co-perpetrator's death since the co-perpetrator was shot by the homeowner, and held that defendant was a factual cause of the death. And though the majority agreed that a victim is necessary to score points under OV 3, the co-perpetrator was held to be a victim because he was harmed by defendant's criminal actions. Indeed, the majority, in dicta, stated that a defendant who causes harm to himself can be a victim for OV 3 scoring.

OV3 and OV9, Firefighters and Neighbor in Arson Case. *People v Fawaz*, 299 Mich App 55; 829 NW2d 259 (2012)**(dec'12).** Defendant was convicted of arson of a dwelling house and other offenses. Two firefighters required treatment from heat exhaustion at the scene and Defendant's elderly neighbor had to be carried from her home after it filled with smoke. The issue was whether the firefighters and the neighbor could be considered

victims for purposes of scoring OV3 (physical injury to a victim) and OV9 (multiple victims of the crime). The court held in the affirmative and remanded for resentencing because the trial court had not included the firefighters and the neighbor as victims in relation to scoring OV3 and OV9.

OV 4, Serious Psychological Injury. *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012)**(june'12).** A bank teller's continuing fear of being robbed by her customers and her sleepless nights was found sufficient to score 10 points for serious psychological injury requiring professional treatment. On March 20, 2013 the Michigan Supreme Court granted leave in this case on another issue (whether imposition of the increased crime victim rights fund fee violated Ex Post Facto Clause rights).

OV4, Serious Psychological Injury. *People v Williams*, 298 Mich App 121; 825 NW2d 671 (2012)**(oct'12).** Where the complainant in a second-degree home invasion and larceny case indicated he felt "angry, hurt, violated, and frightened after the crime," the panel upheld scoring of 10 points under OV 4 based on prior case law.

OV5, Serious Psychological Injury to Victim's Family. *People v Davis*, __ Mich App __ ; __ NW2d __ (2013 WL 1629220, No. 309525, decided April 16, 2013)**(april'13).** Originally, the COA remanded this case back to the trial to consider whether OV 13 had been properly scored. On remand, the trial court held that it was not, and scheduled a resentencing and instructed the probation department to update the presentence report. Before resentencing, the victim's biological mother submitted a victim's impact statement that had not been included with the original PSIR in which she indicated that she was suffering from depression and nervous breakdowns. Based on that statement the updated sentencing information report indicated that an additional 15 points should be scored for OV 5, which scores serious psychological injury to a victim's family requiring professional treatment. Defendant then appealed the addition of OV 5. First, the COA held that the trial court had authority to add OV 5 once it awarded Defendant resentencing. Defendant next argued that OV 5 should not have been scored because the biological mother should not be considered part of the victim's "family" as the victim was adopted as a child. The COA held that no part of the statute limited family to only those people having a blood connection *and* a legally recognized relationship. A blood connection was enough.

OV 6, Intent to Kill. *People v Bowling*, 299 Mich App 552; 830 NW2d 800 (2013)**(feb'13).** The Defendant's intent to kill was irrelevant here as the 50 points was authorized alternatively by the fact that a killing was committed in the course of a home invasion, one of the enumerated felonies authorizing such a score under the statutory sentencing guidelines.

OV 7, Aggravated Physical Abuse. *People v Glenn*, 295 Mich App 529; 814 NW2d 686 (2012)**(feb'12).** Under OV 7, 50 points can be assessed for conduct that amounts to sadism, torture, or excessive brutality, or that is designed to substantially increase the fear and anxiety suffered by a victim. In this armed robbery and felonious assault case, while the court felt defendant's conduct was reprehensible and designed to cause fear and

anxiety (defendant struck two people in the head with the butt of an airsoft gun), such is the "conduct in all armed robberies." Nothing defendant did here qualified under OV 7, and therefore it was error to assess 50 points. **The Michigan Supreme Court granted leave to appeal to the prosecution in this case on June 8, 2012, No. 144979.**

OV 9, Multiple Victims. *People v Carrigan*, 297 Mich App 513; 824 NW2d 283 (2012)**(aug'12).** Defendant was convicted of two counts of malicious destruction of property after causing damage to two schools. The sentencing court scored 25 points for OV 9 (allowable when 20 or more people are placed in danger of property loss or 10 or more people are placed in danger of physical injury or death). The theory utilized was that by damaging schools, defendant placed the entire community in danger of property loss. This was error as the members of the community were indirect, not direct, victims of defendant's crime. To hold otherwise would permit scoring 25 points for OV 9 for virtually every crime, since all crime impacts the community at large.

OV 10, Vulnerable Victim, Child Sexually Abusive Material. *People v Needham*, 299 Mich App 251; 829 NW2d 329 (2013)**(jan'13).** It was appropriate to score 10 points for OV 20, exploitation of a vulnerable victim, in a child sexually abusive material case, even though Defendant had no personal contact with the children depicted in the images. Possession of child sexually abusive material involves systematic exploitation of any vulnerable victim depicted.

OV 10, Vulnerable Victim, Domestic Relationship. *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012)**(may'12).** The trial court erred in scoring 10 points for OV 10, as defendant and complainant had discontinued dating several months earlier, were no longer having sex, and were not living together. Given these facts there was no domestic relationship under the statute.

OV 10, Vulnerable Victim, Predatory Conduct, CSC with Minor. *People v Johnson*, 298 Mich App 128; 826 NW2d 170 (2012)**(oct'12).** The court found that giving of gifts by Defendant and other conduct were sufficient to score OV 10 at 15 points for predatory conduct.

OV 12, Contemporaneous Criminal Acts, Child Sexually Abusive Activity, Vagueness. *People v Loper*, 299 Mich App 451; 830 NW2d 836 (2013)**(feb'13).** Defendant argued that it was error to score OV 12 at 25 points in this child sexually abusive conduct case because the statute prohibits a single image and a collection of images, "resulting in a variance in the number of criminal charges that could be brought by prosecutors in cases in which there is a collection of separate images of child sexually abusive material." The court of appeals disagreed, holding that the number of images (over 100) or the number of disks (4) in this case were sufficient to satisfy the "three or more contemporaneous" felonies required to score OV 12.

OV 13, Pattern of Felonious Criminal Activity, Offenses Not Resulting in Conviction. *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012)**(june'12).** It was appropriate to use an uncharged allegation that defendant participated in another robbery

at the same bank within the 5-year period under the statutory construct to award ten points for OV 13 as there is no requirement that the offense result in a conviction. On March 20, 2013 the Michigan Supreme Court granted leave in this case on another issue (whether imposition of the increased crime victims rights fund fee violated Ex Post Facto Clause rights).

OV 13, Pattern of Felonious Criminal Activity, Offenses Not Resulting in Conviction. *People v Nix*, __ Mich App __ ; __ NW2d __ (2013 WL 2278028, No. 311102, decided May 23, 2013)**(may'13).** A jury convicted defendant of two counts of 2nd degree child abuse and one count of fleeing and eluding. At sentencing, defendant was given 25 points for OV 13 (continuing pattern of criminal behavior). Defendant challenged this because the court considered a felonious assault charge which had been dismissed. The COA held, however, that MCL 777.43(2)(a) specifically permits a court to consider "all crimes within a 5–year period ... regardless of whether the offense resulted in a conviction."

OV 14, Leader in Multiple Offender Case. *People v Jones*, 299 Mich App 284; 829 NW2d 350 (2013)**(jan'13).** Defendant was convicted of three counts of assault with intent to do great bodily harm and several weapons violations after a shooting in the Eastland Mall in Harper Woods. Defendant and a friend targeted another group at the mall and both were armed and drew guns during the confrontation. Defendant argued that since he was the only one charged and the only one who fired a weapon, it was improper to assess 10 points under OV 14 for being a "leader" in a multiple offender situation. The court of appeals disagreed, finding the actions of Defendant and his friend were sufficient here to find a multiple offender situation for purposes of scoring OV 14.

OV 15, Amount of Controlled Substance. *People v Gray*, 297 Mich App 22; 824 NW2d 213 (2012)**(june'12).** Defendant was in possession of far less than 50 grams of cocaine when he was pulled over and ultimately pled to that possession. Though there was more than 50 grams in a hotel room where defendant's girlfriend was waiting for him, he did not plead to that higher amount. Therefore it was error to score 50 points for OV 15 based on an amount over 50 grams. Amounts tallied for OV 15 must be included in the sentencing offense, and it makes no difference that Defendant possessed the larger amount at the same time.

OV 19, Interfering with Administration of Justice. *People v Ratcliff*, 299 Mich App 625; 831 NW2d 474 (2013)**(mar'13).** The COA held that the trial court was justified in assessing ten points for offense variable 19 for interfering with or attempting to interfere with the administration of justice in sentencing Defendant on his convictions for armed robbery, carjacking, and possession of a firearm during the commission of a felony. Evidence at trial indicated that the Defendant had fled on foot from police contrary to an order to freeze.

PRV 1, Holmes Youthful Trainee Status. *People v Williams*, 298 Mich App 121; 825 NW2d 671 (2012)**(oct'12).** Using a theory of statutory construction, the court allowed 25

points for PRV 1 where a prior high severity felony was treated under the Holmes Youthful Trainee Act.

PRV 1 and PRV 5, Out of State Convictions. *People v Crews*, 299 Mich app 381; 829 NW2d 898 (2013)**(feb'13).** The first issue was whether Defendant's prior burglary convictions in Ohio were properly assessed as prior high-severity felony convictions under PRV 1 – Defendant argued they should have been considered low-severity under PRV 2. Because the Ohio burglary convictions were punishable by less than ten years imprisonment they must "correspond" to a crime listed in offense class M2, A, B, C, D, E, F, G or H under Michigan's statutory guidelines system in order to be considered high-severity. As a question of first impression the court determined "correspond" to require only similar or analogous crimes, and found the Ohio burglary convictions qualified, in comparison to Michigan's home invasion statutory construct, as high-severity. As to PRV 5, the court found that an attempt drug offense in Ohio counted toward the 3 or 4 prior misdemeanor convictions necessary to score ten points.

Probation Violation, Sentence Modification. *People v Malinowski,* __ Mich App __ ; __ NW2d __ (2013 WL 2278026, No. 311020, decided May 23, 2013)**(may'13).** The prosecution appealed by leave granted the trial court's order continuing Defendant's probation after Defendant pleaded guilty to violating the terms of his probation by consuming alcohol. The prosecution argued that Defendant should have been sentenced to prison after the violation. The COA affirmed because the trial court merely modified Defendant's probation and did not revoke it.

Restitution, Crime Victim Rights Act. *People v Lloyd*, __ Mich App __ ; __ NW2d __ (2013 WL 2096504, No. 310355, decided May 14, 2013)**(may'13).** Defendant appealed an order of probation following a jury conviction of misdemeanor assault. Defendant received 93 days in jail and was ordered to pay $126,561.63 in restitution to the victim. Defendant argued on appeal that the trial court abused its discretion in tripling the restitution award pursuant to MCL 780.766(5) of the Crime Victim Rights Act, MCL 780.751 et seq. The COA affirmed noting that the statute allows a court to allow three times the actual restitution value where there was serious impairment of a bodily function of the victim. The court felt this case met that standard as defendant's crime left the victim with a prosthetic eye.

Sexual Delinquency, One Day to Life, Hearing. *People v Franklin,* 298 Mich App 539; 828 NW2d 61 (2012)**(july'12).** After entering a no contest plea, defendant was sentenced to 1 day to life as a sexual deviant pursuant to MCL 750.335a(2)(c). The trial court erred in not conducting a hearing pursuant to MCL 767.61a on the sexual delinquency charge. Such a hearing is required even if a defendant pleads guilty or nolo contendere. The court went on to hold that no hearing was needed in this case as the indecent exposure charge to which the sexual delinquency charge was tied was vacated on double jeopardy grounds.

Work Release in OWI 2d. *People v Pennebaker,* 298 Mich App 1; 825 NW2d 637 (2012)**(sep'12).** The trial court, stating reasons, sentenced Defendant to 30 days in an

electronic monitoring work release program after Defendant pled to operating a vehicle while intoxicated, with occupant less than 16, subject to second offense enhancement under MCL 257.625(7)(a)(ii). Because the statute unequivocally states that a defendant must be sentenced to at least 30 days in jail, the trial court erred in allowing Ms. Pennebaker to serve her time at home on tether.

F. Miscellaneous

Deportation, Aggravated Felony, Drug Offenses. *Moncrieffe v Holder*, __ US __, 133 S Ct 1678 (2013)**(april'13).** Defendant Moncrieffe, a Jamaican citizen legally residing in Georgia, was caught with a small amount of marijuana. The Immigration and Nationality Act (INA) provides for mandatory deportation, prohibiting the Attorney General from granting discretionary relief from removal, for those convicted of an "aggravated felony." The Court, 7-2, held that a "state criminal statute that extends to the social sharing of a small amount of marijuana" should not be considered an aggravated felony for these purposes.

Deportation, Release After Serving Half of Minimum, Life Sentence. *Chico-Polo v Department of Corrections,* 299 Mich App 193; 829 NW2d 314 (2013)**(jan'13).** Under MCL 791.234b a prisoner can be paroled for deportation after serving half his minimum sentence. Chico-Polo argued that his life sentence for a drug offense under MCL 333.7401 carried a 20 year minimum since that is when he would be eligible for parole and therefore he should be able to be paroled to be deported after ten years. The trial court determined that the 20 years was a mandatory minimum and Defendant was required to serve the entire period before being eligible for parole to deportation. The court of appeals held that because there is no minimum sentence "imposed by the court" when a defendant is sentence to life imprisonment, the parole to deportation statute does not apply at all.

Federal Rule 52(b), Plain Error, Timing. *Henderson v United States,* __ US __, 133 S Ct 1121 (2013)**(feb'13).** In this case the federal trial judge, with no objection from defendant's counsel, increased the length of sentence to allow defendant to complete a prison drug rehab program. While this was plain error at the time defendant's case was under review due to a recent SCOTUS decision, it was unsettled at the time of trial. The Court in this case resolved a split and held that as long as the error is plain at the time of appellate review it comes under rule 52(b).

Firearms, Felon in Possession, Disposition of Weapons. *People v Minch,* 493 Mich 87; 825 NW2d 560 (2012)**(dec'12).** Defendant was convicted of a weapons offense for possession of a short-barreled shotgun while 86 other noncontraband weapons were seized. The trial court permitted Defendant's agent, his mother, to take possession of the noncontraband weapons until Defendant's disability to possess under the Felon in Possession statute (MCL 750.224f) expired, and the court of appeals affirmed. The supreme court reversed, holding that while Defendant's mother could indeed possess the

weapons, she would have to do so as a successor bailee, not an agent, so that Defendant would have no control or interest in the weapons.

Firearms, Open Carry. *Capital Area Dist. Library v Michigan Open Carry, Inc.,* 298 Mich App 220; 826 NW2d 736 (2012)**(oct'12).** The court held that, under the doctrine of field preemption, district libraries are not permitted to regulate firearms in their premises. State law completely occupies the field of firearm regulation to the exclusion of local units of government.

First Amendment, Stolen Valor Act. *US v Alvarez,* __ US __; 132 S Ct 2537 (2012)**(june'12).** The issue in this case was whether the federal law that makes it a crime to falsely represent oneself to have received the Congressional Medal of Honor is a violation of the Free Speech Clause of the First Amendment. Alvarez stated he was awarded the Congressional Medal while speaking at a board meeting. He was prosecuted, and eventually pled guilty. He appealed, and the Ninth Circuit reversed holding that false statements of fact that caused no harm were protected by the First Amendment and, therefore, no crime was committed. In a 6-3 decision, the SCOTUS affirmed the Ninth Circuit. Using standard First Amendment analysis, the Court found that the law is content-based; that the speech being regulated does not fall within any historically recognized category of unprotected speech like defamation or fraud; and that, applying strict scrutiny, the law is not the least restrictive means of protecting a compelling governmental interest (protecting the integrity of the military awards system).

Habeas, Actual Innocence as Gateway. *McQuiggin v Perkins,* __ US __, 133 S Ct 1924 (2013)**(may'13).** Prior SCOTUS precedent clearly holds that actual innocence will provide a gateway to substantive consideration of issues otherwise barred through procedural default or the AEDPA statute of limitations. In this Michigan case where Defendant waited years after the most recent witness affidavit was signed to present his "newly discovered" evidence of innocence, the Court, in a 5-4 decision, reaffirmed the innocence exception to AEDPA's statute of limitations, but noted that "untimeliness, although not an unyielding ground for dismissal of a petition, does bear on the credibility of evidence proffered to show actual innocence." The Court vacated the decision of the Sixth Circuit, which had ordered the district court to allow Defendant to pursue his habeas petition as if it had been timely, because "[t]he appeals court apparently considered a petitioner's delay irrelevant to appraisal of an actual-innocence claim." The matter was remanded for further consideration. Justice Scalia's dissent scolded the majority for creating an exception to a clear congressional mandate (the one year statute of limitations under AEDPA) when it had no power to do so.

Habeas, Deference to State Courts, Counsel, Right to Appointment for *Marshall v Rodgers,* __ US __, 133 S Ct 1446 (2013)**(april'13).** After a California defendant went to trial *pro se,* he requested appointment of counsel to assist in filing a motion for new trial. The request was denied. The 9th Circuit granted habeas relief but after reviewing the relevant law, the Court criticized the 9th Circuit's "mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." In the absence

of specific SCOTUS case law on the precise issue in this case, the Court, in a Per Curiam opinion, held that the conclusion of the California courts that there was no Sixth Amendment violation due to the failure to appoint counsel after trial was not contrary to clearly established SCOTUS law and the writ should have been denied.

Habeas, Deference to State Courts, Due Process, Retroactive Application of Change in Law. *Metrish v Lancaster,* __ US __, 133 S Ct 1781 (2013)**(may'13).** Defendant Lancaster was charged with murder in Michigan. At the time of the crime diminished capacity was recognized as a defense in Michigan. At his first trial Defendant Lancaster put forth the defense, but it was rejected by the jury. Lancaster's conviction was vacated on other grounds by the Sixth Circuit, but by the time he was tried again the Michigan Supreme Court had rejected the diminished capacity defense in *People v Carpenter*, 464 Mich 223 (2001), and Lancaster was not permitted to raise diminished capacity as a defense. He argued on appeal and during federal habeas proceedings that the retroactive application of *Carpenter* denied him due process of law. A divided panel of the Sixth Circuit granted Lancaster relief, finding that the Michigan Supreme Court's rejection of the diminished capacity defense in *Carpenter* was unforeseeable. The Court, in a unanimous decision, citing to *Harrington v Richter*, 131 S Ct 770 (2011), reversed the Sixth Circuit and found that the Michigan courts' denial of Lancaster's due process claim did not unreasonably apply relevant SCOTUS precedent.

Habeas, Deference to State Courts, Due Process Right to Present a Defense. *Nevada v Jackson,* __ US __, 133 S Ct 1990 (2013)**(june'13).** In a rape case, the Court in a Per Curiam opinion without dissent, reversed the 9th Circuit after that court had granted habeas relief to a criminal defendant because the state had limited the use of extrinsic evidence of claimed previous false allegations to impeach the complainant. Citing *Harrington v Richter*, 131 S Ct 770 (2011), the Court found the state's determination here did not directly conflict with SCOTUS precedent in the area of the constitutional right to present a defense.

Habeas, Deference to State Courts, Sufficiency. *Coleman v Johnson,* 566 US __; 132 S Ct 2060 (2012)**(may'12).** After Petitioner, who was convicted of murder in Pennsylvania under an aiding and abetting theory, lost his claim that the evidence against him was insufficient to convict in the state courts and in federal district court, the 3d Circuit granted the writ based on *Jackson v Virginia,* finding that a conclusion that Petitioner Johnson shared an intent to kill with the actual shooter was "mere speculation." Holding that *Jackson* claims "are subject to two layers of judicial deference" the Court, in a unanimous Per Curiam opinion, reversed the 3d Circuit and reinstated the murder conviction because the jury's finding was not "so insupportable as to fall below the threshold of bare rationality."

Habeas, Deference to State Courts, Sufficiency. *Parker v Matthews,* 566 US __; 132 S Ct 2148 (2012)**(june'12).** In another unanimous Per Curiam opinion, the Court stated that the 6th Circuit had impermissibly set aside two 29-year-old murder convictions "on the flimsiest of rationales." Citing its recent decision in *Cullen v Pinholster* for the proposition that, under AEDPA, the standard of review is "difficult to meet…and highly

deferential," the Court stated that the 6th Circuit's conclusion that under *Jackson v Virginia* the state had failed to prove the absence of extreme emotional disturbance beyond a reasonable doubt was flawed. The Court held there was sufficient evidence to put the question of extreme emotional disturbance to the jury. A second ground upon which the 6th Circuit had granted the writ, prosecutorial misconduct, was also found to be erroneous. The Court held that the 6th Circuit mistakenly found the prosecutor had put forth a claim of collusion (between defense counsel and an expert witness) where the prosecutor immediately clarified that his argument was not meant to suggest collusion. The 6th Circuit also erred in using its own precedent on prosecutorial misconduct instead of the Supreme Court's decision in *Darden v Wainwright*, which outlined a more general standard. Petitioner's death sentence was reinstated.

Habeas, Merits Review by State Courts. *Johnson v Williams*, __ US __, 133 S Ct 1088 (2013)**(feb'13).** In *Harrington v Richter*, __ US __, 131 S Ct 770 (2011), the Court held that when a state court summarily rejects without discussion all claims by a defendant, including federal claims later raised on habeas, the federal habeas court must presume, subject to rebuttal, that the federal claim was reviewed on the merits by the state court. Here the Court extends the *Richter* logic to a situation where the state court speaks to some of defendant's claims but makes no comment on a federal claim later raised on habeas. In that circumstance, as in *Richter*, it is presumed that the state court ruled on the federal issue on the merits. Again the presumption is rebuttable.

Habeas, Procedural Default, IAC in Postconviction as Cause. *Trevino v Thaler*, __ US __, 133 S Ct 1747 (2013)**(may'13).** Under prior precedent (*Coleman v Thompson*, 501 US 722 (1991)) the ineffective assistance of counsel in a state postconviction proceeding will not qualify as cause to excuse a procedural default. The Court recently, in *Martinez v Ryan*, 566 US 1 (2012), held that where the issue in question is ineffective assistance of counsel at trial, and where that issue can be raised only in postconviction proceedings and not on direct appeal, an exception to *Coleman* allows the failure of postconviction counsel to raise the issue of ineffectiveness of trial counsel, if it rises to the level of constitutional ineffectiveness, to excuse the procedural default of failure to timely and properly raise the issue of trial counsel's ineffectiveness in the state courts. In *Trevino* the Court, in a 5-4 decision, extended that exception to cases, as here under the Texas regime, where state systems do no prohibit raising the issue of trial counsel's ineffectiveness on direct appeal, but at the same time make raising the claim at this stage extremely difficult due to inability to develop a proper record.

Habeas, Stay of Proceedings, Incompetence. *Ryan v Gonzales*, __ US __, 133 S Ct 696 (2013)**(jan'13).** Examining two death row cases, one out of the 9th Circuit and another out of the 6th Circuit, where Petitioners were ultimately permitted to indefinitely stay their habeas proceedings due to their incompetence to assist counsel, a unanimous Court sharply restricted that ability. The Court found that the right to stay proceedings after conviction was not appropriately linked to the 6th Amendment right to counsel, nor was it statutorily provided as the 6th Circuit had found. Without determining the precise contours of a district court's discretion to stay habeas proceedings, the Court found the stays in the two cases under examination were inappropriate and reversed the 6th and 9th

circuits, reasoning that to do otherwise would permit petitioners to frustrate the AEDPA's goal of finality by dragging out federal habeas review.

Indigent Criminal Defense System. *Duncan v State of Michigan*, 300 Mich App 176; __ NW2d __ (2013)**(apr'13).** Indigent criminal defendants brought action against the state challenging adequacy of the indigent defense system. Defendants filed motion for class certification. The Circuit Court granted class certification and denied state's motion for summary disposition. State appealed. The Court of Appeals, 284 Mich App 246, 774 NW2d 89, affirmed. Leave to appeal was granted, and the Supreme Court affirmed, albeit in result only, vacated grant of class certification and remanded for reconsideration of motion in light of *Henry v. Dow Chemical Co*. On remand, the circuit court denied state's motion for summary disposition, and state appealed. The COA held the following: (1) denial of state's motion for summary disposition as premature, pending completion of discovery on question of motion for class certification, was not abuse of discretion; (2) prior ruling of COA that criminal defendants stated claim for declaratory and injunctive relief, which ruling was affirmed by Supreme Court, was law of case on remand; (3) defendants were not judicially estopped from asserting law of the case doctrine on remand; (4) prior decision of COA that defendants had standing to challenge adequacy of indigent defense system was law of case on remand; and (5) res judicata did not bar defendants' action against state challenging adequacy of indigent defense system.

Michigan Medical Marijuana Act (MMMA), Brownies. *People v Carruthers*, __ Mich App __; __ NW2d __ (No. 309987, 2013 WL __, decided July 11, 2013)**(july'13).** Defendant was pulled over for a traffic violation and police found 9.1 ounces of "usable marijuana" and 54.9 ounces of brownies containing THC. Defendant was, at the time of the stop, in possession of a medical marijuana card for himself, caregiver applications for four, and a caregiver certificate. The trial court disallowed the medical marijuana defense at trial and Defendant was convicted of possession with intent to deliver marijuana. The first issue was whether the quantity limit of § 4 (2.5 ounces per patient and per patient to whom a caregiver is registered) applied to the entire "edible" (brownies here) or only to the weight of the active ingredient in the edible. The court ducked that issue, holding instead that edibles, like brownies, are not "usable marijuana" under the MMMA. Thus Defendant was not entitled to immunity under § 4 of the MMMA. However, Defendant was entitled to an evidentiary hearing to determine whether he is entitled to put forward a § 8 defense and remand as ordered for this purpose. If Defendant meets his burden on this point he will be entitled to either dismissal of charges or a new trial.

Michigan Medical Marijuana Act (MMMA), Driving, Zero Tolerance. *People v Koon*, 494 Mich 1; __ NW2d __ (2013)**(may'13).** Defendant was pulled over for speeding, admitted to drinking a beer, voluntarily showed a pipe, explained he had a medical marijuana registry card and that he had last smoked marijuana 5-6 hours earlier. A blood test showed active THC in defendant's system (10 nanograms per milliliter). The district court, affirmed by the circuit court, held that the MMMA trumps the "zero tolerance" law (MCL 257.625(8)), and therefore the prosecution must show a defendant was actually impaired by the presence of marijuana in his body. Leave was granted to

the prosecution, and the court of appeals reversed, holding that because the MMMA specifically excepts operating a motor vehicle under the influence of marijuana from its protections (MCL 333.26427(b)(4)), and since the MMMA did not define "under the influence" while the motor vehicle code essentially does that by adopting a zero tolerance provision, the two statutory constructs are not in conflict, and defendant's prosecution for driving under the influence can go forward. *People v Koon,* 296 Mich App 223 (2012). The Michigan Supreme Court, in a unanimous Per Curiam opinion, disagreed and held that the MMMA supersedes the zero tolerance law and operating "under the influence" of marijuana requires more than having "any amount of marijuana in one's system and requires some effect on the person." The court suggested that the legislature set a "legal limit" similar to that applicable to alcohol.

Michigan Medical Marijuana Act (MMMA), § 8 and § 4, Timing of Physician Statement. *People v Kolanek and King,* 491 Mich 382; 817 NW2d 528 (2012)**(may'12).** In a unanimous opinion, the court reversed the court of appeals in *King,* and made it clear that the affirmative defense of § 8 does not require a defendant to establish the requirements of § 4. Therefore the stricter requirements applied to registered patients under § 4, such as the requirement that no more than 2.5 ounces or 12 plants may be possessed, and that the marijuana must be kept in a closed, locked facility, do not have to be complied with to assert the affirmative defense under § 8. With regard to timing of the physician's statement, the court found that the MMMA is to be applied prospectively, and therefore under § 8(a)(1) the physician's statement must be made after enactment of the MMMA but before commission of the offense. Finally, the determination of the court of appeals in *Kolanek* that a defendant could reassert the affirmative defense at trial, even though he failed to establish there was a timely physician's statement at an evidentiary hearing, was held to be in error. Only affirmative defenses that present material questions of fact should be presented to a jury. Here, there was no question that Kolanek could not establish that he obtained a valid physician's statement after enactment of the MMMA but prior to the offense, and therefore he should not get a "second bite at the apple" by putting this before a jury.

Michigan Medical Marijuana Act (MMMA), § 8 and § 4, Collective Cultivation. *People v Bylsma,* 493 Mich 17; __ NW2d __ (2012)**(dec'12).** Under the MMMA, § 4 immunity can be a shield against prosecution only if the strict requirements of that section are met. In this case, Defendant was growing marijuana collectively with other registered caregivers and patients and had access to more than the limit of 12 plants in a closed, locked facility and therefore had no immunity. However, the court of appeals erred in concluding that the Defendant could not assert a § 8 affirmative defense under the MMMA (see *Kolanek*, above). The elements of the § 8 affirmative defense, which must be brought in a pre-trial motion to dismiss, are 1) a physician statement outlining the medical need for marijuana use, 2) possession of an amount of marijuana reasonably necessary for the stated medical purpose, and 3) the possession and delivery of marijuana was for the stated medical purpose.

Michigan Medical Marijuana Act (MMMA), Patient to Patient Transfers. *Michigan v McQueen,* 493 Mich 135; 825 NW2d 543 (2013)**(feb'13).** The Isabella County

Prosecutor brought a public nuisance action against McQueen, owner of Compassioniate Apothecary, LLC, a medical marijuana dispensary, due to the patient to patient transfers of marijuana facilitated by the dispensary. The dispensary permitted their members, all registered patients or caregivers, to purchase marijuana from lockers controlled by others. The trial court denied the prosecution's request to declare the facility a public nuisance but the court of appeals reversed, holding that the dispensary was violating the public health code and the prohibitive conduct was not excused by the MMMA. The supreme court affirmed the result, holding that while the MMMA permitted the sale of marijuana, it does not permit patient to patient transfers of the substance. On June 19, 2013, in *People v Green*, __ Mich __; 831 NW2d 460 (2013) the supreme court reversed a published decision of the court of appeals, *People v Green*, 299 Mich App 313; 829 NW2d 921 (2013)**(jan'13)** on the same point. The supreme court, in its order of reversal, stated that the court of appeals erred in affirming the trial court's grant of Defendant's motion to dismiss charges of delivery of marijuana since MMMA immunity does not protect a registered qualifying patient who transfers marijuana to another registered qualifying patient.

Michigan Medical Marijuana Act (MMMA), Possession of Registry Identification Card. *People v Nicholson,* 297 Mich App 191; 822 NW2d 284 (2012)**(june'12).** Under § 4(a) of the act, which is wholly independent of the affirmative defense provisions set out in § 8, a defendant is immune from arrest and prosecution if he (1) is a qualifying patient; (2) who has been issued and possesses a registry identification card; and (3) possesses less than 2.5 ounces of usable marijuana. In this case, at the time of arrest, defendant had been issued "the equivalent of a registry identification card" under MCL 333.26429(b), which states that if the department doesn't issue a card in response to a valid application within 20 days, the registry ID card shall be considered granted, and a copy of the application papers shall serve as a valid card. However he did not have the application papers on his person at the time of arrest. The court held that immunity from arrest and prosecution are two separate considerations, so that while a defendant must possess (reasonably accessible) his valid card at the time of arrest to be immune from that action, his later production of the valid card in the district court was sufficient to make him immune from prosecution for the misdemeanor offense of possession of marijuana. The case was remanded so that the defendant could jump one more hurdle – showing that he was engaged in the medical use of marijuana in accord with MCL 333.26424(a). This requires that the marijuana, at the time in question, was possessed or used "to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." As of August 2, 2012 no MSC application had been filed.

Michigan Medical Marijuana Act (MMMA), Questions of Fact, Judge or Jury; Michigan Residency Requirement. *People v Jones,* __ Mich App __; __ NW2d __ (No. 312065, 2013 WL __, decided July 9, 2013)**(july'13).** The issue was whether § 4 fact-finding to determine availability of immunity should be placed with judge or jury. Analogizing to entrapment cases, the court held that this fact-finding should be handled by the judge at an evidentiary hearing. The court also held that Michigan residiency is a prerequisite to issuance of a valid registry identification card under the MMMA.

Michigan Medical Marijuana Act (MMMA), Required Use of Expert Testimony. *People v Anderson,* 298 Mich App 10; 825 NW2d 641 (2012)**(sep'12).** This case was remanded by the supreme court in the wake of *Kolanek and King*. Defendant possessed more plants than allowed under the MMMA. In support of an affirmative defense, Defendant and his physician testified that the amount of plants was reasonable to treat Defendant's condition. The trial court found both to be unpersuasive for different reasons. The trial court then stated that, in the absence of relevant expert testimony and any other credible testimony supporting the defense, Anderson failed to establish a defense. Defendant argued that this language constituted a requirement of expert testimony in order to establish a defense. The COA disagreed, holding that there was no such requirement. The trial court merely analyzed the other evidence presented by defendant, i.e., his testimony and that of his physician and, after rejecting that evidence, as well recognizing a lack of expert testimony, denied defendant's motion. The court of appeals originally held that defendant's assertion that the trial court required him to produce an expert was incorrect and affirmed. *People v Anderson,* 293 Mich App 33; 809 NW2d 176 (2011). On remand, after summarizing *Kolanek and King*, the court sent the case back to the trial court for another § 8 hearing and emphasized that the court was not to make credibility determinations or require Defendant to establish any of the elements of § 4.

Michigan Medical Marijuana Act (MMMA), Search Warrant Affidavit. *People v Brown,* 297 Mich App 670; 825 NW2d 91 (2012)**(aug'12).** After getting a tip, detectives did a trash pull and found a piece of 'fresh marijuana.' They put this information in a warrant affidavit but did not check to see if Defendant was a qualifying patient or primary caregiver under the MMMA. The fruits of the search were suppressed by the trial court who found that after enactment of the MMMA, police must include in warrant affidavits "facts sufficient for a magistrate to conclude that the possession of the marijuana alleged in the affidavit is not legal under the MMMA. The court of appeals disagreed, holding that marijuana remains illegal in Michigan.

Michigan Medical Marijuana Act (MMMA), Zoning, Preemption. *Ter Beek v City of Wyoming,* 297 Mich App 446; 823 NW2d 864 (**july'12).** Plaintiff is a qualified medical marijuana patient living in the city of Wyoming. Wyoming's zoning ordinance prohibits all uses contrary to federal and state law. Plaintiff brought a declaratory judgment action seeking to void the ordinance on state preemption grounds as it prohibited conduct permitted by the MMMA. The trial court found that the federal controlled substances act preempted the MMMA and denied Plaintiffs request. The court of appeals held that "enforcement of the ordinance could result in the imposition of sanctions that the immunity provision of the MMMA does not permit" and voided the city ordinance on preemption grounds. After detailed analysis the panel also found that the federal CSA did not preempt the MMMA.

Newly Discovered Evidence, Reasonable Diligence. *People v Rao,* 491 Mich 271; 815 NW2d 105 (2012)**(may'12).** In a 5-2 decision, Justice Cavanagh concurring in result only, the court reversed a split decision of the court of appeals granting a new trial based

on newly discovered evidence in this second degree child abuse case. Defendant, convicted of abusing her adopted daughter, put forward new medical evidence in the form of x-rays taken after the trial. The trial court denied a motion for new trial based on newly discovered evidence, and the court of appeals reversed, finding an abuse of discretion. The court, in an opinion authored by Justice Markman, focused on the first and third factors outlined in *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), that the evidence must be newly discovered and that the party offering the new evidence could not have discovered and produced the evidence at trial using reasonable diligence. The court found these factors interrelated and, in this case, not met because the defense was aware of the potential acquisition of this evidence at the time of trial. The fact that the x-rays did not exist until after trial was not viewed as dispositive. Emphasis was placed on the failure of the defense to seek the x-rays at issue prior to trial, and the court felt that there was a strong possibility that failure was strategic.

Newly Discovered Evidence, Impeachment Evidence. *People v Grissom,* 492 Mich 296; 821 NW2d 50 (2012)**(july'12).** After a sexual assault complainant worked up to an accusation of rape in stages, so that no physical evidence was obtainable, and after the complainant, over a year after the alleged rape, stated that she recognized her rapist near the scene, and later picked him out of a photo lineup, defendant was charged, tried, and convicted of first-degree criminal sexual conduct. Two years after the conviction police and prosecutors obtained evidence from other jurisdictions suggesting that the complainant had made false allegations in the past, some of which were very similar to the factual base of the allegations in this case, and turned this material over to the defense. Defendant filed a pro se motion for relief from judgment, and both the trial court and the court of appeals refused to grant a new trial on the basis that the newly discovered evidence involved impeachment, which could not, under law, qualify as newly discovered evidence sufficient to grant a new trial. The court of appeals also found the evidence would not provide a reasonable chance of acquittal on retrial. While agreeing that newly discovered impeachment evidence will rarely qualify, the court, in a 4-3 decision, held that it can result in the grant of a new trial if "it has an exculpatory connection to testimony concerning a material matter and a different result is probable….It is not necessary that the evidence contradict specific testimony at trial." Any previous case law to the contrary was overruled, and the case was remanded to the trial court to conduct the *Cress* analysis under this framework. The trial court ultimately granted a new trial, a result upheld by the Michigan Supreme Court. 493 Mich 880; 821 NW2d 884 (2012)**(nov'12).**

Officer Immunity, Retaliatory Arrest. *Reichle v Howards,* __ US __; 132 S Ct 2088 (2012)**(june'12).** Howards, while at a shopping mall, saw then Vice President Dick Cheney greeting people outside. Howards, while on his cell phone, stated, "I'm going to ask him how many kids he's killed today." One of the agents assign to protect Cheney overheard the remark, leading several other agents to watch Howards closely. Howards then approached Cheney, and told him that his "policies in Iraq were disgusting." Cheney did not react, but merely thanked the man. As Howards moved past the Vice President he allegedly touched him in some way. He was arrested and charged with harassment (that charge was eventually dismissed). Howards sued several of the agents,

claiming that his arrest was in retaliation for his remarks to Cheney. The Tenth Circuit Court agreed. However, the SCOTUS unanimously reversed the Tenth Circuit holding that Police officers cannot be sued for violating someone's rights, if the right that was supposedly violated was not formally recognized to exist at the time the officers acted. If the court finds that no such right existed at that time (whether or not it might be recognized later), then the claim cannot go to trial. The Court held that there was probable cause for the arrest, and a reasonable officer would not have been expected to know that the arrest could give rise to a First Amendment violation.

Parole, Appeal by Prosecutor, Right to Counsel. *In re Parole of Hill*, 298 Mich App 404; 827 NW2d 407 (2012)**(nov'12).** The prosecutor appealed Hill's grant of parole on a murder charge and Hill requested appointed counsel. When the trial court granted Hill's request for counsel during the pendency of the prosecution's appeal, the prosecutor in turn appealed this decision. The court held that since Hill had not yet been released when the prosecutor initiated an appeal of the board's decision to free him, Hill "had not yet obtained a protected liberty interest" and thus was not fully protected by due process. The court concluded that Hill did not have a constitutionally protected liberty interest and was therefore not entitled to appointed counsel. Nor was Hill entitled to counsel under the Equal Protection Clause. However, the circuit court did have inherent power, in its discretion, to appoint counsel in this case in the interest of justice. The decision whether to appoint counsel in these circumstances upon request is reviewable for abuse of discretion, and the circuit court did not abuse its discretion by appointing counsel in this case.

Plea Consequences, Deportation, Retroactivity of *Padilla*. *Chaidez v United States*, __ US __, 133 S Ct 74 (2013)**(feb'13).** In *Padilla v Kentucky*, 559 US __; 130 S Ct 1473 (2010), the Court held that failure to provide advice to a client about the risk of deportation arising from a guilty plea constitutes ineffective assistance of counsel under *Strickland.* The issue in *Chaidez* was whether *Padilla* applies retroactively and a 7-2 majority held that it does not as it constitutes a new rule. Therefore *Padilla* does not assist defendants whose convictions were final at the time it was decided.

Plea Consequences, Lifetime Electronic Monitoring. *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012)**(may'12).** In a 2-1 decision the court of appeals held that under MCR 6.302 a defendant pleading to first or second degree CSC who is facing lifetime electronic monitoring must be advised about this at the time the plea is taken. In a unanimous decision, the supreme court affirmed and held that under the court rule, and as a matter of constitutional due process, the trial court must inform a defendant pleading to CSC 1 or 2 concerning lifetime monitoring. Such monitoring is in fact part of the sentence, and therefore a direct consequence of a plea for purposes of due process analysis. Failure to so advise will render the plea involuntary.

Plea Consequences, Habitual Offender Enhancement. *People v Brown*, 492 Mich 684; 822 NW2d 208 (2012)**(aug'12).** In a 5-2 decision the Michigan Supreme Court held that it is error, requiring the allowance of plea withdrawal, for the court to fail to advise a defendant concerning the potential maximum sentence for the crime to which he pled as

enhanced by applicable habitual offender status. The remedy applies even if the prosecutor fails to notify defendant of habitual offender enhancement prior to the taking of the plea as permitted by MCL 769.13(3).

Plea Rule Violations. *United States v Davila,* __ US __; 133 S Ct 2139 (2013)**(june'13).** During a pre-trial hearing, a federal magistrate judge urged Defendant to plead guilty after telling him he would not replace appointed trial counsel, a clear violation of Rule 11(c)(1) of the Federal Rules of Criminal Procedure. Noting that other rules (11(h) and 52 (a)) render a violation harmless "if it does not affect substantial rights," the Court found that the 11th Circuit's conclusion that the magistrate judge's error required automatic vacatur of Defendant's plea was erroneous. The case was remanded for a full-record assessment of prejudice.

Prisoner Civil Judgment, Identification of Parties. *Neal et al v Department of Corrections,* 298 Mich App 518; 824 NW2d 285 (2012)**(aug'12).** Plaintiffs successfully sued the MDOC for sexual harassment and sexual assault and settled for $100 million dollars payable in installments over six years. A protective order was provided limiting disclosure of Plaintiffs' identities to prevent retaliation. Various entities looking for child support, court fines, costs, restitution, etc. intervened seeking the identities of Plaintiffs. The court, while noting that the required payments should be made, sent the case back to the trial court with direction to fashion a remedy, preferably a remedy that would necessitate disclosing the names of class members. A "Special Master" was suggested.

Sex Offender Registration, Federal SORNA. *United States v Kebodeaux,* __ US __ (No. 12-418, 2013 WL 3155231, decided June 24, 2013)**(june'13).** Kebodeaux was discharged from the Air Force after being convicted by court-martial of a federal sex offense. He moved to Texas and registered as a sex offender. Subsequently Congress passed the Sex Offender Registration and Notification Act (SORNA) but when Kebodeaux moved within Texas he failed to update his registration and was convicted in federal court for a SORNA violation. The Fifth Circuit reversed, holding that the federal government lacked the power to regulate his intrastate movements. The Court, 7-2, with Justices Scalia and Thomas dissenting, overturned the Fifth Circuit and found that the federal government did have power to require the updating Kebodeaux failed to accomplish under a previous sex offender registration requirement in the Wetterling Act that Kebodeaux was bound by. The fact that SORNA modified the earlier requirements did not make the new demands in applicable to Kebodeaux and his conviction for SORNA violations was proper.

Sex Offender Registration, Minors. *In re Tiemann*, 297 Mich App 250; 823 NW2d 440 (2012)**(may'12).** At a consent hearing under MCL 28.723(a), the trial court found that Tiemann had not met his burden of establishing consent, and therefore he was required to register under SORA. Due process was not offended by a consent hearing which placed the burden on defendant as the SORA is not considered punishment. Since the SORA is a regulatory statute and not criminal, a defendant has no confrontation clause rights at the hearing.

G. SCOTUS PREVIEW (Courtesy of Professor David A. Moran)

I. Search and Seizure

A. Consent Searches

***Fernandez v. California* (to be argued November 2013)**
When a co-tenant of a residence is physically present and objects to an entry and search of the premises, may the police rely on the consent of another co-tenant obtained after the objecting co-tenant has been validly arrested and removed from the premises?

II. Confessions and Interrogations

A. Use of Defendant's Compelled Statements

***Kansas v. Cheever* (to be argued October 2013)**
If a defendant presents expert testimony to establish that he lacked the *mens rea* required by the offense, does the Fifth Amendment preclude the prosecution from rebutting that testimony by presenting evidence from the defendant's court-ordered mental evaluation?

III. Right to Counsel—Ineffective Assistance

A. Ineffective Assistance

***Burt v. Titlow* (to be argued October 2013)**
Was counsel ineffective within the meaning of *Lafler v. Cooper* when, before investigating the strength of the prosecution's case, he withdrew the favorable plea bargain the defendant had previously accepted solely because the defendant claimed innocence, and what remedy should the defendant receive if counsel was ineffective in withdrawing the plea given that she went to trial on a greater charge and was convicted?

B. Right to Counsel of Choice

***Kaley v. United States* (to be argued October 2013)**
If the government, after charges are filed, freezes the funds the defendant needs to retain counsel of choice, is the defendant entitled to an adversarial hearing to show that the funds should not be frozen?