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CRIMINAL LAW UPDATE
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A. Fourth Amendment.

Consent Searches, Co-Tenants. *Fernandez v California,* __ US __; 134 S Ct 1126 (2014)**(feb'14).** Police saw Defendant, a suspect in a robbery, run into an apartment building. They followed him, heard screams from one of the apartments, and knocked on the door. A woman, Rojas, battered and bleeding, came to the door. When Defendant came to the door to object to police entry, they removed him, suspecting that he had beaten Rojas. Later Rojas consented to a police search. The Court, in a 6-3 decision, held that even though Defendant, a co-tenant, had objected to the search and had not revoked his objection, once he was no longer present it was permissible for Rojas, a co-tenant, to consent to the search. The fact that Defendant's absence was caused by police was not controlling since the arrest of Defendant was objectively reasonable.

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."

***Terry* Stop; 4th Amendment**. *Navarette v California*, __ US __; 134 S Ct 1683 (2014)(**april'14).** In a 5-4 opinion authored by Justice Thomas, SCOTUS held that, under the totality of the circumstances analysis, a traffic stop triggered by an anonymous but reliable tip to 911 complied with the Fourth Amendment because the officer had reasonable suspicion that the truck's driver was intoxicated even though the police did not personally observe any evidence of intoxication.

Warrantless Entry. *People v Henry,* __ Mich App __; __ NW2d __ (2014 WL 1847784, Nos. 306449 & 308963, decided May 8, 2014)**(may'14).** Defendant's convictions arose out of a series of armed robberies in the Lansing area. Under the "unique circumstances of this case" COA affirmed the trial court's ruling that police warrantless entry of an apartment was justified on grounds of "hot pursuit" and "other exigencies."

B. Other Pretrial Matters.

Compelled Testimony to Rebut Mental State Defense. *Kansas v Cheever,* __ US __; 134 S Ct 596 (2013)**(dec'13).** Defendant was charged in state court in Kansas with capital murder. When it appeared the state death penalty might be in trouble, prosecution was transferred to federal court where a psychiatric exam was ordered due to Defendant's expressed intent to introduce expert testimony that methamphetamine intoxication negated specific intent. When prosecution returned to state court after the state death penalty was upheld, the trial judge permitted introduction of testimony from the expert

who had examined Defendant pursuant to the earlier federal court order over objection of defense counsel who argued that since the psychiatric exam was done against Defendant's will, allowing the expert to testify was a Fifth Amendment violation as this effectively compelled Defendant to testify against himself. Ultimately the Kansas Supreme Court agreed with Defendant, overturning his murder convicting based on *Estelle v Smith*, 451 US 454. The United States Supreme Court reversed and reinstated Defendant's conviction, holding that, under *Buchanan v Kentucky*, 483 US 402, if a defendant presents expert testimony supporting a mental state defense, the Fifth Amendment does not prevent rebuttal evidence from a court-ordered mental evaluation of the defendant for the limited purpose of rebutting the defendant's expert.

Confession, to Parole Officer. *People v Elliott,* 494 Mich 292; 833 NW2d 284 (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.

Delay in Arrest. *People v Woolfolk,* __ Mich App __; __ NW2d __ (No. 312056, 2014 WL 783564, decided February 27, 2014)**(feb'14)**. Defendant argued that his first degree murder conviction should be reversed due to a five year delay between the offense and his arrest. The court of appeals disagreed, stating that the delay was reasonable under the circumstances, including the disappearance of a key witness for a period of time, and Defendant was unable to show prejudice caused by the delay.

Discovery, *Brady,* Defendant's Diligence as a Factor. *People v Chenault,* __ Mich __ ; __ NW2d __ (2014 WL 1356798, Nos. 146523 & 146524, decided April 4, 2014)**(april'14).** In this case the Michigan Supreme Court considered the proper test for applying SCOTUS's decision in *Brady v Maryland*, 373 US 83 (1963). In *People v Lester*, 591 NW 2d 267 (1998), the Court of Appeals adopted a four-factor test that added a requirement of diligence on the part of the defense to the traditional *Brady* test. The Defendant in this case was denied a video recording of an interview with an incriminating witness. A month after trial, defense counsel moved for a new trial and requested the interview. The trial court granted Defendant's motion for a new trial, concluding that his due process rights had been violated under *Brady*. The COA reversed, analyzing the *Brady* claim using the four-factor test articulated in *Lester*. The Michigan Supreme Court held in this case that a diligence requirement is not supported by *Brady* or its progeny.

The Court overruled *Lester,* and reaffirmed the traditional three-factor *Brady* test. However, because Defendant could not establish that the suppressed evidence was material, the MSC denied his *Brady* claim and affirmed his convictions.

Expert, Appointment for Indigent Defendant. *People v McDonald,* 303 Mich App 424; __ NW2d __ (2013)**(dec'13)**. In this first-degree home invasion case, the trial court refused to approve additional funding so that Defendant's DNA expert (who would testify that Defendant was not a "major" donor with respect to DNA on a gun found near the location of Defendant's arrest), could testify at trial. Under the facts in this case, given the testimony of the prosecution DNA expert that the DNA evidence was "inconclusive" with respect to whether Defendant had touched the gun, the court held that Defendant was not able to show "that expert testimony would likely benefit the defense." It was thus not error to refuse the additional funding.

Pretrial Identification. *People v Woolfolk,* __ Mich App __; __ NW2d __ (No. 312056, 2014 WL 783564, decided February 27, 2014)**(feb'14)**. Years after a murder, police showed a witness a single photo of Defendant. Although conceding that this was "one of the most suggestive photographic identification procedures" the court held that under the totality of circumstances, including that the witness had identified Defendant by nickname prior to being shown a single photo, the procedure in this case did not deny due process. An independent basis was shown by the fact that the witness knew and grew up with the Defendant.

C. Confrontation, Counsel, and Other Trial Issues.

Counsel of Choice, Asset Restraint. *Kaley v United States,* __ US __; 134 S Ct 1090 (2014)**(feb'14).** The United States Supreme Court has held that pre-trial asset restraint is constitutionally permissible where there is probable cause that a defendant committed an offense allowing forfeiture, and the assets in question are traceable to, or related to, the offense charged. Here an order was entered freezing Defendants' assets after a federal grand jury returned an indictment for reselling stolen medical equipment and laundering the proceeds. Defendants sought to challenge the order so that they could use the frozen assets to retain counsel of choice. Although the district court allowed Defendants to challenge traceability of the assets at issue to the offenses charged, it refused to allow them to contest the underlying indictment. The Court agreed, holding that an indicted defendant cannot challenge a grand jury's finding of probable cause.

Counsel, Ineffective Assistance, Expert Witness. *Hinton v Alabama*, __ US __; 134 S Ct 10 (2013)**(nov'13).** Defendant was convicted of two murders where critical evidence was provided by state ballistics experts who testified that bullets found at the scene came from Defendant's gun. Trial defense counsel actually hired an expert who countered the state's ballistics testimony, but because he failed to realize that he could have asked the trial court for additional funding to retain a *competent* expert, trial defense counsel was unable to obtain a fully qualified expert. The United States Supreme Court focused on the need to investigate and hire a defense expert where the case warrants it. Citing a passage in *Harrington v Richter,* 562 US __, 131 S Ct 770, 788 (2011), the Court reiterated that "[c]riminal cases will arise where the only reasonable and available

defense strategy requires consultation with experts or introduction of expert evidence." And while noting that invalid forensic testimony can contribute to wrongful convictions, the *Hinton* Court stated that "this threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses." The Court concluded that trial defense counsel was constitutionally deficient for not investigating and retaining a qualified forensic expert to examine and testify regarding the prosecution's ballistics evidence.

Counsel, Ineffective Assistance, Investigating Defense Witnesses. *People v Herron,* 303 Mich App 392; __ NW2d __ (2013)**(dec'13)**. Defendant was convicted of breaking and entering with intent to commit larceny. He claimed defense counsel was ineffective for not investigating and calling several witnesses who would have backed his claim that the crime was a "call for help" and he did not intend to commit larceny. The court found that trial counsel's actions with respect to the witnesses were reasonable under the circumstances and, furthermore, the witnesses' hearing testimony did not produce a reasonable possibility of a different result and indeed "would have discredited defendant's defense." Thus both prongs of *Strickland* were not satisfied and Defendant's conviction was affirmed.

Counsel, Ineffective Assistance, Plea Withdrawal. *Burt v Titlow*, __ US __; 134 S Ct 10 (2013)**(nov'13).** Defendant and co-defendant Rogers were charged in the death of Rogers' husband. Original defense counsel negotiated a plea for Defendant to manslaughter in exchange for his testimony against Rogers. Immediately before Rogers' trial new defense counsel entered the case, and Defendant's plea was withdrawn. Defendant was subsequently convicted of murder and appealed, alleging ineffective assistance of new trial defense counsel in relation to the plea withdrawal. The Michigan courts affirmed, and the federal district court denied a habeas writ. The Sixth Circuit reversed and granted the writ, finding no evidence in the record that new defense counsel adequately advised Defendant concerning the consequences of plea withdrawal. The Sixth Circuit also concluded that the factual underpinning for the state court's decision – that plea withdrawal was based on Defendant's assertion of innocence – was an unreasonable view of the record. The United States Supreme Court reversed the Sixth Circuit and reinstated Defendant's conviction and sentence for second degree murder. The Court held that, under the Antiterrorism and Effective Death Penalty Act, double deference is owed the state courts on ineffective assistance of counsel issues, and that strict standard was not met here by Defendant. The decision of the state courts to affirm Defendant's conviction was reasonable, and was not "so lacking in justification that there was an error…beyond any possibility of fairminded disagreement." The Court criticized the Sixth Circuit for assuming counsel was ineffective from a silent record.

Double Jeopardy; 5th Amendment. *Martinez v Illinois*, __ US __; 134 S Ct ___ (2014)(**may'14).** The issue in this case was whether a defendant is acquitted, under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, where a court grants a motion for directed verdict after the prosecution refuses to present any evidence at trial to the empaneled and sworn jury. SCOTUS held that a defendant's

jeopardy begins when the jury is sworn, therefore retrial is prohibited under these circumstances.

Evidence, Concealed Pistol License in Felony Firearm Prosecution, Right to Present a Defense. *People v Powell,* 303 Mich App 271; 842 NW2d 538 (2013)**(nov'13).** Defendant was convicted of felony firearm (MCL 750.227b) in relation to an underlying possession with intent to deliver marijuana charge. The trial court granted a new trial because it abused its discretion in denying admission of evidence that Defendant had a Concealed Pistol License (CPL). The court of appeals agreed with this decision, reasoning that the fact Defendant had a valid CPL license was relevant as it shed light on a material point (a material fact does not need to be an element of a crime). A relevant fact in this case was whether defendant was using the handgun he possessed in a legal manner and the license was relevant on that score. Failure to allow introduction of this evidence denied Defendant's right to present a defense. The trial court properly granted a new trial under MCR 2.116(A)(1)(a) and would have been warranted in granting a new trial under MCR 6.431(B) as well.

Evidence, Hearsay, Forfeiture by Wrongdoing. *People v Burns,* 494 Mich 104; 832 NW2d 738 (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,* 301 Mich App 343; 836 NW2d 266 (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, Hearsay, Forfeiture by Wrongdoing. *People v Roscoe,* __ Mich App __; __ NW2d __ (No. 311851, 2014 WL 128114, decided January 14, 2014)**(jan'14).** Defendant was convicted of first degree felony murder. At his trial the court admitted a hearsay statement by the deceased under the forfeiture by wrongdoing rule. Under the rule there was a failure to show, as is required under the forfeiture rule, that Defendant had the specific intent to prevent the deceased from testifying when the killing occurred. Moreover the trial court abused its discretion by refusing to make a finding on this point.

However, Defendant's conviction was affirmed because the error here was not outcome determinative in light of other evidence in the case.

Evidence, Impeachment by Prior Conviction, Waiver. *People v McDonald,* 303 Mich App 424; __ NW2d __ (2013)**(dec'13).** Defendant was convicted of first-degree home invasion and other related crimes. The trial court ruled, pursuant to Defendant's motion in limine, that a prior first-degree home invasion conviction would be admissible for impeachment if Defendant took the stand. The court held that because Defendant did not take the stand at trial he waived the issue. A defendant must testify in order to preserve the issue of improper impeachment by prior conviction. The court reasoned that review of the claimed error, especially as to issues of harm and prejudice, if Defendant does not take the stand, and thus is not impeached by prior conviction, would be "burdened by the need to resort to speculation."

Evidence, Other Acts, 404(b). *People v Roscoe,* __ Mich App __; __ NW2d __ (No. 311851, 2014 WL 128114, decided January 14, 2014)**(jan'14)**. Defendant was convicted of felony murder after he and his cousin broke into an auto dealership where they had previously worked, stole paint materials, and killed a night worker who discovered them. At trial the prosecution admitted evidence of a series of thefts, including three from separate car dealerships. The court upheld admission of this evidence as it was "offered…to prove that defendant had a common scheme or plan, in that he breaks into businesses and steals items that when sold together have a higher resale value, which is a proper purpose under MRE 404(b)." The court noted that an appropriate limiting instruction was given.

Evidence, Police Statements during Interrogation Commenting on Witness Credibility. *People v Musser,* 494 Mich 337; 835 NW2d 319 (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.

Evidence, Spousal Privilege. *People v Szabo,* __ Mich App __; __ NW2d __ (No. 311274, 2014 WL 260312, decided January 3, 2014)**(jan'14)**. Defendant entered the home of his estranged wife armed with a rifle and fired several shots. He was charged with felonious assault and was bound over after his wife testified at his preliminary exam. After he asserted the spousal privilege the trial court dismissed charges. The court of appeals reversed and reinstated charges holding that under the spousal privilege statute, MCL 600.2162(3)(d) there was no privilege in this case since the charges arose from an assault by Defendant on his wife, and thus her testimony against her husband could be

compelled. Recent statutory changes led to the conclusion of the court that no statutory privilege exists at all under these circumstances.

Evidence, MRE 410, Statements in the Course of Plea Negotiations. *People v Smart,* __ Mich App __; __ NW2d __ (No. 314980, 2014 WL 537762, decided February 11, 2014)**(feb'14).** Defendant, charged with another crime, sought to negotiate with information he had concerning an unrelated homicide. In the course of plea discussions, in the presence of his attorney and the detective investigating the homicide, but not in the physical presence of the prosecutor, Defendant inculpated himself in the homicide, and was eventually charged with that crime. The trial court suppressed statements of Defendant made in two different conferences with the police detective under MRE 410, which prohibits admission of any "statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." The court of appeals, in a 2-1 decision, Wilder, J. dissenting, held that the prosecution had abandoned the issue of whether the prosecuting attorney had to be physically present when the statements at issue were made in the course of plea negotiations, and that, contrary to the prosecutor's assertions on appeal, Defendant had a reasonable expectation of negotiating a better plea deal during the second conference with the homicide detective. Therefore the majority upheld the trial court's suppression of Defendant's inculpatory statements at both conferences under MRE 410.

Fifth Amendment; Miranda. *People v Henry,* __ Mich App __ ; __ NW2d __ (2014 WL 1847784, Nos. 306449 & 308963, decided May 8, 2014)**(may'14).** Defendant's convictions arose out of a series of armed robberies in the Lansing area. Defendant argued that the trial court erred in allowing the prosecutor to introduce evidence of statements he made to police during a custodial interrogation. After police read defendant his rights and asked him if he was willing to "give up those rights and make a statement," defendant unequivocally stated "No sir." In doing so, defendant asserted his Fifth Amendment right to remain silent. In light of this unequivocal assertion of the right to remain silent, the trial court erred in holding defendant's statements to police admissible based on a subsequent waiver of rights. The court of appeals, however, ultimately held that this was harmless error in light of the "overwhelming evidence" against defendant, and affirmed the convictions.

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,* 494 Mich 260; 833 NW2d 308 (2013)**(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.

Instructions, Lesser Included Offenses. *People v Jones,* 302 Mich App 434 ; 839 NW2d 51 (2013)**(sep'13).** Defendant was charged with reckless driving causing death and requested an instruction on moving violation causing death. Despite MCL 257.626(5), which specifically prohibits such an instruction in a reckless driving causing death prosecution, the trial court granted the defense request. The majority opinion of the court of appeals upheld the decision of the trial court, holding MCK 257.626(5) unconstitutional because it violates the principle of separation of powers. The offense of moving violation causing death is clearly a necessarily included lesser offense of reckless driving causing death and the courts have held that necessarily included lesser offenses should be instructed upon on request. In dissent, Judge K.F. Kelly concluded that MCL 257.626(5) "neither deprives defendant of the right to a jury determination of all of the elements of the crime charged nor violates the principle of separation of powers." **On November 27, 2013 the Michigan Supreme Court granted the Wayne County Prosecutor's application for leave to appeal in this case, 495 Mich 905; 839 NW2d 490**

Instructions, Voluntary Manslaughter, Self-Defense. *People v Mitchell,* 301 Mich App 282 ; 835 NW2d 615 (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 Unanimity. *People v Chelmicki,* __ Mich App __ ; __ NW2d __ (2014 WL 1646443, No. 313708, decided April 24, 2014)**(april'14).** The COA held that no unanimity instruction is required where the prosecution presents alternate theories in attempting to prove the same element of a crime**.** Defendant argued that the trial court erred in instructing the jury with respect to unlawful imprisonment because the instruction, which gave jurors the option to convict based either on defendant's restraint of the victim by means of a weapon or dangerous instrument, or on defendant's restraint of the victim in order to facilitate the commission of another felony, violated his

"absolute constitutional right to be convicted only upon a unanimous jury verdict." A specific unanimity instruction *may* be required in cases where "more than one act is presented as evidence of the actus reus of a single criminal offense" and each act is established through materially distinguishable evidence that would lead to juror confusion. The COA affirmed the conviction in this case holding that "[w]hen a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory."

Right to Avoid Self-Incrimination; 5th Amendment. *White v Woodall*, __ US __; 134 S Ct 1697 (2014)(**april'14).** The defendant, after pleading guilty to capital murder, kidnapping and 1st degree rape, failed to testify at the penalty phase and was sentenced to death. The trial judge refused to issue the "no adverse inference" instruction at the penalty phase in this capital case, and held that, by entering a guilty plea in the guilt phase, defendant waived his right to be free from self-incrimination. The Kentucky Supreme Court affirmed. Later, the federal district court granted defendant's habeas petition, holding that the trial court did indeed violate defendant's 5th Amendment right by refusing the instruction, and the 6th Circuit affirmed that decision. SCOTUS disagreed in a 6-3 decision, holding that defendant's guilty plea negated the possibility of any adverse inference. Defendant had admitted to the elements of the case that the prosecution would otherwise have had to prove, and therefore there was no inference left for the jury to make. As such, the state courts' rejection of defendant's 5th Amendment claim was not objectively unreasonable and it was error to grant the writ.

Right of Confrontation. *People v Henry,* __ Mich App __ ; __ NW2d __ (2014 WL 1847784, Nos. 306449 & 308963, decided May 8, 2014)**(may'14).** Defendant's convictions arose out of a series of armed robberies in the Lansing area. Defendant was first made a suspect by use of a confidential informant. The officer testified that the confidential informant "came forward with the defendant's name," and that he came to believe that defendant was responsible for two robberies based on what the informant said. Because defendant did not have a prior opportunity to cross-examine the informant, admission of the out of court statements was improper and violated the Confrontation Clause. The court, however, ultimately held that it was harmless error in light of the "overwhelming evidence" against defendant and affirmed the convictions.

Verdict, Inconsistent. *People v Powell,* 303 Mich App 271; 842 NW2d 538 (2013)**(nov'13).** Defendant was convicted of felony firearm (MCL 750.227b) in relation to an underlying possession with intent to deliver marijuana charge. Defendant argued that the felony firearm statute was unconstitutional as applied to him because the jury acquitted him of the underlying possession with intent to deliver charge. The court of appeals found that because the instructions were proper, and since a jury may reach different conclusions on an identical element in two different offenses, the inconsistent verdicts could stand. However, the appellate court upheld the grant of a new trial because the trial court abused its discretion in denying admission of evidence that Defendant had a Concealed Pistol License (CPL).

Witness Unavailability for Purpose of Admitting Prior Testimony. *People v Duncan,* 494 Mich 713; 835 NW2d 399 (2013)**(july'13).** Defendant's wife ran a day care and both Defendant and his wife were charged with first degree criminal sexual conduct and other crimes. The complainant, RS, testified to improper sexual activity at both Defendants' preliminary exams when she was three years old. At trial she was declared incompetent to testify, however, because she professed not to know the difference between the truth and a lie and was agitated and crying. The prosecutor urged the trial court to allow admission of complainant's exam testimony under MRE 804(a), specifically due to lack of memory (the prosecutor switched to arguing RS suffered from a mental illness or infirmity during appellate proceedings). The trial court held none of the five situations of unavailability enumerated in MRE 804(a) applied to RS and refused to allow the prior exam testimony (the other three situations where prior testimony is allowed are 1) declarant is exempted from testifying by privilege, 2) declarant refuses to testify or 3) declarant is absent notwithstanding due diligence to procure attendance). The court of appeals upheld the trial court, citing the difference between incompetence of a witness (witness does not have sufficient physical or mental capacity to testify truthfully) and unavailability (declarant unable to testify due to mental illness or infirmity). The supreme court, with Justice Markman concurring and Justice Cavanagh dissenting, focusing on "mental infirmity," reversed, first recognizing the "unique mental and emotional limitations of youth" and concluding that RS's significant emotional distress rendered her unavailable within the plain meaning of MRE 804(a)(4).

D. Crimes and Offenses, Sufficiency.

Aiding and Abetting, Intent Requirement, Federal Gun-Drug Trafficking Charge. *Rosemond v United States,* __ US __; 134 S Ct 1240 (2014)**(march'14).** Defendant was charged, in the alternative, with aiding and abetting a federal gun/drug trafficking offense. The Defendant's conduct in facilitating the drug offense was sufficient to establish the affirmative act requirement for aiding and abetting the entire offense, include the gun aspect. However, the intent requirement extends to the whole crime, and it must be proven that Defendant knew in advance that one of his comrades would carry a gun. This knowledge must adhere at a point in time where Defendant could have abandoned the criminal enterprise. The trial court's instruction allowing conviction if Defendant simply knew a co-defendant had used a gun during the crime was erroneous.

Assault with Intent to do Great Bodily Harm Less than Murder, Sufficiency. *People v Dillard,* 303 Mich App 372; __ NW2d __ (2013)**(dec'13).** Defendant and his "then-girlfriend" got into an argument after a night of drinking and drug use, ending in Defendant causing "extensive injuries" to complainant. Defendant challenged the sufficiency of evidence as to intent, claiming the crime was at most aggravated assault. The court of appeals disagreed, holding that the injuries suffered by the complainant and the fact that "defendant apparently ceased his assault only because he feared that it had been detected by someone else" supported the jury's finding on intent.

Child Abuse, Failure to Report, Clergy-Parishioner Privilege. *People v Prominski,* 302 Mich App 327; 839 NW2d 32 (2013)**(aug'13).** Defendant was charged with failure to report child abuse after a mother went to him in his role as her pastor to confidentially discuss her suspicions that her husband was engaging in improper sexual activity with her daughters. Engaging in statutory interpretation, the court of appeals affirmed the dismissal of charges. Even though this was not in the nature of a confession, MCL 722.631 and MCL 767.5a(2) absolve the clergy from reporting this type of confidential communication from a parishioner.

Criminal Sexual Conduct, Third Degree, Teachers and Students. *People v Lewis,* 302 Mich App 338; 839 NW2d 37 (2013)**(aug'13).** MCL 750.520d(1)(e)(i) and (ii) defines a crime of third degree CSC if a student between the ages of 16 and 18 has sex with a teacher, substitute teacher or administrator or an employee or contractual service provider for the school. The trial court threw out the charges because the sexual acts in question took place during the summer while school was out of session. Conducting statutory interpretation the court of appeals disagreed and reinstated the charges, holding that if all of the other requirements of the statute were met, it did not matter whether school was in or out of session at the time of the sexual acts.

Dangerous Animal, Specific Intent. *People v Janes,* 302 Mich App 34 ; 836 NW2d 883 (2013)**(july'13).** Defendant was charged with ownership of a dangerous animal after a pit bull he had adopted from a shelter attacked a child. The issue was whether the offense carried strict liability or required proof of criminal intent. Agreeing with the trial court the court of appeals, after statutory interpretation, concluded that "the prosecutor must prove beyond a reasonable doubt that the owner knew that his or her animal was a dangerous animal within the meaning of MCL 287.321(a) prior to the incident at issue." The pertinent statutory language demands that the animal "must meet the definition of a dangerous animal prior to and throughout the attack giving rise to criminal liability." Judge Jansen in dissent would hold that the statute carried strict liability.

Defenses, Entrapment. *People v Vansickle,* 303 Mich App 111; 842 NW2d 289 (2013)**(sep'13).** By chance Defendant ran into undercover officers at a medical marijuana dispensary, and after engaging in "friendly banter" with the officers, who had shown false medical marijuana cards to the dispensary staff, offered to sell them his overage, an exchange which took place in the parking lot. Defendant argued he was entrapped but the court disagreed. After outlining the requirements for a finding of entrapment, and the factors to consider in determining whether the requirements were met, the court found that there was no entrapment as "the officers did not appeal to defendant's sympathy, offer him any unusually attractive inducements or excessive consideration, or use any other means to pressure defendant to sell them marijuana."

Driving Under the Influence, Listed Controlled Substance. *People of Township of Bloomfield v Kane,* 302 Mich App 170; 839 NW2d 505 (2013)**(aug'13).** Defendant was charged with driving under the influence of Zolpidem, a sedative used to treat insomnia, but the charges were dismissed by the circuit court because Zolpidem was not listed in the controlled substances act (MCL 333.7101). The court of appeals reversed and

reinstated charges, holding that the Michigan Vehicle Code references the Public Health Code, which in turn delegates classification of drugs not already listed in the code through administrative rules to the Board of Pharmacy. Because this process effectively listed Zolpidem as a schedule 4 controlled substance under R338.3123(aaa), it was error to dismiss the charges.

Extortion, Hobbs Act, Sufficiency. *Sekhar v United States,* __ US __; 133 S Ct 2720 (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.

Extortion, Serious Consequence to Victim. *People v Harris,* __ Mich __ ; __ NW2d __ (2014 WL 1327832, No. 146212, decided April 3, 2014)**(april'14).** The Michigan Supreme Court overruled two court of appeals decisions (*People v Fobb and People v Hubbard)* which previously held that an extortion conviction under the "against his will" prong of MCL 750.213 may only be maintained when the act defendant sought to compel entailed "serious consequences" to the victim. Here, Defendant was convicted of extortion after he threatened a mechanic unless the mechanic resumed working on defendant's truck in the rain. Defendant, relying on *Fobb and Hubbard*, argued that he could not be convicted of extortion because the act defendant sought to compel—the mechanic's continued work on the truck—was not of serious consequences to the mechanic. In overruling *Fobb* and *Hubbard*, the MSC explained that the plain language of the extortion statute defines extortion in terms of whether the defendant maliciously threatened a person with harm in order to "compel the person so threatened to do . . . any act against his will." Therefore, the act does not need to be of serious consequence to the victim.

Federal Chemical Weapons Prohibition – Overreach. *Bond v United States,* __ US __ (2014 WL 2440534, No. 12-158, decided June 2, 1014)**(june'14).** Bond was prosecuted under the federal Chemical Weapons Convention Implementation Act of 1998 after infecting her husband's mistress with a chemical that would cause an uncomfortable rash. The Court held that this simple assault was covered under state statutes and the federal chemical weapons act, designed to deal with terrorism, assassination and chemical warfare, was an overreach here. Federal prosecution under the act in this instance violated basic principles of federalism under the constitution.

Firearm Possession, Federal Prohibition after Misdemeanor Crime of Domestic Violence. *United States v Castleman,* __ US __ (2013 WL 1225196, No. 12-1371, decided March 26, 2014)**(march'14).** 18 USC §922(g)(9) prohibits possession of a firearm by anyone convicted of a "misdemeanor crime of domestic violence." Defendant was convicted of the misdemeanor offense of intentionally and knowingly causing bodily injury to the mother of his child in Tennessee state court. He argued that this conviction was not sufficient to invoke the firearm ban since it did not involve the use of physical

force. The federal district court and the Sixth Circuit agreed. The Court reversed, however, holding that §922(g)(9)'s "physical force" requirement is satisfied by the degree of force supporting a common law battery conviction – offensive touching.

Larceny from Person, Taking in Presence, Sufficiency. *People v Smith-Anthony,* 494 Mich 669; 837 NW2d 415 (2013)**(july'13).** A loss prevention officer followed Defendant around a Macy's store in Southfield at some length until observing Defendant shoplift some merchandise, later apprehending Defendant outside the store with some difficulty. The court of appeals, in a split opinion, reversed Defendant's conviction of larceny from the person under MCL 750.357, holding that there was insufficient evidence that the larceny was "from the person" since the loss prevention officer "never testified that she was even within arms length of defendant." 296 Mich App 413; 821 NW2d 172 (2012). Using statutory interpretation and examining the meaning of the phrase "from the person" under common law, the supreme court, in a 4-3 opinion, upheld the court of appeals majority, concluding that "the immediate presence test can only be satisfied if the property was in immediate proximity to the victim at the time of the taking." In this case the facts make it clear that the loss prevention officer was far enough away from Defendant at the time of the theft so that there was no immediate presence or proximity. The current standard jury instruction, CJI2d 23.3, allowing conviction if property was within the "immediate area of control" of the victim, was disavowed. Nor does the constructive presence doctrine, obviating the need to show immediate presence where a victim was by force or threat of force removed from or kept away from their property, apply here as the force in this case occurred well after the theft had been completed.

Pandering, Sufficiency. *People v Norwood,* 303 Mich App 466; __ NW2d __ (2013)**(0ct'13).** John Norwood and co-defendant Nicole Hagar sought to persuade an undercover police decoy to relocate to Florida to engage in prostitution and pornography in return for substantial inducements. The district court refused to bind over on a pandering charge, and the circuit court affirmed. After detailing the elements outlined in the offense of pandering under MCL 750.455, an offense carrying a more severe penalty (20 year maximum) than other prostitution related offenses, the court of appeals reversed. The court held that since one of the sections of the pandering statute specifically prohibits encouraging "a female person to…leave this state for the purpose of prostitution" the facts supported the charge here, and the court ordered reinstatement.

Resisting an Unlawful Arrest. *People v Quinn,* __ Mich App __ ; __ NW2d __ (2014 WL 2219246, No. 309600, decided May 29, 2014)**(may'14).** Quinn was charged with resisting arrest. Although Quinn had committed no crime, the arresting officer felt that Quinn was evading her and, because there had been a rash of thefts in the area, felt the need to detain him. At the time of the conviction a lawful arrest was not required to convict of resisting. After Quinn's conviction a new rule was announced in *People v Moreno,* 491 Mich 38; 814 NW2d 624 (2012) which re-established the common-law rule that a person may rightfully resist an unlawful arrest. The first issue on appeal was whether *Moreno* should be applied retroactively and the COA held it should be in cases where a defendant raised the issue on appeal and either the defendant preserved it in the trial court or the defendant can demonstrate plain error affecting substantial rights under

Carines. *Moreno* established that the prosecution must show that the officers acted lawfully as an actual element of the crime of resisting and obstructing a police officer, a question of fact for the jury. Because the jury in this case was not instructed that it should determine whether the officer's actions were lawful the COA remanded for a new trial.

"Sport Shooting Range" as defined by MCL 691.1541 (SSRA). *Addison Township v Barnhart,* __ Mich __ ; __ NW2d __ (2014 WL 1303081, No. 145144, decided April 1, 2014)**(april'14).** Defendant was issued a misdemeanor citation for operating a shooting range without a zoning compliance permit. At issue at trial and on appeal was the definition of "sport shooting range" under the sport shooting range act (SSRA). This designation was critical because, under MCL 691.1542a(2), a sport shooting range that was in existence as of July 5, 1994, that operates in compliance with the generally accepted operation practices—even if not in compliance with an ordinance of a local unit of government—shall be permitted within its preexisting geographic boundaries to undertake additional actions that are authorized under the generally accepted operation practices. Under MCL 691.1541(d), a "sport shooting range" is an area designed and operated for the use of archery, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting. The case bounced between district and circuit court on appeal before the lower courts ultimately held that Defendant's range was not a sport shooting range. The COA upheld this ruling focusing on a commercial purpose analysis, but the MSC reversed. The Court held that, in determining whether a range is a sport shooting range under the SSRA, the focus is on the design and operation of the range, not on the intentions of individual shooters in using the range. A range owner's commercial purpose for operating the range is also irrelevant. The court held that Defendant's range was entitled to protection under the statute and ordered that the charge be dismissed.

Unlawful Imprisonment, Sufficiency. *People v Kosik,* 303 Mich App 146; 841 NW2d 906 (2013)**(nov'13).** Defendant accosted the complainant, an employee in a shoe store, put his arm around her, walked her into a conference room in the store, and closed the door. The room had no windows. After asking a few questions, Defendant tried to convince the complainant that he was "joking," and left. Defendant asserts that the evidence was insufficient to convict him of unlawful imprisonment. The court of appeals, agreeing with the trial court, who had denied Defendant's motion for judgment of acquittal, held that the duration of confinement was insignificant, and that here the confinement was secret. The evidence supported the conviction of unlawful imprisonment.

E. Sentencing.

***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 violence 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.

***Apprendi,* Enhancement by Facts Not Found by Jury, Mandatory Minimum.** *People v Herron,* 303 Mich App 392; __ NW2d __ (2013)**(dec'13)**. In the wake of the United States Supreme Court's decision in *Alleyne v United States,* __ US __; 133 S Ct 2151 (2013), Defendant argued that *Apprendi* should now apply to statutory minimum sentencing ranges. The court of appeals disagreed, largely on the basis that because of the departure ability, the minimum ranges set by Michigan's statutory guidelines are not mandatory.

***Apprendi,* Enhancement by Facts Not Found by Jury, Mandatory Minimum.** *People v Lockridge,* __ Mich App __; __ NW2d __ (No. 310649, 2014 WL 563648, decided February 13, 2014)**(feb'14).** In two separate and complex concurrences in this manslaughter case, Judges Beckering and Shapiro firmly disagree with the conclusion in *People v Herron,* 303 Mich App 392; __ NW2d __ (2013) that *Apprendi* remains inapplicable to sentencing guidelines in Michigan in the wake of *Alleyne v United States,* __ US __; 133 S Ct 2151 (2013). Both concurring judges agreed, however, that they were bound to follow *Herron*.

Crime Victim Rights Assessment, Ex Post Facto. *People v Earl* __ Mich __ ; __ NW2d __ (2014 WL 1242373, No. 145677, decided March 26, 2014)**(march'14).** Defendant was assessed $130 for a crime victim rights fee, though the assessment was in fact $60 when Defendant committed his crime and was later enhanced by statute. Defendant argued that the increase fee violated constitutional prohibitions on ex post facto laws. In *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012), the court of appeals held that the imposition of the increased assessment for offenses committed before that law's effective date "is not a violation of the ex post facto constitutional clauses." The court 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. Subsequently, in an opinion by Justice Cavanagh, the supreme court affirmed the court of appeals.

Departure from Mandatory Minimum. *People v Payne,* __ Mich App __; __ NW2d __ (No. 314816, 2014 WL 1386871 decided April 8, 2014)**(april'14).** Under MCL 750.520b(2)(b) a defendant 17 years of age or older convicted of CSC 1 where the

complainant is less than 13 must be sentenced to a flat mandatory minimum sentence of 25 years. Here the Defendant was 17 and a half years of age, and the complainant was 5 years old. The court sentenced Defendant to 30 to 50 years in prison without articulating substantial and compelling reasons for departure from the mandatory minimum. Defendant was mentally ill but the jury rejected his defense of insanity. The court of appeals rejected the prosecutor's argument that the statutory directive that the sentence be "not less than 25 years" eliminated the need to articulate reasons for a higher minimum. Because the Defendant's guideline range was below the mandatory minimum, any sentence beyond the 25 years must be supported by substantial and compelling reasons and the case was remanded for resentencing. The court rejected Defendant's claim that his sentence was cruel and unusual under *Miller v Alabama*.

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.

Guidelines, Departure. *People v Lockridge,* __ Mich App __; __ NW2d __ (No. 310649, 2014 WL 563648, decided February 13, 2014)**(feb'14)**. Defendant was convicted of manslaughter in the death of his wife. The trial court departed from the guidelines and sentenced Defendant to eight to fifteen years. The court of appeals held that the following reasons for departure were objective and verifiable, and compelling, and adequately supported the sentence given: "1) that defendant violated court orders regarding contact with the victim; (2) that the sentencing guidelines did not reflect the extent of defendant's prior altercations with the victim; (3) that defendant killed the victim in the presence of their children, and then left the residence while the children attempted to revive the victim; and (4) that during and after the offense, defendant showed no concern for the physical or emotional well-being of the children."

Juveniles, Mandatory Life Without Parole, Cruel and Unusual, Birthday Rule. *People v Woolfolk,* __ Mich App __; __ NW2d __ (No. 312056, 2014 WL 783564, decided February 27, 2014)**(feb'14).** Defendant argued that his mandatory sentence of life imprisonment without the possibility of parole is cruel and unusual punishment. The murder for which Defendant was charged took place on the night prior to his 18th birthday, and after an exhaustive analysis the court adopted the "birthday rule" in Michigan, which deems that Defendant turned 18 years of age on the date of his birth and not on the day prior per the common law rule. Thus the court held that *Miller v Alabama*, 567 US ___, 132 S Ct 2455, 2469 (2012) applied to Defendant's case. In that case, 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. Remand for resentencing under *Miller* was ordered.

OV 1, Aggravated Use of a Weapon. *People v Brooks,* __ Mich App __; __ NW2d __ (No. 312639, 2014 WL 625764, decided February 18, 2014)**(feb'14)**. OV 1 provides 5 points for display of a weapon (a knife in this case) and 15 points if the weapon is used to threaten the complainant. Noting that the distinction between these points is a question of first impression, the court concluded that it hinges on "whether the defendant in any way suggests, by act or circumstance, that the weapon might actually be used against the victim." In this case, despite a less than clear factual context, the court concluded that, under the clear error standard for reviewing the trial court's factual findings, it could not conclude that an error occurred here. The assignment of 15 points for OV 1 was upheld.

OV1, OV2; Meth Lab as a Weapon. *People v Gary,* __ Mich App __ ; __ NW2d __ (2014 WL 1508513, No. 314878, decided April 17, 2014)**(april'14).** Defendant pled guilty to operating a meth lab. He had purchased assorted items to be used in creating meth, but did not participate in any other way. The meth lab exploded, seriously injuring a co-defendant. The Court held that both OV1 and OV2 were improperly scored because there was insufficient evidence that either the meth or the lab was used as a weapon. Specifically, the COA held that "involvement in, or exposure to, a methamphetamine lab or its constituent parts, even if an explosion occurs, without more, does not constitute the use of a weapon under OV 1." OV 2 concerns weapons, and since the COA held that the meth lab was not a weapon it was clearly error to score it at 15 points.

OV 3. *People v Armstrong,* __ Mich App __ ; __ NW2d __ (2014 WL 1909995, No. 312301, decided May 13, 2014)**(may'14).** The COA held that bodily injury alone is insufficient evidence to score 10 points under OV 3. OV 3 concerns physical injury and injuries requiring medical treatment are scored at 10 points while injuries that do not require medical treatment are properly scored at 5 points. The complainant in this CSC case indicated that her hymen was reddened and tender from the assault, but never testified that she received any treatment. As such, scoring 10 points here for OV 3 was improper, and the COA remanded for resentencing.

OV 7, Aggravated Physical Abuse. *People v Hardy,* 494 Mich 430; 835 NW2d 340 (2013)**(july'13).** 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 *Hardy,* which was consolidated with *People v Glenn,* the court of appeals issued an unpublished order (November 18, 2011, Docket No. 306106) denying leave to appeal Hardy's plea-based conviction and sentence for carjacking after he was assessed 50 points for OV 7 because he racked a shotgun during commission of the crime. In *People v Glenn*, 295 Mich App 529; 814 NW2d 686 (2012), defendant was convicted of armed robbery and felonious assault. While the court of appeals' panel 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." The court of appeals found that nothing defendant did here qualified under OV 7, and therefore it was error to assess 50 points. The supreme

court, with Justice Cavanagh dissenting in part, upheld the scoring in *Hardy* and reversed the court of appeals in *Glenn.* The supreme court began by clarifying the standard of review for a guidelines scoring issue: "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." Using statutory interpretation principles the court determined "that it is proper to assess points under OV 7 for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount." The majority felt that the conduct in both cases met this test, and therefore it was proper to score 50 points for OV 7 in both instances. Justice Cavanagh, in partial dissent, urged that the phrase "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense" should be "of the same class as sadism, torture, and excessive brutality."

OV 8, Victim Asportation or Captivity. *People v Kosik,* 303 Mich App 146; 841 NW2d 906 (2013)**(nov'13)**. Defendant challenged 15 points under this OV for conduct occurring during the commission of the offense of unlawful imprisonment. The guidelines statute specifically exempts convictions of kidnapping from scoring under OV 8, but the court of appeals held that unlawful imprisonment is a distinct offense from kidnapping and can be scored under this variable.

OV 8, Victim Asportation or Captivity. *People v Dillard,* 303 Mich App 372; __ NW2d __ (2013)**(dec'13).** In this Assault with Intent to do Great Bodily Harm case, there was sufficient asportation to score OV 8 at 15 points where the complainant was moved from Defendant's driveway to his apartment during the assault.

OV 10, Exploitation of Vulnerable Victim, Predatory Conduct. *People v Kosik,* 303 Mich App 146; 841 NW2d 906 (2013)**(nov'13).** Where Defendant "investigated" the store where complainant was working before unlawfully imprisoning her, waiting until complainant was alone, his conduct was sufficient to score 15 points under OV 10.

OV 10, Exploitation of Vulnerable Victim. *People v Dillard,* 303 Mich App 372; __ NW2d __ (2013)**(dec'13).** In this Assault with Intent to do Great Bodily Harm case, the court held that OV 10 was properly scored at ten points where "the victim was clearly 'vulnerable' in light of defendant's greater strength, her intoxication, and the domestic relationship between the two."

OV 14. *People v Rhodes,* __ Mich App __ ; __ NW2d __ (2014 WL 1797658, No. 310135, decided May 6, 2014)**(may'14).** This case was before the COA on remand from the MSC after the MSC decided *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). *Hardy* rejected the "any evidence" standard used in scoring OV 14 (which is scored at either ten points or zero points, depending on whether the defendant was a leader in a multiple offender situation when considering the entire criminal transaction) and announced a "preponderance of the evidence" standard. The Court held that OV 14

was improperly scored in this case using this new standard as defendant's exclusive possession of a weapon did not make him a leader by a preponderance of the evidence.

OV's 16 and 19 and Waiver, Generally. *People v Hershey,* 303 Mich App 330; __ NW2d __ (2013)**(dec'13).** Defendant was convicted of failure to pay child support and sentenced to 3 ½ to 15 years in prison. OV 16 and 19 were scored at five and ten points respectively, and there was no objection to, or discussion on, the scoring of these variables at sentencing. Defendant later filed a motion for resentencing, arguing that , as to OV 16, failure to pay child support did not constitute property "obtained, damaged, lost or destroyed" and that, as to OV 19, failing to pay child support alone did not "interfere with the administration of justice." The trial court denied the motion, adopting the prosecution reasoning that Defendant waived the issues by failing to object at sentencing and that, in any event, the scoring decisions were correct. The court of appeals held that OV 16 was improperly scored as that variable requires loss of something that was already possessed. OV 19 was also improperly scored as Defendant did not interfere with the administration of justice by failing to pay child support or by violating his probation. In part because defense counsel never registered satisfaction with the scoring at issue at sentencing, the court of appeals ruled that the issue was not waived, and because the offense variable issues were raised in a motion for resentencing before the trial court, the argument was preserved and Defendant is entitled to resentencing.

Restitution, Hearsay, Calculation of Amount. *People v Matzke,* 303 Mich App 281; 842 NW2d 557 (2013)**(nov'13).** Defendant was convicted of larceny of property between $1,000.00 and $20,000.00. Although he returned the property (a gas-oil separator) to complainant, there was damage that was proved, at a restitution hearing, partly through hearsay evidence, and the court ordered restitution in the amount of $4,580.00. The court of appeals, after noting that the rules of evidence do not apply to sentencing hearings under MRE 1101(b)(3), held that the trial court properly determined the amount of restitution and that restitution must be ordered unless an exception applies. **On January 31, 2014 the Michigan Supreme Court held an application for leave to appeal in this case in abeyance pending the decision in *People v McKinley*, MSC No. 147391, which will decide "whether an order of restitution is equivalent to a criminal penalty."**

Restitution for Victims' Travel Expenses. *People v Garrison,* __ Mich __ ; __ NW2d __ (2014 WL 2219269, No. 146626, decided May 29, 2014)**(may'14).** Defendant stole property from various vacation homes in Cheboygan County. While the case was pending, three victims of defendant's theft traveled back and forth from their primary residences in order to secure their stolen property and attend a restitution hearing. At the hearing, the victims testified that they had incurred travel expenses related to these trips in the amount of $1,125. The sentencing court included $977 of this amount in its restitution order over defense counsel's objection. Defendant appealed, and the COA reversed the lower court on this issue. This case involves two related statutory schemes: the William Van Regenmorter Crime Victim's Rights Act (CVRA) and Michigan's general restitution statute. The issue was whether these statutes authorize courts to order restitution for the reasonable travel expenses that victims incur from the crime against

them. The MSC concluded that the statutes do authorize travel expense payments because they require courts to order full restitution that is "complete and maximal."

Restitution for Victims' under §2259. *Paroline v United States*, __ US __; 134 S Ct 1710 (2014)(**april'14).** Restitution to the respondent, who was sexually abused as a young girl leading to the production of child pornography, is proper under 18 U.S.C. § 2259 only to the extent the defendant, who possessed images of the victim in this case, was the *proximate cause* of the victim's losses. Victims should be compensated and defendants should be held accountable for the impact of their conduct on those victims, but defendants should only be made liable for the consequences of their own conduct, not the conduct of other offenders.

F. Miscellaneous.

Commutation. *Makowski v Governor,* __ Mich __; __ NW2d __ (2014 WL __, No. 146867, decided June 3, 2014)**(june'14).** In this case Governor Jennifer Granholm granted a commutation to Matthew Makowski shortly before leaving office, then rescinded it four days later after a public uproar. The MSC held that the commutation was final when it was signed, sealed and delivered to the department of corrections. The constitution does not empower the governor to revoke a commutation once it has become final, and the court ordered that Makowski's commutation be reinstated.

Extradition, Juvenile Proceedings. *In re Boynton,* 302 Mich App 632; 840 NW2d 762 (2013)**(oct'13).** Petitioner Boynton, age 12 at the time of the extradition request at issue, lived with his mother in Michigan and had spent time with his godfather in Georgia. Toward the end of his stay in Georgia officials there began an investigation and eventually issued an arrest warrant on charges that Petitioner sexually molested a four-year-old child. The question of first impression was whether the Uniform Criminal Extradition Act, adopted in Michigan at 780.1 *et seq.,* applies to juveniles. The court, after examining authority in other states, held that because the act refers to a "person" without age indication, juvenile proceedings, which are criminal in nature, are covered, and Michigan was bound to honor Georgia's extradition request. Other challenges to extradition here were turned away as well.

Federal Controlled Substances Act, Penalty Enhancement. *Burrage v United States,* __ US __; 134 S Ct 881 (2014)**(jan'14).** Burrage sold heroin to the deceased, who in turn engaged in a drug binge using that heroin and a number of controlled substances not provided by Burrage. §841(b)(1)(C) of the federal Controlled Substances Act adds an enhanced penalty (20 year mandatory minimum) if death "resulted from" use of the substance at issue. Because the proofs here showed that the heroin provided by Burrage was not the "but-for cause" of death, his conviction on the enhanced sentence provision was improper, and the trial court erred in instructing the jury that the Government only had to prove that the Burrage heroin was a contributing cause of death.

Freedom of Information Act, Oakland County Child Killings. *King v Michigan State Police Department,* 303 Mich App 162; 841 NW2d 906 (2013)**(nov'13);** *King v Oakland County Prosecutor,* 303 Mich App 222; 842 NW2d 403 (2013)**(nov'13)**. These cases

involve attempts by relatives of the last of four victims in the Oakland County Child Killings (OCCK), arising from the abduction and killing of four children in 1976 and 1977, to obtain case file information. In the MSP case the court ruled that the trial court properly upheld denial of requests for polygraph reports, and detailed other financial and summary disposition aspects of the FOIA statute. In the case involving the Oakland County Prosecutor the court majority found that the trial court properly affirmed denial of information based on the "law-enforcement-purposes exemption" claiming that release of information would hamper an ongoing investigation. The court also held that the Oakland County Prosecutor did not violate the Crime Victims' Rights section of the Michigan Constitution, added in 1988, because it applies to crimes committed after that date, and because, even if applicable, it does not provide a right to confer with the prosecutor until after charges are filed. Judge Murray, concurring and dissenting, would send the case back to the trial court for more particular findings.

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.

Michigan Medical Marijuana Act (MMMA), Brownies. *People v Carruthers,* 301 Mich App 590; 837 NW2d 16 (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 was 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), Dispensaries. *People v Johnson et al,* 302 Mich App 450; 838 NW2d 889 (2013)**(sep'13).** Defendants, all involved in running a marijuana dispensary, were prosecuted on multiple counts of delivery, possession, and conspiracy to deliver marijuana after undercover officers were sold marijuana and THC at the dispensary. The trial court granted a motion to dismiss as to all defendants, finding the MMMA ambiguous and applying the rule of lenity. The court of appeals reversed and reinstated charges, holding that defendants never argued how the various provisions

of the MMMA exempted them from prosecution, the MMMA did not authorize dispensaries, and because there was no ambiguity on these points the rule of lenity did not apply. The panel further held that the court of appeals' decision in *Michigan v McQueen*, 293 Mich App 644; 811 NW2d 513 (2011), holding that the activities of dispensaries were not protected under the act, was properly applied retroactively as it did not operate as an ex post facto law.

Michigan Medical Marijuana Act (MMMA), Immunity and Defenses under Sections 4 and 8. *People v Hartwick,* 303 Mich App 247; 842 NW2d 403 (2013)**(nov'13).** In this detailed opinion, authored by Judge Saad and joined by Judge Sawyer (Judge Jansen concurred in the result only), substantial additional requirements are put in place for defendants attempting to assert Section 4 immunity or Section 8 defenses under the MMMA. The court first held that, despite the presumption under Section 4(d) that a defendant is engaged in the medical use of marijuana if he has a valid patient or primary caregiver registration card, and thus is entitled to immunity, a defendant must nonetheless introduce evidence of "his patients' medical conditions; (2) the amount of marijuana they reasonably required for treatment and how long the treatment should continue; and (3) the identity of their physicians." Since Defendant Hartwick did not produce this evidence at an evidentiary hearing, he was not entitled to Section 4 immunity. Likewise, in order to assert a Section 8 defense, a defendant caregiver must show that there is an ongoing relationship between his patients and their physicians, know how much marijuana a patient has been prescribed and how long the patient should be using the drug, and "ensure the marijuana sold by the caregiver is actually being used by the patient for medical reasons." An application for leave to appeal has been filed in the Michigan Supreme Court and is currently pending.

Michigan Medical Marijuana Act (MMMA), Immunity and Defenses under Sections 4 and 8. *People v Tuttle,* __ Mich App __; __ NW2d __ (No. 340888, 2014 WL 340888, decided January 30, 2014)**(jan'14)**. Defendant, a licensed patient and certified caregiver for two other patients under the MMMA, sold marijuana to an undercover officer who presented ostensibly legitimate MMMA documentation, but who was not connected to Defendant in a patient-caregiver relationship through the registration process. The failure to properly register as a caregiver for an individual to whom marijuana was transferred denied Section 4 immunity, despite the fact that Defendant had an amount of marijuana justified by his own and his two patients' proper registration. The court also upheld the trial court's denial of a Section 8 defense, holding that proper registration does not establish knowledge of a "bona fide physician-patient relationship," or knowledge of the amount of marijuana needed to treat a particular patient, or knowledge that the marijuana at issue was used to treat a serious medical condition, all of which are required to establish a Section 8 defense. The deciding panel was the same as that in *People v Hartwick,* 303 Mich App 247; 842 NW2d 403 (2013), and the decision in *Hartwick* was endorsed by the majority. Judge Jansen again concurred in the result only. An application for leave to appeal has been filed in the Michigan Supreme Court and is currently pending.

Michigan Medical Marijuana Act (MMMA), Patient-to-Patient Sales, Ex Post Facto. *People v Vansickle,* 303 Mich App 111; 842 NW2d 289 (2013)**(sep'13).** The trial court did not err in prohibiting reference to the MMMA in Defendant's delivery of marijuana trial since, per *Michigan v McQueen*, 293 Mich App 644 (2011), *aff'd on other grds* at 493 Mich 142 (2013), patient-to-patient sales are not permitted under the MMMA. Moreover, this is not an ex post facto due process violation since the delivery of marijuana was and continues to be a violation of the Public Health Code, MCL 333.1101 *et seq.*

Michigan Medical Marijuana Act (MMMA), Questions of Fact, Judge or Jury; Michigan Residency Requirement. *People v Jones,* 301 Mich App 566; 837 NW2d 7 (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 residency is a prerequisite to issuance of a valid registry identification card under the MMMA.

Michigan Medical Marijuana Act (MMMA), Zoning, Preemption. *Ter Beek v City of Wyoming,* 495 Mich 1; __ NW2d __ (2014)**(feb'14).** 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. In *Ter Beek v City of Wyoming,* 297 Mich App 446; 823 NW2d 864 (2012), 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. The Michigan Supreme Court granted leave to appeal in April, 2013, and subsequently, in an unanimous opinion authored by Justice McCormack, upheld the court of appeals, finding that the city zoning code was preempted by the MMMA when in conflict, and that the MMMA is not subject to federal preemption by the federal Controlled Substances Act (CSA), 21 USC 801 *et seq.,* on either impossibility or obstacle conflict preemption grounds. See 21 USC 903.

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.

Sex Offender Registration, Federal SORNA. *United States v Kebodeaux,* __ US __; 133 S Ct 2496 (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.

Trespass on Miltary Base. *United States v Apel,* __ US __; 134 S Ct 1144 (2014)**(feb'14).** The statutory provision that makes it a crime to reenter a military installation after being ordered not to do so applies to areas within the boundaries of the installation where public usage is permitted.

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

I. Search and Seizure

A. *Terry* Stops and Other Detentions Short of Arrest

***Heien v. North Carolina* (to be argued November 2014)**
If an officer makes a traffic stop based on a "reasonable" mistake of law (in this case, the erroneous belief that state law requires a vehicle to have two working brake lights), must the evidence found during the stop be suppressed?

B. Searches Incident to Arrest

***United States v. Wurie* (to be argued April 29, 2014)**
***Riley v. California* (to be argued April 29, 2014)**
After seizing a cellphone incident to arrest, may the police perform a warrantless search of the phone's call log at the scene of the arrest (*Wurie*) and/or a more general search of the phone's contents at the stationhouse (*Riley*)?

II. Post-Conviction Relief

A. Habeas Corpus Appellate Procedure

***Jennings v. Stephens* (to be argued November 2014)**

If petitioner files a single claim of ineffective assistance of counsel raising multiple instances of alleged deficient performance and the district court grants habeas relief finding deficient performance in some instances but rejecting other allegations of deficient performance, must the petitioner file a cross-appeal in order to argue on appeal that the rejected allegations of deficient performance also merit the habeas relief the district court granted?

II. Legislation

The following are brief summaries of key Public Acts. These summaries were provided in part by Michael L. Mittlestat, Assistant Defender, State Appellate Defender Office. For a comprehensive review of all pertinent legislation in the criminal area, go to http://www.michiganprosecutor.org/ and download Tom Robertson's excellent compilations (select Prosecuting Attorneys Coordinating Council, then click on the legislation update under the heading 'Latest Case Law Summaries.') Much of this legislation is extremely complex, and a full understanding demands that the public acts be read completely. Copies of the legislation can be obtained at http://www.michiganlegislature.org/.

PUBLIC ACTS

2013 P.A. 34, effective 5/21/13, amends the penal code, MCL 750.174a, to allow a court to order a sentence imposed for a felony violation of the financial exploitation of a vulnerable adult statute to be served consecutively to any other sentence imposed for a felony violation of the statute. A consecutive sentence would be up to the discretion of the sentencing judge.

2012 P.A. 319, effective 10/1/12, amends the fourth habitual offender statute, MCL 769.112, to require a mandatory minimum sentence of 25 years in prison if the current conviction is for a "serious crime" or a conspiracy to commit a "serious crime", and 1 or more of the prior felony convictions are "listed" prior felonies.

A "serious crime" includes any crime against a person in violation of 83, 84, 86, 88, 89, 317, 321, 349, 349a, 350, 397, 520b, 520c, 520d, 520g(1), 529, or 529a of the Michigan penal code, 1931 PA 328, MCL 750.83, 750.84, 750.86, 750.88, 750.89, 750.317, 750.321, 750.349, 750.349a, 750.350, 750.397, 750.520b, 750.520c, 750.520d, 750.520g, 750.529, and 750.529a.

A "listed prior felony" includes

(a) "Listed prior felony" means a violation or attempted violation of any of the following:

(i) Section 602a(4) or (5) or 625(4) of the Michigan vehicle code, 1949 PA 300, MCL 257.602a and 257.625.

(ii) Article 7 of the public health code, 1978 PA 368, MCL 333.7101 to 333.7545, that is punishable by imprisonment

for more than 4 years.

(iii) Section 72, 82, 83, 84, 85, 86, 87, 88, 89, 91, 110a(2) or (3), 136b(2) or (3), 145n(1) or (2), 157b, 197c, 226, 227, 234a,

234b, 234c, 317, 321, 329, 349, 349a, 350, 397, 411h(2)(b), 411i, 479a(4) or (5), 520b, 520c, 520d, 520g, 529, 529a, or 530 of

the Michigan penal code, 1931 PA 328, MCL 750.72, 750.82, 750.83, 750.84, 750.85, 750.86, 750.87, 750.88, 750.89, 750.91,

750.110a, 750.136b, 750.145n, 750.157b, 750.197c, 750.226, 750.227, 750.234a, 750.234b, 750.234c, 750.317, 750.321, 750.329,

750.349, 750.349a, 750.350, 750.397, 750.411h, 750.411i, 750.479a, 750.520b, 750.520c, 750.520d, 750.520g, 750.529, 750.529a,

and 750.530.

(iv) A second or subsequent violation or attempted violation of section 227b of the Michigan penal code, 1931 PA 328,

MCL 750.227b.

(v) Section 2a of 1968 PA 302, MCL 752.542a.

"Serious crime" would mean any of the following offenses against a person:

-- Assault with intent to commit murder.

-- Assault with intent to do great bodily harm less than murder.

-- Assault with intent to maim.

-- Armed or unarmed assault with intent to rob and steal.

-- Second-degree murder.

-- Manslaughter.

-- Kidnapping.

-- Hostage-taking by a prisoner.

-- Kidnapping a child under the age of 14.

-- Mayhem.

-- First-, second-, or third-degree criminal sexual conduct (CSC), or assault with intent to commit first- or third-degree CSC.

-- Use or possession of a dangerous weapon in the course of committing felony larceny of money or other property.

-- Carjacking.

MCL 769.12

2012 P.A. 330, effective 1/1/13, pertains to false reporting and making false 911 calls.

2012 P.A 351, effective 12/31/12: Makes violation of animal fighting law a predicate offense subject to racketeering laws.

2012 P.A. 353, effective 1/01/2013: Expands definition of "computer" for purposes of violations of M.C.L. 750.145d, to include computer game devices, cell phones, personal digital assistance, or other handheld devices while being used to transmit or receive data or the internet.

2012 P.A. 360, effective 4/1/13, amends M.C.L. 750.423, to expand the perjury definition to include willfully making false declaration in a written record that is singed by a person under penalty of perjury.

2012 P.A. 364, effective 4/1/13: amends M.C.L. 769.4a to specify that a deferral and dismissal of a domestic violence assault conviction constitutes a prior conviction for purposes of enhanced penalties for domestic violence convictions with prior convictions under M.C.L. 750.81, and 750.81a.

2012 P.A. 366, effective 4/1/13, increases maximum penalty for person convicted of domestic violence assault with two prior domestic violence convictions from 2 years in prison and $2,500 fine, five years in prison and up to a $5,000 fine. Also imposes same maximum penalty for aggravated domestic assault with one or more prior domestic assault conviction.

2012 P.A. 367, effective 4/1/13, creates the new offense of assault by strangulation or suffocation, which is punishable in the same manner as assault with intent to do great bodily harm less than murder. M.C.L. 750.84 (1)(b).

2012 P.A. 372, effective 4/1/13, amends the Criminal Sexual Conduct statutes to include sexual penetrations or sexual contact by child care or foster home workers where the victim is a foster home resident at the time of the crime. The offense would be first or second-degree CSC if the victim were more than 13 or less than 16 years old. M.C.L.

750.520b(1)(b)(vi); M.C.L. 750.520c(1)(b)(vi). The offense would be third- or fourth-degree CSC if the victim were at least 16. M.C.L. 750.520d(1)(g); M.C.L. 750.520e(1)(h).

2012 P.A. 455, effective 3/31/13, establishes the offense of organized retail crime, which applies to the theft of retail merchandise from a merchant with the intent or purpose of reselling or distributing it. Punishable by 5 years in prison and up to a $5,000 fine. M.C.L. 752.1083, 752.1084.

2012 P.A. 531, 532, and 533, effective 4/3/13, overhauled the arson and burning statutes, M.C.L. 750.71, 750.71 -76, to establish the crimes of first through sixth degree arson and arson of insured property.

First degree arson, M.C.L 750.72, applies to willfully or maliciously burning by fire or explosives:
--Occupied or unoccupied multi-unit building in which one or more units were a dwelling, regardless of whether occupied,
--Any building or structure or other real property if the fire or explosion resulted in physical injury
--A mine.
Felony, life or any term of years, and/or $20,000 fine or three times the value of the property damaged,

Second degree arson, M.C.L. 750.73: Willfully or maliciously burning a dwelling a dwelling, regardless of whether occupied. Felony punishable by 20 years imprisonment and/or $20,000 fine or three times the value of the property destroyed, whichever is greater.

Third Degree Arson, M.C.L. 750.74: Willfully or maliciously burning:
--Any building or structure or its contents, regardless of whether occupied, or
--Personal property having a value of $20,000 or more, or having a value of $1,000 or more if the person had one or more prior convictions.
Punishable by up to 10 years' imprisonment and/or $20,000 fine or three times the value of the property damaged, whichever is greater.

Fourth Degree Arson, M.C.L. 750.75:
Willfully or maliciously burning any personal property having a value of $1,000 or more but less than $20,000, or, if the person had one or more prior convictions, any personal property having a value of $200 or more.
--Willfully or negligently setting fire to another person's woods, prairie, or grounds or permitting fire to pass from his or her own woods, prairie, or grounds to another person's property causing damage or destruction to that other property.
Punishable by up to five years' imprisonment and/or $10,000 or three
times the value of the property damaged or destroyed, whichever was greater.

Arson of Insured Property, M.C.L. 750.76, applies to willfully or malicious burning any dwelling, building, structure, real property, or personal property that is covered by a fire insurance policy if done with the intent to defraud the insurer.
If a dwelling is involved, life or any term of years and/or $20,000 fine or 3 times the value of the property damaged whichever is greater,
If a building, structure, or real property is involved, 20 years and/or $20,000 fine or 3 times the value of the property damaged, whichever is greater.
If personal property is involved, 10 years and/or $20,000 fine or 3 times the value of the property damaged, whichever is greater.

Fifth Degree Arson, M.C.L. 750.77, burning personal property worth less than $1,000 with a prior conviction. One year in jail and or $2,000 fine or 3 times value of property, whichever is greater.

M.C.L. 750.79 prohibits using, arranging, placing, devising, or distributes inflammable, materials or devices in or near a building, structure, other real property, or personal property with the intent to commit arson in any degree or who aids, counsels, induces, persuades, or procures another to do so. Punishable by 5, 10, or 15 years depending on existence of aggravating circumstances.

2012 P.A. 538, effective 4/1/13, amends 333.3841 to prohibit the willful failure to report the discovery of a dead body to authorities. 5 years and/or $5,000 fine if done for the purpose of concealing a person's death from authorities.

2012 P.A. 583, effective 3/1/13, amends the child sexually abuse material statute, M.C.L. 750.145c , to:

Prohibit knowingly seeking and accessing child sexually abusive material to the list of prohibited acts. Punishable by 4 years and/or up $10,000 fine.

Prohibit copying or reproducing child sexually abuse activity or material. 20 years and/or $100,000 fine.

Define "make" (as in making child sexually abusive material) as bringing into existence by copying, shaping, changing, or combining material, and specifically include intentionally creating a reproduction, copy, or print of child sexually abusive material, in whole or part.

Define "access" as intentionally causing to be viewed by or transmitted to a person.

2012 P.A. 612, 613, effective 3/28/13, and 3/1/13, prohibits probationers, parolees, those on work and school release, from removing, destroying, or interfering with electronic monitoring devices. 4 years and/or $4,000 fine.

2013 P.A. 39, effective 6/4/13, revised the felony murder statute, M.C.L. 750.316(1)(b), to include vulnerable adult abuse in the first **and** the second degree to the list of predicate crimes for felony murder.

2013 P.A. 34, effective 5/21/13, amended the Michigan Penal Code to allow the imposition of consecutive sentences for financially exploiting a vulnerable adult convictions under M.C.L. 750.174a.

2012 P.A. 353, effective 1/1/13, expands the definition of "computer" for purposes of the use of a computer to commit a crime statute, M.C.L. 750.145d, to include computer gaming devices, cell phones, personal digital assistants, or other handheld devices while being used to transmit or receive data over the internet.

2012 P.A. 330, effective 1/1/13, establishes M.C.L. 750.411a [False report of crime or report of medical or other emergency].

5 years, $20,000 if physical injury results.
10 years, $25,000 if impairment of bodily function results.
15 years, $25,000 if death results.

2012 P.A. 104 & 105, effective 7/20/12, establishesM.C.L. 750.479c [Concealing material facts from law enforcement] and provides sentencing guidelines.

93 days, $500 if crime being investigated is a serious misdemeanor
1 year, $2,500 if crime being investigated is punishable by 1 to 4 years
2 years, $5,000 if crime being investigated is a felony punishable by 4 or more years.
4 years, $5,000 if crime being investigated is a serious felony specified in M.C.L. 750.479c(2)(d)

2012 P.A. 242, effective 1/1/13, alters the definition of "pistol" in M.C.L. 750.222 to include a loaded or unloaded firearm that is 26 inches or less in length. The previous definition provided for a 30-inch maximum length.

2012 P.A. 122, effective 8/6/12. The Legislature amended M.C.L. 750.224a, to provide for the lawful possession and reasonable use of electro-muscular disruption devices ("EMD"), e.g., tasers or stun guns, by persons in possession of a valid concealed pistol license permit ("CPL") who have received the necessary training from an authorized dealer. At the same time, **2012 P.A. 123** amended M.C.L. 28.425f et al. to apply to EMDs provisions that currently pertain to persons carrying a concealed pistol under a CPL.

2012 P.A. 323, effective 1/1/13, amends the fleeing and eluding provisions to enhance penalties. MCL 750.479a(5) moves first degree fleeing and eluding from C to B grid (114 to 160 months) and 750.479a(4) shifts second degree fleeing eluding rom the D to C grid (76-114 months). Boats are now covered.

2013 P.A. 54, effective 6/11/13, amends the code of Criminal Procedure to permit a judge or district court magistrate to order use of an electronic monitoring device for those charged with assaultive crimes.

2013 P.A. 93 & 94, effective 7/1/13, establishes Indigent Defense Commission and revises methods for appointing counsel for indigents charged with crimes.

2013 P.A. 124, effective 10/1/13, revises sentencing guidelines classes for certain recently enacted or modified crimes, including the new degrees of arson established by PA's 531, 532 and 533 of 2012.

2013 P.A. 128, effective 10/8/13, amends MCL 762.8 to permit jurisdiction in cases where a felony consists of two or more acts in a county where "the Defendant intended the felony or acts done in perpetration of the felony to have an effect."

2013 P.A. 139, effective 10/22/13, amends the Crime Victims Rights Act to provide for restitution payments to heirs of a victim if the victim dies.

2013 P.A. 149, effective 4/1/14, revises fee and reporting schedules under SORA.

2013 P.A. 152, effective 11/15/13, provides additional restrictions on dissemination of juvenile history record information.

2013 P.A. 203, effective 3/19/14, amends sentencing guidelines provisions to increase sentences for certain activities in relation to drug offenses, particularly travel to Michigan to import drugs.

2013 P.A.'s 212-217, effective 4/1/14. This package of bills adds provisions criminalizing "skimming devices" and providing sentencing guidelines, and increases penalties for related identity theft violations.

2013 P.A.'s 218 & 219, effective 1/1/14, would strictly limit access to motor vehicle accident reports for 30 days, and would prohibit any contact with accident victims or their families for purposes of providing services for a fee during that period.

2013 P.A.'s 220-225, effective 1/1/14. This package of bills regulates and restricts release of information under the Law Enforcement Information Network (LEIN) in relation to drug courts and veteran's courts, and generally provides LEIN access to the Michigan Department of Corrections.

2013 P.A.'s 226 & 227, effective 12/26/13, would amend the Michigan Vehicle Code and the Revised Judicature Act, respectively, to extend the DWI/sobriety court interlock pilot project (created by Public Acts 154 and 155 of 2010) for an additional year and, beginning on January 1, 2015, create the DWI/sobriety court interlock program as a continuation of the pilot project.

2013 P.A. 230, effective 12/26/13, exempts process servers from the penal code's trespassing provisions.

2013 P.A. 268, effective 12/30/13, amends Article 7 of the Controlled Substances Act, and adds Article 8, to classify marijuana as a schedule 2 controlled substance, subject to federal reclassification, and provides for licensure of facilities producing pharmaceutical-grade cannabis (PGC). The bill permits sales of PGC to pharmacies and allows for PGC prescriptions and registration cards for patients.

2013 P.A.'s 274-277, effective 12/30/13. This package of bills adds mental health courts to the Revised Judicature Act.

2014 P.A.'s 4-6, effective 5/12/14. This package of bills adds a felony for felon in possession of ammunition, sets up sentencing guidelines for this offense, and outlines rights restoration procedures and timing.

2014 P.A. 10, effective 2/18/14. Requires chief judge of court to postpone jury service for post-secondary students upon receipt of proof that service would unduly interfere with class schedule.

2014 P.A.'s 22 & 23, effective 3/4/14. These bills set up procedures for juvenile life sentencing in the wake of *Miller v Alabama* which prohibited mandatory non-parolable life sentences for juveniles. Per *Miller*, mandatory non-parolable life sentences are eliminated for those under 18 at the time of the crime. Adjusts non-parolabe life sentence for rape, under certain conditions, for those 18 (previously 17) or older. *Miller* is to be applied prospectively only unless Michigan Supreme Court or United States Supreme Court rules otherwise. Sets up procedures for prospective or retroactive application of *Miller* and requires mandatory minimum of 25 years and a mandatory maximum of at least 60 years in all cases.

2014 P.A.'s 28 & 29, effective 3/6/14. These bills begin the process of setting up local mental health systems, in coordination with law enforcement and local courts, for the purpose of diverting those with serious mental health problems out of the jails and prisons and into mental health treatment.

PA'S 111 AND 112
HB'S 4907 AND 4908
E.D. 7/9/14
Bills clean up issues with the major revisions to the arson statutes, which were passed in 2012 (2012 PA's 531-534 – see pp. 9-22 to 9-23 of the UMLI materials)

PA'S 123 AND 124
HB'S 5154 AND 5155

PRELIMINARY EXAM CHANGES

E.D. 5/20/14, DATE ON WHICH BILLS WERE SIGNED

Arraignment magistrate on felonies must set date for probable cause hearing and exam at time of arraignment
PROBABLE CAUSE HEARING TO BE 7-14 DAYS FROM ARRAIGNMENT
PRELIMINARY EXAM TO BE 5-7 DAYS AFTER PROBABLE CAUSE HEARING

Probable cause hearing to include:
DISCUSSION AS TO PLEA AGREEMENT
DISCUSSION REGARDING BAIL AND BOND MODIFICATION
DISCUSSION REGARDING STIPULATIONS AND PROCEDURAL ASPECTS OF CASE
ANY OTHER RELEVANT MATTERS AGREED TO BY PARTIES

PROBABLE CAUSE HEARING CAN BE WAIVED BY AGREEMENT OF BOTH PARTIES

DISTRICT JUDGE CAN ACCEPT FELONY PLEA; SENTENCING FOR FELONY SHALL BE CONDUCTED BY CIRCUIT JUDGE – NAME OF CIRCUIT JUDGE ASSIGNED AVAILABLE TO LITIGANTS PRIOR TO PLEA

If no plea and no waiver of exam by Defendant WITH CONSENT OF THE PROSECUTOR exam must be held unless adjourned or waived under Sec 7
Parties can agree to schedule exam earlier than 5 days after conference with court approval

UPON REQUEST OF PROSECUTOR EXAM SHALL COMMENCE IMMEDIATELY FOR SOLE PURPOSE OF TAKING AND PRESERVING TESTIMONY OF A VICTIM IF VICTIM IS PRESENT – IF VICTIM TESTIMONY DOES NOT ESTABLISH PC, COURT CAN ADJOURN EXAM TO SCHEDULED DATE AND VICTIM CANNOT BE BROUGHT BACK ABSENT A SHOWING OF GOOD CAUSE

Presumption that codefendants should have consolidated conferences and exams UNLESS PROS CONSENTS TO SEVERANCE OR UPON MOTION OF DEFENSE MAGISTRATE FINDS SEVERANCE REQUIRED BY LAW

SEC 6 – MAGISTRATE SHALL EXAMINE COMPLAINANT AND WITNESSES IN SUPPORT OF THE PROSECUTION IN DEFENDANT'S PRESENCE

SEC 7 – DEFENDANT CAN WAIVE EXAM WITH CONSENT OF PROSECUTOR; ADJOURNMENT, CONTINUANCE OR DELAY OF EXAM MAY BE GRANTED WITHOUT CONSENT OF DEFENDANT OR PROSECUTOR FOR GOOD CAUSE SHOWN AND MAGISTRATE MAY DELAY WITH CONSENT OF BOTH PARTIES

SEC 11A – On motion of either party, magistrate SHALL permit testimony of any witness EXCEPT COMPLAINING WITNESS, ALLEGED EYEWITNESS OR OFFICER TO WHOM DEFENDANT IS ALLEGED TO HAVE MADE INCRIMINATING STATEMENT, to be given by telephone, voice or video conferencing – TESTIMONY BY VIDEO CONFERENCING SHALL BE ADMISSIBLE IN ANY SUBSEQUENT TRIAL OR HEARING AS OTHERWISE PERMITTED BY LAW

SEC 11B - Evidence rules applicable except the following may be admissible at exam without requiring testimony of the author, keeper of records or any additional foundation or authentication:

PROPERLY PERFORMED DRUG ANALYSIS FIELD TESTING TO ESTABLISH SUBSTANCE IS A CONTROLLED SUBSTANCE

COURT ORDER OR ANY RECORD OF A GOVERNMENTAL AGENCY

REPORT OTHER THAN LAW ENFORCEMENT REPORT MADE OR KEPT IN ORDINARY COURSE OF BUSINESS

EXCEPT FOR POLICE INVESTIGATIVE REPORT, ANY OTHER LAW ENFORCEMENT REPORT – FORENSIC REPORTS, LAB REPORTS, MEDICAL REPORTS, REPORT OF AN ARSON INVESTIGATOR, AUTOPSY REPORTS

However, either prosecution or defense can ask the magistrate to allow a witness from whom hearsay testimony was introduced to be called on a satisfactory showing to magistrate that live testimony will be relevant to bindover decision

MAGISTRATE MAY CONDUCT CIRCUIT COURT ARRAIGNMENT AS PROVIDED BY COURT RULE

Under House Bill 5155, PA 124, district court has jurisdiction of PC conferences and circuit court arraignments in all felony cases; chief district court judge has power to allow magistrates to take particular actions, including the conduct of probable cause conferences in felony cases

III. Michigan Court Rule Developments (Courtesy of SADO Deputy Director Jonathan Sacks)

New Rules

1. Sentencing agreements vs. recommendations: 2011-19 – Amends MCR 6.302 and 6.310.
    - The rule eliminates a defendant's ability to withdraw a guilty plea if a judge chooses not to follow a sentencing *recommendation*.
    - This is consistent with federal rules. A defendant may still withdraw if a judge does not follow a sentencing *agreement*.
    - The rule also clarifies that a defendant's misconduct between plea and sentence means a defendant forfeits the right to withdraw a plea where a judge chooses not to follow a *Cobbs* evaluation or *Killebrew* agreement.

Takeaway: An attorney must make sure that his or her client is aware if a plea is pursuant to a sentencing agreement or recommendation and the difference between the two procedures.

2. Notice and Demand: 2010-14 - Allows forensic reports to be admitted into evidence without the forensic analyst's presence if defendant does not object, MCR 6.202.
    - Prosecution must provide notice of lab analyst report and a defendant must then demand lab analyst testimony, or else a report and the certificate may be admitted.
    - The original proposal created a notice and demand rule that would have created an exception to the rules of evidence and too much judicial discretion, the Court instead adopted a rule that allowed the parties to have discretion over production of lab analyst testimony.

3. 2011-18 – Amends MCR 6.302 to require the court to advise defendant of lifetime monitoring requirement for certain criminal sexual conduct offenses
    - Makes court rule consistent with *People v Cole*, 491 Mich 324 (2012).

4. 2013-24 - Rescind Administrative order No. 2011-3 and Adoption of Administrative Order No. 2013-_(modification of caseflow management Guidelines)
    - Small, but welcome change. It would slow down a percentage of disposition deadlines in district and circuit court, reducing to some degree the "rocket docket" culture.
    - Adopted: *Criminal Proceedings.* ~~90~~70% of all felony cases should be adjudicated within 91 days from the date of entry of the order binding the defendant over to the circuit court; ~~98~~85% within 154 days; and ~~100~~98% within 301 days. Incarcerated persons should be afforded priority for trial.

5. 2010-34 - Motion for directed verdict, amendment of MCR 6.419

- This is an appropriate result. The original proposal would have allowed prosecution appeals of acquittals on directed verdicts, in spite of double jeopardy concerns.
- Instead, the new rule is innocuous, simply allowing judges to reserve an immediate ruling.

6. 2012-18 – Amends MCR 2.512 to Require Use of Model Criminal Jury Instructions by trial courts.
   - One result is automatic access to defense bar for instructions rather than through ICLE.
   - Supreme Court rather than State Bar controls appointments to Committee on Model Criminal Jury instructions.

7. 2012-03 – Adopts Rule 1.111 and Rule 8.217 to improve access to foreign language interpreters to persons with Limited English Proficiency (LEP).
   - A court is required to provide an interpreter for a party or witness if the court determines one is needed for either the party or the witness to meaningfully participate.
   - Only parties who are able afford the expense are subject to reimbursement requirements. In determining whether a party has the ability to reimburse for interpreter services, the court will impose costs only if the party has income above 125% of the federal poverty level and the court finds assessment of the interpreter costs would not unreasonably impede the person's ability to pursue or defend a claim.

Proposed Rules

1. 2013-18 - Proposed Amendments Regarding Videoconferencing and new MCR 8.124
   - Proposal sets up uniform standards and procedures for courts to use videoconferencing equipment.
   - Proposal leaves to judicial discretion videoconferencing for a defendant in the courtroom and for a witnesses testifying. Unlike the current rule, parties would not need to request or consent to videoconferencing. The only exception is for defendant's presence at trial or evidentiary hearings that are part of a trial.
   - Confrontation Clause is implicated because a witness could testify at trial via video.
   - Right to a defendant's presence is implicated because defendants would not need to be physically present at sentencing or evidentiary hearings.

Takeaway: Proposal raises as yet unsettled constitutional questions.

2. 2012-11 Proposed rule would amend MCR 6.302 to add a harmless error provision.
   - Consistent with federal rules.
   - Opponents cite differences between Michigan and the federal system: (1) the lack of an appeal by right in Michigan; (2) judicial involvement in the plea process

pursuant to *People v Cobbs*, 443 Mich 276 (1993); (3) and the formal written plea agreements used in the federal system.

3. 2013-18 - Proposed New Rules for E-filing and Draft Standards
   - Adopts statewide e-filing standards for trial and appellate courts.
   - Sets 5:00 PM as a deadline for filing. This is inconsistent with current Court of Appeals e-filing and with federal PACER filing, both of which are midnight.