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CRIMINAL LAW UPDATE
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A. Fourth Amendment.

GPS devices, Warrantless Tracking. *United States v. Jones*, __ US __; 132 S Ct 945; 181 L Ed 2d 911 (2012)**(Jan '12).** Defendants were convicted of conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base in the US District Court for the District of Columbia. In the course of their investigation law enforcement obtained a search warrant to attach a Global-Positioning-System (GPS) to Jones's wife's vehicle. The warrant allowed the device to be attached within 10 days in Washington DC but the officers erred and attached it on the 11th day in Maryland. After tracking the car for about a month charges were brought against Jones and others. The defendant alleges that the GPS is a violation of his 4th Amendment rights. The district court held that data compiled while the vehicle was on public streets was admissible because the defendant had no expectation of privacy on public streets, but any data from it when it was parked at Jones's house was suppressed. The DC Circuit disagreed and said that all material was obtained without a proper warrant and everything that was gathered from the GPS was a Fourth Amendment violation. The Supreme Court agreed with the circuit court and found that installation of the GPS device was a trespassory search within the Fourth Amendment whether on private property or public streets. The Court rationalized: "The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Here, the Government's physical intrusion on an "effect" for the purpose of obtaining information constitutes a "search." This type of encroachment on an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted." *Id.* at 948-949.

Resisting Unlawful Warrantless Entry. *People v Moreno***,** 491 Mich 38; 814 NW2d 624 (2012)**(april'12).** After being charged with resisting and obstructing a police officer defendant filed a pretrial motion to quash the information in Ottawa Circuit Court. The circuit court judge denied defendant's motion. Two police officers tried to enter the defendant's home unlawfully, without a warrant – the defendant physically struggled with them and tried to prevent entry. He was then arrested for resisting and obstructing under MCL 750.81d(1). Overturning the court of appeals decision in *People v Ventura*, 262 Mich App 370; 686 NW2d 748, the Michigan Supreme Court followed common law principal by holding that a person can resist an illegal arrest. The majority held that the legislature, in enacting 750.81d, did not clearly abrogate this common law principle. Justices Markman and Young dissented, claiming that in 2002 the legislature amended MCL 750.479 and enacted MCL 750.81d, both of which failed to contain a lawful act requirement on the part of police officers as long as they were acting as a police officer at the time that the resisting and obstructing occurred.

Vehicle Search, Objective Reliance, Good Faith. *People v Mungo*, 295 Mich App 537; 813 NW2d 796 (2012)**(mar'12).** Defendant was charged with unlawfully carrying a concealed weapon. He filed a motion to quash the information and suppress evidence in Washtenaw circuit court which was granted. The state appealed. The COA reversed and remanded in reliance on *New York v Belton*, 453 US 454 (1981). Defendant then appealed, and the Michigan supreme court reversed the COA decision and remanded for reconsideration in light of *Arizona v. Gant*, 556 U.S. 332 (2009), which overturned parts

of *Belton*. On remand, the COA affirmed the circuit court's order suppressing evidence and quashing the Information. The state then sought leave to appeal in the MSC, which was granted. The MSC vacated the second decision of the COA, and again remanded for reconsideration in light of the then recently decided *Davis v United States*, 564 US __; 131 SCt 2419; 180 LEd2d 285 (2011). *Davis* held that, when police conduct a search in objective reasonable reliance on binding appellate precedent at the time of the incident, the search shall not be later subject to changes in the law. The issue before the COA in this case then was, in light of *Davis*, did the police search Mungo's car in objectively reasonable reliance on binding appellate precedent at the time of the incident (*Belton*). The COA held that the police did conduct the search in compliance with *Belton*, and reversed the circuit court's exclusion of the gun evidence and remanded to the trial court for further proceedings.

Vehicle Search, Reasonableness. *People v Tavernier*, 295 Mich App 582; 815 NW2d 154 (2012)**(jan'12).** Defendant was convicted of carrying a concealed weapon, possession of a firearm by a felon, possession of a firearm during the commission of a felony, operating a motor vehicle while intoxicated and with an occupant under the age of 16, and possession of marijuana. He appealed, claiming that the officer's search of his car was improper under *Arizona v. Gant*, 556 U.S. 332 (2009). *Gant* had overruled the bright line rule allowing a search of the passenger compartment incident to arrest under *New York v Belton*, 453 US 454 (1981). *Gant* held that such a search is reasonable only if the arrestee is within reaching distance of the passenger compartment at the time of the search, or it is reasonable to believe the vehicle contains evidence of the offense of arrest. The COA held that, in this case, the facts known to the police officer at the time of the search, coupled with his common sense, based on his experience, training, and the totality of the circumstances, were sufficient for the trial court to conclude that it was reasonable to believe that the vehicle might contain evidence of driving under the influence of drugs, "which was the offense of arrest."

Vehicle Stop, Obstruction of Driver's View. *People v Dillon*, __Mich App __; __NW2d__ (2012 WL 1694633, No.303083, decided May 15, 2012)**(may '12).** Defendant was bound over in an Oakland County District Court on a charge of possession of less than 25 grams of heroin – the circuit court suppressed the narcotics recovered in the search and dismissed on the basis that the police officer had no probable cause for the traffic stop. The police officer alleged that he stopped the defendant because his air freshener, hanging from his rear view mirror, was obstructing the driver's view – a violation under MCL 257.709(1)(c). The court analyzes the circumstances surrounding a stop from a totality of the circumstances, common sense standpoint, and the intent of the officer is irrelevant. *People v Jenkins*, 472 Mich 26; 691 NW2d 759 (2005). An officer must have reasonable suspicion to warrant a traffic stop – the court found that because of the defendant's dangling air freshener, the officer had suspicion to think that the obstructed vision statute was being violated. When making his valid stop, the officer than observed the defendant throw an object out of the window of the vehicle – giving him probable cause to prolong the stop and investigate further. Finding the stop valid, and that the statute for an obstruction of driver's view was not unduly vague, the court reversed the lower court's suppression and remanded.

Warrant Unnecessary for Probation Violation Arrest. *People v Glenn-Powers*, __Mich App __; __NW2d__ (2012 WL 1605265, No.301914, decided May 8, 2012)**(may '12).** Defendant was on probation in Washtenaw County. He violated his probation by not informing his agent of a change of address, failing to meet the requirement that he be enrolled in some sort of schooling, and committing an assault. His agent requested an arrest warrant, using a standard form that included the motion, an affidavit, and bench warrant. The next time that the defendant reported to probation he was placed under arrest and a search incident to arrest revealed over 30 packets of heroin. The defendant argued that the search was invalid because the affidavit accompanying the arrest warrant was not sworn under oath, which he argued is a Fourth Amendment requirement. MCL 764,15(1)(g) establishes that an arrest warrant is not necessary for a probation violation when a "peace officer has reasonable cause to believe the person ... has violated 1 or more conditions of a ... probation order imposed by a court of this state...." A warrant is not required under the Constitution to arrest for a probation violation, so whether the warrant was properly executed is irrelevant as long as the required probable cause for the probation violation exists. Because the arrest was lawful the search was as well.

Warrantless Entry, Imminent Threat of Violence. *Ryburn v Huff*, __ US __; 132 S Ct. 987; 181 L Ed2d 966 (2012)**(Jan '12).** A high school student in California wrote a letter threatening to "shoot up" his school. After interviewing the principal and various students, officers believed that the young man was being bullied at school, had not been to school in two days, and possibly had the correct mental state to carry out his threat. The officers had just received training on bullying and the correlation that it had to school violence. They decided that they needed to interview the student themselves, and went to his house. After knocking, announcing their presence, and calling the house phone the officers called the student's mother. She answered her cellular phone and informed them that she and her son were inside the house – when they requested to speak to her son she hung up. A few minutes later both of them came outside of the house to talk to the police. After some initial questions the officers asked if they could continue the conversation inside the house but the mother refused them entry. The officers found the mother's behavior to be suspicious – especially the fact that she never asked them why they were at her house. When a Sergeant asked her if there were any guns in the house she turned around and ran inside. He followed because he was scared of what could possibly be inside the house. The other officers followed. The student's father was inside the house, and he asked the officers to leave but they remained inside for 5-10 minutes. The officers talked to the whole family but they did not search them or their house. They concluded the rumors were false and left the house. The family then brought an action under Rev. Stat. § 1979, 42 U.S.C. § 1983 against the police – they allege that their Fourth Amendment rights were violated when their home was entered without a warrant. The Court laid out the standard it uses to determine when police officers need to obtain a warrant to enter a residence versus when the threat of violence is so imminent that they are exempt from that requirement. Referencing past decisions in *Brigham City v Stuart*, 547 US 398; 126 S Ct 1943; 164 L Ed2d 650 (2006), *Mincey v Arizona*, 547 US 103; 98 S Ct 2408; 67 L Ed2d 290 (1978), and *Georgia v Randolph*, 547

US 103; 126 S Ct 1515; 164 L Ed2d 208 (2006), the Court stated, "A reasonable police officer could read these decisions to mean that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence." The Court found that under all the circumstances surrounding the event the officers' decision to enter the house was reasonable stating, "Judged from the proper perspective of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns, petitioners' belief that entry was necessary to avoid injury to themselves or others was imminently reasonable."

B. Other Pretrial Matters.

Confession, *Miranda* in Prison. *Howes v. Fields*, __ US __; 132 S Ct 1181; 182 L Ed2d 17(2012)**(feb '12).** The Defendant was serving time in the Michigan Department of Corrections for Third Degree Criminal Sexual Conduct charges. Law enforcement believed that the defendant had knowledge about another crime that occurred before he went to prison. He was taken from his cell to a conference room where he was questioned for five to seven hours by two law enforcement officers who were involved with the open case. The officers were armed but the defendant was not in restraints. He was told multiple times that he could leave and could go back to his cell – the door was sometimes open and sometimes shut during the interview. He was never advised of his *Miranda* warnings or told that he did not have to talk to the officers. The defendant did say a few times that he wanted to stop the interview but he did not ask to leave the conference room. The defendant argued that his confession should be suppressed because he was subjected to custodial interrogation without *Miranda* warnings. The United States Supreme Court disagreed with the Sixth Circuit's decision that imprisonment, questioning in private, and questioning about events in the outside world automatically created a custodial situation requiring *Miranda*. The Court stated that there is no per se rule regarding prisoners and *Miranda* and different variables must be weighed. Further, the Court pointed out elements that may affect the necessity for a person's *Miranda* rights outside of prison are actually non-existent when applied to someone who is already incarcerated. A prisoner is not going to be bribed to speak to an interviewer because of possible prompt release, a prisoner knows that his interviewers most likely do not have the ability to affect his possible sentence for the alleged crime, and the shock that can go with an unexpected arrest does not exist for someone who is already in prison. The Court established that when someone is taken aside for questioning in prison it does not automatically create a custodial situation, and the fact that the subject of the questions involved acts that occurred outside the prison is not an automatic trigger either. After weighing numerous variables from this specific situation, the Court found that Defendant was not taken into custody in this case, and that *Miranda* warnings were not required. It pointed out that the defendant was not restrained, was told numerous times that he was free to leave, and was interviewed under normal conditions.

Confession, *Miranda* in Prison. *People v Cortez*, 294 Mich App 481; 811 NW2d 25 (2011)**(oct'11).** Defendant was a prisoner of the MDOC when shanks were found within his area of control after a lockdown following gang fights. He was placed in isolation, per policy, and later questioned by an MDOC official without *Miranda* warnings. Defendant's statements were later turned over to the Michigan State Police and used against him at trial. The court agreed with the circuit court that the Defendant's statements were admissible despite the lack of warnings. In a prison setting, a finding of custody for *Miranda* purposes demands added restrictions beyond those normally experienced in prison. In this case Defendant's isolation was general policy following a prison disturbance and/or the discovery of weapons. Moreover, no "outside official" was involved in the questioning. Therefore, though a "close call" Defendant's questioning was more akin to general on the scene questioning and no warnings were required. *Miranda* is not intended to hamper prison officials investigating prison offenses**. On May 25, 2012, the MSC vacated the CA holding that the failure to provide *Miranda* warnings did not violate Defendant's Fifth Amendment Rights and remanded to the CA for reconsideration in light of *Howes v Fields.* 491 Mich 925.**

Confession, *Miranda,* Functional Equivalent to Questioning. *People v White*, 294 Mich App 622; __ NW2d __ (2011)**(nov'11).** Defendant was charged with 1st degree felony murder, armed robbery, and possession of a firearm during the commission of a felony. After Defendant invoked his right to counsel, the interrogating officer continued to make statements to Defendant indicating that he was putting the public at risk if he did not tell him where the gun was. In response, Defendant eventually made incriminating remarks. While not framed as questions, the trial court held that the officer was improperly interrogating Defendant and suppressed his statements. The prosecution appealed. Using the test announced in *Rhode Island v Innis*, 446 US 291 (1980), the COA majority held that "(1) there was no evidence suggesting the police were aware that respondent was peculiarly susceptible to an appeal to his conscience or that respondent was unusually disoriented or upset at the time, (2) the conversation consisted of only a few short remarks, (3) there was not a "lengthy harangue" in the presence of the respondent and (4) the comments were not particularly evocative, the officers should not have known that the respondent would have been moved to make a self-incriminating statement." Thus the COA held that the trial court erred in suppressing defendant's statements and reversed and remanded. Judge Shapiro dissented, stating that, because the detective's actions constituted express questioning, or at the very least, the functional equivalent thereof, he would have affirmed the trial court's suppression of defendant's statements. **On March 30, 2012, the MSC granted leave to appeal. *People v White,* 491 Mich 890; 810 NW2d 36 (2012).**

Confession, *Miranda,* Parole Officers. *People v Elliott*, 295 Mich App 623; 815 NW2d 575 (2012)**(mar'12).** Defendant was arrested for violating his parole after police received information that he had committed a robbery. The police questioned Defendant, but first advised defendant of his *Miranda* rights. Defendant invoked his right to counsel, and the interrogation ended. A few days later, a parole officer served Defendant with parole-violation charges while Defendant was still in jail. The parole officer asked Defendant for a statement regarding the robbery charge without first advising of his

Miranda rights. Defendant confessed, and that confession was used to convict him. At issue was whether the trial court erred when it denied Defendant's motion to suppress his statements to the parole officer and, if so, whether the error was harmless. The COA reversed and remanded, holding that: Defendant was in custody for *Miranda* purposes when he met with parole officer, Defendant was subjected to an interrogation for *Miranda* purposes during his meeting with parole officer, parole officer was a law enforcement officer for *Miranda* purposes as a matter of law, and error in trial court's admission of Defendant's incriminating statements to parole officer was not harmless. **The Michigan supreme court has granted leave in this case** and will address "whether, and, in light of *Howes v. Fields*, 565 U.S. ——, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012), under what custodial circumstances, a parole officer not acting in concert with police is required to provide the warnings before questioning an in-custody parolee who, during police questioning, has previously invoked his right to counsel about an offense giving rise to an alleged parole violation, if the parole officer's testimony concerning the parolee's responses to such questioning is to be admissible at the trial for that offense." *People v Elliott*, 491 Mich 938; 815 NW2d 129 (2012).

Double Jeopardy. *People v Franklin*, __ Mich App __; __ NW2d __ (2012 WL 2579608, No. 296591, decided July 3, 2012)**(july'12).** Considering the "multiple punishment" aspect of jeopardy rather than the successive trial component, the court held that convictions for both aggravated indecent exposure and indecent exposure are not permissible, because "the offense of indecent exposure does not contain any elements that are distinct from the offense of aggravated indecent exposure."

Double Jeopardy, Legal Error Resulting in DV. *People v Evans*, 491 Mich 1; 810 NW2d 535 (2012)(**march '12**). The defendant was charged with burning real property other than a dwelling (MCL 750.73) in Wayne County Circuit Court. Mid-trial the circuit court judge erroneously granted defendant's directed verdict motion based on an incorrect reading of the requirements for what constitutes "real property" under the statute. The court based its directed verdict on its false belief that the prosecution was required to present evidence that the burned building was not a dwelling. The Defendant argued that the directed verdict amounted to an acquittal, and that double jeopardy barred the state from retrying him. The Michigan Supreme Court disagreed with the Defendant's theory and held that the trials court's ruling did not bar retrial. The court differentiated between a directed verdict granted based on a factual element necessary for a conviction and one based on an element not necessary for conviction – finding that double jeopardy only attaches when a factual element necessary for conviction is resolved by the trial court. "We hold that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred." Justices Cavanagh, Kelly, and Hathaway dissented. Cert has been granted on this case, which will be heard by the United States Supreme Court in November, 2012.

Double Jeopardy, Retrial after Hung Jury Mistrial. *Blueford v Arkansas*, __ US __; 132 S Ct 2044; 182 LEd2d 937 (2012)**(may'12).** This case arose when Blueford was

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

C. Confrontation, Counsel, and Other Trial Issues.

***Brady* Violation, Eye Witness Statement.** *Smith v. Cain,* __ US __; 132 S Ct 627; 181 L Ed 2d 571 (2012)**(jan'12).** The Defendant, Juan Smith, was found guilty of five counts of first-degree murder in a Louisiana district court. Defendant was convicted based solely on one eyewitness's testimony from the night of the event. The witness testified at trial, confidently identifying Defendant as the perpetrator, but his testimony contradicted statements he had given to police on the night of the crime and five days after it occurred, indicating he did not see the perpetrators' faces and could not identify anyone. The contradictory statements were never disclosed to the defense prior to trial. During postconviction proceedings the police files were turned over to defense counsel and the statements came to light. The defense argued that the failure of the prosecution to turn over the statements amounted to a violation under *Brady v Maryland*. *Brady* prevents a state from keeping from the defense pertinent evidence that is crucial to the defendant's guilt. The eight-justice majority rationalized that under *Brady* and all of its progeny, all material evidence needs to be turned over to the defense. Evidence is material if there is a reasonable chance that it would have affected the result of the proceeding. The Court pointed out that the witness's testimony was the only evidence linking Defendant to the homicides, and to keep a statement from the defense that impeached the only evidence that convicted the defendant is a *Brady* violation. Justice Thomas dissented stating that the defendant did not clearly show that the contradictory statements of the eyewitness would have had a reasonable probability of affecting the outcome of trial had they been disclosed.

Confrontation, DNA Lab Report. *Williams v. Illinois,* 567 US __; 132 S Ct 2221; __ L Ed 2d __ (2012)**(june'12).** Cellmark, an accredited DNA laboratory, provided police with a DNA profile from swabs taken from the complainant in a criminal sexual conduct case. The issue in this case was whether *Crawford v Washington*, 541 US 36 (2004), bars

an expert from expressing an opinion based on facts about a case that were made known to the expert but about which the expert could not testify. Here the expert, called to testify in a bench trial, claimed that the DNA profile produced by Cellmark matched a profile produced by the state police lab using Defendant Williams' blood. In an opinion by Justice Alito, joined by The Chief Justice and Justices Kennedy and Breyer, the Court held that the Cellmark report was an out-of-court statement not offered for its truth, but solely for the purpose of the state's expert in explaining assumptions upon which his opinion rested. Therefore the Cellmark report fell outside the scope of the Confrontation Clause. Justice Alito also found that even if the Cellmark report had been admitted, there would not be a Confrontation Clause violation because, given that the report was not sought for use against Defendant Williams, who was not under suspicion at the time, "it was "very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach." Justice Thomas concurred in the result, while Justice Kagan, joined by Justices Scalia, Ginsburg and Sotomayor, dissented, holding that "[f]orensic evidence is reliable only when properly produced, and the Confrontation Clause prescribes a particular method for determining whether that has happened."

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

Confrontation, Two-Way Interactive Video Technology, Waiver. *People v Buie*, 491 Mich 294; 817 NW2d 33 (2012)**(may'12).** Defendant was convicted of 1st degree CSC, victim under the age of 13, partly due to the testimony of two doctors who were allowed to testify by way of two-way, interactive video technology. Defendant argued that allowing this violated his constitutional right of confrontation. The COA first heard the case in August of 2009, when it held that a trial court may allow video-conferencing if it either makes case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation, or if the case meets the following three-prong test: (1) the defendant is

either present in the courtroom or has waived the right to be present, (2) there is a showing of good cause, and (3) the parties consent. The court remanded this case to the trial court to address these issues. At the evidentiary hearing it was stipulated that both witnesses would have testified in person if video-conferencing had not been available. The prosecution conceded that it "presented no specific state interest invoked for having [the doctors] testify via video rather than in person. Rather, it was done for convenience, but only after an agreement was reached with defense counsel..." The COA held that there was no public policy or state interest at issue in this case important enough to outweigh defendant's right of confrontation. The COA also held that the three elements listed above were not met. The court focused on the third element – consent. The COA held that a defense counsel may waive a defendant's right of confrontation, but may only do so if the waiver is a legitimate trial tactic or strategy **and the defendant does not object to the decision.** At the evidentiary hearing, defendant testified that defense counsel informed him of the video testimony immediately before it took place. Defendant told counsel that it "didn't feel right" to have witnesses testify from outside of the courtroom, and requested that she object. In response to his request, counsel made a statement regarding defendant questioning the veracity of the proceedings. Finally, the COA held that having allowed the video procedure cannot be deemed harmless error and vacated defendant's conviction. The supreme court reversed, holding that the right of confrontation may be waived by counsel so long as a defendant does not object. No personal waiver by a criminal defendant is required. Under these facts, the majority concluded there was no objection, and therefore defendant's confrontation rights were waived. In dissent Justice Cavanagh, joined by Justice Kelly, concluded that defendant did indeed personally object to the confrontation denial.

Counsel, Ineffective Assistance, *Cronic* v *Strickland* Standards. *People Gioglio,* 296 Mich App 12; 815 NW2d 589 (2012)**(march'12).** The court of appeals originally reversed defendant's conviction on a finding that trial defense counsel failed to subject the prosecutor's case to meaningful adversarial testing and therefore, under *United States v Cronic*, 466 US 648 (1984), there was no need to show prejudice. The MSC subsequently reversed and ordered the court of appeals to reconsider the IAC issue under *Strickland*. The court extensively examined the *Strickland* requirements that, in order to obtain relief, a defendant must show his attorney's acts or omissions fell outside a range of reasonable professional conduct and, further, that any deficient performance under the performance prong must be shown to have produced a reasonable probability of a different outcome. In applying those standards the court of appeals failed to find that counsel's conduct (there were serious claims of bias and inaction which had previously been found to be a complete failure to subject the prosecutor's case to meaningful adversarial testing) fell below an objective standard of reasonableness under *Strickland*.

Counsel, Ineffective Assistance – Duty to Inform Client of Immigration Consequences of Plea under Padilla, Retroactivity. *People v Gomez,* 295 Mich App 411; __ NW2d __ (2012)**(feb'12).** Defendant pled to a marijuana offense, received probation, and was discharged in 2005. Four years later DHS notified defendant that his conviction rendered him deportable. The next year SCOTUS issued its decision in *Padilla v Kentucky*, 559 US __; 130 S Ct 1473 (2010), which required defense counsel, to

be effective, to advise of immigration consequences of a plea, and defendant moved for relief from judgment. Since defendant's conviction had become final, the issue of retroactivity is governed by *Teague v Lane*, 489 US 288 (1989). The court found that under the *Teague* analysis, *Padilla* is a new rule and therefore cannot be considered retroactive since it does not fall under either *Teague* exception as it "does not regulate private conduct, nor is the requirement so implicit in the structure of criminal proceedings that retroactivity is mandated." Nor does Michigan law provide a basis to find Padilla retroactive. The trial court properly denied defendant's motion for relief from judgment. **On June 25, 2012, No. 144897, the MSC held this case in abeyance pending the SCOTUS decision in *United States v Chaidez,* 2012 WL 1468539.**

Counsel, Ineffective Assistance, Failure to Move to Suppress under *Miranda*. *People v Comella,* __ Mich App __; __ NW2d __ (2012 WL 1889204, No. 301458, decided May 24, 2012)**(may'12).** In order to establish IAC for failure to move to suppress un-*Mirandized* statements, a defendant must show he would have prevailed had the issue been raised. In this case, as in *People v Mayes (Aft Rem),* 202 Mich App 181, 191; 508 NW2d 161 (1993), there were factors supporting a finding of a custodial environment and factors negating such a conclusion. Therefore it is "unclear whether defendant would have prevailed on this issue" and therefore it cannot be determined that defendant was denied effective counsel. The court also refused to find counsel ineffective for failing to object to prosecutorial misconduct, finding that there was in fact no prosecutorial misconduct to object to.

Counsel, Ineffective Assistance, Failure to Object to Erroneous Jury Instruction, Non Prejudicial Error. *People v Eisen,* 296 Mich App 326; __ NW2d __ (2012)**(april'12).** Defendant was convicted of three counts of first degree criminal sexual conduct and one count of third degree criminal sexual conduct. He was sentenced to 210 to 540 months imprisonment for each count of first degree criminal sexual conduct and 120 to 180 months imprisonment for the third degree criminal sexual conduct count. Defendant argued that trial counsel failed to object to an erroneous jury instruction, which resulted in a denial of his due process rights and ineffective assistance of counsel. The court did agree with Defendant that his attorney failed to object to an erroneous jury instruction and that "this conduct fell below an objective standard of reasonableness." The trial court failed to instruct the jury on the requirement that a first degree criminal sexual conduct charge required the victim to be under 13 years old. However, the verdict form did state that requirement, and the court reasoned that a jury form is part of the package of jury instructions, and that greatly reduced the prejudicial effect of the age element missing from the oral instructions. There was also overwhelming evidence at trial that the victim was under 13 at the time of the offenses. The court held that although there was error in the oral jury instructions when they failed to contain an element required for first degree criminal sexual conduct, because of all the other mitigating factors present the error did not prejudice Defendant enough to warrant reversal.

Counsel, Ineffective Assistance, Failure to Object to Bolstering and Hearsay. *People v Douglas,* 296 Mich App 186; __ NW2d __ (2012**)(april'12)**. Despite trial defense counsel's testimony at a *Ginther* hearing that he failed to object to hearsay statements

because his trial strategy was to show the complainant in a child sex abuse case told different stories to different people, the court of appeals found this failure to constitute ineffective assistance of counsel as the witness testimony was generally consistent. Moreover, defense counsel's failure to object to bolstering testimony did not support his trial strategy, which was to convince the jury that complainant was not believable. Counsel was also ineffective for failing to impeach the complainant with inconsistent statements, including statements suggesting she was coached, made at the preliminary examination.

Counsel, Ineffective Assistance, Failure to Produce Witness. *People v Russell III,* __ Mich App __; __ NW2d __ (2012 WL _____, No. 304159, decided September 4, 2012)**(sep'12).** Defendant was jury convicted of Assault with Intent to do Great Bodily Harm Less than Murder and Reckless Driving after he crashed his vehicle into one of two people who had accosted him while seeking to take a computer from his vehicle. After a *Ginther* hearing the trial court granted a new trial due to defense counsel's failure to produce a witness who observed the events at issue and contradicted the prosecution's proofs. The court of appeals majority reversed the grant of a new trial on this basis, stating that the witness in question, who was never contacted by defense counsel (counsel did review her police statement), gave testimony at the hearing conflicting with the defense theory, and therefore it was permissibly strategic to fail to call her. Judge Krause, in dissent, would have upheld the trial court's determination as the facts suggested to her that, while not likely, the witness's account could have been seen as consistent with the theory of defense and the physical evidence. Judge Krause, using the appropriate deferential standard, determined that in her view the trial court did not commit clear error.

Counsel, Ineffective Assistance, Inability to Admit Evidence. *People v Armstrong,* 490 Mich 281; 806 NW2d 676 (2011)**(oct'11).** Mr. Armstrong, 25, was charged with twice brutally raping a 15 year old. The complainant had some serious credibility issues. She testified that after the second alleged rape she made no effort to contact defendant. Her cell phone records provided an abundance of evidence to the contrary. Trial defense counsel who, according to the court, had been practicing only 8 months, became flustered by an objection from the prosecutor when he tried to admit the phone records without a proper foundation, and gave up. The trial court and the court of appeals agreed that the performance prong of *Strickland* had been met, but both ruled that there was insufficient prejudice to defendant to require reversal. The supreme court disagreed, and noted that the cell phone records provided the only documentary proof that the complainant "lied to ***this*** jury."

Counsel, Ineffective Assistance, On Postconviction. *Martinez v Ryan,* 566 US __; 132 S Ct 73; 182 L Ed 2d 272 (2012)**(march'12).** Holding that the right to effective trial counsel is a "bedrock principle in our justice system," the seven-justice majority determined that where, as here (Arizona), a defendant cannot raise the issue of ineffectiveness of trial counsel on direct review and can raise it for the first time in state collateral proceedings, ineffectiveness of postconviction counsel can serve as cause to excuse procedural default on the issue of ineffectiveness of trial counsel for later federal

habeas proceedings. The Court left open the question of whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial.

Counsel, Ineffective Assistance, Plea Proceedings. *Lafler v Cooper,* 566 US __; 132 S Ct 1376; 182 L Ed 2d 398 (2012)**(march'12).** In this Michigan habeas case, the Court, in a 5-4 decision, upheld the grant of the writ after the Michigan Court of Appeals unreasonably applied *Strickland*. Defendant had initially agreed to accept a plea deal which would have given him a substantially reduced sentence, but later refused to accept the bargain after trial defense counsel convinced him that the prosecution could not establish the elements of assault with intent to murder since the complainant had been hit below the waist after defendant repeatedly fired a gun aimed at her. The parties agreed that this advice violated *Strickland's* performance prong, and the Court focused on prejudice. The Court found that defendant successfully demonstrated that, barring the deficient performance, there was a reasonable probability he and the state trial court would have accepted the plea, which would have substantially reduced the sentence he ultimately received after trial. The Court did alter the federal district court's remedy (specific performance of the plea offer), and remanded with direction that the state reoffer the plea and, if defendant accepts, to allow the state trial court wide discretion to resentence pursuant to the agreement, leave the conviction and sentence after trial undisturbed, or provide relief between these two positions.

Counsel, Ineffective Assistance, Plea Proceedings. *Missouri v Frye,* 566 US __; 132 S Ct 1399; 182 L Ed 2d 379 (2012)**(march'12).** Noting the fact that plea dispositions occur in over 90% of state and federal prosecutions, the five justice majority enforced the right to effective assistance of counsel, and held that failure to apprise a defendant of a plea offer set to lapse constitutes constitutionally ineffective assistance under *Strickland*. However, a defendant still must show prejudice, and that entails establishing that not only would he have accepted the offer, but that, of relevance here where another offense was committed during the pendency of the proceedings, the prosecution and the trial court would, given state law, have followed through on enforcement of the bargain. The case was remanded to the state courts for a prejudice inquiry.

Counsel, Ineffective Assistance, Pretrial Proceedings, Plea Bargaining. *People v Douglas,* 296 Mich App 186; __ NW2d __ (2012)(april'12). Citing *Lafler*, the court of appeals found defense counsel ineffective at the plea negotiation stage for failing to inform defendant that he would be subject to a 25-year mandatory minimum sentence if convicted of first-degree CSC (and for erroneously telling defendant he would most likely be sentenced to a minimum term between five and eight years), and for erroneously advising defendant that he would not be able to live with his children if he was required to register under SORA. The case was remanded with direction that the prosecution reinstate its plea offer (to CSC 4) and, if defendant fails to accept the offer, for a new trial due to reversible trial error.

Evidence, Cleric-Congregant Privilege. *People v Bragg,* __ Mich App __; __ NW2d __ (2012 WL 1605259, No. 305140, decided May 8, 2012)**(may'12).** Defendant was

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

Evidence, CSC, Other Acts, MCL 768.27a versus MRE 404(b). *People v Watkins, People v Pullen*, 491 Mich 450; 818 NW2d 296 (2012)**(june'12).** These consolidated cases involve MCL 768.27a(1), which provides in relevant part that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." Defendants were convicted of CSC. Evidence was admitted against them under MCL 768.27a(1). Both Defendants appealed, arguing that that MCL 768.27a conflicts with MRE 404(b), and the rule of evidence prevails over the statute. They further argued that the witness testimony should have been excluded under both MRE 404(b) and MRE 403, which their respective trial courts failed to consider. The COA affirmed Defendants' convictions. After

granting leave to appeal, the MSC held that that MCL 768.27a does indeed conflict with MRE 404(b), but that the statute prevails over the court rule because it does not impermissibly infringe on the MSC's authority regarding rules of practice and procedure under Const 1963, art 6 § 5. The MSC further held that evidence admissible under MCL 768.27a remains subject to MRE 403, which provides that a court may exclude relevant evidence if the danger of unfair prejudice, among other considerations, outweighs the evidence's probative value. The court instructed that, when applying the balancing test in MRE 403 to evidence admissible under MCL 768.27a, however, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. The court ultimately affirmed Watkins' convictions, and remanded Pullen's case to the trial court for further proceedings consistent with the court's opinion. Justice Kelly wrote a dissenting opinion which was joined by Justices Cavanagh and Hathaway. In her opinion, Kelly agreed with the majority that MCL 768.27a and MRE 404(b) irreconcilably conflict. However, she would hold that MCL 768.27a is an unconstitutional legislative intrusion into the power of the judiciary.

Evidence, Domestic Violence Cases. *People v Meissner*, 294 Mich App 438; 812 NW2d 37 (2011)**(oct'11).** Defendant was charged with first degree home invasion, domestic violence and obstruction. By the time of trial the complainant, pregnant with Defendant's child, substantially recanted. The court held that under MCL 768.27c, allowing hearsay in DV cases if certain circumstances are met (statements must be trustworthy and timely), statements made to police months or days after the alleged acts of violence are timely. And by definition statements made to police are trustworthy. Finally, under MCL 768.27b, prior acts of domestic violence can be admitted even if identical to the charged offense.

Evidence, Expert Testimony, Exclusion. *People v Kowalski*, 492 Mich 106; __ NW2d __ (2012)**(july'12)**. In this interlocutory appeal, the trial court and a court of appeals majority ruled that, under MRE 702 and MRE 403, defendant's proffered expert testimony from a social psychologist and a clinical and forensic psychologist regarding the occurrence of false confessions considering police tactics, and the psychological characteristics of defendant, could not be introduced at trial. The court, as a preliminary matter, disagreed with the court of appeals finding that the phenomenon of false confessions was within the common knowledge of laypersons, and hence not subject to expert interpretation at trial. The court held that "a purported false confession…constitutes counterintuitive behavior that is not within the ordinary person's common understanding, and thus expert assistance can help jurors understand how and why a defendant might confess falsely." Any expert testimony is subject to other limitations under MRE 702, and after analyzing the social psychologist's proffered testimony, the court upheld the trial court's exclusion due to problems with the data and methods underlying the studies relied upon. However, the court found that the decision of the trial court and the court of appeals to exclude the forensic psychologist's testimony concerning the "specific study of defendant himself" was in error, as that evidence was independent of the unreliable false confession literature, and the lower courts erred in assessing admissibility under MRE 702 and MRE 403. The case was remanded to the

circuit court for a proper assessment of the forensic psychologist's evidence under the rules of evidence.

Evidence, Identification, Reliability, Due Process. *Perry v New Hampshire,* __ US __; 132 S Ct 716 (2012)**(jan'12)**. Interpreting the due process clause, the Court held that the federal constitution does not require judicial oversight as to the reliability of an eyewitness identification unless the identification was come at through a suggestive procedure arranged by police. In an 8-1 opinion authored by Justice Ginsburg, the Court went on to state that only evidence that is "so extremely unfair [example given was state's knowing use of false evidence] that its admission violates fundamental conceptions of justice" is barred by the due process clause. In this case the Court allowed an identification originating in a one-person showup in a parking lot which was the scene of the crime, despite the fact that the eyewitness later failed to identify the defendant in a photo lineup. The Court allowed the identification because police had not arranged the parking lot showup, which was held immediately after the crime occurred. A jury, not a judge, traditionally evaluates reliability of evidence subject to other safeguards such as the right to counsel, confrontation and cross-examination, warning instructions to the jury, state evidence rules that bar evidence that is more prejudicial than probative, etc. Justice Ginsburg claimed that the constitutional requirement that the government prove a defendant's guilt beyond a reasonable doubt also safeguards against convictions based on evidence of questionable reliability.

Jury Selection, Venire, Systemic Exclusion. *People v Bryant,* 491 Mich 575; __ NW2d __ (2012)**(june'12).** Defendant was convicted of 1st degree CSC in Kent County. There was only one African-American in the jury venire of 42 people. The Michigan court of appeals earlier remanded for a hearing on this issue. The trial court concluded that systemic exclusion had not been proven. Defendant again appealed to the COA, and the panel reversed his conviction, holding that representation of African-Americans on Defendant's panel was unfair and unreasonable, and that defendant had established systemic exclusion. Evidence was offered on all three measurement tests discussed by the U.S. Supreme Court in *Berghuis v Smith*, __ US __; 130 S Ct 1382 (2010), the absolute disparity test, the comparative disparity test, and the standard deviation test. The COA panel held that the comparative disparity test was the best measure of underrepresentation in this case, and there was a sufficient comparative disparity to conclude that the representation of African-Americans on Defendant's panel was unfair and unreasonable. The state appealed and the MSC granted leave. The MSC held that a court must apply all the relevant tests for evaluating the representation data, and not just the comparative disparity test. Furthermore, a court must examine the composition of jury pools, or venires, over time using the most reliable data available to determine whether representation of a distinct group is fair and reasonable. After considering the results of those tests using the most reliable data set, which included the composition of jury pools or venires over a three-month period, the MSC concluded that defendant failed to show that the representation of African–Americans was not fair and reasonable. Accordingly, the court reversed the judgment of the COA and reinstated defendant's convictions and sentences. Justices Cavanagh and Kelly dissented. Justice Cavanagh argued that, "[w]hen the showing of underrepresentation is close, or none of the methods

of analysis are particularly well-suited to a case, I believe courts should 'glance ahead' to the third prong of the *Duren* test and consider a defendant's evidence of systematic exclusion. Under this approach, if the jury-selection process appears likely to systematically exclude a distinctive group, that is, the jury-selection process bears the mark of a nonbenign influence, a court may give a defendant the benefit of the doubt on underrepresentation. Applying this approach to the facts of this case, I agree with Justice Kelly's conclusion that the Court of Appeals did not clearly err by holding that defendant is entitled to a new trial." (citations omitted).

Public Trial, Jury Voir Dire. *People v Vaughn*, 491 Mich 642; __ NW2d __ (2012)**(july'12)**. A court officer cleared the courtroom during jury voir dire. There was no objection. The court held that while the court of appeals erred when it held that failure to assert his public trial right foreclosed later relief, the failure to object makes the right to public trial subject to the forfeiture rule stated in *People v Carines*, 460 Mich 750 (2012). Although error in excluding the public is structural, it is still subject to plain error analysis. This was plain error affecting substantial rights, but the court found defendant was not actually innocent and defendant failed to show that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." The 3-justice concurrence found fault with the extent of the majority opinion's reliance on the presence of the venire, who are members of the public, in making this assessment.

Voir Dire, Defendant's Presence. *People v Buie*, __Mich App__ ; __ NW2d __ (2012 WL _____, No.278732, October 2, 2012**(oct'12).** On remand from the Michigan Supreme Court for consideration of remaining issues after that court reversed the court of appeals on the two-way interactive video confrontation issue (see above), the court of appeals considered Defendant Buie's absence from a portion of the voir dire. Considering Defendant's absence as an unpreserved constitutional error, the court held that even though Mr. Buie did not voluntarily waive his right to be present, and did not provide grounds for removal, he failed to show that his absence was prejudicial.

D. Crimes and Offenses, Sufficiency

Armed Robbery, Actual Taking Not Needed Under Course of Conduct Theory. *People v Williams*, 491 Mich 164; 814 NW2d 270 (2012)**(may'12).** Defendant pled guilty to armed robbery and nolo contendere to a second count of armed robbery even though he did not obtain any cash or merchandise during the "robbery." Defendant filed a motion to withdraw his pleas, which was denied by the trial court. Defendant appealed, arguing that, because he failed to take or remove any actual property from the intended target of his robbery, there was not a sufficient factual basis to support his guilty plea to armed robbery. The COA majority disagreed and affirmed. After granting leave, the MSC also affirmed Defendant's convictions in 4-3 opinion, with the majority holding that the facts elicited at Defendant's plea allocution were sufficient to sustain his conviction for armed robbery, even though he was unsuccessful in obtaining money when he attempted to rob the tobacco shop. More specifically the court held that when the

legislature revised the robbery statute, MCL 750.530, to encompass a "course of conduct" theory of robbery, it specifically included "an attempt to commit the larceny" as sufficient to sustain a conviction for robbery itself. The MSC majority concluded that this amendment effectuated a substantive change in the law governing robbery in Michigan such that a completed larceny is no longer necessary to sustain a conviction for the crime of robbery or armed robbery.

Assault Resulting in Death, Sufficiency, Shaken Baby Syndrome. *Cavazos v Smith*, __ US __; 132 S Ct 2; 181 L Ed 2d 311 (2011)**(oct'11).** Competing medical evidence in this SBS case caused the Court to issue a slap-down to the 9th Circuit after that court repeatedly refused to cancel the writ they had granted to a caring grandmother who was sentenced to 15 years to life with little evidence that she had caused the death of her grandchild. The Court held that *Jackson v Virginia* "makes clear that it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial."

Bear Hunting, Aiding and Abetting. *People v Levigne*, __ Mich App __; __ NW2d __ (2012 WL 2581042, No.306777, decided July 3, 2012)**(july'12)**. Defendants were convicted of a misdemeanor violation of the Natural Resources and Environmental Protection Act (NREPA) for using a hunting dog to assist a Native American hunter in killing a bear outside of hunting season. A Wildlife Conservation Order (WCO) identified the period in 2010 when it was lawful to hunt bear in Michigan using a firearm as September 17-September 25. The Native American friend of Defendants had a permit to hunt outside of season until October 26, 2010, and therefore he was within his rights to be hunting bear, but Defendants did not possess such a permit. The district court held that they violated NREPA by assisting in the hunt – Defendants argued that they could take part in a hunt of bear out of season – they just could not kill the bear. The circuit court affirmed the district court's decision – the Michigan Court of Appeals disagreed. The disagreement arises out of the definition of "taking" that is required for a violation. Defendants argued that helping to hunt down the bear using their hunting dog did not constitute a taking as defined by the law. The state disagreed. The higher court looked to the language of the statute and reasoned that if the legislature had intended a taking to mean simply aiding/abetting in a hunt they would not have used such specific language when drafting the law. The court held, "The statutory provision and the DNR order at issue do not prohibit an unarmed individual from assisting someone with the lawful taking of a bear, nor do they prohibit someone from taking a bear *without* a firearm, crossbow or bow and arrow. Had the legislature or DNR intended to prohibit such behavior, the unambiguous language of those bodies would exhibit that intent."

Breaking and Entering Causing Damage, Sufficiency. *People v Kloosterman*, 295 Mich App 68; 810 NW2d 917 (2011)**(dec'11).** Defendant was convicted in Kent County of breaking and entering a trailer, causing damage. He appealed arguing that there was insufficient evidence of the required damage element. Defendant had cut a lock to a trailer to gain access. The issue was whether the lock should be considered to be part of the trailer. The COA held that the lock was a part of the trailer, and thus Defendant was

subject to an enhanced sentence for damaging a part of the trailer when breaking the lock and entering the trailer.

Carjacking, Sufficiency, Presence of Complainant. *People v Jones*, __ Mich App __ ; __ NW2d __ (2012 WL 2330196, No. 303753, decided June 19, 2012)**(june'12).** Defendant was charged with a multitude of crimes, and was also charged and sentenced as a habitual offender, third offense. Defendant argued that his carjacking conviction was erroneous because the police officer was not present inside the police vehicle when Defendant took it. The court found that to be irrelevant since the legislature had previously amended the carjacking statute and removed presence as an element of the offense.

Constitutionality of MSU Ordinance. *People v Rapp*, __ Mich __; __ NW2d __ (2012 WL 3064002, No. 143343 & 143344, dated July 27, 2012)**(july'12)**. In a 5-2 decision the Michigan Supreme Court ruled that a Michigan State University Ordinance making it an offense to "disrupt the normal activity" of a protected person is facially overbroad under the ruling of the United States Supreme Court in *City of Houston, Texas v Hill*, 482 US 451; 107 S Ct 2502; 96 L Ed 2d 398 (1987). Defendant confronted an MSU parking enforcement employee who had ticketed Defendant in an MSU parking structure. Because the ordinance in question would allow for verbal disruptions of university employees, it is clearly overbroad and infringes on First Amendment rights.

Constitutionality of Statute Regulating Production of Audio or Video Recordings for Gain. *People v Douglas*, 295 Mich App 129; 813 NW2d 337 (2011)**(dec'11).** Defendant was charged with copying audio or video recordings for gain. Defendant had a number of DVDs and CDs that were clearly handmade with handwritten titles. The Wayne county circuit court dismissed the case, finding the recordings statute constitutionally vague. The state appealed. The statute at issue provides that "[a] person shall not ... [s]ell, rent, distribute, transport, or possess for the purpose of selling, renting, distributing, or transporting, or any combination thereof, a recording with knowledge that the recording" does not "contain in a prominent place on its cover, box, jacket, or label the true name and address of the manufacturer" (MCL 752.1051 through 752.1057). Specifically, the trial court held that the term "prominent place" was vague. The COA held that the statute was not unconstitutional as applied to Defendant, and reversed and remanded. The court noted that Defendant failed to point to any facts indicating that he complied with the statute at all—that is, that his CDs and DVDs displayed the manufacturer's true name and address somewhere on the jacket. Therefore, he cannot claim that vagueness in the words "prominent place" caused him to violate the statute. However, the COA also held that the statute, as written, was facially overbroad as applied to all distribution and possession of recordings, and limited application to commercial recordings to avoid striking the statute.

Criminal Sexual Conduct, 1st Degree, Underlying Felony. *People v Lockett, People v Johnson*, 295 Mich App 165; 814 NW2d 295 (2012)**(jan'12).** Defendants were convicted of 1st degree criminal sexual conduct and accosting a minor for immoral purposes. Defendants had picked up three girls one night in their van. The girls were 17,

16 and 14 years of age. Each defendant engaged in sexual acts with the 17 year old in plain sight of the 14 year old. The defendants were charged with, among other crimes, CSC 1st under MCL 750.520b(1)(c), for penetration (with the 17 year old) committed under circumstances involving a felony, where the felony was disseminating sexually explicit matter to a minor (the 14 year old) who was in plain view, under MCL 722.675(1)(b). The trial court found that there was a sufficient nexus between Lockett's sexual penetration of the 17 year old girl and the crime of disseminating sexually explicit matter to the youngest girl. The COA held that the defendants could not be convicted of 1st degree criminal sexual conduct involving penetration under circumstances involving another felony because the "victim" of the sexual penetration was not impacted by the circumstances of the underlying felony.

Criminal Sexual Conduct, Minors. *In re Tiemann*, __Mich App__ ; __ NW2d __ (2012 WL 1623528, No. 303813, May 8, 2012, released for publication July 3, 2012)**(may'12).** The 15-year-old Defendant had sex with a 14-year-old girl and challenged the plea-based order of adjudication on multiple grounds. The court held that prosecution of Tiemann did not violate public policy, and MCL 750.520d was not ambiguous as applied to two teenagers under 16. The court further ruled that prosecution of one individual under the age of 16 while not prosecuting the other is permissible, as there was no equal protection violation due to the fact that the male minor was prosecuted while the female minor was not charged. There was no evidence Tiemann was charged based on his gender, and there was evidence he was charged due to his aggressive behavior.

Defenses, Entrapment. *People v Akhmedov*, __ Mich App __; __ NW2d __ (2012 WL _____, Nos. 303129 & 305625, decided July 26, 2012, approved for publication September 11, 2012)**(july'12).** The court rejected Defendant's claim of entrapment because the misconduct of a police informant could not be attributed to the police. At the time of the drug crimes at issue there was an insufficient agency relationship between the informant and the police.

Defenses, Imperfect Self-Defense. *People v Reese,* 491 Mich 127; 815 NW2d 85 (2012)**(may'12)**. Following a bench trial, the defendant was convicted of voluntary manslaughter in Wayne County Circuit Court. Defendant urged that the evidence was insufficient to support a finding of voluntary manslaughter – pointing to the doctrine of imperfect self-defense. Defendant and the deceased had a disagreement, and engaged in a shooting match on a Detroit street. The deceased died from two gunshot wounds and Defendant sustained one gunshot wound to his leg. At trial, Defendant argued that he shot the deceased in self-defense. The circuit court judge found that Defendant was initial aggressor and fired the first shot, causing the deceased to pull out his weapon, which resulted in a shootout. The Michigan Supreme Court agreed with the circuit court, finding that there was sufficient evidence to support Defendant's conviction – Defendant participated in a shootout, which requires the intent to create a high risk of great bodily harm. The court further found that Michigan law does not recognize the doctrine of imperfect self-defense as an independent theory that automatically mitigates criminal liability for a homicide from murder to voluntary manslaughter. Instead, facts which

could have supported a theory of imperfect self-defense can serve to separate murder from manslaughter. "However, the element distinguishing murder from manslaughter – malice – is negated by the presence of provocation and heat of passion." (citing from *People v Mendoza*, 468 Mich at 540). Applying the common law definitions to these facts, the court concluded that the trial court appropriately convicted Defendant of manslaughter, finding that he was the initial aggressor. Judge Kelly, joined by Cavanagh and Hathaway, concurred and dissented, agreeing with the reinstatement of the manslaughter verdict but finding that the pronouncements on imperfect self-defense were unnecessary to the decision here.

Defenses, Self Defense, Felony Firearm, Jury Instructions. *People v Goree,* 296 Mich App 293; 819 NW2d 82 (2012)**(apr'12).** A jury convicted defendant, Nathaniel Goree, of felony-firearm (MCL 750.227b), but acquitted him of any underlying assault charge because they felt the act was done in self-defense. The trial court then erroneously instructed the jury that a felony-firearm offense cannot be justified by self-defense. The Court of Appeals held that, just as a defendant's commission of a violent crime may be excused when the defendant acts to protect himself or others, so can an accompanying firearm-possession charge. As such, the COA held that the instruction was improper, and vacated defendant's felony-firearm conviction and sentence, and remanded for a new trial before a properly instructed jury.

Driving While License Suspended, Elements, Mexican National. *People v Acosta-Baustista*, __ Mich App __ ; __ NW2d __ (2012 WL 1520899, No. 303015, decided May 1, 2012)**(may'12).** Defendant was a Mexican National who possessed a driver's license from Mexico that expired on May 2, 2009. An accident Defendant was involved in on September 3, 2009 resulted in the death of the other driver. The police determined that Defendant was not at fault in the accident, but he was charged with a violation of MCL 257.904(4) – operating a motor vehicle without a license, or with a suspended or revoked license, causing death. Mexico and the United States both honor the licenses of each other, a fact that was established by the 1943 Convention on the Regulation of Inter–American Automotive Traffic. The court found that because the language of MCL 257.904 did not account for someone driving with an expired license, and Defendant was driving with an expired Mexican license, MCL 257.904 was not applicable. The court noted that someone who has never been fit to drive, or someone who has lost the privilege to drive, are substantively different from someone who has been fit to drive but just failed to maintain the proper paperwork. The court also noted that the fact that the defendant was a Mexican National was irrelevant here because Michigan honors Mexican licenses.

Felony Murder, Adult Abuse as Predicate. *People v Comella Jr.*, __ Mich App __ ; __ NW2d __(2012 WL 1889204, No.301458, decided May 24, 2012)**(may '12).** Defendant's elderly wife was admitted to the hospital a number of times for various injuries before the last incident where EMS workers responded to Defendant's home because his wife was unconscious – she died two days later from a subdural hematoma. The ME determined homicide was the cause of death. Defendant was convicted of felony murder with vulnerable adult abuse second degree being the underlying felony.

Defendant appealed arguing that the state is required to prove both vulnerable adult abuse in the first and second degree for it to be used as a predicate to felony murder. Similarly, Defendant argued that his trial counsel was ineffective for not asking for a jury instruction that stated both first and second degree must be proved by the state. The Court of Appeals disagreed, and held that the felony murder statute requires either first OR second degree to be proven – not both. The language of MCL 750.316(1)(b) states, "vulnerable adult abuse in the first and second degree under section 145n," as being a possible predicate felony for felony murder. The defendant claims that because the statute uses "and" instead of "or" as it does in other instances, the legislature must have meant that both degrees of vulnerable adult abuse must be proven. The court chose to not take the use of "and" literally – pointing out that both first and second degree vulnerable adult abuse cannot be charged for one act as one requires intent while the other requires recklessness.

Felony Nonsupport, Impossibility to Pay. *People v Likine, Parks, Harris*, 492 Mich 367; __ NW2d __ (2012)**(july'12)**. The majority in this 4-3 split adopted the common law defense of impossibility to pay for defendants in nonsupport cases as opposed to the inability to pay defense advocated by the dissent and in place in the 49 other states. The majority found this result mandated by the legislative construct surrounding the area of nonsupport which requires parents "to have done everything possible to provide for their child and to have arranged their finances in a way that prioritized their parental responsibility so that the child does not become a public charge." In *People v Adams*, 262 Mich App 89; 683 NW2d 729 (2004), the court held that inability to pay is not a defense to a violation of MCL 750.165 as felony nonsupport is, as of legislative changes in 1999, a strict liability offense. The majority agreed with this holding, and adopted an "impossibility" defense based in the notion that involuntary actions can eliminate the *actus reus* element of an offense. In order to establish an impossibility defense a defendant must show "that he or she acted in good faith and made *all reasonable efforts* to comply wiith the family court order, but could not do so through no fault of his or her own." These reasonable efforts include borrowing money and efforts to seek employment. A "non-exhaustive" list of factors to be considered include "whether the defendant has taken reasonable precautions to guard against financial misfortune and has arranged his or her financial affairs with future contingencies in mind, in accordance with one's parental responsibility to one's child."

Judicial Misconduct. *People v Waterstone*, 296 Mich App 121; 296 NW2d 121 (2012)**(apr'12).** Judge Waterstone presided over a drug case which involved a confidential informant (CI). The judge, after ex-parte communications with the prosecutor, knowingly allowed police officers to present perjured testimony in an attempt to protect the identity of the CI. The attorney general (AG) brought four separate felony charges under MCL 750.505 alleging misconduct. The issue in this case is whether MCL 750.478 (misdemeanor willful neglect of duty by a public officer) precludes the AG's prosecution of defendant under MCL 750.505, which allows punishment for indictable common law offenses (including felony charges) when punishment is not otherwise allowed by statute. The AG argued that all four charges are predicated on nonfeasance and nonfeasance alone, and the counts themselves are drafted in terms of willful neglect

of duty. The trial court had dismissed three counts. The AG appealed. The COA held that the misdemeanor statute, MCL 750.478, constitutes a statute that expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance), which is the type of misconduct set forth in the particular charges brought by the AG against defendant. The elements of the charged offense are the elements of a statutory offense, MCL 750.478. Therefore, under the plain and unambiguous language in MCL 750.505, which allows for prosecution for felony misconduct in office only if the offense at issue is not punishable by another staute, MCL 750.505 cannot be invoked as a basis to try and convict defendant. The COA affirmed the trial court's ruling quashing the three felony counts, and also reversed the trial court's ruling to allowing one felony count to proceed to trial.

Larceny from a Person, Elements. *People v Smith-Anthony,* __ Mich App __ ; __ NW2d __ (2012 WL 1556653, No.300480, decided May 3, 2012)**(may '12).** The court found that when Defendant shoplifted perfume from a mall and then fought with a security guard who tried to stop her, she was not committing larceny from a person. MCL 750.357 requires that a defendant steal from another person to be charged with larceny from a person, and here Defendant was not stealing from the security guard but from the store – there was no proof that the perfume was ever possessed by the guard or even in close proximity to him. The larceny from a person charge differs from simple larceny because it requires the added element of "invasion of the person and the presence of the victim" which was not present here.

Possession of Tasers, Constitutionality of Ban. *People v Yanna,* __ Mich App __; __ NW2d __ (2012 WL 2401400, No. 306144, decided June 26, 2012)**(june'12)**. Consolidating cases involving MCL 750.224a "Possession or Sale of a Taser" arising out of Bay and Muskegon Circuit Courts, the Michigan Court of Appeals held that the state and federal constitutions prevent the state from completely prohibiting the possession and use of tasers by private citizens. The statute states that no one besides law enforcement may sell or possess, "a portable device or weapon from which an electrical current, impulse, wave, or beam may be directed, which current, impulse, wave, or beam is designed to incapacitate temporarily, injure, or kill." In both lower court cases, Defendants had possession of a taser or stun gun – one while working behind the counter at a party store, and the other in his own home. Both parties argued that the 2nd Amendment allowed them to carry these "weapons" and their rights were violated by charges under MCL 750.224a. The court, looking to *DC v Heller,* 554 US 570; 128 S Ct 2783; 171 Led2d 637(2008), declared that tasers are protected arms because they do not fit into any of the *Heller* exceptions. Because tasers are protected arms, it would be unconstitutional to ban them from private citizens' homes. The court used the Second Amendment to decipher whether or not private citizens could open carry tasers as protection outside of their homes. The court surmised that total prohibition on open carrying of a taser or a stun gun would go against the Second Amendment's declaration that citizens can carry and keep arms and the Michigan Constitution's declaration that citizens may "bear" arms for self-defense.

Racketeering, Elements. *People v Kloosterman,* __ Mich App __ ; __ NW2d __(2012 WL 1862331, No.303443, decided May 22, 2012)**(may '12).** Defendant was convicted of racketeering in Kent County. He was allegedly returning items to Home Depot using different forms of identification, receiving new products in exchange, and then listing them on Craigslist for sale. There was video surveillance of the defendant using the ID's to make the returns as well as an in court identification by a cashier. MCL 750.159i(1) states, "[a] person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity." The defendant argued that because he was one individual, his actions did not fit the description of racketeering required by the statute – there needed to be a criminal enterprise he was acting on behalf of to qualify. The court defined the terms "associate" and "employ" since the statute itself failed to do so. Reversing the lower court and finding the evidence here insufficient to convict the court stated: "[A] defendant, acting alone, cannot be *both* the person *and* the enterprise. To "associate," a person must necessarily align or partner with *another* person or entity. Indeed, the meaning of the word is not ordinarily interpreted to mean that a person associates with him or herself, and it would stretch the meaning of the word beyond reason to conclude that the Legislature intended such an unusual usage. Similarly, to "employ" requires that a person be engaged or hired by some other entity; an individual would not generally find him or herself in a situation calling for hiring one's self or engaging one's own services."

OWI, Operating, Actual Physical Control. *City of Plymouth v Longeway,* 296 Mich App 1; 818 NW2d 419 (2012)**(mar'12).** The defendant, while intoxicated, started her car and shifted it into reverse before an observing officer pulled behind her in order to stop her from moving. Her car never moved. The issue was whether defendant's actions constituted "operation" of her car allowing her to be charged with OWI. The circuit court dismissed the charges holding that they did not, but the COA reinstated the charges holding that a person need not move a car to be operating it. The court further held that a defendant clearly has actual physical control of a vehicle when starting the engine, applying the brakes, shifting the vehicle from park to reverse, and then shifting back to park.

E. Sentencing

***Apprendi*, Enhancement by Facts Not Found by Jury, Fines.** *Southern Union Co. v United States,* 567 US __; 132 S Ct 2344; __ L Ed 2d __ (2012)**(june'12).** The Southern Union Company was convicted of one count of violating the Resource Conservation and Recovery Act for storing mercury without a permit between September 19, 2002 and October 19, 2004. A maximum fine was computed for that period, based on a one-day fine of $50,000.00, at 38.1 million, and the company was actually fined 6 million with a 12 million "community service obligation." In a 6-3 opinion the majority disagreed with the government and the First Circuit, holding that *Apprendi v New Jersey,* 530 US 466 (2000), does in fact apply to fines which are substantial enough to trigger the Sixth

Amendment's jury-trial guarantee. Therefore, in cases where the amount of a potential fine implicates the right to trial by jury, the determination of any fact that increases a criminal defendant's maximum potential sentence (other than the fact of a prior conviction) is reserved to the jury, even where that sentence is a fine and not a term of imprisonment or death.

Consecutive Sentencing, CSC 1, MCL 750.520b(3). *People v Ryan,* 295 Mich App 388; 819 NW2d 55 (2012)**(feb'12).** In 2006, MCL 750.520b was amended to add section (3) which allows for discretionary consecutive sentencing under the CSC 1 statute for "any other criminal offense arising from the same transaction." In this case defendant was convicted of 7 counts of CSC 1, all requiring a mandatory 25 year minimum sentence. The trial court ordered one of these counts to also be served consecutively, issuing an effective 50-year mandatory minimum sentence. Defendant raised a multitude of arguments for the proposition that "any other criminal offense" must be interpreted as an offense different from CSC 1. The court of appeals disagreed, finding that another CSC 1 count can be interpreted as an "other criminal offense" for consecutive sentencing purposes under the 2006 amendment. The court also concluded that the two convictions which were ordered to run consecutively did arise from the same transaction, as the acts of fellatio and vaginal intercourse comprising these two counts occurred at the same time. Finally, given the "horrific abuse" in this case, the court held that the 50-year minimum sentence was not disproportionate.

Consecutive Sentencing, Federal to State. *Setser v United States,* 566 US __; 132 S Ct 1463; 182 L Ed 2d 455 (2012)**(march'12).** Setser received a 151-month sentence for federal drug charges while awaiting sentencing on state probation violation and drug charges. The federal district court, not knowing what the state sentences would be, ordered the federal drug sentence to run consecutive to the state probation violation sentence and concurrent to the state drug charge. The state later sentenced Setser to 5 years on the probation violation and 10 years on the drug charge, and ordered these two sentences to run concurrently, foiling the federal district court's sentencing decision. The 5th Circuit affirmed the consecutive sentence issued by the federal district court, even though the state court sentencing decision made it unclear how to administer it. The Court, in a 6-3 decision, upheld the 5th Circuit over objection of Setser and the Government, concluding that the statutory provisions in question clearly indicate that length of sentence is a judicial function, not a function of the Bureau of Prisons, and that Setser has administrative and judicial remedies available to challenge any perceived unfairness once it is determined how the federal and state sentences will mesh.

Consecutive Sentencing, Offenses While Incarcerated. *People v Williams,* 294 Mich App 461; 811 NW2d 88 (2011)**(oct'11).** Defendant, in jail for domestic violence, tried to swap marijuana for a candy bar. He was convicted of delivery of marijuana and inmate in possession. The substantial sentences (4th offender) for these felonies were set to run consecutive to the DV sentence he had been serving *and consecutive to each other.* The court held that the latter consecutive term was improper as MCL 768.7a(1) cannot be used to impose consecutive sentences for contemporaneous acts giving rise to offense tried together at one trial.

Costs, No Need for Precise Measurement. *People v Sanders,* __ Mich App __; __ NW2d __ (2012 WL 1949017, No. 303051, decided May 29, 2012)**(may'12).** Defendant pled to delivery of heroin, less than 50 grams, second offense, and was sentenced to prison. He challenged the imposition of $1,000.00 in "costs" that were general, and not specific to defendant's case. Defendant agreed that costs could be imposed, but argued that the trial court must provide a more precise basis for costs. The court of appeals disagreed that the cost most be calculated for each individual case, but did hold that the trial court must provide "a more concrete basis for the general cost figure utilized." Despite language suggesting a bar in older cases, the court held that the statute allowing costs does not bar reasonable "overhead costs" of the court. The case was remanded so that the trial court could provide an adequate explanation for the reasonableness of $1,000.00 in costs and so that defendant could challenge that determination if he so desires. The cost amount can be a flat fee, and there is no need to particularize the cost fee to an individual case. After remand the court issued a second published decision in October of 2012, *People v Sanders,* __ Mich App __; __ NW2d __ (2012 WL _____, No. 303051, decided October 2, 2012)**(oct'12).** In that opinion the court noted that on remand the Berrien County trial court concluded after a hearing that the actual cost per case in that county far exceeded the $1,000 imposition here and upheld the imposition of costs. The court of appeals declined Defendant Sanders' invitation to consider a lesser cost for plea cases as the court did not want to create a financial incentive for a defendant to plead guilty.

Federal Drug Sentences, Retroactivity of Fair Sentencing Act. *Dorsey v United States,* 567 US __; 132 S Ct 2321; __ L Ed 2d __ (2012)**(june'12).** The Fair Sentencing Act, effective August 3, 2010, modified drug sentences under the Anti-Drug Abuse Act of 1986, reducing the cocaine crack/powder disparity from 100-1 to 18-1. The result was that the 5-year minimum was triggered by 28 grams of crack (instead of 5) while the 10-year minimum required 280 grams (formerly 50). The powder levels remain. The Court, construing the amending statute, determined that the new levels applied to conduct occurring prior to the effective date (8/3/10) in cases where sentencing occurred after the effective date.

Guidelines Departure. *People v Akhmedov,* __ Mich App __; __ NW2d __ (2012 WL _____, Nos. 303129 & 305625, decided July 26, 2012, approved for publication September 11, 2012)**(july'12).** The trial court departed from the guidelines because he felt that if he gave Defendant more than 363 days in jail Defendant would be unable to cancel deportation proceedings. The court of appeals, in this appeal by the prosecution, remanded for resentencing. The court held that the trial court erred in departing from the guidelines as the departure was based on a misreading of the federal law regarding immigration issues.

Habitual Offender Application when Defendant Sentenced as Juvenile. *People v Jones,* __ Mich App __ ; __ NW2d __ (2012 WL 2330196, No. 303753, decided June 19, 2012)**(june'12).** Defendant was charged with a multitude of crimes, and was also charged and sentenced as a habitual offender, third offense. Defendant argued that he was not a habitual offender third, but a habitual offender second, because one of his prior

felonies was a conviction in circuit court, and he was subsequently sentenced as a juvenile. The court focused on the statutory language of MCL 769.11(1), which provides for an enhancement based on a defendant's prior felony record. The court, deciding a question of first impression, found the habitual offender act simply requires a felony conviction, and such a conviction can be used for enhancement even if a defendant was ultimately sentenced as a juvenile.

Holmes Youthful Trainee Act (HYTA), Abuse of Discretion. *People v Khanani*, 296 Mich App 175; 817 NW2d 655 (2012)**(april'12).** After outlining the nature and purpose of the HYTA, the majority in this 2-1 ruling held that the trial court abused its discretion in allowing HYTA sentencing as defendant's age (19), and the seriousness of one of the charged offenses (home invasion), militated against granting HYTA treatment. The case was remanded for resentencing, allowing defendant to withdraw his guilty pleas if conditional on the grant of HYTA status. The dissent would have remanded for clarification of reasons for grant of HYTA status.

Juveniles, Mandatory Life Without Parole, Cruel and Unusual. *Miller v Alabama*, 567 US __; 132 S Ct 2455' __ L Ed 2d __ (2012)**(june'12).** The 8th Amendment to the federal constitution prohibits cruel and unusual penalties, or sentences that subject defendants to "excessive sanctions." In a 5-4 decision the Court, through a majority opinion authored by Justice Kagan, determined that two lines of cases contributed to the conclusion that mandated sentences of death in prison for juveniles is impermissible. The first line bans sentencing practices that reflect a mismatch between the culpability of a class of offenders and the severity of a penalty. An example is the Court's ban on the death penalty for children. The second line demands that the sentencing authority consider offender characteristics and the circumstances surrounding the offense before issuing the ultimate penalty of death. The majority held that these two lines prohibit automatic sentencing of juveniles to life without parole even in homicide cases.

Lifetime Electronic Monitoring. *People v King*, __ Mich App __; __ NW2d __ (2012 WL 3101751, No. 301793, decided July 31, 2012)**(july'12).** MCL 750.520n(1) provides for lifetime electronic monitoring for defendants convicted of CSC 1 or 2 if defendant is 17 or older and the complainant is less than 13. However, a section of the CSC 1 statutory scheme (MCL 750.20b) appears to mandate lifetime monitoring without noting any age restriction. The court in *People v Brantley*, __ Mich App __; __ NW2d __ (2012 WL 1758673, No. 298488, decided May 17, 2012)**(may'12)** earlier held that this section demands lifetime monitoring of all those convicted of CSC 1, regardless of the ages of the defendant or the complainant. The majority in *King* disagreed and called for a conflict panel under MCR 7.215(J)(2) & (3).

Non-Parolable Life for CSC, Cruel and Unusual. *People v Brown*, 294 Mich App 377; 811 NW2d 531 (2011)**(oct'11).** Defendant was convicted of first degree CSC and was sentenced to life without parole mandated by MCL 750.520b(2)(c) when a defendant is over 17 and the complainant is under 13 if defendant had a similar previous conviction. After discussing penalties for similar offenses in other state the court turned down

defendant's claim that his sentence was unconstitutional because it was cruel and unusual.

OV 1, Aggravated Use of Weapon, Heroin. *People v Ball*, __ Mich App __; __ NW2d __ (2012 WL 2330197, No. 303727, decided June 19, 2012)**(june'12).** Defendant was convicted of delivery of heroin. It was an ordinary drug transaction. The prosecutor requested that OV 1 be scored at 20 points, arguing that defendant subjected the purchaser of the heroin to a harmful substance, that being the heroin itself. The trial court agreed. The court of appeals reversed, holding that while heroin is in fact a harmful substance and could be used as a weapon, there was no indication that it was used as a weapon in this case.

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

OV 4, Serious Psychological Injury. *People v Earl*, __ Mich App __; __ NW2d __ (2012 WL 2330198, No. 302945, decided June 19, 2012)**(june'12).** A bank teller's continuing fear of being robbed by her customers and her sleepless nights was found sufficient to score 10 points for serious psychological injury requiring professional treatment.

OV 4, Psychological Injury to Victim. *People v Lockett*, 295 Mich App 165; 814 NW2d 295 (2012)**(jan'12).** Defendant was convicted of 1st degree criminal sexual conduct and accosting a minor for immoral purposes. Lockett argued that the trial court incorrectly assessed 10 points for offense variable OV4 (psychological injury to victim) at his sentencing. The COA agreed, holding that a record devoid of evidence of whether the victim suffered a serious psychological injury cannot support the scoring of 10 points. There was no testimony indicating that the victim in this case had suffered any psychological injury, the presentence report contained no information that would indicate any victim suffered psychological harm, and the record did not include a victim-impact statement.

OV 7, Aggravated Physical Abuse. *People v Glenn*, 295 Mich App 529; 814 NW2d 686 (2012)**(feb'12).** Under OV 7, 50 points can be assessed for conduct that amounts to sadism, torture, or excessive brutality, or that is designed to substantially increase the fear

and anxiety suffered by a victim. In this armed robbery and felonious assault case, while the court felt defendant's conduct was reprehensible and designed to cause fear and anxiety (defendant struck two people in the head with the butt of an airsoft gun), such is the "conduct in all armed robberies." Nothing defendant did here qualified under OV 7, and therefore it was error to assess 50 points. **The Michigan Supreme Court granted leave to appeal to the prosecution in this case on June 8, 2012, No. 144979.**

OV 9, Multiple Victims. *People v Carrigan*, __ Mich App __; __ NW2d __ (2012 WL 3138117, No. 302090, decided August 2, 2012)**(aug'12).** Defendant was convicted of two counts of malicious destruction of property after causing damage to two schools. The sentencing court scored 25 points for OV 9 (allowable when 20 or more people are placed in danger of property loss or 10 or more people are placed in danger of physical injury or death). The theory utilized was that by damaging schools, defendant placed the entire community in danger of property loss. This was error as the members of the community were indirect, not direct, victims of defendant's crime. To hold otherwise would permit scoring 25 points for OV 9 for virtually every crime, since all crime impacts the community at large.

OV 10, Vulnerable Victim, Domestic Relationship. *People v Brantley*, __ Mich App __; __ NW2d __ (2012 WL 1758673, No. 298488, decided May 17, 2012)**(may'12).** The trial court erred in scoring 10 points for OV 10, as defendant and complainant had discontinued dating several months earlier, were no longer having sex, and were not living together. Given these facts there was no domestic relationship under the statute.

OV 13, Pattern of Felonious Criminal Activity, Offenses Not Resulting in Conviction. *People v Earl*, __ Mich App __; __ NW2d __ (2012 WL 2330198, No. 302945, decided June 19, 2012)**(june'12).** It was appropriate to use an uncharged allegation that defendant participated in another robbery at the same bank within the 5-year period under the statutory construct to award ten points for OV 13 as there is no requirement that the offense result in a conviction.

OV 15, Amount of Controlled Substance. *People v Gray*, __ Mich App __; __ NW2d __ (2012 WL 2044369, No. 302168, decided June 5, 2012)**(june'12).** Defendant was in possession of far less than 50 grams of cocaine when he was pulled over and ultimately pled to that possession. Though there was more than 50 grams in a hotel room where defendant's girlfriend was waiting for him, he did not plead to that higher amount. Therefore it was error to score 50 points for OV 15 based on an amount over 50 grams. Amounts tallied for OV 15 must be included in the sentencing offense, and it makes no difference that Defendant possessed the larger amount at the same time.

Restitution, Blue Cross Blue Shield. *People v Allen*, 295 Mich App 277; 813 NW2d 806 (2011)**(nov'11).** Defendant was convicted of prescription fraud and was sentenced to one year probation. She was also ordered to pay $5,753.88 in restitution to BCBS. BCBS investigated defendant's fraud to determine whether defendant otherwise misused confidential information, an investigation BCBS was legally required to conduct according to its field investigator. Although defendant was not able to be connected to

other fraudulent prescriptions, the dollar value of the time spent conducting the investigation was pegged at $5,753.88. Holding that trial courts are required to order full restitution, the court found that BCBS did indeed suffer the loss of the 44 hours that their field investigator had to spend investigating defendant's fraud, and therefore the trial court "did not clearly err when it found that Blue Cross suffered a direct financial loss as a result of Allen's course of criminal conduct."

Sexual Delinquency, One Day to Life, Hearing. *People v Franklin,* __ Mich App __; __ NW2d __ (2012 WL 2579608, No. 296591, decided July 3, 2012)**(july'12).** After entering a no contest plea, defendant was sentenced to 1 day to life as a sexual deviant pursuant to MCL 750.335a(2)(c). The trial court erred in not conducting a hearing pursuant to MCL 767.61a on the sexual delinquency charge. Such a hearing is required even if a defendant pleads guilty or nolo contendere. The matter was remanded with instruction to conduct the required hearing.

Work Release in OWI 2d. *People v Pennebaker,* __ Mich App __; __ NW2d __ (2012 WL _____, No. 304708, decided September 13, 2012)**(sep'12).** The trial court, stating reasons, sentenced Defendant to 30 days in an electronic monitoring work release program after Defendant pled to operating a vehicle while intoxicated, with occupant less than 16, subject to second offense enhancement under MCL 257.625(7)(a)(ii). Because the statute unequivocally states that a defendant must be sentenced to at least 30 days in jail, the trial court erred in allowing Ms. Pennebaker to serve her time at home on tether.

F. Miscellaneous

Deportation, Immigration and Nationality Act. *Kawashima v Holder,* __ US __; 132 S Ct 1166; 182 L Ed 2d 1 (2012)**(march'12).** The Kawashimas, two resident aliens, were convicted of willfully making and subscribing false tax returns, and aiding and assisting in preparation of false tax returns. Their deportation was ordered under the Immigration and Nationality Act. The government contended that the Kawashimas' charges qualified as crimes involving fraud or deceit under 8 U.S.C. § 1101(a)(43)(M)(i) (Clause (i)) and thus were aggravated felonies for which they could be deported under § 1227(a)(2)(A)(iii). The Kawashimas' objected to their deportation, arguing that the felonies they were convicted of did not involve fraud or deceit that is required by Clause (i). After looking to the statute for guidance, the Court reasoned that the charged offense does not have to explicitly contain fraud or deceit as elements, but must contain elements that involve deceitful conduct, which both charged offenses here contain. The Court also found that tax evasion fits into Clause (i) and that there is no proof that Congress did not intend it to be there – the Kawashima's were properly deported under the INA. Justices Ginsburg, Breyer and Kagan dissented.

Firearms, Order to Return to Defendant's Designee. *People v Minch,* 295 Mich App 92; 811 NW2d 571 (2011)**(dec'11).** Defendant pled to one count of possession of a short-barreled shotgun and one count of felony firearm. The trial court ordered the

return, to defendant's designee, his mother, of 87 non-contraband firearms seized in a raid on defendant's home. The prosecutor filed an emergency appeal and, after granting a stay, the court of appeals upheld the trial court's order to return the firearms to defendant's mother. The court was not persuaded by the prosecution argument that to allow this would be to permit defendant to illegally possess or transfer weapons, and found that to refuse to return the legal weapons, which had not been subjected to forfeiture proceedings, to defendant's designee would violate defendant's due process rights. **On June 1, 2012, No. 144631, the MSC issued an order directing the scheduling of oral argument on whether to grant the prosecutor's application for leave or take other action.**

First Amendment, Stolen Valor Act. *US v Alvarez*, __ US __; 132 S Ct 2537; 183 LEd2d 574 (2012)**(june'12).** The issue in this case was whether the federal law that makes it a crime to falsely represent oneself to have received the Congressional Medal of Honor is a violation of the Free Speech Clause of the First Amendment. Alvarez stated he was awarded the Congressional Medal while speaking at a board meeting. He was prosecuted, and eventually pled guilty. He appealed, and the Ninth Circuit reversed holding that false statements of fact that caused no harm were protected by the First Amendment and, therefore, no crime was committed. In a 6-3 decision, the SCOTUS affirmed the Ninth Circuit. Using standard First Amendment analysis, the Court found that the law is content-based; that the speech being regulated does not fall within any historically recognized category of unprotected speech like defamation or fraud; and that, applying strict scrutiny, the law is not the least restrictive means of protecting a compelling governmental interest (protecting the integrity of the military awards system).

Habeas, Contrary to *Existing* SCOTUS Precedent. *Greene v Fisher*, 565 US __; 132 S Ct 38; 181 L Ed 2d 336 (2011)**(nov'11).** This case involves an obvious *Bruton/Gray* violation. The Pennsylvania trial court violated *Bruton v United States*, 391 US 123 (1968) as refined by *Gray v Maryland*, 523 US 185 (1998), when it allowed a nontestifying co-defendant's confession to be introduced with ineffectual redaction. After a divided panel of the Third Circuit affirmed the denial of the writ, the Court unanimously upheld this decision based on the fact that *Gray* was decided while the Pennsylvania Superior Court's merits affirmance of Greene's conviction was pending before the Pennsylvania Supreme Court, and the state supreme court never dealt with the issue on the merits. Holding that the *Teague* analysis is distinct, the Court affirmed that, for AEDPA purposes, the pronouncement of the SCOTUS relied upon must have been decided before the last state court decision on the merits, not simply before the state court conviction becomes final. The Court held in reserve the issue of whether AEDPA would "bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague*…" and also noted that Greene missed two opportunities to assert his *Gray* violation in a manner that would have likely ultimately produced relief for him (a cert petition to SCOTUS or a state postconviction action).

Habeas, Counsel; Appointment in Capital Cases. *Martel v Clair*, 565 US __; 132 S Ct 1276; 182 L Ed 2d 135 (2012)**(mar'12).** Under a federal statutory scheme defendants in

capital cases are entitled to appointed counsel for federal habeas proceedings. This case involved a dispute over what standard should be utilized when a defendant requests replacement of counsel. Despite an argument from the state that the standard should be tightened to avoid undue delay, the Court held that lower courts should employ the same "interests of justice" standard utilized in a related statute. In this case, however, reversing the ruling of the 9th Circuit, the Court held that the federal district court did not abuse its discretion when it denied replacement of counsel under the "interests of justice" standard.

Habeas, Deference to State Courts, Confession. *Bobby v Dixon,* 565 US __; 132 S Ct 26; 181 L Ed 2d 328 (2011)**(nov'11).** In this death penalty case a divided Sixth Circuit had granted the writ based on a series of violations surrounding the petitioner's statements to police. In a unanimous, Per Curiam opinion the Court reversed the grant of the writ, citing its recent decision in *Harrington v Richter*, 562 US __; 131 S Ct 770 (2011) for the proposition that under the AEDPA deference clause there must be an error, based on clear and existing SCOTUS precedent, that is "beyond any possibility for fairminded disagreement" before the writ can be granted. Finding no such "grievous" error in the ruling of the Ohio state courts with respect to the petitioner's admitted confession to murder, the grant of the writ was revoked.

Habeas, Deference to State Courts, Confrontation. *Hardy v Cross,* 565 US __; 132 S Ct 490; 181 L Ed 2d 468 (2011)**(dec'11).** When an Illinois court, after a mistrial due to hung jury, allowed a missing complainant's testimony to be read to the jury at a second trial, the Seventh Circuit granted the writ. SCOTUS, in another unanimous Per Curiam opinion, reversed the grant of the writ, holding that the decision of the Illinois appellate court concerning the diligence exercised by state authorities in seeking the complainant before the second trial "did not represent an unreasonable application of our Confrontation Clause precedents."

Habeas, Deference to State Courts, *Brady*. *Wetzel v Lambert,* 565 US __ ; 132 S Ct 1195; 182 L Ed 2d 35 (2012)**(feb'12).** Almost two decades after he was convicted of murder in Pennsylvania and sentenced to death, petitioner brought a postconviction claim in state court under *Brady*, claiming a police activity sheet naming another suspect was not provided at trial. After the state courts and the federal district court on habeas declined to grant relief, finding the statement regarding another suspect ambiguous, the 3d Circuit granted the writ. In a 6-3 decision, citing its recent decision in *Harrington v Richter*, 562 US __; 131 S Ct 770 (2011) for the proposition that under the AEDPA a habeas court must determine what arguments or theories supported the state court decision and then ask whether fairminded jurists could differ over whether such arguments/theories are inconsistent with a prior SCOTUS decision, rebuked the 3d Circuit and reinstated petitioner's conviction and sentence of death.

Habeas, Deference to State Courts, Sufficiency. *Coleman v Johnson,* 566 US __; 132 S Ct 2060; 182 L Ed 2d 978 (2012)**(may'12).** After Petitioner, who was convicted of murder in Pennsylvania under an aiding and abetting theory, lost his claim that the evidence against him was insufficient to convict in the state courts and in federal district

court, the 3d Circuit granted the writ based on *Jackson v Virginia*, finding that a conclusion that Petitioner Johnson shared an intent to kill with the actual shooter was "mere speculation." Holding that *Jackson* claims "are subject to two layers of judicial deference" the Court, in a unanimous Per Curiam opinion, reversed the 3d Circuit and reinstated the murder conviction because the jury's finding was not "so insupportable as to fall below the threshold of bare rationality."

Habeas, Deference to State Courts, Sufficiency. *Parker v Matthews,* 566 US __; 132 S Ct 2148; 183 L Ed 2d 32 (2012)**(june'12).** In another unanimous Per Curiam opinion, the Court stated that the 6th Circuit had impermissibly set aside two 29-year-old murder convictions "on the flimsiest of rationales." Citing its recent decision in *Cullen v Pinholster* for the proposition that, under AEDPA, the standard of review is "difficult to meet…and highly deferential," the Court stated that the 6th Circuit's conclusion that under *Jackson v Virginia* the state had failed to prove the absence of extreme emotional disturbance beyond a reasonable doubt was flawed. The Court held there was sufficient evidence to put the question of extreme emotional disturbance to the jury. A second ground upon which the 6th Circuit had granted the writ, prosecutorial misconduct, was also found to be erroneous. The Court held that the 6th Circuit mistakenly found the prosecutor had put forth a claim of collusion (between defense counsel and an expert witness) where the prosecutor immediately clarified that his argument was not meant to suggest collusion. The 6th Circuit also erred in using its own precedent on prosecutorial misconduct instead of the Supreme Court's decision in *Darden v Wainwright,* which outlined a more general standard. Petitioner's death sentence was reinstated.

Habeas, Failure to Exhaust; Procedural Default; Abandonment by Counsel. *Maples v Thomas,* 565 US __; 132 S Ct 912; 181 L Ed 2d 807 (2012)**(jan'12).** The federal district court denied petitioner's habeas petition because he had procedurally defaulted in state court by not appealing the state trial court's order denying postconviction relief. While noting that attorney negligence on postconviction does not constitute cause to overcome procedural default, the Court, in a 7-2 opinion authored by Justice Ginsburg, held that here Petitioner Maples was abandoned by his pro bono counsel without notice, severing the agency relationship and establishing cause for any procedural default. The matter was remanded to determine prejudice.

Habeas, Jurisdiction, Statute of Limitations. *Gonzalez v Thaler,* 565 US __; 132 S Ct 641; 181 L Ed 2d 619 (2012)**(jan'12).** A certificate of appealability (COA) is required to appeal a decision of a federal district court on habeas to the appropriate federal appellate court. Despite language in the applicable statute suggesting an appeal may lie only where the denial of a constitutional right is at issue, the Court, in an 8-1 decision (Scalia dissenting), held that statutory language at issue is not jurisdictional, and the federal appellate courts may consider appeals from decisions dismissing habeas petitions for a statute of limitations (SOL) violation. In this case the Fifth Circuit's determination that direct review ended when the time for Petitioner to take an appeal to the state's highest court expired (the Petitioner failed to seek review from the state's highest court). Since Petitioner did not file his federal habeas petition until after one year from that point, his petition was barred as untimely.

Habeas, Statute of Limitations, Waiver. *Wood v Milyard*, 566 US __; 132 S Ct 1826; 182 L Ed 2d 733 (2012)**(april'12).** After being sentenced to life for murder in Colorado, Petitioner filed a habeas petition in federal court. When asked by the federal district court whether it planned to contest timeliness, the state indicated it would not challenge, but was not conceding, the timeliness of the petition. The district court denied the writ on the merits. After ordering briefing on the timeliness issue, the Tenth Circuit held the petition time barred. The Court, in a seven-justice majority opinion authored by Justice Ginsburg, held that the federal courts of appeal do indeed have the right, but not the obligation, to consider a forfeited SOL defense. Here, however, the state explicitly waived the defense, and therefore the 10th Circuit erred in not deciding Wood's federal habeas petition on the merits. Justice Thomas, joined by Justice Scalia, agreed with the judgment but would hold that federal courts of appeal cannot sua sponte consider either forfeited or waived defenses.

Michigan Medical Marijuana Act (MMMA), Separate "Enclosed Locked Facility" Requirement. *People v Bylsma,* 294 Mich App 219; 816 NW2d 426 (2011)**(sep'11).** Defendant and his brother were registered primary caregivers. Defendant rented an enclosed, locked facility, and was growing marijuana for two patients for whom he had been approved as a primary caregiver. His brother and other registered caregivers were utilizing the same space, and defendant's tutelage, to grow marijuana for patients for whom they had been approved as caregivers. Despite this, the Grand Rapids police, using a warrant, seized 88 marijuana plants from defendant's locked facility, and he was charged with manufacturing marijuana, and subjected to an enhanced sentence under MCL 333.7413(2)(a). His motion to dismiss was denied because each set of 12 plants permitted under the MMMA to meet the needs of a single patient must be kept in a separate closed, locked facility, accessible by only one individual. The court of appeals agreed with the denial, and held that since defendant himself was only connected to two qualifying patients through registration as a primary caregiver, he was only allowed to possess 24 plants, and his access to the plants of other patients, connected to other primary caregivers, was a violation of the controlled substance act with no immunity and no affirmative defense available to defendant under §'s 4(b) or 8 of the MMMA. An application for leave to the MSC was pending as of August 2, 2012.

Michigan Medical Marijuana Act (MMMA), Dispensary, Patient to Patient Sales. *State v McQueen,* 293 Mich App 644; 811 NW2d 513 (2011)**(aug'11).** The issue in this case was whether the MMMA permits the operation of a private club that facilitated the sale of marijuana from one patient to another. The dispensary retained at least 20 percent of the sale price. The trial court found the dispensary operated within the MMMA. The Court of Appeals reversed. The specific issue was whether the "transfer" and "delivery" language in the MMA contemplated sales. The COA held that "the 'delivery' or 'transfer' of marihuana is only one component of the 'sale' of marihuana - the 'sale' of marihuana consists of the 'delivery' or 'transfer' *plus* the receipt of compensation. The 'medical use' of marihuana, as defined by the MMMA, allows for the 'delivery' and 'transfer' of marihuana, but not the 'sale' of marihuana." The MSC granted leave to appeal on March 28, 2012, briefing is complete, but no date has been set for oral argument as of August 2, 2012.

Michigan Medical Marijuana Act (MMMA), Timing of Physician Statement. *People v Reed,* 294 Mich App 78; 819 NW2d 3 (2011)**(aug'11).** Defendant suffers from chronic back pain as a result of degenerative disk disease (he underwent surgery a decade ago) and, upon passage of the MMMA, he began exploring medical marijuana to relieve his pain. He was rejected by the clinic he had been attending for treatment because they received federal funding. He was continuing his search for a place to receive certification when an aerial surveillance conducted by the Huron Undercover Narcotics Team (HUNT) spotted six marijuana plants growing at defendant's residence. Approximately three weeks after the aerial surveillance spotted the six plants, defendant obtained a certification to use medical marijuana from a doctor, and ten days after he received his registry identification card from MDCH he was arrested. The court set the time frame for requiring possession of a valid registry card, and for obtaining a physician's statement, to "before commission of the purported offense." Judges Meter, Owens and O'Connell held that Defendant, since he grew six marijuana plants prior to obtaining his physician's statement and registry identification card, was "not immune from arrest, prosecution, or penalty." No MSC application was filed.

Michigan Medical Marijuana Act (MMMA), Possession of Registry Identification Card. *People v Nicholson,* __ Mich App __; __ NW2d __ (2012 WL 2401399, No. 306496, decided June 26, 2012)**(june'12).** Under § 4(a) of the act, which is wholly independent of the affirmative defense provisions set out in § 8, a defendant is immune from arrest and prosecution if he (1) is a qualifying patient; (2) who has been issued and possesses a registry identification card; and (3) possesses less than 2.5 ounces of usable marijuana. In this case, at the time of arrest, defendant had been issued "the equivalent of a registry identification card" under MCL 333.26429(b), which states that if the department doesn't issue a card in response to a valid application within 20 days, the registry ID card shall be considered granted, and a copy of the application papers shall serve as a valid card. However he did not have the application papers on his person at the time of arrest. The court held that immunity from arrest and prosecution are two separate considerations, so that while a defendant must possess (reasonably accessible) his valid card at the time of arrest to be immune from that action, his later production of the valid card in the district court was sufficient to make him immune from prosecution for the misdemeanor offense of possession of marijuana. The case was remanded so that the defendant could jump one more hurdle – showing that he was engaged in the medical use of marijuana in accord with MCL 333.26424(a). This requires that the marijuana, at the time in question, was possessed or used "to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." As of August 2, 2012 no MSC application had been filed.

Michigan Medical Marijuana Act (MMMA), Driving, Zero Tolerance. *People v Koon,* 296 Mich App 223; 818 NW2d 473 (2012)**(april'12)**. Defendant was pulled over for speeding, admitted to drinking a beer, voluntarily showed a pipe, explained he had a medical marijuana registry card and that he had last smoked marijuana 5-6 hours earlier. A blood test showed active THC in defendant's system. The district court, affirmed by the circuit court, held that the MMMA trumps the "zero tolerance" law (MCL 257.625(8)), and therefore the prosecution must show a defendant was actually impaired

by the presence of marijuana in his body. Leave was granted to the prosecution, and the court of appeals reversed, holding that because the MMMA specifically excepts operating a motor vehicle under the influence of marijuana from its protections (MCL 333.26427(b)(4)), and since the MMMA did not define "under the influence" while the motor vehicle code essentially does that by adopting a zero tolerance provision, the two statutory constructs are not in conflict, and defendant's prosecution for driving under the influence can go forward. An application for leave was pending in the MSC as of August 2, 2012.

Michigan Medical Marijuana Act (MMMA), Enclosed Locked Container, § 8. *People v Danto and Nater,* 294 Mich App 596; __ NW2d __ (2011)**(nov'11).** While the bulk of this split opinion focuses on a point conceded by the defense regarding admissibility of other acts under MRE 404(b), and whether the defense, but not the prosecution, was barred from mentioning the MMMA (the dissent found this inconsistency by the majority perplexing), there was an issue concerning the provisions of the MMMA that was agreed upon by the full panel. It was held that the defense failed to support its defense under § 8 of the act because, since § 7 notes that medical use of marijuana must be carried out in accord with provisions of the act, and since § 4 demands enclosure in a closed, locked container, and since defendants could clearly not show compliance with this provision, the defense under § 8 was properly barred. No MSC application was filed, though the latter holding was overruled by the MSC in *Kolanek*.

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

Michigan Medical Marijuana Act (MMMA), Required Use of Expert Testimony. *People v Anderson,* __ Mich App __; __ NW2d __ (2012 WL _____, No. 300641, decided September 18, 2012)**(sep'12).** This case was remanded by the supreme court in the wake of *Kolanek and King*. Defendant possessed more plants than allowed under the MMMA. In support of an affirmative defense, Defendant and his physician testified that

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

Michigan Medical Marijuana Act (MMMA), Search Warrant Affidavit. *People v Brown,* __ Mich App __; __ NW2d __ (2012 WL _____, No. 303371, decided August 28, 2012)**(aug'12).** After getting a tip, detectives did a trash pull and found a piece of 'fresh marijuana.' They put this information in a warrant affidavit but did not check to see if Defendant was a qualifying patient or primary caregiver under the MMMA. The fruits of the search were suppressed by the trial court who found that after enactment of the MMMA, police must include in warrant affidavits "facts sufficient for a magistrate to conclude that the possession of the marijuana alleged in the affidavit is not legal under the MMMA. The court of appeals disagreed, holding that marijuana remains illegal in Michigan.

Michigan Medical Marijuana Act (MMMA), Zoning, Preemption. *Ter Beek v City of Wyoming,* __ Mich App __; __ NW2d __ (2012 WL 3101758, No. 306240, decided July 31, 2012)**(july'12).** Plaintiff is a qualified medical marijuana patient living in the city of Wyoming. Wyoming's zoning ordinance prohibits all uses contrary to federal and state law. Plaintiff brought a declaratory judgment action seeking to void the ordinance on state preemption grounds as it prohibited conduct permitted by the MMMA. The trial court found that the federal controlled substances act preempted the MMMA and denied Plaintiffs request. The court of appeals held that "enforcement of the ordinance could result in the imposition of sanctions that the immunity provision of the MMMA does not permit" and voided the city ordinance on preemption grounds. After detailed analysis the panel also found that the federal CSA did not preempt the MMMA.

Newly Discovered Evidence, Reasonable Diligence. *People v Rao*, 491 Mich 271; 815 NW2d 105 (2012)**(may'12).** In a 5-2 decision, Justice Cavanagh concurring in result only, the court reversed a split decision of the court of appeals granting a new trial based on newly discovered evidence in this second degree child abuse case. Defendant, convicted of abusing her adopted daughter, put forward new medical evidence in the form of x-rays taken after the trial. The trial court denied a motion for new trial based on newly discovered evidence, and the court of appeals reversed, finding an abuse of discretion. The court, in an opinion authored by Justice Markman, focused on the first

and third factors outlined in *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), that the evidence must be newly discovered and that the party offering the new evidence could not have discovered and produced the evidence at trial using reasonable diligence. The court found these factors interrelated and, in this case, not met because the defense was aware of the potential acquisition of this evidence at the time of trial. The fact that the x-rays did not exist until after trial was not viewed as dispositive. Emphasis was placed on the failure of the defense to seek the x-rays at issue prior to trial, and the court felt that there was a strong possibility that failure was strategic.

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

Officer Immunity, Grand Jury Testimony. *Rehberg v Paulk,* __ US __; 132 S Ct 1497; 182 LEd2d 593 (2012)**(apr'12).** In this case the SCOTUS unanimously resolved a long standing circuit conflict when it held that a governmental official who serves as a witness in a grand jury proceeding is entitled to the same absolute immunity from suit under Section 1983 as a witness who testifies at trial. Some circuits had awarded only qualified immunity. Rehberg had brought a Section 1983 action against James Paulk, a police officer, for allegedly committing perjury at grand jury proceedings which led to an indictment against Rehberg.

Officer Immunity, Retaliatory Arrest. *Reichle v Howards,* __ US __; 132 S Ct 2088; 182 LEd2d 985 (2012)**(june'12).** Howards, while at a shopping mall, saw then Vice President Dick Cheney greeting people outside. Howards, while on his cell phone, stated, "I'm going to ask him how many kids he's killed today." One of the agents assign to protect Cheney overheard the remark, leading several other agents to watch Howards closely. Howards then approached Cheney, and told him that his "policies in Iraq were disgusting." Cheney did not react, but merely thanked the man. As Howards moved past

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

Officer Immunity, Search Warrants. *Messerschmidt v Millender,* __ US __; 132 S Ct 1235; 182 LEd2d 47 (2012)**(feb'12).** This case arose from a search warrant police obtained after Jerry Ray Bowen shot at his ex-girlfriend with a sawed-off shotgun. A tip led Detective Messerschmidt to the home of Bowen's former foster mother, Augusta Millender. Messerschmidt obtained a warrant to search Millender's home for any evidence of Bowen, his guns and/or items showing Bowen's gang membership or affiliation. A sheriff's SWAT team executed the warrant but found neither Bowen nor his gun. Instead they seized Millender's shotgun and a box of ammunition, both of which she lawfully possessed. Millender brought a section 1983 action against Messerschmidt. The issue in this case is whether reasonable, well trained officers should have known that the warrant failed to establish probable cause. The Ninth Circuit held that Messerschmidt and the other officers should have known, and denied qualified immunity to the officers relying on *Malley v Briggs*, 475 US 335, 106 S Ct 1092, 89 L Ed 2d 271 (1986). However, in a 6-3 decision, the SCOTUS reversed the Ninth Circuit holding that the officers were entitled to qualified immunity for executing a search warrant for firearms and evidence of gang activity in a home after a victim reported that the suspect had threatened her with a gun. The Court found that the facts of this case would lead a reasonably trained officer to believe that Bowen owned more weapons than just the sawed-off shotgun used in the shooting. While the dissenters felt that the gang-related language had nothing to do with the crime, the majority held that evidence of gang related activity would "prove helpful in prosecuting him for the attack." The opinion was authored by Chief Justice Roberts. Justice Breyer filed a concurring opinion. Justice Kagan filed an opinion concurring in part and dissenting in part. Justice Sotomayor filed a dissenting opinion, which was joined by Justice Ginsburg.

Parole, Prosecutor's Appeal of Grant, Standard of Review. *In re Parole of Haeger,* 294 Mich App 549; 813 NW2d 313 (2011)**(nov'11)**, and *In re Parole of Elias,* 294 Mich App 507; 811 NW2d 541 (2011)**(nov'11).** In these two detailed, lengthy, and unanimous, published decisions, both authored by Judge Gleicher, the court set out to define the legal parameters for prosecution challenges to grants of parole by the board. Haeger and Elias had both been granted parole after both had served well beyond their minimum sentences and after both had been repeatedly flopped. In both cases the local circuit courts had reversed the grant of parole upon complaint of the prosecutor. The court of appeals upheld the reversal of the grant in *Haeger*, not because the board had acted wrongly, but because they had not made a sufficient record to assure that they had

properly exercised their discretion in granting parole. In *Elias*, the court reversed the circuit court's reversal of the parole board's grant of parole because the parole board, in that case, had laid a proper record justifying its action. Judge Gleicher made it clear that in *Elias* the circuit court had "overstepped the bounds of judicial review," and erred when it applied the standard of review utilized under the Administrative Procedures Act as this is not a contested case under the APA. Judicial review in this context is limited by the abuse of discretion standard. The decision of the parole board must be upheld if it is supported by competent, material and substantial evidence on the whole record. It is improper for the circuit court to substitute its judgment for that of the parole board.

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

Plea Consequences, Habitual Offender Enhancement. *People v Brown*, __ Mich __; __ NW2d __ (2012 WL _____, No. 143733, decided August 16, 2012)**(aug'12).** In a 5-2 decision the Michigan Supreme Court held that it is error, requiring the allowance of plea withdrawal, for the court to fail to advise a defendant concerning the potential maximum sentence for the crime to which he pled as enhanced by applicable habitual offender status. The remedy applies even if the prosecutor fails to notify defendant of habitual offender enhancement prior to the taking of the plea as permitted by MCL 769.13(3).

Prisoner Civil Judgment, Identification of Parties. *Neal et al v Department of Corrections*, __ Mich App __; __ NW2d __ (2012 WL _____, No. 305142, decided August 7, 2012)**(aug'12).** Plaintiffs successfully sued the MDOC for sexual harassment and sexual assault and settled for $100 million dollars payable in installments over six years. A protective order was provided limiting disclosure of Plaintiffs' identities to prevent retaliation. Various entities looking for child support, court fines, costs, restitution, etc. intervened seeking the identities of Plaintiffs. The court, while noting that the required payments should be made, sent the case back to the trial court with direction to fashion a remedy, preferably a remedy that would necessitate disclosing the names of class members. A "Special Master" was suggested.

Sex Offender Registration, Federal. *Reynolds v United States*, 565 US __; 132 S Ct 975; 181 L Ed 2d 935 (2012)**(jan'12).** The federal Sex Offender Registration and Notification Act, passed in 2006, requires certain sex offenders to register with the states for inclusion on state and federal registries. The issue before the Court was the date on which the federal registration requirement took effect for sex offenders convicted before the Act became law. In a 7-2 decision, Justices Scalia and Ginsburg dissenting, the Court

held that the Act's registration requirements do not apply to pre-Act offenders "until the Attorney General specifies that they do apply." The case was remanded to determine whether the Attorney General's interim rule constitutes a valid specification.

Sex Offender Registration, Minors. *In re Tiemann*, __Mich App__ (2012 WL 1623528, No. 303813, May 8, 2012, released for publication July 3, 2012)**(may'12).** At a consent hearing under MCL 28.723(a), the trial court found that Tiemann had not met his burden of establishing consent, and therefore he was required to register under SORA. Due process was not offended by a consent hearing which placed the burden on defendant as the SORA is not considered punishment. Since the SORA is a regulatory statute and not criminal, a defendant has no confrontation clause rights at the hearing.

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

I. Search and Seizure

A. What Constitutes a "Search"?

Florida v. Jardines **(to be argued October 2012)**
Did the government conduct a Fourth Amendment search without a warrant or probable by bringing a narcotics dog to the front door of a private home and having it sniff the door?

B. Probable Cause

Florida v. Harris **(to be argued October 2012)**
Does the alert of a "well-trained" narcotics dog on the exterior of a vehicle provide probable cause to search the vehicle?

C. The Exigency Exception

Missouri v. McNeely **(to be argued January 2013)**
Is the fact that alcohol in blood dissipates enough, without more, to constitute an exigency so that the police can automatically take anyone arrested for drunk driving who refuses a chemical test to a medical facility for a warrantless blood draw?

D. *Terry* Stops and Other Brief Detentions

***Bailey v. United States* (to be argued October 2012)**
May police officers, pursuant to *Michigan v. Summers*, detain a person incident to the execution of a search warrant even when the person has already left the vicinity of the search before the warrant is executed?

II. Double Jeopardy

***Evans v. Michigan* (to be argued November 2012)**
Does double jeopardy bar retrial after the trial judge erroneously holds a particular fact to be an element of the offense and grants a midtrial directed verdict because the prosecution failed to prove that fact?

III. Right to Counsel

A. Ineffective Assistance of Counsel

***Chaidez v. United States* (to be argued November 2012)**
Does *Padilla v. Kentucky*, holding that criminal defendants receive ineffective assistance of counsel when their attorneys fail to advise them that pleading guilty will subject them to deportation, apply to persons whose convictions became final before *Padilla*?

IV. Post-Conviction Relief

A. Retroactivity of Favorable Authority

***Chaidez v. United States* (to be argued November 2012)**
Does *Padilla v. Kentucky*, holding that criminal defendants receive ineffective assistance of counsel when their attorneys fail to advise them that pleading guilty will subject them to deportation, apply to persons whose convictions became final before *Padilla*?