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CRIMINAL LAW UPDATE
OCTOBER 2013THRUOUGH OCTOBER 2014

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I. Case Law

A. Fourth Amendment.

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

Random Drug Screen, Family Court. *In re Contempt of Dorsey*, __ Mich App __; __ NW2d __ (2014 WL 4435591, No. 309269, decided September 9, 2014)**(sep'14).** The family division of Livingston County Circuit Court had jurisdiction over Defendant's son in a delinquency case and ordered drug testing of Defendant's mother. The mother's refusal resulted in a finding of criminal contempt. The court of appeals upheld this finding, stating that the family court has jurisdiction over adults pursuant to MCL 712A.6 if "necessary for the physical, mental or moral well-being of a particular juvenile…". And even though the ordered random drug screening was an unconstitutional invasion of privacy under the Fourth Amendment and Const 1963, art 1, §11, this issue was waived by a failure to timely object and the contempt finding was valid as Defendant was required to follow the order.

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

***Terry* Stop; Confidential Informant.** *People v Nguyen*, 305 Mich App740; __ NW2d __ (2014)**(june'14).** Using a police "team" approach the court found that the collective knowledge of Troy police and ICE agents, relying primarily on information from a confidential informant, was sufficient to find probable cause to stop Defendant's vehicle and arrest him on drug charges. Probable cause did not dissipate after a weapons pat-down and vehicle search uncovered no contraband as Defendant's evasive actions before pulling over suggested he was hiding drugs on his person. A search incident to arrest may still be valid even though the arrest is not made until after the search is conducted.

***Terry* Stop; Obscured License Plate.** *People v Dunbar*, __ Mich App __; __ NW2d __ (2014 WL 4435838, No. 314887, decided September 9, 2014)**(sep'14).** Contraband (cocaine, marijuana, and a handgun) was found in Defendant's pickup truck after it was

pulled over by police. The sole ground for the stop was a suspected violation of MCL 257.225(2), which criminalizes obscuring a license plate. Police claimed that a trailer hitch ball made it difficult for them to read the plate. In a 2-1 decision, Judge Meter dissenting, the court held that the statute made no mention of common towing equipment, the plate was otherwise in pristine condition and legible, and therefore it was improper for police to make a stop. Judge O'Connell, concurring, held that the broad construction of the statute could be construed to make ordinary car equipment (bike racks, trailers, etc.) illegal and renders the statue unconstitutionally vague. He would interpret the statute to require only that the plate itself be free of obscuring material. The dissent claimed this would allow a "shield" to be set up as long as it was not attached to the plate.

Warrantless Entry. *People v Henry*, 305 Mich App 127; __ NW2d __ (2014)**(may'14).** Defendant's convictions arose out of a series of armed robberies in the Lansing area. Under the "unique circumstances of this case" COA affirmed the trial court's ruling that police warrantless entry of an apartment was justified on grounds of "hot pursuit" and "other exigencies."

Warrentless Search at Arrest, Cell phones. *Riley v California*, __ US __; __ S Ct __ (2014)**(june'14).** In the *Riley* case and the companion case of *United States v Wurie*, police seized cell phones belonging to defendants at arrest without a warrant, uncovering incriminating information later used to prosecute them. After examining a trilogy of cases dealing with searches incident to arrest, the Court concluded, in a near unanimous opinion with Alito, J. concurring in part, that privacy concerns with respect to electronic data on cell phones trumped any interest in officer safety or loss/destruction of evidence. Thus the Court refused to extend the categorical rule in *United States v Robinson*, 414 US 218, where it allowed search of a cigarette pack found on the arrestee to prevent destruction of evidence. Subject to exigent circumstances analysis on a case to case basis, discussed primarily in relation to safety concerns, the Court held that police must obtain a warrant before searching cell phone data.

B. Other Pretrial Matters.

Compelled Testimony to Rebut Mental State Defense. *Kansas v Cheever*, __ US __; 134 S Ct 596 (2013)**(dec'13).** Defendant was charged in state court in Kansas with capital murder. When it appeared the state death penalty might be in trouble, prosecution was transferred to federal court where a psychiatric exam was ordered due to Defendant's expressed intent to introduce expert testimony that methamphetamine intoxication negated specific intent. When prosecution returned to state court after the state death penalty was upheld, the trial judge permitted introduction of testimony from the expert who had examined Defendant pursuant to the earlier federal court order over objection of defense counsel who argued that since the psychiatric exam was done against Defendant's will, allowing the expert to testify was a Fifth Amendment violation as this effectively compelled Defendant to testify against himself. Ultimately the Kansas Supreme Court agreed with Defendant, overturning his murder convicting based on *Estelle v Smith*, 451 US 454. The United States Supreme Court reversed and reinstated Defendant's conviction, holding that, under *Buchanan v Kentucky*, 483 US 402, if a

defendant presents expert testimony supporting a mental state defense, the Fifth Amendment does not prevent rebuttal evidence from a court-ordered mental evaluation of the defendant for the limited purpose of rebutting the defendant's expert.

Competence to Stand Trial. *People v Kammeraad,* __ Mich App __; __ NW2d __ (2014 WL 4999455, No. 315114, decided October 7, 2014)**(oct'14).** Despite the fact that Defendant's disruptive and nonsensical caused a forfeiture of his right to counsel and his right to be present at trial, the court ruled that the trial court's failure to request a competency exam was not error. Because the trial court was in a better position to assess Defendant's behavior the appellate panel refused to substitute its judgment for that of the trial court on this point.

Delay in Arrest. *People v Woolfolk,* 304 Mich App 450; 848 NW2d 169 (2014)**(feb'14)**. Defendant argued that his first degree murder conviction should be reversed due to a five year delay between the offense and his arrest. The court of appeals disagreed, stating that the delay was reasonable under the circumstances, including the disappearance of a key witness for a period of time, and Defendant was unable to show prejudice caused by the delay.

Discovery, *Brady,* Defendant's Diligence as a Factor. *People v Chenault,* 495 Mich 142; 845 NW2d 731 (2014)**(april'14).** In this case the Michigan Supreme Court considered the proper test for applying SCOTUS's decision in *Brady v Maryland,* 373 US 83 (1963). In *People v Lester,* 591 NW 2d 267 (1998), the Court of Appeals adopted a four-factor test that added a requirement of diligence on the part of the defense to the traditional *Brady* test. The Defendant in this case was denied a video recording of an interview with an incriminating witness. A month after trial, defense counsel moved for a new trial and requested the interview. The trial court granted Defendant's motion for a new trial, concluding that his due process rights had been violated under *Brady*. The COA reversed, analyzing the *Brady* claim using the four-factor test articulated in *Lester*. The Michigan Supreme Court held in this case that a diligence requirement is not supported by *Brady* or its progeny. The Court overruled *Lester,* and reaffirmed the traditional three-factor *Brady* test. However, because Defendant could not establish that the suppressed evidence was material, the MSC denied his *Brady* claim and affirmed his convictions.

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

Double Jeopardy, Collateral Estoppel. *People v Wilson*, 496 Mich 91; 825 NW2d 134 (2014)**(june'14).** Defendant was convicted of first-degree felony murder and other charges. The jury acquitted on charges of first-degree premeditated murder and first-degree home invasion, which was the only felony that supported the first-degree felony murder charge. After Defendant's conviction was reversed due to failure to allow him to represent himself, the prosecution recharged first-degree felony murder grounded on the home invasion charge. The trial court granted Defendant's motion to dismiss, holding that the Double Jeopardy Clause prevented a second prosecution on that charge as a second jury could not consider home invasion as an element of felony murder after Defendant had been acquitted on that charge. The court of appeals reversed, claiming inconsistency of the first verdict negated application of the collateral estoppel doctrine. In a 4-3 decision written by Justice McCormack, the Supreme Court sided with the trial court and dismissed the felony murder charge on Double Jeopardy, Collateral Estoppel grounds. The majority held that while inconsistent verdicts within the same trial were lawful, the inconsistency will not allow an acquitted count to be retried due to Double Jeopardy protections.

Expert, Appointment for Indigent Defendant. *People v McDonald*, 303 Mich App 424; 844 NW2d 168 (2013)**(dec'13)**. In this first-degree home invasion case, the trial court refused to approve additional funding so that Defendant's DNA expert (who would testify that Defendant was not a "major" donor with respect to DNA on a gun found near the location of Defendant's arrest), could testify at trial. Under the facts in this case, given the testimony of the prosecution DNA expert that the DNA evidence was "inconclusive" with respect to whether Defendant had touched the gun, the court held that Defendant was not able to show "that expert testimony would likely benefit the defense." It was thus not error to refuse the additional funding.

Fifth Amendment, *Miranda*. *People v Henry*, 305 Mich App 127; __ NW2d __ (2014)**(may'14).** Defendant's convictions arose out of a series of armed robberies in the Lansing area. Defendant argued that the trial court erred in allowing the prosecutor to introduce evidence of statements he made to police during a custodial interrogation. After police read defendant his rights and asked him if he was willing to "give up those rights and make a statement," defendant unequivocally stated "No sir." In doing so, defendant asserted his Fifth Amendment right to remain silent. In light of this unequivocal assertion of the right to remain silent, the trial court erred in holding defendant's statements to police admissible based on a subsequent waiver of rights. The court of appeals, however, ultimately held that this was harmless error in light of the "overwhelming evidence" against defendant, and affirmed the convictions.

Fifth Amendment, *Miranda*. *People v Tanner*, 496 Mich 199; __ NW2d __ (2014)**(june'14).** Charged with murder, Defendant was read his Miranda rights and invoked his right to counsel. The next day Defendant told a jail psychologist he wanted to "get something off his chest." The psychologist told jail staff and the jail administrator spoke to Defendant who asked for an attorney. The jail administrator told Defendant he could not provide counsel but could contact police and Defendant agreed. The administrator informed the prosecution and police. Law enforcement and an attorney,

apparently provided by the court when the prosecutor informed the court of Defendant's request, arrived at the same time. The jail administrator told the attorney to wait while he allowed police to interview Defendant, who did not know an attorney was waiting for him at the jail. The Defendant incriminated himself in the murder and the trial court suppressed Defendant's statements under *People v Bender*, 452 Mich 594 (1996), which held that police must promptly inform a suspect that an attorney is available when that attorney has made contact with them. In a 5-2 decision, McCormack and Cavanagh dissenting, the court overruled *Bender* and held Defendant's statements were voluntary and admissible. The majority found that the uncoerced waiver of *Miranda* rights by Defendant was not impacted by the fact that Defendant did not know an attorney was waiting to see him, citing *Moran v Burbine*, 475 US 412 (1986).

Notice, Date of Offense. *People v Gaines*, __ Mich App __; __ NW2d __ (2014 WL 3843747, Nos. 310367, 310368, 310369, decided August 5, 2014)**(aug'14)**. Defendant was convicted of several counts of CSC arising out of consensual relationships he had with 14 and 15 year old girls when he was in his senior year in high school and the year after his graduation. Defendant argued he was denied due process because the prosecution failed to prove certain offenses occurred on the date claimed in the charging documents. The court held that precise dates do not have to be proven, especially in "sexual offenses involving children," and that here the prosecution made a good faith effort to establish the dates of the offenses and Defendant was not prejudiced.

Pretrial Identification. *People v Woolfolk*, 304 Mich App 450; 848 NW2d 169 (2014)**(feb'14)**. Years after a murder, police showed a witness a single photo of Defendant. Although conceding that this was "one of the most suggestive photographic identification procedures" the court held that under the totality of circumstances, including that the witness had identified Defendant by nickname prior to being shown a single photo, the procedure in this case did not deny due process. An independent basis was shown by the fact that the witness knew and grew up with the Defendant.

C. Confrontation, Counsel, and Other Trial Issues.

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

Counsel, Ineffective Assistance, Expert Witness. *Hinton v Alabama*, __ US __; 134 S Ct 1081 (2014)**(feb'14).** Defendant was convicted of two murders where critical

evidence was provided by state ballistics experts who testified that bullets found at the scene came from Defendant's gun. Trial defense counsel actually hired an expert who countered the state's ballistics testimony, but because he failed to realize that he could have asked the trial court for additional funding to retain a *competent* expert, trial defense counsel was unable to obtain a fully qualified expert. The United States Supreme Court focused on the need to investigate and hire a defense expert where the case warrants it. Citing a passage in *Harrington v Richter*, 562 US __, 131 S Ct 770, 788 (2011), the Court reiterated that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." And while noting that invalid forensic testimony can contribute to wrongful convictions, the *Hinton* Court stated that "this threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses." The Court concluded that trial defense counsel was constitutionally deficient for not investigating and retaining a qualified forensic expert to examine and testify regarding the prosecution's ballistics evidence.

Counsel, Ineffective Assistance, Failure to Object to Improper Vouching Testimony. *People v Douglas*, 496 Mich 557; 852 NW2d 587 (2014)**(july'14).** Defendant was convicted of CSC with his 3 ½ year old daughter. Trial defense counsel's failure to object to testimony of several witnesses improperly vouching for the credibility of the complainant was found to be reversibly ineffective in this hotly contested credibility contest. The improper testimony included a statement by complainant's mother that she knew her daughter does not lie, and statements by an expert witness from Care House who told the jury that she found complainant's statements had been substantiated and there was no indication that complainant was coached by her mother or that she was being untruthful.

Counsel, Ineffective Assistance, Investigating Defense Witnesses. *People v Herron,* 303 Mich App 392; 845 NW2d 533 (2013)**(dec'13)**. Defendant was convicted of breaking and entering with intent to commit larceny. He claimed defense counsel was ineffective for not investigating and calling several witnesses who would have backed his claim that the crime was a "call for help" and he did not intend to commit larceny. The court found that trial counsel's actions with respect to the witnesses were reasonable under the circumstances and, furthermore, the witnesses' hearing testimony did not produce a reasonable possibility of a different result and indeed "would have discredited defendant's defense." Thus both prongs of *Strickland* were not satisfied and Defendant's conviction was affirmed.

Counsel, Ineffective Assistance, Plea Negotiations. *People v Douglas*, 496 Mich 557; 852 NW2d 587 (2014)**(july'14).** Defendant's CSC convictions arising from allegations by his 3 ½ year old daughter were unanimously reversed for evidentiary error and ineffective assistance of counsel at trial. In a 4-3 split on this point, the MSC ruled that though counsel erred in failing to accurately advise Defendant on the consequences of conviction during plea discussions, the remedy of reinstatement of the plea should not have been provided by the court of appeals as a full assessment of the record reveals that

Defendant would not have taken the plea deal even had he known that he was facing a mandatory minimum sentence of 25 years.

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

Counsel, Waiver/Forfeiture. *People v Kammeraad*, __ Mich App __; __ NW2d __ (2014 WL 4999455, No. 315114, decided October 7, 2014)**(oct'14).** After a thorough discussion concerning the difference between waiver and forfeiture, the court held that Defendant's constant disruptive and nonsensical conduct forfeited his right to counsel. In this case the trial court followed the appropriate procedures but Defendant would not engage in any discourse on the subject. Trial defense counsel's failure to in any way test the prosecution's case was not ineffective because Defendant maintained no right to counsel.

Evidence, Compelled Statements, Obstruction of Justice, Police Misconduct. *People v Hughes*, __ Mich App __; __ NW2d __ (2014 WL 3434646, Nos. 316072, 317158, 317272, decided July 15, 2014)**(july'14).** In this case three police officers gave statements regarding an assault by one of them on a civilian to Internal Affairs under pain of dismissal. Afterward a video of the assault was discovered, and it showed all three officers had committed perjury. Under *Garrity v New Jersey*, 385 US 493 (1967) and MCL 15.393, providers of compelled statements, such as those given by the officers to Internal Affairs in this case, are protected against use of the statements against them in a criminal prosecution. However, subsequent case law makes clear that the protections of *Garrity* extend only to "crimes already committed" and does not prohibit use of these statements in subsequent prosecutions for independent crimes such as perjury or obstruction of justice. Nor does MCL 15.393 permit false statements to go unpunished as

the court of appeals held that the statute limits the phrase "involuntary statements" to include true statements only.

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

Evidence, Gangs and Propensity. *People v Bynum*, 496 Mich 610; 852 NW2d 570 (2014)**(july'14).** In a Calhoun County murder case the prosecution, over defense objection, introduced expert testimony on gangs, including testimony that Defendant was "posted up" and waiting to commit acts of violence to protect turf. Under MRE 404(a) and MRE 702, expert testimony on gangs can be admitted for an appropriate purpose, such as showing motive, as this evidence is generally beyond the understanding of jurors. However, character evidence cannot be used to establish a defendant acted in conformity with character traits of gang membership on a particular occasion. Because the gang expert in this case crossed the line by telling the jury that on this particular occasion Defendant's gang membership established premeditation, a new trial was required.

Evidence, Hearsay, Corroboration of Child CSC Complainant. *People v Douglas*, 496 Mich 557; 852 NW2d 587 (2014)**(july'14).** Introduction of 3 ½ year old complainant's statements at forensic interview, after earlier corroborating statements to her mother had been introduced, was improper under MRE 803A. Nor could this statement come in under the residual hearsay exception set out in MRE 804(24) as it was lacking in reliability. This case involved a straight up credibility contest between Defendant and the complainant, and the erroneous introduction of the detailed statements at a forensic interview which took place a year after the alleged acts was reversibly prejudicial.

Evidence, Hearsay, Forfeiture by Wrongdoing. *People v Roscoe*, 303 Mich App 633; 846 NW2d 402 (2014)**(jan'14).** Defendant was convicted of first degree felony murder. At his trial the court admitted a hearsay statement by the deceased under the forfeiture by wrongdoing rule. Under the rule there was a failure to show, as is required under the forfeiture rule, that Defendant had the specific intent to prevent the deceased from testifying when the killing occurred. Moreover the trial court abused its discretion by refusing to make a finding on this point. However, Defendant's conviction was affirmed

because the error here was not outcome determinative in light of other evidence in the case.

Evidence, Hearsay, Statement to Treating Physician in CSC Case. *People v Duenaz*, 306 Mich App 85; __ NW2d __ (2014)**(july'14).** The court used the factors set out in *People v Meeboer*, 439 Mich 310 (1992) to uphold trial court's admission of statement (under MRE 803(4)) of eight-year-old complainant to treating physician identifying Defendant as her assailant in child sexual assault case.

Evidence, Impeachment by Prior Conviction, Waiver. *People v McDonald*, 303 Mich App 424; 844 NW2d 168 (2013)**(dec'13).** Defendant was convicted of first-degree home invasion and other related crimes. The trial court ruled, pursuant to Defendant's motion in limine, that a prior first-degree home invasion conviction would be admissible for impeachment if Defendant took the stand. The court held that because Defendant did not take the stand at trial he waived the issue. A defendant must testify in order to preserve the issue of improper impeachment by prior conviction. The court reasoned that review of the claimed error, especially as to issues of harm and prejudice, if Defendant does not take the stand, and thus is not impeached by prior conviction, would be "burdened by the need to resort to speculation."

Evidence, Other Acts, 404(b). *People v Roscoe*, 303 Mich App 633; 846 NW2d 402 (2014)**(jan'14)**. Defendant was convicted of felony murder after he and his cousin broke into an auto dealership where they had previously worked, stole paint materials, and killed a night worker who discovered them. At trial the prosecution admitted evidence of a series of thefts, including three from separate car dealerships. The court upheld admission of this evidence as it was "offered…to prove that defendant had a common scheme or plan, in that he breaks into businesses and steals items that when sold together have a higher resale value, which is a proper purpose under MRE 404(b)." The court noted that an appropriate limiting instruction was given.

Evidence, Prior Sexual Assault, Relevance, Rape-Shield. *People v Duenaz*, 306 Mich App 85; __ NW2d __ (2014)**(july'14).** In this child sexual assault case, Defendant urged it was error to refuse to allow evidence of a sexual assault on the complainant by another a year before the alleged assault by Defendant in order to show origin of complainant's knowledge of sexual matters. The court of appeals upheld the trial court's refusal to allow this evidence, holding that under the facts of this case it lacked relevance and would tend to mislead the jury.

Evidence, Spousal Privilege. *People v Szabo*, 303 Mich App 737; 846 NW2d 412 (2014)**(jan'14)**. Defendant entered the home of his estranged wife armed with a rifle and fired several shots. He was charged with felonious assault and was bound over after his wife testified at his preliminary exam. After he asserted the spousal privilege the trial court dismissed charges. The court of appeals reversed and reinstated charges holding that under the spousal privilege statute, MCL 600.2162(3)(d) there was no privilege in this case since the charges arose from an assault by Defendant on his wife, and thus her

testimony against her husband could be compelled. Recent statutory changes led to the conclusion of the court that no statutory privilege exists at all under these circumstances.

Evidence, MRE 410, Statements in the Course of Plea Negotiations. *People v Smart*, 304 Mich App 244; 850 NW2d 579 (2014)**(feb'14).** Defendant, charged with another crime, sought to negotiate with information he had concerning an unrelated homicide. In the course of plea discussions, in the presence of his attorney and the detective investigating the homicide, but not in the physical presence of the prosecutor, Defendant inculpated himself in the homicide, and was eventually charged with that crime. The trial court suppressed statements of Defendant made in two different conferences with the police detective under MRE 410, which prohibits admission of any "statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." The court of appeals, in a 2-1 decision, Wilder, J. dissenting, held that the prosecution had abandoned the issue of whether the prosecuting attorney had to be physically present when the statements at issue were made in the course of plea negotiations, and that, contrary to the prosecutor's assertions on appeal, Defendant had a reasonable expectation of negotiating a better plea deal during the second conference with the homicide detective. Therefore the majority upheld the trial court's suppression of Defendant's inculpatory statements at both conferences under MRE 410. **On September 17, 2014, the MSC, pursuant to an application for leave to appeal by the prosecution, ordered supplemental briefing and scheduling of the case for oral argument to determine whether leave should be granted.**

Instructions, Deadlocked Jury. *People v Galloway*, __ Mich App __; __ NW2d __ (2014 WL 4723483, No. 316262, decided September 23, 2014**(sep'14).** The trial court went beyond the standard jury instruction in this case when the jury asked what would occur if they could not agree on a verdict, even though they had not reached that point and were still deliberating. By improperly suggesting that the jury take an internal poll to ascertain whether a majority believed a verdict could be reached the trial court deviated from the proper instructional language and this should not repeated. However, under the facts of the instant case the appellate court found insufficient prejudice and affirmed Defendant's convictions.

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

November 27, 2013 the Michigan Supreme Court granted the Wayne County Prosecutor's application for leave to appeal in this case, 495 Mich 905; 839 NW2d 490. The case was argued August 26, 2014.

Jury Unanimity. *People v Chelmicki,* 305 Mich App 58; 850 NW2d 612 (2014)**(april'14).** The COA held that no unanimity instruction is required where the prosecution presents alternate theories in attempting to prove the same element of a crime**.** Defendant argued that the trial court erred in instructing the jury with respect to unlawful imprisonment because the instruction, which gave jurors the option to convict based either on defendant's restraint of the victim by means of a weapon or dangerous instrument, or on defendant's restraint of the victim in order to facilitate the commission of another felony, violated his "absolute constitutional right to be convicted only upon a unanimous jury verdict." A specific unanimity instruction *may* be required in cases where "more than one act is presented as evidence of the actus reus of a single criminal offense" and each act is established through materially distinguishable evidence that would lead to juror confusion. The COA affirmed the conviction in this case holding that "[w]hen a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory."

Presence at Trial, Waiver/Forfeiture, Disruptive Conduct. *People v Kammeraad,* __ Mich App __; __ NW2d __ (2014 WL 4999455, No. 315114, decided October 7, 2014)**(oct'14).** Although Defendant never formally waived his right to be present at trial, the court held that Defendant's constant disruptive and nonsensical conduct caused the loss of his right to be present through the doctrine of forfeiture.

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

Right of Confrontation. *People v Henry,* 305 Mich App 127; __ NW2d __ (2014)**(may'14).** Defendant's convictions arose out of a series of armed robberies in the Lansing area. Defendant was first made a suspect by use of a confidential informant. The officer testified that the confidential informant "came forward with the defendant's name," and that he came to believe that defendant was responsible for two robberies

based on what the informant said. Because defendant did not have a prior opportunity to cross-examine the informant, admission of the out of court statements was improper and violated the Confrontation Clause. The court, however, ultimately held that it was harmless error in light of the "overwhelming evidence" against defendant and affirmed the convictions.

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

D. Crimes and Offenses, Sufficiency

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

Assault with Intent to do Great Bodily Harm Less than Murder, Sufficiency. *People v Dillard*, 303 Mich App 372; 845 NW2d 518 (2013)**(dec'13).** Defendant and his "then-girlfriend" got into an argument after a night of drinking and drug use, ending in Defendant causing "extensive injuries" to complainant. Defendant challenged the sufficiency of evidence as to intent, claiming the crime was at most aggravated assault. The court of appeals disagreed, holding that the injuries suffered by the complainant and the fact that "defendant apparently ceased his assault only because he feared that it had been detected by someone else" supported the jury's finding on intent.

Contempt, Family Court. *In re Contempt of Dorsey*, __ Mich App __; __ NW2d __ (2014 WL 4435591, No. 309269, decided September 9, 2014)**(sep'14).** The family division of Livingston County Circuit Court had jurisdiction over Defendant's son in a delinquency case and ordered drug testing of Defendant's mother. The mother's refusal resulted in a finding of criminal contempt. The court of appeals upheld this finding, stating that the family court has jurisdiction over adults pursuant to MCL 712A.6 if "necessary for the physical, mental or moral well-being of a particular juvenile…". And

even though the ordered random drug screening was an unconstitutional invasion of privacy under the Fourth Amendment and Const 1963, art 1, §11, this issue was waived by a failure to timely object and the contempt finding was valid as Defendant was required to follow the order.

Defenses, Duress, Homicide. *People v Henderson,* 306 Mich App 1; __ NW2d __ (2014)**(june'14).** After first noting that it is well established that duress is not a defense to homicide, the court held that this exclusion applied as well to aiding and abetting a homicide and thus Defendant was not entitled to a duress instruction in this case. The same logic that prohibits the duress defense from applying in a homicide case also eliminates the defense in a prosecution for assault with intent to murder.

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

Exciting a Contention, Constitutionality. *People v Vandenberg,* __ Mich App __; __ NW2d __ (2014 WL 4930412, No. 314479, decided October 2, 2014**(oct'14).** Defendant was arrested after engaging in protest actions at the 58th District Court relating to a traffic fine. She was convicted of resisting and obstructing and, under MCL 750.81d(1) of "making or exciting any disturbance or contention." Because the language "exciting any contention" is vague and overbroad and impinges on First Amendment freedoms, and because the court in this case instructed the jury on this language and the prosecutor used this language in arguing the case to the jury, Defendant's conviction on this count must be reversed. The resisting and obstructing conviction was also reversed because the jury may have improperly found that Defendant was lawfully arrested "because her peaceful expression of ideas gave offense to her listeners."

Extortion, Serious Consequence to Victim. *People v Harris,* 495 Mich 120; 845 NW2d 477 (2014)**(april'14).** The Michigan Supreme Court overruled two court of appeals decisions (*People v Fobb and People v Hubbard*) which previously held that an extortion conviction under the "against his will" prong of MCL 750.213 may only be maintained when the act defendant sought to compel entailed "serious consequences" to the victim. Here, Defendant was convicted of extortion after he threatened a mechanic unless the mechanic resumed working on defendant's truck in the rain. Defendant, relying on *Fobb and Hubbard*, argued that he could not be convicted of extortion because the act defendant sought to compel—the mechanic's continued work on the truck—was not of serious consequences to the mechanic. In overruling *Fobb* and *Hubbard*, the MSC explained that the plain language of the extortion statute defines extortion in terms of

whether the defendant maliciously threatened a person with harm in order to "compel the person so threatened to do . . . any act against his will." Therefore, the act does not need to be of serious consequence to the victim.

Federal Bank Fraud. *Loughrin v United States,* __ US __; 134 S Ct 2384 (2014)**(June'14).** Loughrin was charged with bank fraud under 18 USC §1344(2) after he forged stolen checks, used them to buy product at Target, then returned the goods for cash. The district court at trial refused a request to instruct the jury that to convict they must find Loughrin had the intent to defraud a financial institution, and he was convicted. The Court held that the offense merely requires an intent to obtain bank property accomplished by a false statement. A defendant need not intend to defraud the bank itself.

Federal Chemical Weapons Prohibition – Overreach. *Bond v United States,* __ US __; 134 S Ct 2077 (2014)**(june'14).** Bond was prosecuted under the federal Chemical Weapons Convention Implementation Act of 1998 after infecting her husband's mistress with a chemical that would cause an uncomfortable rash. The Court held that this simple assault was covered under state statutes and the federal chemical weapons act, designed to deal with terrorism, assassination and chemical warfare, was an overreach here. Federal prosecution under the act in this instance violated basic principles of federalism under the constitution.

Federal Gun Laws, Straw Purchaser. *Abramski v United States,* __ US __; 134 S Ct 2259 (2014)**(june'14).** Abramski was convicted of knowingly making false statements as to any material fact related to lawfulness of a gun sale under 18 USC §922(a)(6) and a related offense after he purchased a handgun for his uncle. Abramski argued that so long as the sale to him was proper, no offense was committed. The Court, in a 5-4 decision, found otherwise, holding that the statutory context indicated that misrepresentation by a straw buyer is material and supports his convictions.

Firearm Possession, Federal Prohibition after Misdemeanor Crime of Domestic Violence. *United States v Castleman,* __ US __; 134 S Ct 1405 (2014)**(march'14).** 18 USC §922(g)(9) prohibits possession of a firearm by anyone convicted of a "misdemeanor crime of domestic violence." Defendant was convicted of the misdemeanor offense of intentionally and knowingly causing bodily injury to the mother of his child in Tennessee state court. He argued that this conviction was not sufficient to invoke the firearm ban since it did not involve the use of physical force. The federal district court and the Sixth Circuit agreed. The Court reversed, however, holding that §922(g)(9)'s "physical force" requirement is satisfied by the degree of force supporting a common law battery conviction – offensive touching.

Pandering, Sufficiency. *People v Norwood*, 303 Mich App 466; 843 NW2d 775 (2013)**(0ct'13).** John Norwood and co-defendant Nicole Hagar sought to persuade an undercover police decoy to relocate to Florida to engage in prostitution and pornography in return for substantial inducements. The district court refused to bind over on a pandering charge, and the circuit court affirmed. After detailing the elements outlined in

the offense of pandering under MCL 750.455, an offense carrying a more severe penalty (20 year maximum) than other prostitution related offenses, the court of appeals reversed. The court held that since one of the sections of the pandering statute specifically prohibits encouraging "a female person to…leave this state for the purpose of prostitution" the facts supported the charge here, and the court ordered reinstatement.

Resisting an Unlawful Arrest. *People v Quinn,* __ Mich App __ ; 853 NW2d 383 (2014 WL 2219246, No. 309600, decided May 29, 2014)**(may'14).** Quinn was charged with resisting arrest. Although Quinn had committed no crime, the arresting officer felt that Quinn was evading her and, because there had been a rash of thefts in the area, felt the need to detain him. At the time of the conviction a lawful arrest was not required to convict of resisting. After Quinn's conviction a new rule was announced in *People v Moreno,* 491 Mich 38; 814 NW2d 624 (2012) which re-established the common-law rule that a person may rightfully resist an unlawful arrest. The first issue on appeal was whether *Moreno* should be applied retroactively and the COA held it should be in cases where a defendant raised the issue on appeal and either the defendant preserved it in the trial court or the defendant can demonstrate plain error affecting substantial rights under *Carines. Moreno* established that the prosecution must show that the officers acted lawfully as an actual element of the crime of resisting and obstructing a police officer, a question of fact for the jury. Because the jury in this case was not instructed that it should determine whether the officer's actions were lawful the COA remanded for a new trial.

"Sport Shooting Range" as defined by MCL 691.1541 (SSRA). *Addison Township v Barnhart,* 495 Mich 90 ; 845 NW2d 88 (2014)**(april'14).** Defendant was issued a misdemeanor citation for operating a shooting range without a zoning compliance permit. At issue at trial and on appeal was the definition of "sport shooting range" under the sport shooting range act (SSRA). This designation was critical because, under MCL 691.1542a(2), a sport shooting range that was in existence as of July 5, 1994, that operates in compliance with the generally accepted operation practices—even if not in compliance with an ordinance of a local unit of government—shall be permitted within its preexisting geographic boundaries to undertake additional actions that are authorized under the generally accepted operation practices. Under MCL 691.1541(d), a "sport shooting range" is an area designed and operated for the use of archery, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting. The case bounced between district and circuit court on appeal before the lower courts ultimately held that Defendant's range was not a sport shooting range. The COA upheld this ruling focusing on a commercial purpose analysis, but the MSC reversed. The Court held that, in determining whether a range is a sport shooting range under the SSRA, the focus is on the design and operation of the range, not on the intentions of individual shooters in using the range. A range owner's commercial purpose for operating the range is also irrelevant. The court held that Defendant's range was entitled to protection under the statute and ordered that the charge be dismissed.

Unlawful Imprisonment, Sufficiency. *People v Kosik,* 303 Mich App 146; 841 NW2d 906 (2013)**(nov'13).** Defendant accosted the complainant, an employee in a shoe store, put his arm around her, walked her into a conference room in the store, and closed the

door. The room had no windows. After asking a few questions, Defendant tried to convince the complainant that he was "joking," and left. Defendant asserts that the evidence was insufficient to convict him of unlawful imprisonment. The court of appeals, agreeing with the trial court, who had denied Defendant's motion for judgment of acquittal, held that the duration of confinement was insignificant, and that here the confinement was secret. The evidence supported the conviction of unlawful imprisonment.

E. Sentencing

***Apprendi,* Enhancement by Facts Not Found by Jury, Mandatory Minimum.** *Alleyne v. United States*, __ US __; 133 S Ct 2151 (2013)**(june'13).** Defendant was charged with using/carrying a firearm in relation to a crime of violence under 18 USC §924(C)(1)(A). This crime carries a mandatory 5 year minimum which increases to a mandatory 7 year minimum if the weapon is "brandished." Overruling *Harris v United States*, 536 US 545 (2002), the Court held that the logic of *Apprendi v New Jersey*, 530 US 466 (2000) demanded that facts impacting the mandatory minimum of a sentence range, like facts increasing the maximum sentence, are "elements" of the crime charged and must be determined by a jury. Because Alleyne's jury did not find that he brandished a weapon in this case, it was error for the district court to add 2 years to the mandatory minimum for this conduct. While the Court repeatedly referenced the mandatory minimum aspect here, there is language in the four-justice plurality, and in a three-justice concurrence, that suggests facts that alter a statutory range (as in Michigan's guidelines) may have to be determined by a jury. However the 5th vote to overrule *Harris* was reluctantly cast by Justice Breyer who underscored the mandatory nature of the increase in the floor of the permissible sentencing range as pivotal to his decision.

Bulletin: Critical Sentencing Guidelines Development - MSC Grants Leave in *Lockridge*, *Herron* held in abeyance. On June 11, 2014 the Michigan Supreme Court granted leave to appeal in the *Lockridge* case, outlined below and in section E of the June 2013 through June 2014 materials at www.tieberlaw.com (click on Criminal Law Update) , and held *Herron,* also outlined below, in abeyance. It is critical that the issue be preserved in any case where facts not proved to a jury or admitted are used to increase the minimum guidelines range.

***Apprendi,* Enhancement by Facts Not Found by Jury, Mandatory Minimum.** *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013)**(dec'13)**. In the wake of the United States Supreme Court's decision in *Alleyne v United States*, __ US __; 133 S Ct 2151 (2013), Defendant argued that *Apprendi* should now apply to statutory minimum sentencing ranges. The court of appeals disagreed, largely on the basis that because of the departure ability, the minimum ranges set by Michigan's statutory guidelines are not mandatory.

***Apprendi,* Enhancement by Facts Not Found by Jury, Mandatory Minimum.** *People v Lockridge*, 304 Mich App 278; 949 NW2d 388 (2014)**(feb'14)**. In two separate and complex concurrences in this manslaughter case, Judges Beckering and Shapiro firmly

disagree with the conclusion in *People v Herron,* 303 Mich App 392; 845 NW2d 533 (2013) that *Apprendi* remains inapplicable to sentencing guidelines in Michigan in the wake of *Alleyne v United States*, __ US __; 133 S Ct 2151 (2013). Both concurring judges agreed, however, that they were bound to follow *Herron*.

Crime Victim Rights Assessment, Ex Post Facto. *People v Earl* 495 Mich 33; 845 NW2d 721 (2014)**(march'14).** Defendant was assessed $130 for a crime victim rights fee, though the assessment was in fact $60 when Defendant committed his crime and was later enhanced by statute. Defendant argued that the increase fee violated constitutional prohibitions on ex post facto laws. In *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012), the court of appeals held that the imposition of the increased assessment for offenses committed before that law's effective date "is not a violation of the ex post facto constitutional clauses." The court held that the imposition of this fine was not intended as punishment. On March 20, 2013 the Michigan Supreme Court granted leave in *Earl* on this issue. Subsequently, in an opinion by Justice Cavanagh, the supreme court affirmed the court of appeals.

Costs. *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014)**(june'14).** Defendant was convicted of a felony in Allegan County Circuit Court. As part of the sentence the court ordered Defendant to pay $1,000.00 in unspecified court costs. The court of appeals remanded under *People v Sanders*, 296 Mich App 710 (2012), which had upheld general imposition of costs, to establish reasonable figures for felony cases in Allegan County. After the local court administrator testified that the average cost of felony cases was $1,238.48, the trial court found a reasonable relationship between the costs imposed and the actual costs, and the court of appeals affirmed. In a unanimous opinion the Michigan Supreme Court held that, under a statutory construction analysis, MCL 769.1k(1)(b)(ii), allowing imposition of "any cost," does not provide independent authority to impose "any cost" but simply allows imposition of costs the legislature has separately authorized by statute. Since the statute under which defendant was convicted does not provide courts with authority to impose general costs, it was improper to do so here, and *Sanders* is overruled to the extent it holds to the contrary. As of September, 2014, legislation (HB 5785; SB 1054) specifically authorizing the imposition of general costs in all felony cases had been introduced.

Delayed Sentencing, Loss of Jurisdiction. *People v Smith,* 496 Mich 133; 852 NW2d 127 (2014)**(june'14).** Under a statutory construction analysis the court assessed whether MCL 771.1(2), which allows a trial court to delay sentencing "for not more than 1 year" to provide defendant an opportunity to prove his or her eligibility for probation or other leniency, divests the trial court of jurisdiction to sentence after the one year period expires. The supreme court, overruling a string of court of appeals decisions, unanimously held that it does not, and further held that the actions of the trial court in dismissing the case against defendant over objection of the prosecutor violated the constitutional principle of separation of powers.

Departure from Mandatory Minimum. *People v Payne,* 304 Mich App 667; 850 NW2d 601 (2014)**(april'14).** Under MCL 750.520b(2)(b) a defendant 17 years of age or

older convicted of CSC 1 where the complainant is less than 13 must be sentenced to a flat mandatory minimum sentence of 25 years. Here the Defendant was 17 and a half years of age, and the complainant was 5 years old. The court sentenced Defendant to 30 to 50 years in prison without articulating substantial and compelling reasons for departure from the mandatory minimum. Defendant was mentally ill but the jury rejected his defense of insanity. The court of appeals rejected the prosecutor's argument that the statutory directive that the sentence be "not less than 25 years" eliminated the need to articulate reasons for a higher minimum. Because the Defendant's guideline range was below the mandatory minimum, any sentence beyond the 25 years must be supported by substantial and compelling reasons and the case was remanded for resentencing. The court rejected Defendant's claim that his sentence was cruel and unusual under *Miller v Alabama*.

Guidelines, Departure. *People v Lockridge*, 304 Mich App 278; 949 NW2d 388 (2014)**(feb'14)**. Defendant was convicted of manslaughter in the death of his wife. The trial court departed from the guidelines and sentenced Defendant to eight to fifteen years. The court of appeals held that the following reasons for departure were objective and verifiable, and compelling, and adequately supported the sentence given: "1) that defendant violated court orders regarding contact with the victim; (2) that the sentencing guidelines did not reflect the extent of defendant's prior altercations with the victim; (3) that defendant killed the victim in the presence of their children, and then left the residence while the children attempted to revive the victim; and (4) that during and after the offense, defendant showed no concern for the physical or emotional well-being of the children." **Note that on June 11, 2014 the MSC granted leave to appeal in this case on an *Apprendi/Alleyne* issue. See summary in this section above under *Apprendi*.**

Guidelines, Scoring and Sentencing Within Guidelines on Highest Offense Only. *People v Lopez*, 305 Mich App 686; __ NW2d __ (2014)**(june'14).** In a 2-1 decision the majority upheld scoring and sentencing within the guidelines only on the most serious offense. In dissent, Judge Gleicher stated that while under the statutory construct the probation office is absolved from scoring guidelines for lower offenses, the trial court maintains an obligation to sentence within them unless a departure is warranted.

Juveniles, Mandatory Life Without Parole, Cruel and Unusual, Birthday Rule. *People v Woolfolk*, 304 Mich App 450; 848 NW2d 169 (2014)**(feb'14).** Defendant argued that his mandatory sentence of life imprisonment without the possibility of parole is cruel and unusual punishment. The murder for which Defendant was charged took place on the night prior to his 18th birthday, and after an exhaustive analysis the court adopted the "birthday rule" in Michigan, which deems that Defendant turned 18 years of age on the date of his birth and not on the day prior per the common law rule. Thus the court held that *Miller v Alabama*, 567 US ___, 132 S Ct 2455, 2469 (2012) applied to Defendant's case. In that case, the United States Supreme Court ruled "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." The *Miller* Court noted that juveniles and adults are different for purposes of sentencing, and explained that sentencing schemes that mandate life without parole for juveniles convicted of homicide offenses do not take into account a

juvenile's individual characteristics and thus are unconstitutional. Remand for resentencing under *Miller* was ordered.

Juveniles, Mandatory Life Without Parole, Cruel and Unusual, Retroactivity. *People v Carp,* 496 Mich 440; 852 NW2d 801 (2014)**(july'14).** In *Miller v Alabama,* 567 US ___, 132 S Ct 2455, 2469 (2012) the United States Supreme Court ruled "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In *Carp* (joined with *People v Davis* and *People v Eliason*), the MSC, in a 4-3 decision, held that *Miller* was not retroactive under either state or federal retroactivity rules and that neither the state or federal constitution categorically barred imposition of a life without parole sentence on juvenile homicide offenders, including those convicted of felony murder on an aiding and abetting theory. Finally as to the claim that a sentence of life without parole imposed on Eliason, who was 14 years old at the time of the offense, was unconstitutional, the majority held this issue was not ripe for review since, as that case was on direct review when *Miller* was decided, resentencing must take place under MCL 769.25 and it is not clear whether Eliason will be sentenced to life without parole.

OV 1, Aggravated Use of a Weapon. *People v Brooks,* 304 Mich App 318; 848 NW2d 161 (2014)**(feb'14)**. OV 1 provides 5 points for display of a weapon (a knife in this case) and 15 points if the weapon is used to threaten the complainant. Noting that the distinction between these points is a question of first impression, the court concluded that it hinges on "whether the defendant in any way suggests, by act or circumstance, that the weapon might actually be used against the victim." In this case, despite a less than clear factual context, the court concluded that, under the clear error standard for reviewing the trial court's factual findings, it could not conclude that an error occurred here. The assignment of 15 points for OV 1 was upheld.

OV1, OV2; Meth Lab as a Weapon. *People v Gary,* 305 Mich App 10; 849 NW2d 414 (2014)**(april'14).** Defendant pled guilty to operating a meth lab. He had purchased assorted items to be used in creating meth, but did not participate in any other way. The meth lab exploded, seriously injuring a co-defendant. The Court held that both OV1 and OV2 were improperly scored because there was insufficient evidence that either the meth or the lab was used as a weapon. Specifically, the COA held that "involvement in, or exposure to, a methamphetamine lab or its constituent parts, even if an explosion occurs, without more, does not constitute the use of a weapon under OV 1." OV 2 concerns weapons, and since the COA held that the meth lab was not a weapon it was clearly error to score it at 15 points.

OV 3. *People v Armstrong,* 305 Mich App 230; 851 NW2d 856 (2014)**(may'14).** The COA held that bodily injury alone is insufficient evidence to score 10 points under OV 3. OV 3 concerns physical injury and injuries requiring medical treatment are scored at 10 points while injuries that do not require medical treatment are properly scored at 5 points. The complainant in this CSC case indicated that her hymen was reddened and tender from the assault, but never testified that she received any treatment. As such, scoring 10 points here for OV 3 was improper, and the COA remanded for resentencing.

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

OV 8, Victim Asportation or Captivity. *People v Dillard,* 303 Mich App 372; 845 NW2d 518 (2013)**(dec'13).** In this Assault with Intent to do Great Bodily Harm case, there was sufficient asportation to score OV 8 at 15 points where the complainant was moved from Defendant's driveway to his apartment during the assault.

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

OV 10, Exploitation of Vulnerable Victim. *People v Dillard,* 303 Mich App 372; 845 NW2d 518 (2013)**(dec'13).** In this Assault with Intent to do Great Bodily Harm case, the court held that OV 10 was properly scored at ten points where "the victim was clearly 'vulnerable' in light of defendant's greater strength, her intoxication, and the domestic relationship between the two."

OV 11, Additional Penetration. *People v Duenaz,* 306 Mich App 85; __ NW2d __ (2014)**(july'14).** The trial court erred in scoring OV 11 at 50 points, rather than 25, as the evidence supported only one additional penetration. Even though the trial court sentenced within the corrected guidelines range, the mere fact that the correction of the error changed the range requires resentencing under the rationale that Defendant is entitled to a sentence based on accurate information.

OV 14, Leader in Multiple Offender Case. *People v Rhodes,* 305 Mich App 85; 849 NW2d 417 (2014)**(may'14).** This case was before the COA on remand from the MSC after the MSC decided *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). *Hardy* rejected the "any evidence" standard used in scoring OV 14 (which is scored at either ten points or zero points, depending on whether the defendant was a leader in a multiple offender situation when considering the entire criminal transaction) and announced a "preponderance of the evidence" standard. The Court held that OV 14 was improperly scored in this case using this new standard as defendant's exclusive possession of a weapon did not make him a leader by a preponderance of the evidence.

OV's 16 and 19 and Waiver, Generally. *People v Hershey,* 303 Mich App 330; 844 NW2d 127 (2013)**(dec'13).** Defendant was convicted of failure to pay child support and sentenced to 3 ½ to 15 years in prison. OV 16 and 19 were scored at five and ten points respectively, and there was no objection to, or discussion on, the scoring of these variables at sentencing. Defendant later filed a motion for resentencing, arguing that , as to OV 16, failure to pay child support did not constitute property "obtained, damaged,

lost or destroyed" and that, as to OV 19, failing to pay child support alone did not "interfere with the administration of justice." The trial court denied the motion, adopting the prosecution reasoning that Defendant waived the issues by failing to object at sentencing and that, in any event, the scoring decisions were correct. The court of appeals held that OV 16 was improperly scored as that variable requires loss of something that was already possessed. OV 19 was also improperly scored as Defendant did not interfere with the administration of justice by failing to pay child support or by violating his probation. In part because defense counsel never registered satisfaction with the scoring at issue at sentencing, the court of appeals ruled that the issue was not waived, and because the offense variable issues were raised in a motion for resentencing before the trial court, the argument was preserved and Defendant is entitled to resentencing.

PRV 5, Prior Misdemeanor Convictions. *People v Stevens,* __ Mich App __; __ NW2d __ (2014 WL 4472612, No. 312325, decided September 11, 2014)**(sep'14)**. Misdemeanor convictions for possession of drug paraphernalia are considered controlled substance offenses for purposes of scoring prior misdemeanors under PRV 5.

Restitution, Cost of Investigation. *People v Gaines,* __ Mich App __; __ NW2d __ (2014 WL 3843747, Nos. 310367, 310368, 310369, decided August 5, 2014)**(aug'14).** In this CSC case the court ordered Defendant to pay restitution for police investigation ($864 for 24 hours) and for a forensic analyst ($3,672 for 102 hours). Unlike narcotics "buy money," the loss of which results directly from a defendants crime, general police investigative costs are not related directly to the criminal transaction and it was error to order restitution for these costs.

Restitution, Hearsay, Calculation of Amount. *People v Matzke,* 303 Mich App 281; 842 NW2d 557 (2013)**(nov'13).** Defendant was convicted of larceny of property between $1,000.00 and $20,000.00. Although he returned the property (a gas-oil separator) to complainant, there was damage that was proved, at a restitution hearing, partly through hearsay evidence, and the court ordered restitution in the amount of $4,580.00. The court of appeals, after noting that the rules of evidence do not apply to sentencing hearings under MRE 1101(b)(3), held that the trial court properly determined the amount of restitution and that restitution must be ordered unless an exception applies.

Restitution, SSDI Benefits. *In re Lampart,* __ Mich App __; __ NW2d __ (2014 WL 3757685, No. 315333, decided July 31, 2014)**(july'14).** Under 42 USC 407(a) SSDI (Social Security Disability Income) benefits, although not means tested, are exempt from restitution orders in a criminal case. It is impermissible to use the legal process to obtain payment of those benefits to satisfy a restitution order.

Restitution, Uncharged Conduct. *People v McKinley,* 496 Mich 410; 852 NW2d 770 (2014)**(june'14).** In *People v Gahan*, 456 Mich 264; 571 NW2d 503 (1997), the court held that MCL 780.766(2) authorized a court to order restitution to "all" victims, even if the losses were not the factual predicate for a defendant's conviction. McKinley was convicted of theft offenses and ordered to pay $158,180.44 in restitution, $94,431.00 of which was to "victims of uncharged thefts attributed to the defendant by his accomplice."

In 6 -1decision, Cavanagh dissenting, the MSC overruled *Gahan*, stating it was wrongly decided, and ordered that the restitution be limited to thefts for which Defendant had been convicted.

Restitution - Victims' Travel Expenses. *People v Garrison,*495 Mich 362; 852 NW2d 45 (2014)**(may'14).** Defendant stole property from various vacation homes in Cheboygan County. While the case was pending, three victims of defendant's theft traveled back and forth from their primary residences in order to secure their stolen property and attend a restitution hearing. At the hearing, the victims testified that they had incurred travel expenses related to these trips in the amount of $1,125. The sentencing court included $977 of this amount in its restitution order over defense counsel's objection. Defendant appealed, and the COA reversed the lower court on this issue. This case involves two related statutory schemes: the William Van Regenmorter Crime Victim's Rights Act (CVRA) and Michigan's general restitution statute. The issue was whether these statutes authorize courts to order restitution for the reasonable travel expenses that victims incur from the crime against them. The MSC concluded that the statutes do authorize travel expense payments because they require courts to order full restitution that is "complete and maximal."

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

F. Miscellaneous

Bail Bond Forfeiture. *In re Forfeiture of Bail Bond,* 496 Mich 320; 852 NW2d 747 (2014)**(june'14).** Defendant failed to appear and the surety who had posted a $50,000.00 bond was ordered to pay this amount even though the trial court had failed to provide statutory notice of Defendant's failure to the surety within the 7 day limit provided by MCL765.28(1). *Relying on In re Forfeiture of Bail Bond (People v Moore)*, 276 Mich App 482 (2007), the court of appeals upheld this result. The MSC unanimously concluded that the 7 day notice requirement was mandatory and reversed the trial court's order requiring the surety to pay the bond, overruling the earlier decision.

Commutation. *Makowski v Governor*, 495 Mich 465; 852 NW2d 61 (2014)**(june'14).** In this case Governor Jennifer Granholm granted a commutation to Matthew Makowski shortly before leaving office, then rescinded it four days later after a public uproar. The MSC held that the commutation was final when it was signed, sealed and delivered to the department of corrections. The constitution does not empower the governor to revoke a commutation once it has become final, and the court ordered that Makowski's commutation be reinstated. On September 17, 2014 the MSC amended the last sentence

of their opinion to change the commuted sentence from parolable life to a sentence of a minimum term of years – equivalent to the amount of time served as of the date of the commutation decision – to a maximum of life with jurisdiction in the parole board.

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

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

Freedom of Information Act, Oakland County Child Killings. *King v Michigan State Police Department,* 303 Mich App 162; 841 NW2d 906 (2013)**(nov'13);** *King v Oakland County Prosecutor,* 303 Mich App 222; 842 NW2d 403 (2013)**(nov'13)**. These cases involve attempts by relatives of the last of four victims in the Oakland County Child Killings (OCCK), arising from the abduction and killing of four children in 1976 and 1977, to obtain case file information. In the MSP case the court ruled that the trial court properly upheld denial of requests for polygraph reports, and detailed other financial and summary disposition aspects of the FOIA statute. In the case involving the Oakland County Prosecutor the court majority found that the trial court properly affirmed denial of information based on the "law-enforcement-purposes exemption" claiming that release of information would hamper an ongoing investigation. The court also held that the Oakland County Prosecutor did not violate the Crime Victims' Rights section of the Michigan Constitution, added in 1988, because it applies to crimes committed after that date, and because, even if applicable, it does not provide a right to confer with the prosecutor until after charges are filed. Judge Murray, concurring and dissenting, would send the case back to the trial court for more particular findings.

Habeas, Standard of Review. *Lopez v Smith,* __ US __ (2014 WL 4956764, No. 13-946, decided October 6, 2014)**(oct'14).** Defendant was adequately apprised of an aiding

and abetting theory prior to trial in this murder case, but the prosecution's entire focus, until requesting an instruction on aiding and abetting during trial, was on proving Defendant was the principal actor. The 9th circuit affirmed the grant of the writ based on lack of notice, citing one of their own cases on point, and several general notice cases decided by SCOTUS. The Supreme Court reversed and denied the writ, re-affirming their lately repeated holding that the statutory standard of review under AEDPA demands that state court decisions be contrary to clearly defined SCOTUS precedent before the writ can be granted. See *Nevada v Jackson*, 133 S Ct 1990 (2013); *Marshall v Rodgers*, 133 S Ct 1446 (2013).

Michigan Medical Marijuana Act (MMMA), Dispensaries. *People v Johnson et al*, 302 Mich App 450; 838 NW2d 889 (2013)**(sep'13).** Defendants, all involved in running a marijuana dispensary, were prosecuted on multiple counts of delivery, possession, and conspiracy to deliver marijuana after undercover officers were sold marijuana and THC at the dispensary. The trial court granted a motion to dismiss as to all defendants, finding the MMMA ambiguous and applying the rule of lenity. The court of appeals reversed and reinstated charges, holding that defendants never argued how the various provisions of the MMMA exempted them from prosecution, the MMMA did not authorize dispensaries, and because there was no ambiguity on these points the rule of lenity did not apply. The panel further held that the court of appeals' decision in *Michigan v McQueen*, 293 Mich App 644; 811 NW2d 513 (2011), holding that the activities of dispensaries were not protected under the act, was properly applied retroactively as it did not operate as an ex post facto law.

Michigan Medical Marijuana Act (MMMA), Immunity and Defenses under Sections 4 and 8. *People v Hartwick*, 303 Mich App 247; 842 NW2d 403 (2013)**(nov'13).** In this detailed opinion, authored by Judge Saad and joined by Judge Sawyer (Judge Jansen concurred in the result only), substantial additional requirements are put in place for defendants attempting to assert Section 4 immunity or Section 8 defenses under the MMMA. The court first held that, despite the presumption under Section 4(d) that a defendant is engaged in the medical use of marijuana if he has a valid patient or primary caregiver registration card, and thus is entitled to immunity, a defendant must nonetheless introduce evidence of "his patients' medical conditions; (2) the amount of marijuana they reasonably required for treatment and how long the treatment should continue; and (3) the identity of their physicians." Since Defendant Hartwick did not produce this evidence at an evidentiary hearing, he was not entitled to Section 4 immunity. Likewise, in order to assert a Section 8 defense, a defendant caregiver must show that there is an ongoing relationship between his patients and their physicians, know how much marijuana a patient has been prescribed and how long the patient should be using the drug, and "ensure the marijuana sold by the caregiver is actually being used by the patient for medical reasons." **On June 11, 2004, the MSC granted leave to appeal in this case which will be argued at a future date with *People v Tuttle* (below). The issues specified in the leave grant are: (1) whether a defendant's entitlement to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., is a question of law for the trial court to decide; (2) whether factual disputes regarding § 4 immunity are to be resolved by the trial court; (3) if so, whether the**

trial court's finding of fact becomes an established fact that cannot be appealed; (4) whether a defendant's possession of a valid registry identification card establishes any presumption for purposes of § 4 or § 8; (5) if not, what is a defendant's evidentiary burden to establish immunity under § 4 or an affirmative defense under § 8; (6) what role, if any, do the verification and confidentiality provisions in § 6 of the act play in establishing entitlement to immunity under § 4 or an affirmative defense under § 8; and (7) whether the Court of Appeals erred in characterizing a qualifying patient's physician as issuing a prescription for, or prescribing, marijuana.

Michigan Medical Marijuana Act (MMMA), Immunity and Defenses under Sections 4 and 8. *People v Tuttle*, 304 Mich App 72; 850 NW2d 484 (2014)**(jan'14)**. Defendant, a licensed patient and certified caregiver for two other patients under the MMMA, sold marijuana to an undercover officer who presented ostensibly legitimate MMMA documentation, but who was not connected to Defendant in a patient-caregiver relationship through the registration process. The failure to properly register as a caregiver for an individual to whom marijuana was transferred denied Section 4 immunity, despite the fact that Defendant had an amount of marijuana justified by his own and his two patients' proper registration. The court also upheld the trial court's denial of a Section 8 defense, holding that proper registration does not establish knowledge of a "bona fide physician-patient relationship," or knowledge of the amount of marijuana needed to treat a particular patient, or knowledge that the marijuana at issue was used to treat a serious medical condition, all of which are required to establish a Section 8 defense. The deciding panel was the same as that in *People v Hartwick*, outlined above, and the decision in *Hartwick* was endorsed by the majority. Judge Jansen again concurred in the result only. **On June 11, 2004, the MSC granted leave to appeal in this case which will be argued at a future date with *People v Hartwick* (above). The issues specified in the leave grant are: (1) whether a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., who makes unlawful sales of marijuana to another patient to whom he is not connected through the registration process, taints all aspects of his marijuana-related conduct, even that which is otherwise permitted under the act; (2) whether a defendant's possession of a valid registry identification card establishes any presumption for purposes of § 4 or § 8; (3) if not, what is a defendant's evidentiary burden to establish immunity under § 4 or an affirmative defense under § 8; and (4) what role, if any, do the verification and confidentiality provisions in § 6 of the act play in establishing entitlement to immunity under § 4 or an affirmative defense under § 8.**

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

marijuana was and continues to be a violation of the Public Health Code, MCL 333.1101 *et seq.*

Michigan Medical Marijuana Act (MMMA), Zoning, Preemption. *Ter Beek v City of Wyoming*, 495 Mich 1; 846 NW2d 531 (2014)**(feb'14).** Plaintiff is a qualified medical marijuana patient living in the city of Wyoming. Wyoming's zoning ordinance prohibits all uses contrary to federal and state law. Plaintiff brought a declaratory judgment action seeking to void the ordinance on state preemption grounds as it prohibited conduct permitted by the MMMA. The trial court found that the federal controlled substances act preempted the MMMA and denied Plaintiffs request. In *Ter Beek v City of Wyoming*, 297 Mich App 446; 823 NW2d 864 (2012), the court of appeals held that "enforcement of the ordinance could result in the imposition of sanctions that the immunity provision of the MMMA does not permit" and voided the city ordinance on preemption grounds. After detailed analysis the panel also found that the federal CSA did not preempt the MMMA. The Michigan Supreme Court granted leave to appeal in April, 2013, and subsequently, in an unanimous opinion authored by Justice McCormack, upheld the court of appeals, finding that the city zoning code was preempted by the MMMA when in conflict, and that the MMMA is not subject to federal preemption by the federal Controlled Substances Act (CSA), 21 USC 801 *et seq.*, on either impossibility or obstacle conflict preemption grounds. See 21 USC 903.

Personal Protection Order (PPO), Sex Offenses. *IME ex rel GE v DBS*, __ Mich App __; __ NW2d __ (2014 WL 3970113, No. 316274, decided August 14, 2014)**(aug'14).** Respondent was convicted of CSC against the petitioner in the past and is now contesting the constitutionality of MCL 600.2950a, which "provides the victims of sexual assault with an automatic right to obtain a PPO against the persons convicted of attacking them." The court found the statute constitutional, and noted that a respondent does receive notice and a meaningful opportunity to be heard before the PPO issues. And while a PPO must be issued where a petitioner establishes that a respondent has been convicted of sexually assaulting the petitioner, the trial court is free to modify or rescind the order after a proper motion, and can tailor the order to specific circumstances.

Sex Offender Registration, Student Safety Zone. *People v Mineau*, __ Mich App __; __ NW2d __ (2014 WL 3843746, No. 313178, decided August 5, 2014)**(aug'14)**. Defendant was convicted of aggravated indecent exposure after he allegedly exposed himself to students passing his house in a school bus. Under MCL 28.735(1), Defendant, as a registered sex offender, cannot live within a "student safety zone." Because his house was within 1,000 feet of a school Defendant was in such a zone. The act exempts anyone who was living in such a zone on January 1, 2006 unless a defendant "initiates or maintains contact with a minor within that student safety zone." While Defendant was in his home on 1/1/06 the court held that the actions of the conviction offense could establish the "exception to the exception," and since his indecent exposure to students was within the zone, Defendant was required to vacate his residence within 90 days of sentencing.

Sex Offender Registration, Not Punishment. *People v Temelkoski*, __ Mich App __; __ NW2d __ (2014 WL 5343824, No. 313670, decided October 21, 2014)**(oct'14)**. Defendant pled to CSC 2 for conduct with a 12-year-old and was adjudicated under the Holmes Youthful Trainee Act (HYTA) in 1994. The trial court removed him from the sex offender registry in 2012, finding that registration was a punishment and violated the Ex Post Facto Clause and that HYTA "is not a conviction." The court of appeals reversed, holding that under the HYTA statute registration is required for those adjudicated for listed offenses, including CSC 2, prior to October 1, 2004. After a detailed analysis the court found that registration does not constitute punishment and thus does not constitute an ex post facto violation and is not cruel or unusual punishment.

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

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

I. Search and Seizure

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

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

***Rodriguez v. United States* (to be argued January 2015)**
Was defendant subjected to an illegal seizure when his traffic stop was extended by seven to eight minutes so that the officer could arrange to have a drug sniffing dog walk around the defendant's car?

B. Reasonable Expectations of Privacy

***Los Angeles v. Patel* (to be argued in January 2015)**
Does a hotel have a reasonable expectation of privacy against a warrantless, suspicionless police inspection of the guest registry pursuant to a statute that authorizes such inspections?

II. Miscellaneous Trial Issues

A. Confrontation Clause

***Ohio v. Clark* (to be argued January 2015)**
Does an individual's statutory duty to report suspected child abuse make that individual a state agent for purpose of the Confrontation Clause, and is a child's out-of-court statement to a teacher who has asked the child about potential abuse a "testimonial" statement subject to the Confrontation Clause?

III. Constitutional Limitations on Criminal Liability

***Elonis v. United States* (to be argued December 1, 2014)**
In a prosecution for transmitting a threat, does the First Amendment require the government to prove that the defendant subjectively intended to threaten, or is it sufficient that a reasonable person would have regarded the communication as a genuine threat?

IV. Post-Conviction Relief

A. Habeas Standards of Review

***Chappell v. Ayala* (to be argued January 2015)**
Is a state court's decision that any error would be harmless a decision on the merits for purposes of AEDPA, and did the federal appellate court properly apply the harmlessness standard of *Brecht v. Abramson*?

B. Habeas Corpus Appellate Procedure

***Jennings v. Stephens* (to be argued October 15, 2014)**
If petitioner files a single claim of ineffective assistance of counsel raising multiple instances of alleged deficient performance and the district court grants habeas relief finding deficient performance in some instances but rejecting other allegations of deficient performance, must the petitioner file a cross-appeal in order to argue on appeal that the rejected allegations of deficient performance also merit the habeas relief the district court granted?

II. Legislative Update

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

PUBLIC ACTS

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

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

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

A "listed prior felony" includes

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

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

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

for more than 4 years.

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

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

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

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

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

and 750.530.

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

MCL 750.227b.

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

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

-- Assault with intent to commit murder.

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

-- Assault with intent to maim.

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

-- Second-degree murder.

-- Manslaughter.

-- Kidnapping.

-- Hostage-taking by a prisoner.

-- Kidnapping a child under the age of 14.

-- Mayhem.

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

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

-- Carjacking.

MCL 769.12

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

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

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

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

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

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

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

2012 P.A. 372, effective 4/1/13, amends the Criminal Sexual Conduct statutes to include sexual penetrations or sexual contact by child care or foster home workers where the victim is a foster home resident at the time of the crime. The offense would be first or second-degree CSC if the victim were more than 13 or less than 16 years old. M.C.L. 750.520b(1)(b)(vi); M.C.L. 750.520c(1)(b)(vi). The offense would be third- or fourth-degree CSC if the victim were at least 16. M.C.L. 750.520d(1)(g); M.C.L. 750.520e(1)(h).

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

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

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

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

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

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

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

If a building, structure, or real property is involved, 20 years and/or $20,000 fine or 3 times the value of the property damaged, whichever is greater.
If personal property is involved, 10 years and/or $20,000 fine or 3 times the value of the property damaged, whichever is greater.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2013 P.A. 268, effective 12/30/13, amends Article 7 of the Controlled Substances Act, and adds Article 8, to classify marijuana as a schedule 2 controlled substance, subject to federal reclassification, and provides for licensure of facilities producing pharmaceutical-

grade cannabis (PGC). The bill permits sales of PGC to pharmacies and allows for PGC prescriptions and registration cards for patients.

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

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

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

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

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

2014 P.A.'s 111 & 112, effective 7/0/14. HB'S 4907 & 4908. These bills clean up issues with the major revisions to the arson statutes, which were passed in 2012 (2012 PA's 531-534 – see pp. 9-22 to 9-23 of the UMLI materials)

2014 P.A.'s 123 & 124, effective 5/20/14, date on which bills were signed. HB'S 5154 & 5155. These critical bills deal with PRELIMINARY EXAM CHANGES summarized as follows:

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

Probable cause hearing to include:
DISCUSSION AS TO PLEA AGREEMENT
DISCUSSION REGARDING BAIL AND BOND MODIFICATION

DISCUSSION REGARDING STIPULATIONS AND PROCEDURAL ASPECTS OF CASE
ANY OTHER RELEVANT MATTERS AGREED TO BY PARTIES

PROBABLE CAUSE HEARING CAN BE WAIVED BY AGREEMENT OF BOTH PARTIES

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

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

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

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

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

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

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

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

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

COURT ORDER OR ANY RECORD OF A GOVERNMENTAL AGENCY

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

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

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

MAGISTRATE MAY CONDUCT CIRCUIT COURT ARRAIGNMENT AS PROVIDED BY COURT RULE

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

2014 P.A.'s 130, 133 & 134, effective 7/1/14. HB 5263; SB's 628 & 749. Crime Victim's Rights Act. Includes parents in definition of victim in certain circumstances.

2014 PA 158, effective 7/1/14. SB 409. Unlawful Imprisonment added as predicate offense for felony murder.

2014 PA's 191-192, effective 9/22/14. SB's 582 & 583. Increases penalties and provides guidelines for shooting at occupied structure from vehicle.

2014 PA's 198-199, effective 6/24/14. HB's 5591 & 5592. Excludes breast feeding from indecent exposure and disorderly conduct laws.

2014 PA 200, effective 6/24/14. HB 4486. Provides for involuntary substance abuse treatment.

2014 PA's 201-207, effective 12/21/14. HB's 4085, 4155, 5325 & 5328; SB's 49, 834 & 881. Weapons issues – FOIA and safety and training.

2014 PA's 216-218, effective 1/1/15. HB's 5089, 5090 & 5363. Prohibit and provide guidelines for purchase or possession of ephedrine or pseudoephedrine with intent to manufacture meth.

2014 PA's 219-220, effective 9/24/14. HB's 4567 & 4568. Increase penalties and provide sentencing guidelines for certain drunk and drugged driving offenses.

2014 PA's 221-222, effective on 91st day after sine die adjournment. HB's 4895 & 4896. Increase penalties and provide guidelines for concealment of stolen vehicle repeat offenses.

2014 PA's 224-225, effective 9/24/14. HB's 5070 & 5071. Define and criminalize and provide guidelines for squatting on certain premises.

2014 PA 227, effective on 91st day after sine die adjournment. HB 5445. Creates sexual assault kit evidence submission act.

2014 PA 249, effective on 91st day after sine die adjournment. HB 5332. Creates substance abuse disorder credentialing program and requires compliance by certain state departments and agencies.

2014 PA's 275-276, effective 1/1/15. SB's 535 & 756. Prohibit sale of ephedrine or pseudoephedrine without prescription to individual previously convicted of meth related offense. Creates meth abuse reporting act.

2014 PA's 279-280, effective 9/30/14. SB's 279-280. Regulate pharmacies, manufacturers, and wholesale distributors and provide guidelines for certain violations.

2014 PA 283, effective 12/31/14. SB 633. Allow a person to serve 10 hours of community service instead of paying a driver responsibility fee.

2014 PA 289, effective on 91st day after sine die adjournment. SB 915. Make it a felony to fraudulently indicate on a vehicle certificate of title that there is no security interest.

2014 PA 299, effective 10/3/14. HB 4915. Extend sunset on crime victim's rights fund.

2014 PA 300, effective 1/1/15. HB 5615. Include purchase or possession of ephedrine in racketeering statute.

2014 PA's 315 & 316, effective 1/12/15. HB 5385 & SB 863. Expand roadside PBT for alcohol to include analysis for controlled substances.

2014 PA's 318 & 320, effective 1/1/15. SB's 998 & 1021. Create sexual assault evidence kit tracking and reporting act; outline hospital administration and procedures relating to sexual assault evidence kit.

2014 PA 319, effective 4/1/15. SB 1004. Create sexual assault victim's access to justice act.

2014 PA 321, effective 1/12/15. SB 1036. Require expedited HIV testing upon request of victim of sexual assault under certain circumstances.

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

New Rules

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

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

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

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

4. 2013-24 - Rescind Administrative order No. 2011-3 and Adoption of Administrative Order No. 2013-_(modification of caseflow management Guidelines)

- Small, but welcome change. It would slow down a percentage of disposition deadlines in district and circuit court, reducing to some degree the "rocket docket" culture.
- Adopted: *Criminal Proceedings.* ~~90~~70% of all felony cases should be adjudicated within 91 days from the date of entry of the order binding the defendant over to the circuit court; ~~98~~85% within 154 days; and ~~100~~98% within 301 days. Incarcerated persons should be afforded priority for trial.

5. 2010-34 - Motion for directed verdict, amendment of MCR 6.419
   - This is an appropriate result. The original proposal would have allowed prosecution appeals of acquittals on directed verdicts, in spite of double jeopardy concerns.
   - Instead, the new rule is innocuous, simply allowing judges to reserve an immediate ruling.

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

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

8. 2005-19 – Amends Rule 2.507, effective January 1, 2015, to allow court, sitting as trier of fact without a jury, to view "property or place where a material event occurred.

Proposed Rules

1. 2013-18 - Proposed Amendments Regarding Videoconferencing and new MCR 8.124
   - Proposal sets up uniform standards and procedures for courts to use videoconferencing equipment.

- Proposal leaves to judicial discretion videoconferencing for a defendant in the courtroom and for a witnesses testifying. Unlike the current rule, parties would not need to request or consent to videoconferencing. The only exception is for defendant's presence at trial or evidentiary hearings that are part of a trial.
- Confrontation Clause is implicated because a witness could testify at trial via video.
- Right to a defendant's presence is implicated because defendants would not need to be physically present at sentencing or evidentiary hearings.

Takeaway: Proposal raises as yet unsettled constitutional questions.

2. 2013-18 - Proposed New Rules for E-filing and Draft Standards
   - Adopts statewide e-filing standards for trial and appellate courts.
   - Sets 5:00 PM as a deadline for filing. This is inconsistent with current Court of Appeals e-filing and with federal PACER filing, both of which are midnight.
3. 2013-36 – Proposed Amendments of Subchapter 7.300 of the Michigan Court Rules
   - Would update, reorganize and renumber rules regarding practice in the Michigan Supreme Court. Issued 10/22/14 with comment period expiring 2/1/15.