STATE APPELLATE DEFENDER OFFICE
and
CRIMINAL DEFENSE RESOURCE CENTER

SADO

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Features

Departments

Appellate Courts

Supreme Court Reinstates Trial Court Order Removing Mr. Temelkoski from Sex Offender Registry

In a dispositive order, the Michigan Supreme Court reversed the Court of Appeals and reinstated the trial court's order removing the defendant from the sex offender registry because requiring defendant to register violated due process. *People v Boban Temelkoski*, ___ Mich ___ (entered January 24, 2018, Docket No. 150643). Requiring Temelkoski to register under the Sex Offender Registration Act (SORA) violated his right to due process because (1) he pleaded guilty in reasonable reliance on the possibility of receiving a sentence under the Holmes Youthful Trainee Act (HYTA); (2) at the time of Temelkoski's sentencing, the HYTA provided that, after successful completion of probation, a youthful trainee "shall not suffer a civil disability"; and (3) registration under SORA is a civil disability.

In 1993, Temelkoski pleaded guilty to second-degree criminal sexual conduct under the HYTA, which allows young offenders to be placed on probation for a number of years and to avoid a felony conviction if probation is successfully completed. At the time of Temelkoski's sentencing, the HYTA also provided that a youthful trainee "shall not suffer civil disability" if probation is successfully completed.

While Temelkoski was still on probation, the Legislature enacted SORA, which required a defendant convicted of second-degree criminal sexual conduct to register with the police for 25 years. In 2011, the Legislature imposed the requirement of lifetime registration on certain defendants, including Temelkoski. Temelkoski moved for removal from the registry arguing that lifetime registration was cruel and unusual punishment and that the requirement for lifetime registration was an ex post facto punishment. The trial court granted Temelkoski's motion, the prosecution appealed, and the Court of Appeals reversed.

The Supreme Court reversed the Court of Appeals and reinstated the trial court's order removing Temelkoski from the registry on due process grounds. Due process requires that a promise or agreement of the prosecutor that is an inducement or consideration in making a plea must be fulfilled. *Santobello v New York*, 404 US 257 (1971). The Court reasoned that the *Santobello* principle applies equally to statutory provisions, such as those in the HYTA, that induce a defendant to plead guilty. Temelkoski was screened and presumably deemed eligible for the HYTA, so it was clear that disposition under the HYTA was contemplated by the parties. The possibility of discharge under the HYTA was a principal consideration in Temelkoski's decision whether to plead guilty or go to trial. Indeed, given that Temelkoski pleaded guilty to the principal charge, it appeared to the Court that the possibility of discharge under the HYTA was the only motivation for his decision to plead guilty. Because Temelkoski pleaded guilty based on the inducements of the 1994 HYTA and successfully completed his HYTA training, retroactive application of SORA deprived Temelkoski of the benefits to which he was entitled under the HYTA and violated his right to due process.

Justice Wilder wrote a dissenting statement, joined by Justice Zahra. Justice Wilder would have remanded to the trial court to develop a factual record regarding whether Temelkoski was promised benefits under the HYTA and whether he was actually induced to plead guilty as a result of that promise. Justice Wilder also expressed concern over extending the *Santobello* principle beyond promises made by prosecutors to statutory benefits.

The order did not address several broader issues in the questions presented in the Court's original order granting leave to appeal, including: (1) whether the requirements of SORA amount to "punishment"; (2) whether requiring defendants like Temelkoski to register under SORA is an ex post facto punishment; and (3) whether it is cruel and/or unusual punishment to require defendants to register under SORA.

Read the order and Justice Wilder's dissenting statement here:

by John Zevalking
Associate Editor

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https://www.facebook.com/sadomich

Citizens Alliance on Prisons and Public Spending (CAPPS)

Bills Expand Employment Opportunities in the Healthcare Industry

On January 30, John Cooper, CAPPS policy director, and J.T. Weis, CEO of Abcor Industries, testified before the House of Representatives Law and Justice Committee at the invitation of the chair, Representative Klint Kesto (R – District 39). Their testimony emphasized the need to increase the available workforce in Michigan and to remove barriers to employment. Michigan Department of Corrections (MDOC) staff also testified, discussing the importance of meaningful pathways to employment upon reentry.

The testimony was in support of a series of bills that will remove the lengthy bans on employment in the healthcare industry for people with prior misdemeanors and felonies, regardless of their suitability for employment. The bills are:

- HB 5450, sponsored by Representative Klint Kesto (R - District 39)
- HB 5451, sponsored by Representative Jeff Noble (R - District 20)
- HB 5452, sponsored by Representative Curt Vanderwall (R - District 101)

Michigan's unemployment rate is at historic lows and many employers are starved for qualified employees. Removing barriers to employment for formerly incarcerated people is an opportunity to address the talent needs of our state.

Tens of thousands of people are legally barred from employment in many healthcare facilities – for years after they have paid their debt to society. The

bills remove these blanket bans, allowing employers the discretion to carefully screen their own employees and substantially increasing employment opportunities.

Employment is a critical component of successfully returning to the community after a period of incarceration. Cooper said:

> Limiting access to employment for individuals with criminal records is misguided policy that contributes to recidivism and thus negatively impacts public safety.
>
> Michigan's recidivism rate within three years of release is approximately 28 percent, which leaves significant room for improvement.

J.T. Weis told the Committee that nearly 50 percent of the employees in his Holland-based company were formerly incarcerated.

Kyle Kaminski, MDOC legislative liaison, discussed the challenges in creating prison training programs that lead to employment. Kaminski said:

> We need feedback from employers that they would actually hire these folks. Then the MDOC would very much be interested in adding programs that would address these needs.

A number of organizations support the bill in addition to CAPPS, including the ACLU of Michigan, Americans for Prosperity, Criminal Defense Attorneys of Michigan (CDAM), Detroit Regional Chamber, Grand Rapids Area Chamber of Commerce, Nation Outside, Michigan Chapter of the National Association of Social Workers, and the Saginaw County Chamber of Commerce. Currently, the MDOC does not take a position on the bills but is in support of the concepts outlined in the proposed legislation.

CAPPS testimony in support of HB 5450, 5451, and 5452 is located at http://bit.ly/2BHFaQE.

HB 5377 Would Make Parole Process More Objective

On February 6, John Cooper, CAPPS policy director, leaders of two Michigan business associations, a crime survivor organization, a faith coalition, and a conservative interest group testified before the House of Representatives Law and Justice Committee in support of HB 5377. Michigan Department of Corrections (MDOC) is neutral on the bill but provided supporting information to the Committee. John Cooper, CAPPS policy director, provided written testimony as time was limited.

Currently, incarcerated people who are eligible for parole undergo a rigorous risk assessment by the parole board. By law, board members can only deny parole for "substantial and compelling" reasons when individuals' scores indicate they are a low risk to public safety. Unfortunately, the law did not define those reasons.

HB 5377, sponsored by Representative Klint Kesto (R - District 39), defines "substantial and compelling" reasons for parole denials. The bill creates an objective parole process while preserving the parole board's ability to deny parole to any individual for objective safety concerns.

Cooper wrote:

> HB 5377 reduces the risk of inconsistent parole decisions for similarly-situated prisoners. It puts the focus of the parole release on whether the prisoner presents a credible risk to public safety if released, and it creates objective standards for making this determination.
>
> By increasing the transparency and predictability of the parole process, it increases prisoners' incentives to invest in their own rehabilitation.

Lindsay Case Palsrok, senior director of government relations at the Detroit Regional Chamber, and Veronica Horn, senior director of government relations at the Saginaw County Chamber of Commerce, urged the Committee to support the bill as an opportunity to support Michigan's business climate. Palsrok said:

> Low-risk parole-eligible people can become productive members of our workforce.

Keith den Hollander, chairman at the Christian Coalition of Michigan, said it is not just, moral or cost-effective to continue punish people when there is no public safety benefit. His faith and that of his members has taught him that "**all people are of equal value and are redeemable.**"

Shari Ware, executive director of Still Standing Against Domestic Violence and a survivor of

domestic violence, urged the Committee to support rehabilitation and smart investments in community safety. Still Standing is a nonprofit organization serving men, women, and children affected by domestic violence through education, prevention, and awareness. Ware said:

> We believe in the power of restoration and that anyone who is willing to change their behavior can be transformed by the renewing of their minds, fortifying the family and strengthening our communities.

Kyle Kaminski, MDOC legislative liaison, said the parole board has become more evidence-based over time and emphasized that "**what this bill does is lock this in for future parole boards.**"

A number of organizations support the bill in addition to CAPPS, including the ACLU of Michigan, Americans for Prosperity, Christian Coalition of Michigan, Criminal Defense Attorneys of Michigan (CDAM), Detroit Regional Chamber, Michigan Council on Crime and Delinquency, Saginaw County Chamber of Commerce, and Still Standing Against Domestic Violence. Family members of Nelson Sumpter submitted written statements in support of the bill. Currently, the MDOC does not take a position on the bill but is in support of the concepts outlined in the proposed legislation.

CAPPS testimony in support of HB 5377 is located at http://2015capps.capps-mi.org/2018/02/hb-5377-would-make-parole-process-more-objective/

If you would like to join CAPPS' efforts, please contact Laura Sager, executive director, at lmsager@gmail.com or select "Join" on the CAPPS website home page (http://2015capps.capps-mi.org/) in the upper right corner.

Online Brief Bank

Subscribers to the Criminal Defense Resource Center's online resources, found at www.sado.org, have access to more than 1,800 appellate pleadings filed by SADO Attorneys in the last five years. The brief bank is updated regularly and is open to anyone who wants to subscribe to online access. On our site, briefs are searchable by keyword, results can be organized by relevance or date, and the pleadings can be filtered by court of filing. Below are some of the issues presented in briefs added to our brief bank in the last few weeks. For confidentiality purposes, names of clients and witnesses have been removed.

BB 303149: Defendant was denied a fair trial by the admission, over objection, of an entire investigative subpoena as substantive evidence; he was denied a fair trial by the introduction of allegations that he had abused the mother of his children repeatedly, that he was violent and aggressive, and that he had been in jail previously.

BB 303482: The trial court reversibly erred, over a defense objection, in holding that a witness was unavailable to testify in person at this trial, and that the prosecution thus could read his prior recorded testimony from the preliminary examination to the jury, as the prosecution failed to present a sufficient demonstration of an exercise of due diligence to insure the witness's appearance, thus denying defendant's constitutional right to confront his accuser.

BB 303720: Defendant is entitled to resentencing where the trial judge improperly departed based on factors already considered in the scoring of the guidelines and on her subjective belief that defendant lacked remorse, which is unsupported by the factual record. He is also entitled to resentencing because the above guidelines range sentence that the judge imposed is disproportionate and unreasonable. Finally, the sentence of a 60 year minimum term violated defendant's right to jury trial as it nullifies the jury's verdict of not guilty on the 1st degree murder charge.

BB 303915: The trial court lacked the statutory authority to require defendant to pay a $60 DNA testing fee.

BB 303968: Defendant's Fourth Amendment right to privacy was violated by the prosecution's admission of evidence of the approximate location of his cell phone during the hours surrounding the homicide incident where the prosecution did not obtain a warrant, under a showing of probable cause, to obtain cell tower records from the provider for that cell phone account.

BB 304158: Structural error mandating reversal occurred when the trial court failed to administer an oath to the jury.

BB 304165: The consideration of a risk assessment at sentencing violated defendant's state and federal due process rights. This is because the assessment is not proper sentencing information, and it was not provided to the defendant before sentencing. The results must be deleted from the presentence investigation report.

BB 304297: The trial court abused its discretion by spurning defendant's offer to concede that he was a sex offender subject to registry requirements, and instead permitting the prosecution to admit the full judgment record of the prior convictions, thus allowing the jury to learn that defendant had a sex-offense conviction that involved child pornography.

BB 304299: Defendant was denied a fair trial when the trial court failed to declare a mistrial and, instead, gave a limiting instruction that the jury could not reasonably follow as to the prosecution's references to a witness's anticipated testimony in its opening statement.

BB 304370: Defendant's conviction must be vacated because the trial court did not have jurisdiction to try and convict him while his timely application for leave to appeal was pending in the Michigan Supreme Court.

BB 304379: Defendant's convictions and sentences should be vacated, and the charges ordered dismissed with prejudice, as defendant was denied his constitutional speedy trial right.

BB 304295: Defendant did not effectively waive his right to counsel and was thereby deprived of his Sixth Amendment rights at his guilty plea. Accordingly, his plea was involuntary and must be withdrawn.

BB 304433: Defendant's convictions should be reversed where the prosecution's case relied upon inadmissible and prejudicial evidence of threatening phone calls and previous gang affiliations.

BB 304434: MCL 777.49 was improperly applied to increase defendant's sentence because it is void for vagueness. The sentence must be vacated, and the case must be remanded for resentencing.

BB 304472: Defendant must be retried because the prosecution improperly relied on "drug profile" testimony as substantive evidence of guilt. The error in admitting such testimony was plain. In the alternative, counsel was ineffective for not objecting.

BB 304560: Defendant was denied due process of law by an unduly suggestive identification procedure, which tainted an in-court identification that had no independent basis; trial counsel was ineffective in failing to move to suppress the in-court identification.

BB 304618: Prosecutorial misconduct deprived defendant of his constitutional right to a fair trial and counsel was ineffective for failing to object.

BB 304706: The Court must remand for resentencing. The trial judge did not point to any sentencing reasons not already adequately accounted for by the guidelines or even attempt to justify the departure.

BB 304753: The trial court reversibly erred in denying the defense's request that the jury be instructed that to be guilty of first-degree child abuse the defendant had to have intended the act and intended to cause serious physical harm or have known that serious physical harm would result, from *People v Maynor*, and/or the trial court reversibly erred in its response to the jury's question during deliberations, again declining to give guidance in this regard as requested by the defense.

BB 304857: The trial court reversibly erred in failing to consider defendant's income, in accord with the plain language of the statute, at the time it imposed probation oversight fees.

BB 303872: Defendant was deprived of due process and the right to compulsory process when the prosecution failed to notify the defense of the res gestae witnesses who were present during the incident; trial counsel was ineffective in failing to investigate and produce the witnesses.

BB 304912: Defendant was denied her due process right to an impartial jury by the massive pretrial publicity and the trial court's denial of her motion for change of venue.

BB 304939: Trial counsel erred in failing to advise defendant of the mandatory 25-year minimum sentence applicable to the charges, thus causing defendant to reject a very favorable plea offer.

BB 305103: The trial court violated defendant's due process rights by failing to consider an updated presentence report.

Spotlight On: Michael H. Dagher-Margosian

Please tell us something about your background, where you practice, and how long you have been a criminal defense lawyer.

I grew up a son of two criminal defense attorneys who were (and are) truly devoted to The Cause. Early on, my parents instilled in me what it is to be compassionate, empathetic, and non-judgmental. They taught me to stand up to injustice, and to be an advocate for the underdog. I attribute my work ethic and passion for criminal defense to Gary Margosian and Jeanice Dagher-Margosian.

I went to Michigan State University for undergrad and law school. I graduated law school in 2014 and have been practicing for just over three years. I did private practice devoted solely to criminal defense once I graduated, but I was just waiting for the right public defense office position to become available. In December 2015, I joined the inaugural full-time Lenawee County Public Defense Office and have been there since.

Please tell about one of your interesting or unusual cases.

While I've had some interesting jury trials, what I'm most proud of (and what has been the most influential) are the appeals I've done as a public defender. My initial role at Lenawee PD was handling misdemeanors in front of a particularly pro-prosecutor judge (shocking, I know). It had long been thought that this judge knew criminal law better than just about anyone in the county; after all, he was the chief prosecutor for quite a few years, he was the chief appellate prosecutor of the county before that, and he prided himself on specializing in criminal law. Enter stage left a "young hippie kid from Ann Arbor," trying to tell this judge what is, and is not, legal. I quickly learned that he was not going to listen to my arguments. He consistently denied my requests. He knew, or so he thought, he could get away with these oppressive tactics because nobody was going to challenge his rulings. After learning that placating to his style would not result in the desired results for my clients, I decided to go in a different direction. I decided to appeal his practices. My first challenge dealt with the judge ordering, as part of retail fraud probation, the statutory civil demand by the store to be included in the probationer's fines/costs. My argument was that this is a *civil* demand and should not be included in a *criminal* probation. I filed a brief, had oral arguments in circuit court, and the circuit court agreed. So, the judge no longer included that in his probation orders. Next, I had a client who, to get the benefit of concurrent sentences, wanted to decline probation. The judge would not let us do that, so I took that case up on appeal. After oral arguments, the circuit court again agreed with us, that a probationer can reject probation and be sentenced accordingly. We got a written opinion from Circuit Court. The prosecutor's office has filed an application for leave in the Court of Appeals on this case. We've appealed three similar fact patterns and have won on all three.

The latest issue that I've appealed is whether a sentencing judge can tell a probationer, with a valid medical marijuana card, not to use medical marijuana while on probation. While the Circuit Court didn't outright rule in our favor, it did shift the sentencing practice in district court. I've gotten reversals on 5 district court rulings, which has shifted how the judge approaches my sentencings. The local newspaper even sat in on one of these hearings and wrote up an article of how the district court judge was getting reversed every time we took an issue up on appeal. The judge now thinks twice about denying my arguments because he knows people are watching and he does not want to be shown up by some "young hippie kid from Ann Arbor" again. We are slowly but surely untying the knots.

How could the criminal justice system in Michigan be improved?

Prioritize public defense. A system that represents 80% of criminal defendants needs to be prioritized. The amount of resources and efforts devoted to improving public defense is egregiously under par. As a society, we lament the fact that our "justice" system puts so many of our own behind bars or into the system, yet we continue to tighten the chokehold on the efficacy and competency of public defense. Under-funded, over-burdened, time-chasing public defenders cannot do an effective job if this trend continues. Programs like Gideon's Promise are improving the culture of public defense, but much more needs to be done. Hopefully the MIDC can continue to improve public defense in Michigan.

Any recurring issues that you see?

As a fairly new attorney, I watch other attorneys to see what works and what doesn't. The biggest concern I see is a sense of callousness on the part of the attorney. "Oh, this guy again." "Ugh, what'd (blank) do this time." "He's been in jail before, I'll talk with him in a couple days. He knows how to handle it." When we lose empathy for our client for who he/she is as a person, we've given up. And we've given the client up. As criminal defense attorneys, we are the aegis between the government and our client. And we all know the government doesn't give a damn about our clients. If you lose feeling, you need to cut off the callous. Do not be a lawyer's lawyer; be a client's lawyer.

What advice do you have for other defense attorneys?

Don't be afraid to be wrong. If you think something is wrong, say it. Make an issue of it. Even if everyone in the courtroom is saying you're wrong, make your arguments. **Preserve the record**. Don't worry that things have been done a certain way for so long; who's to say that way is the right way? Don't be afraid to challenge. Follow your instincts and be true to your intuition. If you are afraid to be wrong, then you are afraid to grow. The best way to predict the future is to create it.

by Neil Leithauser
Associate Editor

Trial Court Successes: January & February 2018

Michael H. Dagher-Margosian won not guilty verdicts – after a jury deliberated for about fifteen minutes – January 20, 2018, in a case charging domestic assault, assault and battery, and trespass.

Melonie K. Bates won a not guilty verdict from a jury January 11, 2018, in a second-degree home invasion case.

Jennifer J. France, with the Chippewa County Public Defender's Office, won dismissal in January of a probation violation in an aggravated stalking case. In February, **Ms. France** successfully obtained suppression of an audio recording from use by the prosecution at trial.

Chad D. Catalino, Supervising Attorney of the Misdemeanor Division of the Muskegon County Public Defender's Office, reported that Assistant Public Defender **Katherine M. Gorski** won not guilty verdicts following a bench trial January 19, 2018, in a case involving aggravated assault charges. On that same day, Assistant Defender **Angella R. Doremire** also won a not guilty verdict for her client, and, on February 15, 2018, Assistant Defender **Charles Martin Ayres, II,** won a not guilty verdict from a jury in a domestic violence case.

Adam Vanderpols, with the Madarang Hoort & Associates firm, won a not guilty verdict in an assault and battery case in the 64A Judicial District Court (Ionia) on January 19, 2018.

Joshua P. Rubin won not guilty verdicts from a jury January 23, 2018, in the 31st Judicial (St. Clair County) Circuit Court, in a case with three criminal counts, including assault by strangulation and domestic violence. **Mr. Rubin** also obtained not guilty verdicts in two jury trials in the 72nd Judicial District Court (Port Huron); one case involved a domestic violence charge, and the other case involved an aggravated assault charge.

Adil Haradhvala had three recent successes. On January 22, 2018, in the 16th Judicial (Macomb County) Circuit Court, he obtained dismissal of a felony count of capturing an image of an unclothed person, thereby avoiding the felony conviction and SORA registration; on January 25, 2018, also in the 16th Judicial Circuit Court, he negotiated a concealed weapon charge into a diversionary program; and, on January 30, 2018, **Mr. Haradhvala** negotiated a reduction of a five-year felony charge down to a 93-day misdemeanor in the 37th Judicial District Court (Warren). On February 13, 2018, **Mr. Haradhvala** was able to get a client acquitted of the charges of unlawful imprisonment and unarmed robbery following a bench trial in the 16th Judicial (Macomb County) Circuit Court; the client was convicted of the lesser offenses of misdemeanor aggravated assault and larceny in a building.

Jonathan B. D. Simon won a not guilty verdict for his client in a third-degree home invasion case after a bench trial in the 3rd Judicial (Wayne County) Circuit Court.

Wendy H. Barnwell won not guilty verdicts after a bench trial February 6, 2018, in a case in the 3rd Judicial (Wayne County) Circuit Court charging carrying a concealed weapon, felon in possession of a firearm, and felony firearm.

Jordan Zuppke won a not guilty verdict from a jury in a domestic violence case in the 35th Judicial District Court (Plymouth).

by Neil Leithauser
Associate Editor

Wayne County Prosecutor's Conviction Integrity Unit

The Wayne County Prosecutor's Office ("WCPO") recently hired Valerie R. Newman (formerly of the State Appellate Defender Office) as Director of the Conviction Integrity Unit. The Unit, which is an independent division in the WCPO, investigates claims of actual innocence, that is, the person claiming a wrongful conviction must have no criminal responsibility for the crime of conviction. The Unit does not function as an appellate court.

Claims may be mailed to the Conviction Integrity Unit at the following address:

Wayne County Prosecutor's Office
Conviction Integrity Unit
Frank Murphy Hall of Justice
1441 St Antoine
Detroit, MI 48226

Conviction Integrity Unit website:
https://www.waynecounty.com/elected/prosecutor/conviction-integrity-unit.aspx

Claim form online:
https://www.waynecounty.com/elected/prosecutor/ciu-review-request-form.aspx

by Neil Leithauser
Associate Editor

Reports and Studies

Brain Damage Possible Link to Criminal Behavior

A recent study suggests that damage to certain areas of the brain may make a person more likely to engage in criminal behavior. The study, by researchers at Harvard Medical School, found that brain lesions found in 17 people who had committed criminal activity after brain injury typically involved an area associated with moral decision-making.

A recent article notes that interest relating of possible links between brain damage and criminal behavior peaked after the 1966 Texas Tower Sniper shootings; in that case, the shooter, Charles Whitman, had complained of headaches and personality changes in the period before he stabbed to death his mother and his wife and then shot and killed at least 14 people and wounded 31 more from the Tower. In a later autopsy it was discovered that Whitman had a tumor in his brain.

The researchers noted that not all people with lesions in the brain area will commit crimes, and they indicated they could not predict who with lesions in those areas might commit crimes due to the effects of other factors, including genetics, environmental and social factors.

Sources: *Harry Pettit, "Can brain injuries make you a CRIMINAL? Damage to areas linked with making moral choices boosts your risk of breaking the law, reveals Harvard study," dailymail.co.uk, December 19, 2017:*
http://www.dailymail.co.uk/sciencetech/article-5191683/Can-brain-injuries-make-CRIMINAL.html
Wikipedia link:
https://en.wikipedia.org/wiki/Charles_Whitman

Officials Seek 50% Cut in Parole and Probation Populations

Recent reports from the Justice Lab at Columbia University have led officials involved in community supervision to call for a 50% reduction in the number of people on probation and parole. One of the reports, "Too big to succeed: The impact of the growth of community corrections and what should be done about it," published January 29, 2018 ("Report"), noted that the principles of probation and parole developed in the 19th Century (in 1841 and 1876, respectively) were initially focused on rehabilitation and community supervision of the offender, rather than on harsher punishments. Over time, the numbers of people on probation, parole, or incarcerated increased significantly; however, funding for community-based supervision failed to keep pace. As a result, one effect was for community corrections – instead of being an alternative to incarceration – to develop into an "add-on."

For example, between 1980 and 2007, the number of people on probation and parole in the United States increased almost four times; probationers increased from 1.1 million to 4.3 million, and parolees increased from 220,400 to 826,100. Also, the number of people incarcerated in prisons and jails increased from 474,368 to 2.3

million. As of 2015, one out of every 53 American adults were on probation or parole. One researcher, Michelle Phelps, from the University of Minnesota, noted, "Rather than choosing probation *or* prison, we have increasingly chosen all of the above, despite sustained declines in crime rates since the 1990s."

Between 1983 and 2008, the number of people directed into community supervision doubled; however, on average, 88% of allocated funds from authorities went to prisons, with only 12% being allocated for probation and parole programs. The increasing workload on the probation and parole systems, according to the Report, "have led policy makers from coast to coast to rely on fees paid by people on probation and parole to bail out shrinking corrections budgets." In 2015, the White House Council of Economic Advisors issued a report wherein it was noted:

> "Fines and fees create large financial and human costs, all of which are disproportionately borne by the poor. High fines and fee payments may force the indigent formerly incarcerated to make difficult trade-offs between paying court debt and other necessary purchases. Unsustainable debt coupled with the threat of incarceration may even encourage some formerly incarcerated individuals to return to criminal activity to pay off their debts, perversely increasing recidivism."

The problems of inadequate funding, "get tough" on crime, and the increasing use of numerous special conditions placed on probationers and parolees, has led to an increase in the numbers of technical violators being returned to incarceration. The Report notes, "Charged with assuring the public safety in a political environment with low risk tolerance, community corrections personnel have too often resorted to probation and parole revocations and incarceration." One former commissioner of probation in New York City said, "Few probation agencies have the ability to 'step up' people on probation who technically violate (or are at risk of violating) to drug treatment, cognitive behavioral therapy, or employment programs. As a result, probation officers with little to no resources, eager to manage risk and their large caseloads, default to the most available option they have – the most expensive and punitive option – the formal violation process which often results in jail or prison."

Recent research cited in the Report suggests that "being under parole supervision may actually be causally related to reincarceration." As a result, many jurisdictions have sought to reduce the number of conditions imposed on probationers and parolees, reduce the time of supervision periods, and to incentivize good behavior. By reducing the number of individuals under supervision, communities can refocus the savings realized on necessary support services for the individuals.

Six major recommendations were made by the Harvard Kennedy School Program in Criminal Justice Policy and Management in 2017; the recommendations are quoted below:

- Reserving the use of community corrections for only those who truly require supervision;
- Reducing lengths of stay under community supervision to only as long as necessary to accomplish the goals of sentencing;
- Exercising parsimony in the use of supervision conditions to no more conditions than required to achieve the objectives of supervision;
- Incentivizing progress on probation and parole by granting early discharge for those who exhibit significant progress;
- Eliminating or significantly curtailing charging supervision fees; and
- Preserving most or all of the savings from reducing probation and parole populations and focusing those resources on improving community-based services and supports for people under supervision.

Sources: *TCR Staff, "Top Officials Call for 50% Cut in Probation, Parole," the crimereport.org, January 29, 2018:*
https://thecrimereport.org/2018/01/29/top-officials-call-for-slashing-us-probation-and-parole-numbers-by-50-percent/
Columbia University, Justice Lab, "Too big to succeed: The impact of the growth of community corrections and what should be done about it," January 29, 2018:
http://justicelab.iserp.columbia.edu/img/Too_Big_to_Succeed_Report_FINAL.pdf
Program in Criminal Justice Policy and Management, Statement on the Future of Community Corrections, Harvard Kennedy School (August 28, 2017):

https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/statement_on_the_future_of_community_corrections_final.pdf

AI Better than Humans at Spotting Liars

A newly developed AI system, called Deception Analysis and Reasoning Engine ("DARE"), recognizes five micro-expressions – "frowning, eyebrows raising, lip corners turning up, lips protruded and head side turn" – associated with a person lying. In tests, where the system viewed videos from 15 courtroom sessions and then was tested on spotting the micro-expression in a final video, the AI found 92% of the micro-expressions. In contrast, human subjects engaging in the same tests, found 81% of the micro-expressions. The researchers claimed that their "vision system, which uses both high-level and low level visual features, is significantly better at predicting deception compared to humans."

Sources: *Shivali Best, "The robot that knows when you're lying: Scientists create an AI that can detect deception in the courtroom (and it's already 'significantly better' than humans)," dailymail.co.uk, December 20, 2017:*
http://www.dailymail.co.uk/sciencetech/article-5197747/AI-detects-expressions-tell-people-lie-court.html

by Neil Leithauser
Associate Editor

Surveillance News

Increased Warrantless Searching of Travelers' Phones at Borders in 2017

In 2017, authorities searched the phones of 30, 200 travelers, most when leaving the country, and about 80% of which belonged either to foreigners or legal permanent residents; the number reflects an increase of 19,501 over 2016. In January 2018, Customs and Border Protection issued a new policy relating to phone searches and specified that only the device, and not data in the cloud, may be searched without approval by a supervisor and with "reasonable suspicion" and "articulable facts" to support a more advanced search. The new policy has been criticized by the ACLU, and by Senators Ron Wyden (D., Ore.) and Rand Paul (R., Ky.), who have introduced a bill that would require search warrants for the searches.

Sources: *Alicia A. Caldwell and Laura Meckler, "Border Agents' Searches of Travelers' Phones Skyrocketed, Agency Says," wsj.com, January 5, 2018:*
https://www.wsj.com/articles/border-agents-searches-of-travelers-phones-skyrocketed-agency-says-1515179058
U.S. Customs and Border Protection:
https://www.cbp.gov/travel/cbp-search-authority

Smartphone Cameras to See Through Walls

A recent article described how newer camera research is moving away from simply developing more megapixels to a system of fusing camera data with computational processing. The new imaging techniques could work with different wavelengths of light beyond the visible spectrum, and the cameras would have multiple sensors to gather the different data; a final image would subsequently be created using the image data collected by the different sensors. The cameras would, through the different wavelengths utilized, then have an increased ability to 'see through' obstructions such as fog, or walls.

Source: *Staff writer, "The next generation of smartphone cameras could see through walls," pcauthority.com.au, January 24, 2018:*
https://www.pcauthority.com.au/news/the-next-generation-of-smartphone-cameras-could-see-through-walls-481698

Amazon Echo Spot

The new Amazon Echo Spot, retailing for about $130.00 in January 2018, is Alexa-equipped, has a camera and microphone, and comes with a 2.5-inch touchscreen. The camera function, according to Amazon, only records during video calls and "drop-ins." However, privacy concerns have been raised about the device being unintentionally activated or being hacked.

A recent article in the *dailymailonline* noted that a security researcher found the 2015 and 2016 versions of the Amazon Echo could be turned into live-feed microphones. The Amazon Spot also contains a camera, has four microphones embedded, and has advanced noise cancelling technology, so that voices can be heard more clearly from across a room, even when there is background music playing.

Another article presented some concerns this way: "The privacy concerns are obvious: an always-listening (for a keyword) microphone in your bedroom, and a camera pointing at your bed."

Users can turn-off the camera manually or by telling Alexa to turn it off. An Amazon spokesperson was quoted as saying that Amazon takes the customer's privacy seriously and has taken steps to make sure the device is secure: "These include hardware control via the mic/camera off button, disallowing third party application installation on the device, rigorous security reviews, and encryption of communication between Echo Spot, the Alexa App and Amazon servers."

Sources: *Ry Crist, "Amazon Echo Spot review: Alexa's touchscreen misses the sweet spot," cnet.com, December*
https://www.cnet.com/products/amazon-echo-spot/review/

Drop-ins described:
Taylor Martin, "How to use Drop In with your Amazon Echo speakers," cnet.com, June 27, 2017:
https://www.cnet.com/how-to/how-to-use-drop-in-with-your-amazon-echo-speakers/
Press Association and Phoebe Weston, "Amazon's creepy plan to put a camera and microphone in every BEDROOM with launch of its £120 Echo Spot 'smart alarm,'" mailonline.co.uk, January 16, 2018:
http://www.dailymail.co.uk/sciencetech/article-5273947/Amazon-s-Echo-Spot-coming-UK-later-month.html
Tom Warren, "Amazon's Echo Spot is a sneaky way to get a camera into your bedroom," theverge.com, September 28, 2017:
https://www.theverge.com/2017/9/28/16378472/amazons-echo-spot-camera-in-your-bedroom

by Neil Leithauser
Associate Editor

From Other States

Colorado: Defendant Entitled to New Trial on Murder Charges Where Prosecutor Violated Brady

After defendant's conviction, the prosecution disclosed two reports that had been in its possession since the first days of the investigation. One report documented the discovery of a note found on the day of the murder indicating that white supremacists were planning to murder white inmates in the prison. The other showed a detective's suspicion that the murder was linked to another homicide that had been committed in the prison a few days later. Defendant's motion for a new trial was granted and affirmed on appeal where the state violated defendant's due process rights under *Brady* when it suppressed this exculpatory and material evidence. *People v. Bueno*, Colo., No. 13SC1017, 2018 BL 19216, 1/22/18.

Ohio: Search of Defendant's Purse During Traffic Stop Violated Fourth Amendment

Defendant was pulled over for speeding while driving her boyfriend's car and arrested on a warrant. The arresting officer pulled defendant's purse from the car and searched it after she was arrested and handcuffed. Because the purse was not in defendant's possession and was in her boyfriend's car, which was protected under the Fourth Amendment, the warrantless search violated defendant's constitutional rights and required vacation of her convictions and sentences. *State v. Banks-Harvey*, 2018 BL 20951, Ohio, 2016-0930, 1/16/18.

2d Circuit: 7-Year Delay Violated Defendant's Speedy Trial Rights

Defendant's speedy trial rights were violated where he was incarcerated for 7 years prior to his trial. The extreme length of the delay weighed heavily against the government. Also weighing against the government were delays caused by sending defendant out three times for competency evaluations, a seven-month delay caused by failure to provide timely transportation to and from the third competency examination, delays caused by court reporters, and delays caused by the dilatory tactics of defense counsel. *United States v. Tigano*, 2018 BL 21084, 2d Cir., 15-3073, 1/23/18.

9th Circuit: Exclusion of Relevant Third-Party Culpability Evidence Required New Trial

Defendant was caught coming into the United States from Mexico with methamphetamine in her car and denied that she knew the drugs were there. The district court excluded, on relevancy grounds, evidence of third-party culpability, including prior drug-related convictions of defendant's next-door

neighbor in Mexico and the neighbor's deportation from the United States. The evidence was admissible to support the defense theory that the neighbor had packed the vehicle driven by defendant, who regularly traveled to the United States to purchase clothing, with methamphetamine and set her up as a "blind mule" to transport methamphetamine into the United States. The error required reversal of defendant's conviction. *United States v. Espinoza*, 2018 BL 20718, 9th Cir., 16-50033, 1/22/18.

10th Circuit: Petitioner Filed Viable Claim Regarding Withholding of Funds from Prison Account

Petitioner brought a due process claim after money was withheld from his prison account under a Colorado regulation. Petitioner claimed that $3.82 was exempt because he had less than $10 in his account. Petitioner also argued that a prison official withheld another $1.41 in retaliation for complaining about the first withholding. The 10th Circuit held that petitioner's claim should not have been dismissed as frivolous where he alleged that the withholding was atypical in his prison environment and significant given his minimal pay each month and that petitioner pled sufficient facts to connect the second withholding to the filing of his first grievance. *Johnson v. Whitney*, 2018 BL 23033, 10th Cir., 17-1249, 1/24/18.

Arizona: Warrantless GPS Tracking of Truck Violated Fourth Amendment Rights of Passenger

Warrantless GPS tracking of a truck over the course of three days violated the Fourth Amendment rights of a passenger who sometimes drove the truck. The passenger had a reasonable expectation that he wouldn't be tracked while he traveled with the truck's owner. The divided Arizona Supreme Court held, however, that because the search in this case was conducted in objectively reasonable reliance on binding appellate precedent, the good faith exception applied. *Arizona v. Jean,* Ariz., No. CR-16-0283-PR, 1/3/18: full text at http://src.bna.com/vrb.

Training Events

LOCAL Training Events

March 9, 2018 – Pre-Trial Motion Practice
The last two live 2017-2018 CAP Seminars are scheduled for the following dates at the Coleman A. Young Municipal Center (C.A.Y.M.C.) on the following Fridays this year: March 9, 2018 - Pre-Trial Motion Practice, and March 23, 2018 - Search & Seizure. **All CAP Seminars will begin at 1:30pm on each scheduled day.** For additional information or questions visit http://capwayne.org/.

March 24, 2018 – Two Part Trial Training: Prelims and Sentencing Mitigation
Part I: This training session will arm defense attorneys with tools to conduct a preliminary examination that will help win motions, trials, and leverage better deals in circuit court. Intended for new and experienced attorneys alike, this session will address questions like: Why is it important to hold? How should I prepare my cross? Does 768.27b apply at the exam? Is it ever appropriate to call a defense witness? What do I do when the prosecutor threatens to add charges? The trainer for this session is attorney Elizabeth Young. Elizabeth is a public defender at the Metropolitan Justice Center of Southeast Michigan where she has worked for the past year and a half. Prior to MJCSEM, she was in private practice defending the accused throughout Metro-Detroit.

Part II: Bring your own case (B.Y.O.C.) to work on during this hands-on felony sentencing clinic. Learn how to prepare your client for allocution and outcomes, develop a mitigation plan, write an effective sentencing memorandum, and improve your sentencing advocacy skills. The clinic will be led by Dana Mertz, an experienced defense mitigation specialist at the Federal Defender Office of Detroit. ***Attendees may register for Part I only, Part II only, or both Parts I and II*** This seminar is free of charge. Advance registration is required. Space is extremely limited, so please register early! Contact Heather Waara at hwaara@sado.org with questions about this event. For online registration: https://secure.obsurvey.com/survey/9b05312d-939d-4ac7-8598-2a24396264a3
Flyer available:
http://www.sado.org/content/temporary/10948_Trial-Training--Part-1-and-2.pdf

May 8, 2018 - Informational Session for Friends and Family of the Incarcerated
The State Appellate Defender Office will host its next Informational Session for Family and Friends of the Incarcerated on Tuesday, May 8, 2018, in

Detroit. SADO staff will be on hand to address the process of appealing a conviction and how an appeal is different from the trial or plea proceedings and will inform attendees about the visiting policies of the MDOC and how to communicate and stay connected with incarcerated loved ones. Specific topics may vary slightly depending on what attendees wish to discuss. This free session is open to all, including attorneys and professionals. Light refreshments will be provided. If you plan to attend, please call 313-256-9833 at least two days in advance to RSVP. See flyer for details, http://www.sado.org/content/pub/10914_Family.pdf. For questions about the event, or to RSVP, please contact Marilena David-Martin at mdavid@sado.org or call 313.256.9833. (Next sessions include: August 11, 2018 in Detroit and December 4, 2018 in Lansing).

NATIONAL Training Events

March 7-10, 2018 – ABA TECHSHOW

The State Bar of Michigan will present its 2018 ABA TECHSHOW on March 7-10, 2018, at the Hyatt Regency in Chicago, Illinois. The ABA TECHSHOW has over 30 years of experience bringing lawyers and technology together! Legal work today is dependent on technology to manage day to day activities, to practice more competently, and to service clients more effectively. ABA TECHSHOW teaches you how technology can work for you. Through the expansive Expo Hall, CLEs, presentations, and workshops, you will be able to get your questions answered and learn from the top legal professionals and tech innovators, all under one roof. Regardless of your expertise level, there's something for you at ABA TECHSHOW. Program agenda, online registration and additional information available here: http://www.techshow.com/

March 22, 2018 - 9th Annual Post-Conviction Conference

NACDL will present its 9th Annual FREE Post-Conviction Conference "Reinvestigating and Litigating Post-Conviction Innocence Claims" in Memphis, Tennessee on Thursday, March 22, 2018. National experts will provide cutting edge instruction on topics essential for reinvestigating and litigating post-conviction innocence claims. The morning sessions provide a fresh alternative to the panel! Targeted sessions focused on specific issues & skills, including: digital investigation plus social media investigation tactics and ethics; investigating the police and other witnesses; recanting witnesses – specifically addressing cases with recanting experts in addition to snitches and other witnesses; investigating and litigating ineffective assistance of counsel; and the strategy and ethics of dealing with the media in innocence cases. In the afternoon, we shift to forensics, with in-depth training on time and manner of death, working with medical examiners, using experts in post-conviction hearings and more. Program agenda, online registration and additional information available here: https://members.nacdl.org/event-details?id=39005574-cf6d-4912-b33c-3dc94b6c648a

April 18-21, 2018 - Spring Meeting & Seminar

NACDL will present its 2018 Spring Meeting and Seminar "Search, Seizure & Criminal Litigation" at the Roosevelt Hotel in New York, New York. At this 2-day seminar, our nationally recognized faculty of experts and leading litigators will provide their expertise on the latest Fourth Amendment issues including how it applies to 21st century communications. You will learn practical tips on litigating computer searches, auto searches, border searches, Title III wiretaps, FISA warrants, warrantless searches of historical cell-phone records, and you will acquire the skills necessary to use suppression as a discovery tool, what creative motions to file, and how to preserve issues for appeal. Most importantly, you will be provided with the strategic tools and arguments to protect your client from the fruits of unreasonable searches, seizures, or other law enforcement intrusions using traditional means or with modern technology. Program agenda, online registration and additional information available here: https://members.nacdl.org/event-details?id=0d160c47-aca0-4772-9f2c-f08449f6d255

June 4-8, 2018 – 2018 Holistic Defense & Leadership Conference

The NLADA will present its Holistic Defense & Leadership Conference on June 4-8, 2018, at the Sheraton Hotel in Philadelphia, Pennsylvania. The Holistic Defense & Leadership Conference will bring together the public defense community to explore better ways to provide holistic defense services to low-income people who encounter the criminal justice system. Highlights include Discussion/Innovation Labs, networking dinners and more! Program agenda, online registration and additional information available here: http://www.nlada.org/node/14161

June 20-22, 2018 – 8th Annual West Coast White Collar Conference

NACDL will present its West Coast White Collar Conference in Santa Monica, California, on June 20-22, 2018, at the stunning Fairmont Miramar Hotel &

Bungalows. This program will feature several hot topic white collar practice issues plus great networking events. Specifically, this program will explore how to successfully defend your client in financial fraud cases, protecting your clients in parallel proceedings, improving your motions practice, navigating a number of challenging ethical concerns, and cutting-edge topics like defending a white-collar case in the digital age. We'll also explore the white-collar enforcement priorities of the new administration and close with a panel celebrating several recent winning defense strategies. If that weren't enough, nationally recognized constitutional litigator Jeffrey Fisher will join us to share his insights on the Supreme Court. Program agenda, online registration and additional information available here:
https://members.nacdl.org/event-details?id=b0341a1e-b48a-40ce-9824-0a3f6bb70e9e

July 26-29, 2018 – 2018 Annual Meeting and Seminar

NACDL will present its 2018 Annual Meeting & Seminar "Murder, Mayhem and Malice" in Miami, Florida on July 26-29, 2018 at the Loews Miami Beach Hotel. Violent crime, whether involving, murder, mayhem, or malice, presents a unique set of challenges for criminal defense lawyers. Our experienced faculty will teach you how to win motions and try cases involving violent crimes and crimes that occur in the streets. Whether it be a civil protest that turns to mayhem, drug dealing with death resulting, or a classic domestic murder case, our faculty will provide you with new perspectives, tools, and strategies to win these cases. Program agenda, online registration and additional information available here:
https://members.nacdl.org/event-details?id=a3a79fc1-27fa-48f4-9047-f40718993e4b&reload=timezone

U.S. Court of Appeals: Selected Sixth Circuit Opinion Summaries

Some Provisions of Ohio's Precious Metals Dealers Act Violated Fourth Amendment

Plaintiffs, a coin shop, brought Fourth Amendment challenges to warrantless search provisions in Ohio's Precious Metals Dealers Act (PMDA) that allowed state agents to inspect certain records without first obtaining a warrant. After finding that precious metals dealing was a "closely regulated industry," the court held that provisions of the PMDA requiring licensees to detail, on police-approved forms, a description of all precious metals purchased and to make these forms available to police each business day and permitting warrantless searches of articles themselves fell within the scope of the administrative search exception to the Fourth Amendment's warrant requirement and furthered the state's interest in tracking down stolen items containing precious metals and returning them to their lawful owners. However, the PMDA provision giving state inspectors access to all of a dealer's records at all times was facially unconstitutional and not necessary to furthering the state's interest in recovering stolen jewelry and coins, and it did not serve as an adequate warrant substitute because it was overly broad in scope. The dealers' as-applied Fourth Amendment challenges were not ripe for adjudication where provisions applied only to licensees, but it was unclear whether dealers had licenses, and the state had not executed warrantless searches, issued show cause orders, or imposed fines pursuant to the provisions. *Liberty Coins, LLC v. Goodman*, 880 F.3d 274 (CA 6, 2018). **PRETRIAL MOTIONS AND PROCEDURE-Search and Seizure-Warrant Requirements.**

Prohibiting the Sale of Firearms to Domestic Violence Misdemeanant Did Not Violate the Second Amendment or Equal Protection Rights

Plaintiff tried to purchase a firearm and was rejected because a mandatory national background check revealed that he had been convicted of misdemeanor domestic violence and federal law prohibits domestic violence misdemeanants from possessing firearms. The Court held that a reasonable fit existed between the statute prohibiting domestic violence misdemeanants from possessing firearms and the important government interest of preventing domestic gun violence. Thus, the statute did not violate plaintiff's rights protected by the Second Amendment under an intermediate level of scrutiny where the government presented evidence of high recidivism rates among domestic abusers and of risks presented by the presence of a firearm in domestic abusers' homes. The Court also held that the domestic violence misdemeanant who had been prohibited from possessing firearms

because he had been adjudicated guilty under a state law of voluntary criminal conduct was not similarly situated to individuals disqualified from possessing firearms because they had been adjudicated as a "mental defective," an involuntary and possibly temporary and treatable medical condition. The mere fact that plaintiff did not have the same avenue as persons adjudicated as mental defectives for reestablishing his right to possess a firearm did not violate his equal protection rights. *Stimmel v. Sessions*, ___ F.3d ___ (CA 6, 2018 WL 283770). **CONSTITUTIONAL RIGHTS-Right to Bear Arms, CONSTITUTIONAL RIGHTS-Equal Protection.**

Fact Issues Precluded Summary Judgment on Several of Plaintiff's Claims Regarding Constitutionally Inadequate Medical and Psychiatric Treatment at Wayne County Jail

Plaintiff received treatment for a self-inflicted burn wound on her chest as well as for psychological needs while incarcerated in the Wayne County Jail and brought a § 1983 action contending that she received constitutionally inadequate medical and psychiatric treatment. The Sixth Circuit reversed in part the grant of summary judgment in favor of defendants finding that the inmate's self-inflicted burn wounds and psychiatric needs were sufficiently serious to satisfy the objective component of an Eighth Amendment medical claim where the burn was serious enough to require a skin graft and plaintiff needed medication to manage her bipolar disorder and depression.

Fact issues precluded summary judgment against the jail medical director based on burn wound treatment as to whether the director disregarded the risk that jail medical staff would fail to adhere to his prescribed plan but did not preclude summary judgment as to inmate's psychiatric treatment.

A jail physician was not deliberately indifferent to the inmate's serious medical needs in failing to treat her self-inflicted burn wounds on her chest where the physician saw the inmate two days after she arrived in jail and, during that visit, observed wounds, prescribed additional medication to ward off infection, and scheduled a follow-up appointment.

The jail's female psychiatric social worker provided medically reasonable response where she saw the inmate at the inmate's behest, and she examined the inmate and sent her to mental health screening under the mistaken assumption that the inmate had not yet been screened.

A jail nurse was not deliberately indifferent in treating burn wounds where there was nothing to suggest that nurse knew or should have known of the risk that treatment ordered by a doctor for the inmate would not be implemented as prescribed.

A genuine issue of material fact existed as to: 1) whether a jail nurse intentionally scrubbed the inmate's wounds to cause unnecessary pain to inmate; 2) whether jail nurses who allegedly failed to change the inmate's dressing for her wounds consciously disregarded the serious risk that the physician's plan of treatment for the inmate would not be implemented as prescribed; 3) whether jail nurses were aware of the serious psychiatric needs of the inmate; 4) whether they disregarded the risk that the inmate might needlessly suffer by going without her psychiatric medication when they decided not to verify her claims with an outside pharmacist or doctor's office; and 5) whether such actions were part of practice or custom of the jail, precluding summary judgment on the inmate's § 1983 municipal liability claim. *Richmond v. Huq*, ___ F.3d ___ (CA 6, 2018 WL 266125). **CONSTITUTIONAL RIGHTS-Cruel and Unusual Punishment, MISCELLANEOUS-§ 1983 Actions.**

Michigan Supreme Court: Selected Order Summaries

Resentencing Required Where Wayne Circuit Failed to Articulate Any Reason for Departure Sentence

In lieu of granting leave to appeal, the Supreme Court vacated the sentence and remanded for resentencing where the trial court failed to articulate any reason for imposing a minimum sentence that was below the applicable guidelines range. *People v. Eddie Williams*; ___ Mich. ___ (#156759, 01-24-18); Daniel J. Rust. **SENTENCING AND PUNISHMENT-Guidelines-Appellate Review-Departure Reasons.**

Wayne Circuit's Order Removing Defendant from Sex Offender Registry Reinstated

Where Defendant Completed HYTA After 1994 Conviction for CSC

The Supreme Court reversed the judgment of the Court of Appeals and reinstated the Wayne Circuit's order removing defendant from the sex offender registry. In 1994, defendant pleaded guilty as charged to second-degree CSC and was sentenced as a youthful trainee under HYTA. After defendant pleaded guilty, the Legislature enacted SORA which retroactively defined defendant's completion of youthful training as a conviction and required him to register under and comply with SORA. On appeal, defendant did not claim that he was promised assignment as a youthful trainee in exchange for his guilty plea, but rather, he claimed that he was induced by HYTA to plead guilty because the statute offered him potential benefits for pleading guilty that he could not otherwise have obtained had he exercised his constitutional right to a trial (no record of a conviction or any related civil disabilities). The Supreme Court extended the *Santobello* principle, which applies to record promises made by prosecutors, to apply with equal force to statutory provisions, such as HYTA, holding that because defendant pleaded guilty on the basis of the inducement provided in HYTA as effective in 1994, was assigned to HYTA training by the trial judge, and successfully completed his HYTA training, retroactive application of SORA deprived defendant of the benefits under HYTA to which he was entitled and therefore violated his constitutional right to due process.

Justice Wilder dissented, joined by Justice Zahra, and would have remanded to the trial court to further develop the factual record to determine (1) whether, at the time of his plea, defendant was promised benefits derived from his assignment to and subsequent release from youthful trainee status under HYTA, and (2) whether he was actually induced to plead guilty as a result of that promise. *People v. Boban Temelkoski*; ___ Mich. ___ (#150643, 01-24-18); David Herskovic. **SENTENCING AND PUNISHMENT-Sex Offenders Registration Act (SORA)-Constitutional Considerations, CONSTITUTIONAL RIGHTS-Due Process, GUILTY PLEAS-Specific Performance of Bargain.**

Michigan Court of Appeals: Selected Opinion Summaries

Conviction in Wayne Circuit for Child Sexually Abusive Activity Was Supported by Sufficient Evidence and Judge Did Not Pierce Veil of Judicial Impartiality

Defendant was convicted by jury of child sexually abusive activity for showing a 16-year-old a pornographic video and then propositioning the minor for sex acts in exchange for money. The court rejected defendant's argument that M.C.L. 750.145c(2) is limited to conduct involving the production of sexually abusive material and held that it includes persons who arrange for or attempt or prepare to arrange for child sexually abusive activity, and thus there was sufficient evidence to support defendant's conviction.

Defendant was not denied a fair trial because the trial judge pierced the veil of judicial impartiality where the trial court's reading of M.R.E. 611 was not calculated to cause the jury to believe that the court had any opinion regarding the case and was not likely to unduly influence the jury but, rather, was merely explaining its interruptions of defense counsel's cross examination and was not intended to belittle defense counsel. The trial court appropriately exercised its discretion to control the trial to prevent improper questioning and avoid wasting time. Any error was also cured by the jury instructions.

Defendant's sentence was not an unreasonable departure as it was inside the guidelines which were enhanced by the habitual offender act. *People v. Kelvin Willis*; ___ Mich. App. ___ (#334398, 01-11-18); Ronald D. Ambrose. **OFFENSES-Child Sexually Abusive Activity, MISCELLANEOUS-Statutory Interpretation-Rules of Statutory Interpretation, JUDGE-Comments, SENTENCING AND PUNISHMENT-Guidelines-Departures.**

Defendant Was Not Entitled to New Trial in Oakland Circuit for AWIM Conviction for Shooting at Men Repossessing His Vehicle

Defendant was convicted by jury of two counts of AWIM and felony firearm for shooting at men attempting to repossess his vehicle. Defendant was not entitled to a new trial based upon ineffective assistance of counsel where: 1) defendant was not entitled to a jury instruction on the use of nondeadly

force in self-defense because firing a deadly weapon at other people involves the use of deadly force even if the gun was aimed poorly; 2) an argument that the self-help repossession statute, M.C.L. 440.9609, does not include situations where there has been a breach of the peace would have been meritless because the only breach of the peace was caused by defendant's shooting; and 3) there was no evidence that would establish that trial counsel failed to interview or investigate potentially helpful witnesses and there was no basis for concluding that defense counsel failed to subject the prosecution's case to meaningful adversarial testing.

Defendant's argument that the verdict was against the great weight of the evidence because he reasonably acted in self-defense was rejected as it was essentially an argument urging the court to conclude that defendant's version of events was more credible than the evidence offered by the prosecution.

Defendant was not entitled to resentencing where OV6 was correctly scored at 25. While the plain language of M.C.L. 777.36(2)(a) permits the sentencing court to consider information that was not presented to the jury, nothing in the statutory language suggests that the trial court should take into account information that is not relevant to the variable in question such as defendant's age, health, family status, and lack of a criminal record, which have no bearing on defendant's intent at the time he decided to open fire on the victims.

The court declined to evaluate defendant's argument that his sentence was unreasonable because there was no error in the scoring and the sentence was based on accurate information. *People v. Henry Anderson*; ___ Mich. App. ___ (#334219, 01-16-18); Ronald D. Ambrose. **COUNSEL-Ineffectiveness Of-Failure to Investigate and/or Present Defense, OFFENSES-Assault With Intent to Murder (AWIM)-Sufficiency of Evidence, SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs)-OV6 Intent to Kill or Injure Another Individual.**

Trial Counsel Was Not Ineffective for Failing to Object to Wayne Circuit's Use of One-Person Grand Jury Proceeding

Defendant challenged the use of a one-person grand jury after he was convicted for several offenses after robbing and shooting the complainant as complainant was attempting to sell defendant his video equipment. Defendant was indicted by a one-person grand jury where the complainant and an eye-witness to the shooting were the only witnesses that testified. The court held that defendant's counsel was not ineffective for failing to object to the use of the grand jury procedure because defendant's right to counsel had not yet attached at the time of the challenged procedure. A grand jury proceeding is not an adversary hearing at which the guilt or innocence of the accused is adjudicated, but rather, is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.

Because there was no indictment against defendant at the time of the one-person grand jury, defendant's right to confront witnesses was not implicated as he was not yet a "criminal defendant" who had been formally charged. Because the one-person grand jury did not violate defendant's constitutional rights, defendant's trial attorney was not ineffective for failing to advance these arguments. The court would not decide the issue of whether the one-person grand jury procedure is, as a matter of policy, improper, finding that the Legislature acted within its province when it created an alternative charging procedure and a prosecutor may use her discretion to invoke the procedure. Also, defendant cannot show prejudice from the use of the one-person grand jury given that he was ultimately convicted beyond a reasonable doubt. *People v. Robert Green*; ___ Mich. App. ___ (#334880, 01-23-18); Kristina Larson Dunne. **INDICTMENT AND INFORMATION-Grand Jury Proceedings, COUNSEL-Absence of at Critical Stage, COUNSEL-Ineffectiveness Of-Failure to File Pretrial Motion.**

Barry Circuit Properly Scored the Guidelines and Imposed Departure Sentence; Admission of Similar Acts Evidence Was Harmless Error

Defendant was convicted by jury of AWIM, assault by strangulation, and domestic violence. The court held that the trial court abused its discretion when it allowed admission of similar acts evidence of prior acts of domestic violence against defendant's first wife that occurred 16 years prior to the charged crimes. This evidence could not be admitted under the "interest of justice" exception to the 10-year time limit of M.C.L. 768.27b because this exception should be narrowly construed. Evidence of prior acts older than 10 years are admissible only if that evidence is uniquely probative or if without its admission the jury is likely to be misled and this testimony was consistent with and cumulative to the victim's testimony regarding defendant's character and propensity. This evidence was also not admissible

under M.R.E. 404(b) because the purpose of the evidence was to show that defendant acted in conformity with the character shown in the prior acts and, to the degree it was at all probative, it would not survive review under M.R.E. 403 due to its danger of unfair prejudice. The court, however, found the error to be harmless because of the overwhelming evidence of guilt.

The trial court properly refused to instruct on mitigating circumstances where defendant did not offer evidence that his "emotional excitement" was caused by something that would cause an ordinary person to act rashly and because the assault happened over the course of time and not in a sudden impulsive act.

Defense counsel was not ineffective for asking a police officer's opinion, during cross examination, whether defendant had an intent to murder the victim where this issue was not supported by the record and instead the record showed defense counsel's valid trial strategy, which was to show that the officer did not have any knowledge of defendant's intent.

The trial court properly scored OV 7 for excessive brutality where defendant attempted to strangle or suffocate the victim three times and during the assault the victim's five-year-old child awoke and defendant told the child to say goodbye to the victim and that her grandmother would take good care of her and it appeared that defendant intended to rape the victim while he was strangling her. Defendant's claim of error as to OV 4 also failed because the evidence showed that the victim sought professional counseling. Although the act of strangulation is not always enough to score OV 3 at 25 points for life threatening or permanent incapacitating injury, where the evidence showed that the strangulation was severe enough and continued long enough such that the victim lost consciousness or control over bodily functions, it demonstrated that the anoxic injury was severe enough to be life threatening. Finally, the defendant's long history of abusing the victim, the presence of a child during the assault, and the damage done to a family of four children were not fully accounted for in the guidelines and supported a departure sentence and the 7% increase was proportional. *People v. Robert Rosa*; ___ Mich. App. ___ (#336445, 01-23-18); Michael A. Faraone. **COUNSEL-Ineffectiveness Of-Trial Tactics and Strategy, EVIDENCE-Proof of Other Crimes (Similar Acts)-To Show Motive, Intent-M.C.L. 768.27B (Domestic Violence), INSTRUCTIONS-Intent and Willfulness, SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs)-OV7 Aggravated Physical Abuse, SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs)-OV4 Psychological Injury to a Victim, SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs)-OV3-Degree of Physical Injury to a Victim, SENTENCING AND PUNISHMENT-Departure Reasons-Upward Departure Affirmed.**

Michigan Court of Appeals: Selected Unpublished Opinion Summaries

Remand to Macomb Circuit Required for Modification of the JOS to Remedy Double Jeopardy Violations

Trial defense counsel was ineffective for failing to move to sever co-defendants' murder trials where one defendant's out-of-court statements to police were detrimental to the other defendant and one defendant's defense was to shift the blame to the other defendant. The error, however, was harmless. Defendant Blackmon's dual convictions for first-degree murder and first-degree felony murder arising from the death of one victim violated double jeopardy and required remand for modification of the judgment of sentence to specify a single conviction and sentence for first-degree murder supported by two different theories. Defendant Easterling's dual convictions for first-degree felony murder and second-degree murder arising from the death of one victim violated double jeopardy requiring the vacation of the conviction and sentence for second degree murder. In all other respects, defendants' convictions and sentences were affirmed. *People v. Bria Blackmon, People v. Demonte Easterling*; unpublished opinion of 11-28-17 (COA#s 332644 & 332702); MAACS - Lawrence Katz, MAACS - Laurel Kelly-Young. **COUNSEL -- Ineffectiveness Of -- Failure to File Pretrial Motion, PRETRIAL MOTIONS AND PROCEDURE -- Joinder and Severance -- Joinder of Defendants, CONSTITUTIONAL RIGHTS -- Double Jeopardy -- Multiple Punishments.**

Remand to Barry Circuit Required for Determination of How Much Restitution Can Be Attributable to Defendant's Conviction Offense

Defendant challenged the amount of restitution that he was required to pay jointly and severally with his codefendants on leave granted. The panel held that because defendant only pled guilty to possession of methamphetamine and not to operating a methamphetamine laboratory or manufacturing or distributing methamphetamine and the restitution was for damages caused by the manufacture of methamphetamine and defendant's roommate, the codefendant, pled guilty to manufacture of methamphetamine, the trial court erred in ordering defendant to pay the restitution where the order was explicitly based, in part, on defendant's knowledge of, imputed knowledge of, or participation in the production of methamphetamine in the home. The panel remanded for a determination of how much in restitution can be attributable to defendant's conviction offense. *People v. Bradley McKelvey*; unpublished opinion of 11-07-17 (COA# 334346); SADO - Sofia V. Nelson. **ECONOMIC PENALTIES -- Restitution -- Course of Conduct.**

Resentencing Required Where Wayne Circuit Misscored OV 13

Defendant's convictions and sentences were affirmed, but the matter was remanded for resentencing where trial defense counsel was ineffective for failing to challenge the scoring of OV 13 (continuing pattern of criminal behavior). The trial court scored this variable at 25 based, in part, on convictions for felony firearm and larceny from a motor vehicle, which are not crimes against a person. Because the amendment to the variable changed the grid level, defendant was entitled to resentencing. *People v. Jamar Alexander*; unpublished opinion of 11-28-17 (COA#s 333896 & 334949); MAACS - Michael J. McCarthy. **SENTENCING AND PUNISHMENT -- Guidelines -- Scoring -- Scoring of Offense Variables (OVs) – OV13 Continuing Pattern of Criminal Behavior.**

Resentencing Required Where Kalamazoo Circuit Misscored OVs 4 and 13

Defendant's convictions and sentences were affirmed, but the matter was remanded for resentencing where the prosecutor conceded that the trial court misscored OVs 4 and 13. Because the amendment to the variables changed the grid level, defendant was entitled to resentencing. *People v. Jamal Stokes*; unpublished opinion of 11-28-17 (COA# 334849); MAACS - Ronald Ambrose. **SENTENCING AND PUNISHMENT -- Guidelines -- Scoring -- Scoring of Offense Variables (OVs) -- OV4 -- Psychological Injury to a Victim -- OV13 Continuing Pattern of Criminal Behavior.**

Remand to Wayne Circuit Required for Resentencing Where Court Misscored OV4

Defendant's convictions were affirmed, but the matter was remanded for resentencing where the trial court misscored OV4. While the victim testified that he was afraid during the robbery and the officer who took his statement immediately after the robbery testified that he appeared shaken and as though something traumatic happened, this evidence was insufficient. There was no victim impact statement, preliminary examination testimony, or victim statement at sentencing, and the victim's expression of fearfulness while a crime is being committed, by itself, is insufficient, see *People v. White*, ___ Mich. ___ (149490, 12/26/17). Because this amendment lowered defendant's guideline range, he was entitled to resentencing. *People v. Wesley Banks*; unpublished opinion of 01-11-18 (COA# 333776); Marilena David-Martin. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs) OV4-Psychological Injury to a Victim.**

One of Defendant's Convictions Must Be Vacated to Remedy Double Jeopardy Violation and Resentencing is Required Where Jackson Circuit Misscored OVs 7 and 13

Defendant was convicted of armed robbery, assault with intent to rob while armed, conspiracy to commit assault with intent to rob while armed, and felony firearm. Defendant's convictions of both armed robbery and assault with intent to rob while armed violate the double jeopardy prohibition against multiple punishments for the same offense because assault with intent to rob while armed is a lesser included offense of armed robbery and neither crime contains an element the other does not, and defendant's conviction and sentence for assault with intent to rob while armed were vacated.

The trial court erred by assessing 50 points for OV7 based upon the actions of a co-defendant; defendant was not physically present during the robbery and there was no evidence that defendant either assisted or encouraged the co-defendant to engage in conduct beyond the minimum required to commit the offense. Only defendant's actual participation should be scored. This amendment

affected defendant's guideline range, so he was entitled to resentencing. Because defendant's vacated conviction for assault with intent to rob was one of the prior felonies against a person used to score OV 13 and the trial court did not address charges that were brought against defendant in the past that were dismissed, this variable was misscored at 25. However, if on remand the trial court finds that a preponderance of the evidence establishes that the past offenses took place and that defendant committed them, the court may further amend the score of OV13. *People v. Joshua Mitchell*; unpublished opinion of 01-11-18 (COA# 334244); Daniel D. Bremer. **CONSTITUTIONAL RIGHTS-Double Jeopardy-Multiple Punishments, SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs) OV7 Aggravated Physical Injury, SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs) OV13 Continuing Pattern of Criminal Behavior.**

Remand to Kalamazoo Circuit Required for Amendment of the Judgment of Sentence to Correct Double Jeopardy Violation

Defendant's convictions were affirmed, but the matter was remanded for amendment of the judgment of sentence to reflect a single count of felony murder supported by two theories – torture and first-degree child abuse – as multiple murder convictions arising from the death of one single victim violate double jeopardy. *People v. Daveeta Walker*; unpublished opinion of 01-11-18 (COA# 335796); Jacqueline J. McCann. **CONSTITUTIONAL RIGHTS-Double Jeopardy-Multiple Punishments.**

Remand to Jackson Circuit Required for Amendment of the Judgment of Sentence to Correct Double Jeopardy Violation

Defendant's convictions were affirmed, but because defendant's convictions of both armed robbery and assault with intent to rob while armed arising from the same incident involving only one victim violate the double jeopardy prohibition against multiple punishments for the same offense, defendant's conviction and sentence for assault with intent to rob while armed must be vacated. *People v. Darius Spencer*; unpublished opinion of 01-11-18 (COA# 336605); Ronald D. Ambrose. **CONSTITUTIONAL RIGHTS-Double Jeopardy-Multiple Punishments.**

Remand to Wayne Circuit Required for Resentencing Where Court Misscored OVs 3 and 17

Defendant's convictions were affirmed, but the matter was remanded for resentencing where the prosecution conceded, and the panel agreed, that OV 3 and OV 17 were scored erroneously because the instant offense did not involve "the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive." Because this amendment lowered defendant's guideline range, he was entitled to resentencing. *People v. Jamal Rivers*; unpublished opinion of 01-16-18 (COA# 333936); Kristin Lavoy. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs) OV3-Degree of Physical Injury to a Victim, SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs) OV17 Degree of Negligence Exhibited.**

Defendant's Reckless Driving Convictions Were Affirmed but Resentencing Was Required Where Delta Circuit Misscored OV 13 Based on the Four Individuals Injured in One Accident

Defendant was convicted by jury of reckless driving causing death and three counts of reckless driving causing serious impairment of a bodily function. Defendant drove through a stop sign but testified that he tried to stop but his brakes failed. After the crash, the vehicles were inspected, and a broken rear brake line was found. The court held there was sufficient evidence to convict where there was evidence that defendant purposefully drove through a stop sign at a high speed without any attempt to brake and that he may even have accelerated into the intersection, and therefore, a jury could fairly conclude that defendant's actions were willful or that they were done with wanton disregard of the potential consequences.

The trial court did not abuse its discretion when it allowed the owner/operator of a local automobile repair shop to testify as an expert on auto mechanics where the lawyers conducted an extensive inquiry into his qualifications, he described his training and extensive experience in brake analysis and repair, he had a college certification in automotive technology and a state certification in brakes, he had 15 years' experience inspecting and repairing brakes, and he had repaired hundreds of brakes. The fact that he had never testified as an expert did not preclude his testimony. His testimony that the brake line was broken from the crash itself and not due to corrosion or other natural cause was based on a reasonable

analysis. Defense counsel was not ineffective for failing to hire a mechanical expert to challenge this testimony where defense counsel conducted an extensive cross examination of the prosecution's expert regarding his process and conclusions and defendant provided no indication that any expert witness would have been able to offer favorable testimony. Because a challenge to the basis of the expert's testimony would have been futile, counsel did not provide ineffective assistance by failing to make such a challenge.

In an issue of first impression, the court held that where defendant's reckless driving constituted a single act, although with multiple victims, and nothing was presented to show that he committed separate acts against each individual victim in the course of the reckless driving, it was improper to score OV 13 at 25 points for a pattern of continuing criminal conduct when defendant had no prior record and all four convictions arose from a single act. The court found that the word "continuing" clearly refers to an event or process that takes place over time and that the statute contemplates that there must be more than one felonious event. The court distinguished *People v. Gibbs*, 299 Mich. App. 473 (2013), where defendant Gibbs robbed a jewelry store during which he took property that belonged to the store and demanded that the two individuals present in the store turn over their personal possessions to him. The court found that in *Gibbs* there were three separate acts against each of the three victims and these three distinct crimes constituted a pattern of criminal activity. The court likewise distinguished *People v. Harmon*, 248 Mich. App. 522 (2001), where the defendant took four photographs of two underage victims on a single day, and thus the trial court could properly score OV 13 in that case where the defendant committed separate acts in a single criminal episode. Defendant was remanded for resentencing. *People v. Dalton Carll*; ___ Mich. App. ___ (#336272, 01-23-18); Mark F. Hugger. **COUNSEL-Ineffectiveness Of-Failure to Call an Expert, OFFENSES-Reckless Driving, SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs)-OV13 Continuing Pattern of Criminal Behavior.**

Ogemaw Circuit Erred When It Denied Defendant's Request for Instruction on Involuntary Manslaughter

Defendant's felon in possession of a firearm and felonious assault convictions were affirmed, as well as one count of felony firearm, but his jury trial convictions for second degree murder and the felony firearm conviction tied to that predicate offense were reversed where the trial court erroneously concluded that involuntary manslaughter was not a necessarily included offense and denied defendant's request to instruct the jury on involuntary manslaughter. The prosecutor may choose to have the court enter convictions for involuntary manslaughter and felony-firearm or may instead choose to retry defendant on these counts. *People v. Patrick Sourander*; unpublished opinion of 01-25-18 (COA# 332091); Nicholas J. Venditelli. **INSTRUCTIONS-Included Offenses-Requested by Defendant But Refused by Court, OFFENSES-Murder, Second-Degree-Included Offense.**

Resentencing Required Where Wayne Circuit Misscored OV8

In these consolidated cases, defendants' convictions were affirmed, but the matter was remanded for resentencing where the trial court misscored OV 8 and the amendment affected the guidelines range. The panel held that there was no evidence that the complainant was "held captive" where, during the course of the robbery, the complainant was able to leave the house and run away. Even though one of the defendants attempted to block the door, the statute refers to captivity that was actually effected, not captivity that was merely attempted or contemplated. Likewise, even though defendants confiscated the complainant's keys and prevented him from leaving in his truck, the fact that defendants prevented the complaint from leaving in his vehicle does not equate with captivity where he was otherwise able to walk or run away. Also, any captivity was not "beyond the time necessary to commit the offense." *People v. Matthew Keller* and *People v. Aaron Denlar*; unpublished opinion of 01-25-18 (COA#s 334123 & 335254); Julie E. Gilfix, Alanna P. O'Rourke. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables(OVs)-OV8 Victim Asportation or Captivity.**

Macomb Circuit Erred When It Entered a JOS Listing the Wrong Conviction Offenses

Defendant's convictions and sentences were affirmed, but the matter was remanded for the ministerial correction of the judgment of sentence where it listed the wrong offenses. *People v. Robert Moore*; unpublished opinion of 01-25-18 (COA# 333341); Jacqueline J. McCann. **POST-TRIAL MOTIONS AND APPEALS-Appeals-Remedies.**

Remand to Wayne Circuit Required for Application of Reasonableness Standard to Departure Sentence

In docket number 334742 of these consolidated cases, the matter was remanded where the trial court failed to apply the reasonableness standard of *Steanhouse* when justifying its departure sentences. *People v. Christopher Johnson*; unpublished opinion of 01-25-18 (COA#s 334741 & 334742); Jonathon B.D. Simon. **SENTENCING AND PUNISHMENT-Guidelines-Appellate Review-Departure Reasons.**

Chippewa Circuit Erred When It Rejected Lawful Charge Plea Bargain

Defendant, charged with several counts of distributing child sexually abusive material and using a computer to commit a crime, entered into a plea agreement with the prosecutor that had the clear intent to structure the charges so that defendant would be pleading guilty to all the charges but in a manner that would not provide for the possibility of consecutive sentencing. The trial judge rejected the deal stating, "I'm sick of this," and subsequently sentenced defendant above the guidelines to consecutive sentences. The panel held that the trial court improperly engaged in the negotiation of the plea bargain and that a judge may not reject a charge bargain to which both sides agree unless he finds that it is not voluntary, knowing, or accurate. Nothing in the court rules permits a trial judge to reject a plea simply because he does not like the plea agreement. The judgment was vacated, and the matter remanded for entry of judgment as to the bargain the court refused to accept and for resentencing before a different judge.

The panel also noted that on remand the trial court is not permitted to impose restitution to the police department for the forensic examination performed on defendant's computer because the general cost of investigating and prosecuting criminal activity is not direct financial harm as a result of a crime and the forensic examination was part of the ordinary costs of investigation or operation. *People v. Aftab Zaman*; unpublished opinion of 01-25-18 (COA# 335742); Dana Bruce Carron. **GUILTY PLEA-Refusal to Accept, ECONOMIC PENALTIES-Restitution-Extent of Loss.**

Resentencing Required Where Barry Circuit Misscored OV19 and Failed to Articulate Adequately When Imposing Departure Sentence

Defendant's convictions were affirmed, but the matter was remanded for resentencing. Defendant's statement, "don't tell anyone," made to a witness while he was on the phone with 911 explaining that he had just shot someone was too ambiguous to be used to support a score of 10 for OV19 for interference with the administration of justice where it was just as likely that defendant was telling the witness not to tell any of their acquaintances and defendant had cooperated with the police.

The trial court also abused its discretion when applying the principle of proportionality for a departure sentence where some of the reasons given by the trial court to exceed the guidelines were adequately accounted for in the guidelines and it was not clear whether the court would have departed based on the other reasons alone. It was difficult to ascertain the trial court's reasoning for the extent of the departure imposed and its rationale regarding whether the departure sentence was proportionate to the seriousness of the crime, and therefore resentencing was required. *People v. Sigmund Rumpf*; unpublished opinion of 01-30-18 (COA# 333544); Alona Sharon. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables(OVs)-OV19 Threat to the Security of a Penal Institution or Court or Interference with the Administration of Justice, SENTENCING AND PUNISHMENT-Guidelines-Appellate Review-Departure Reasons.**

Resentencing Required Where Ottawa Circuit Failed to Articulate Adequate Reasons for Extent of Departure Sentence

Defendant's conviction for CSC second-degree was affirmed, but the matter was remanded for resentencing where defendant was given more than a 100% increase over the highest possible minimum sentence within the guidelines. The panel found that the reasons given for the departure were factors considered in the charge and the guidelines. The age of the victim was a factor in the charge, the vulnerability of the child was accounted for in OV 10, psychological injury was accounted for in OV 4, and multiple incidences of abuse were scored in OV 13. The trial court failed to explain why these guidelines scores were inadequate in this case. Grounds for a departure included that OV 10 was only scored due to the victim's age but could have been further scored for abuse of defendant's authority status and because the abuse occurred within a domestic relationship and that defendant lacked rehabilitative potential because he had been involved in similar behavior involving his biological daughter years ago. While the trial court did not abuse its discretion in concluding that the recommended range was disproportionately low, defendant is entitled to resentencing because the extent of the departure did

not satisfy the principle of proportionality. *People v. Antonio Rivera*; unpublished opinion of 02-08-18 (COA# 336384); Christine A. Pagac. **SENTENCING AND PUNISHMENT- Guidelines-Appellate Review-Departure Reasons-Upward Departures Reversed.**

Schoolcraft Circuit Erred When It Scored OV 9 and When It Imposed Restitution That Was Based on Uncharged Conduct

Defendant's convictions were affirmed, but the matter was remanded for vacation of the restitution order. The panel held that OV9 was misscored where defendant's convictions of lying to a peace officer and obstruction of justice did not in themselves have physical victims and did not place any victims in danger. However, because the trial court stated a proper justification for its departure sentence and because the guidelines did not fully account for defendant's assistance in the cover up of a triple homicide, the trial court's departure from the intermediate sanction guideline level was reasonable and proportionate to defendant's offenses and remand was unnecessary despite the error in scoring OV 9. The trial court's imposition of restitution for the victims' burned car was based on uncharged conduct where the obstruction of justice charge was based solely on leaving Michigan and attempting to dispose of tires, requiring vacation of the order imposing restitution. *People v. Kenneth Brunke*; unpublished opinion of 02-13-18 (COA# 336617); Cecilia Baunsoe Quirindongo. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring of Offense Variables (OVs)-OV9 Number of Victims, ECONOMIC PENALTIES-Course of Conduct.**

Resentencing Required Where Wayne Circuit Failed to Articulate Adequate Reasons for Departure Sentence

On remand from the Supreme Court for plenary review of whether defendant's sentence was disproportionate, the panel found an abuse of discretion. Defendant paid an employee to burn a house, and the fire resulted in the death of a Detroit firefighter. Defendant's guidelines were 225 to 375 months, and he was sentenced to 500 to 750 months imprisonment on his jury conviction of second-degree murder. Defendant was previously successful in getting a remand for resentencing due to the trial court's failure to justify the extent of the departure sentence, but on remand the same trial judge imposed the same sentence.

The panel found that two of the trial court's reasons to depart were not taken into consideration in the guidelines: 1) the unicity of the offense with a prior fire that indicated defendant's financial motivation for setting the fires, and defendant was never charged for the first fire; and 2) the risk of harm to firefighters of defendant's behavior. The panel concluded, however, that the trial court's third reason – the duty of society and of the trial court to protect first responders – was not unique to defendant or defendant's crime and not otherwise relevant to a proportionality determination. These reasons were insufficient to support the conclusion that defendant's departure sentence was more reasonable and proportionate than a sentence within the guidelines. Further, the trial court abused its discretion in failing to provide adequate reasons for the extent of the departure. The panel remanded for resentencing by a different judge noting in particular the trial court's statement that the issue of unicity trumps the concern for proportionality with regard to its sentence. The panel found that the trial court explicitly disregarded *Milbourn* and the principle of proportionality. Judge Meter would have affirmed the sentence. *People v. Mario Willis*; unpublished opinion of 02-01-18 (COA# 320659); Craig A. Daly. **SENTENCING AND PUNISHMENT-Guidelines-Appellate Review-Departure Reasons-Upward Departures Reversed.**

Resentencing Required Where Wayne Circuit Failed to Articulate Adequate Reasons for Departure Sentence

On remand from the Supreme Court for plenary review of whether defendant's sentence was disproportionate, the panel found an abuse of discretion. Defendant was convicted by jury of voluntary manslaughter and sentenced to 10 to 15 years with a guideline range of 36 to 71 months. Although the trial court's finding that the overall brutality of the crime and the resultant severe injuries to the victim were sufficient reasons for a departure, the trial court calculated 95 OV points for the brutality of defendant's actions including 50 points for OV7. Therefore, the trial court failed to explain why the extent of the departure was warranted requiring remand for resentencing. *People v. Fernandus Ellen*; unpublished opinion of 02-01-18 (COA# 325627); Jacqueline J. McCann. **SENTENCING AND PUNISHMENT-Guidelines-Appellate Review-Departure Reasons-Upward Departures Reversed.**

Training Calendar

Complete details on the training events listed below appear at page 12 of this month's newsletter.

March 7-10, 2018	ABA TECHSHOW	SBM - Chicago, Illinois
March 9, 2018	Pre-Trial Motion Practice	CAP - Detroit, MI
March 22, 2018	Post-Conviction Conference	NACDL - Memphis, TN
March 23, 2018	Search & Seizure	CAP - Detroit, MI
March 24, 2018	Prelims and Sentencing Mitigation	SADO – CDRC - Detroit, MI
April 18-21, 2018	Spring Meeting & Seminar	NACDL - New York, NY
May 8, 2018	Informational Session for Family and Friends	SADO - Detroit, MI
June 4-8, 2018	Holistic Defense Conference	NLADA - Philadelphia, PA
June 20-22, 2018	West Coast Conference	NACDL - Santa Monica, CA
July 26-29, 2018	Annual Meeting & Seminar	NACDL - Miami, FL
August 11, 2018	Informational Session for Family and Friends	SADO - Detroit, MI
December 4, 2018	Informational Session for Family and Friends	SADO - Lansing, MI

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