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and
CRIMINAL DEFENSE RESOURCE CENTER

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Features

Departments

Appellate Courts

Directed Traffic Enforcement Patrols: Have "Best Intents" Produced Perverse Results?

Introduction

A recent, defense-favorable, Eastern District of Michigan U.S. District Court decision, (which is being appealed by the U.S. Attorney's Office), highlights the overlap that exists between so-called "proactive" traffic enforcement patrols and uneven treatment of racial and ethnic minorities by the criminal justice system.[1] While the Court's Opinion and Order does not explicitly make reference to this overlap, when "read between the lines," it leaves little room for doubt that the Court based its ultimate decision — suppressing a handgun because it was seized during an illegal traffic stop — on its belief that at least one such "proactive traffic enforcement" stop was the product of an *overactive*, and unconstitutional patrol.[2]

"Directed Traffic Enforcement Patrols"

Whether viewed as a necessary and efficacious law enforcement tool for controlling urban crime, or seen as just one more example of divisive and discriminatory "profiling,"[3] directed traffic enforcement patrol programs are not a new phenomenon. In essence, these programs are premised on the theory that, when high-crime, "hot spot" areas of inner-cities can be identified, "zero tolerance" – of even the most minor traffic violations – will result in higher police *visibility* in those areas, leading, in turn, to reduction in crime. Along with this *general deterrence* model comes, in both theory *and* practice, the added "benefit" of *specific* deterrence: whenever traffic enforcement stops lead to the discovery[4] of contraband in the vehicles stopped — usually drugs, or guns, or both – the involved contraband is seized, and the specific perpetrators are arrested.

In "directed traffic enforcement patrol" *theory*, therefore, it is "hot spot," inner-city areas, of more highly concentrated crime, that are the targets of these patrols. The *reality* that these areas are also disproportionately populated by poor and minority citizens, and that directed traffic enforcement programs therefore also disproportionally target minorities and the poor, seems mostly absent from the (theoretical) discussion. In essence, these programs "redline"[5] poor and minority neighborhoods, for "zero tolerance" traffic enforcement, while allowing for *relative tolerance* of minor traffic violations in non-minority communities.

Theoretical and practical debates aside,[6] however, directed traffic enforcement patrol programs are not new, and in spite of their questionable character, both in terms of constitutionality and *long-term* efficacy,[7] one such program is currently in full operation in several Michigan cities, including Flint.[8] The "nuts and bolts" of that program were explored during the suppression hearing conducted in the *Johnson* case, and while the resulting Opinion and Order granting the defendant's suppression motion did *not* question the constitutionality of the program, the Court's explicit references to some of those "nuts and bolts" may manifest the Court's perception that the Flint program's nuts and bolts were "cross-thread," and abused, by the arresting officer who initiated the defendant's traffic stop.

"The Illegal Stop"

Integral to the Court's ruling – that Mr. Johnson's traffic stop was *not* supported by probable cause that he had committed a civil infraction – was a factual record developed over the course of an extensive *written* discovery process, followed by a two-day evidentiary hearing.

These proceedings disclosed that, at approximately 1:48 a.m., on May 25, 2012, two Michigan State Police Troopers were engaged in a "directed traffic enforcement patrol," near the corner of Wisner and Cooper Streets in the City of Flint. Their decision to patrol that *particular* "directed area" was prompted by the fact that the area had been designated as a "hot spot," i.e., one known to law enforcement has having an increased concentration of violent crime, in addition (allegedly) to one in which traffic violations occur in relatively higher numbers.[9]

Defendant Johnson, who at that hour was headed home from work, driving in the direction of the Flint home he shared with his wife, was alone in her vehicle, which he had borrowed for the night. Along the route, as he approached the "four-way stop" at the intersection of Wisner and Cooper Streets, he observed a marked MSP patrol vehicle parked in a stationary position approximately 2 blocks away. According to his testimony, that vehicle was located at a 90˚ angle to his own direction of travel, allowing him to clearly see the "Michigan State Police" shield on its passenger door. Aware that his drivers' license was suspended, (he was carrying only a "fake" license with him), and knowing that he was travelling through a high-crime area just before 2:00 a.m., he made sure to signal a right turn, and to bring his vehicle to a complete stop before proceeding with that right turn and heading in the direction of his residence.

Moments later, after traveling approximately three-quarters of the way toward the next intersection, Mr. Johnson observed the troopers' patrol vehicle — now in motion, and traveling behind him — "closing fast." As he began to slow his own vehicle, preparing to stop it at the stop sign located at that next intersection, he then observed the activation of the patrol vehicle's "overheads." At that point, since no other vehicles were traveling in the immediate area, he concluded that he was, unfortunately, being "pulled over" by troopers.

"Pull over" he did, and when he was eventually ordered to exit the vehicle — on suspicion of driving without a valid driver's license[10] — he did, in fact, step outside. Then, immediately upon exiting, one of the troopers (allegedly) saw a hand gun, lying (also allegedly) in plain sight, on driver's side floor.

As a consequence, he was taken into custody,[11] the hand gun found in his wife's vehicle was seized, and because he "qualified" for a mandatory 15-year Bureau of Prisons sentence, under the federal Armed Career Criminal Act ("ACCA"), he was indicted in Federal Court.

Officer Testimony Conflicts, Contadicts

Mr. Johnson, in addition to pleading "not guilty" to the indictment – he denied any awareness of the presence of the gun in the vehicle – was adamant that he *had* brought his vehicle to a complete stop, at both of the involved intersections. The officers' suppression hearing testimony was otherwise. Specifically, one of them (but not the other) testified that, as the patrol vehicle was "passing by" the defendant's vehicle at the first stop sign, he observed

the defendant "roll through the stop," (committing a civil infraction). That same officer (but not the other) further testified that he was thus required to turn his vehicle around — essentially to make a "u-turn" — in order to pursue the defendant's vehicle.

As for the second officer, while he "didn't see" the first civil infraction, he did testify to having observed the defendant – before complying with the order to pull over – "roll through" the second stop sign, located at the next intersection. After "rolling through" *that* stop sign, the second officer further testified, the defendant slowly continued, eventually pulling the vehicle to a stop not on the roadway, but instead next to some well-lit gas pumps, located in a well-lit gas station *adjacent to* the roadway, and about a city block past the second stop sign.

The Issues

On this record, the defendant argued that (1) the government had not met its burden to show, by a preponderance, that the defendant actually committed the first civil infraction, and that (2) the defendant was "seized," constitutionally, when he began the *process of complying* with the arresting officer's activation of his vehicle's overhead emergency lights, after having rapidly "closed" on the Defendant's vehicle. (Regarding the second of these arguments, in other words, the defendant's "loss of liberty" had already occurred, in direct response to the officer's "show of authority," before he arrived at the second stop sign, and his "seizure" was thus a *fait accompli* **before** the second alleged civil infraction took place.)

Initially, the District Court Magistrate Judge, (to whom the defendant's motion to suppress had been referred by the District Judge, and who had conducted the two-part suppression hearing), rejected both of the defendant's arguments. As to the first, the Magistrate Judge found that the Wisner-Cooper Streets stop sign violation *had* occurred, reasoning, on *relative credibility* grounds, that the combined testimony of the arresting officers, although inconsistent at times (and even contradictory at other times) was still sufficiently reliable to "trump" the defendant's testimony that he had not, in fact, "rolled" the Wisner-Cooper stop sign.

As to defendant's second argument, the Magistrate Judge disagreed with the premise that the defendant had been "seized," for constitutional purposes, when he began the *process* of stopping his vehicle. Instead, according to the Magistrate Judge, the defendant was not *legally* seized until he brought his vehicle to a *complete* stop. Until then, the Magistrate Judge ruled, the defendant had not "actually submitted" to the officers' "show of authority."

Thus, the Magistrate Judge further reasoned, even if the defendant had not, in fact, "rolled" the first stop sign, "rolling" the second one (which, unlike the situation with the first stop sign, both of the officers agreed Defendant had done) amounted to "a separate, independent basis for the traffic stop." Consequently, finding that the traffic stop *was* supported by probable cause, the Magistrate Judge issued a Report and Recommendation that Defendant's motion to suppress should be denied.

Findings And Analysis Rejected, Motion Granted

The Defendant, asserting his right to *de novo* review, filed his objections before the District Court Judge, challenging both the factual findings made, and the legal analysis employed, in the Report and Recommendation. The Court, in turn, issued an Opinion and Order (1) *rejecting* the Magistrate Judge's recommendation, and (2) *granting* the suppression motion.[12]

Although the Court agreed with each of the defendant's two core arguments, (again, that the government had not shown, by a preponderance, that the first civil infraction occurred at all, and that the second civil infraction, even if *were shown to have occurred,* came too late to serve as probable cause for Defendant's "seizure"), the grounds on which the Court relied to adopt those arguments were starkly different.

Specifically, the Court treated the second argument — the "seizure question" — as primarily a question of how "the law applied to the facts,"[13] and recognized that resolution of the first argument required only straightforward, *factual* analysis: "in totality," who was more credible, the officer who said he saw the defendant "roll" the Wisner-Cooper stop sign, or the defendant, who was adamant that he had not done so?

On review, the Court concluded that the "credibility evidence" did not preponderate in favor of the officer. In itself, this finding is remarkable — seldom do defendants prevail in "he said/he said" contests with police officers. This particular defendant, moreover, stood to avoid a *mandatory minimum* 15-year sentence, if only he could convince the Court to grant his motion. The Court's analysis,

while acknowledging this credibility factor, refused to put inordinate weight upon it, stating that "the fact that [the] defendant is facing significant jail time if convicted is not a reason on its own to discredit his testimony, as no criminal defendant's testimony would be deemed credible under this premise." Neither, the Court acknowledged, did the "motive to fabricate" factor present a one-way proposition, since "an officer's testimony may be colored by a personal or professional interest in the outcome of a case [,]" (citing *United States v. Lopez-Medina*, 461 F.3d 724, 744 [6th Cir. 2006]).

Notably, the Report and Recommendation had also recognized that, whenever motions to suppress evidence are brought, police officers, just like defendants, have "an interest in the outcome." The Court's decision *rejecting* the Report and Recommendation, however, while crediting the Magistrate Judge for having acknowledged this fact, nevertheless refused to follow the recommendation that the officer, "on balance," should be found more credible than the defendant.

For present purposes, though, it is the Court's *explanation* for refusing to follow the Magistrate Judge's credibility determination that is most instructive:

> In reaching this decision, the Court places more relevance than [the] Magistrate Judge . . . on the fact that the stop occurred in a "hot" spot where the officers are engaged in "proactive traffic policing." (*Hearing transcript citation omitted.*) [I]t is not evident [, however,] that he evaluated whether [the officers' personal or professional] interests or the nature of the officers' patrol duties may have impacted their credibility. In light of the inconsistencies in the officers' testimony, the Court *cannot ignore the reality* that they were patrolling the area for traffic violations, but *targeting* weapons and/or drugs. (Emphasis added.)

As this passage from the Court's opinion demonstrates, the "reality" that the arresting officers in the *Johnson* case were "targeting" something *other than* "strict traffic enforcement," but were doing so under the *guise* of enforcing the traffic laws, was not "lost" on the Court.[14] Neither, it may be supposed, had it escaped the Court's attention that the "something else" being "targeted" was a Flint city neighborhood *that had been officially designated for unequal traffic enforcement*. And, finally, the Court's refusal to "ignore the reality of targeting," having played such a pivotal role in its decision to discredit police officer testimony regarding the subject of probable cause, may be seen as an expression of deep suspicion that "proactive traffic policing," (at least as manifested in the traffic stop arrest at issue), affords *less than* "equal protection under the law" to residents of poor and minority neighborhoods.

Conclusion

The District Court's ultimate decision in *Johnson* - to actually discredit officer testimony, and then suppress dispositive evidence - prompts two important questions that legislators, judges, law-enforcement officers, and (perhaps especially) citizens, must seriously consider: *first,* could it be that "proactive traffic enforcement patrols," as *officially-approved* measures that, by design, *unequally* enforce traffic laws, have become a form of "hyperactive" policing that produces illegal traffic stops which, in turn, result in the illegal incarceration of citizens who "just happen" to reside in poor and minority communities? *And second,* if the answer is "yes," are any of the *specific deterrence* law enforcement gains achieved by these patrols seriously *outweighed* by their inherent costs, e.g., citizen disaffection and mistrust, "disrespect for the law," and a consequent *absence* of *general deterrence*?

As Justice Brandeis so wisely said, dissenting in *Olmstead v. United States,* 277 U.S. 438, 479 (1928):

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evilminded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

by Glenn Simmington

Glenn Simmington was born in St. Louis, Missouri, July 14, 1952. He graduated from the University of Michigan with honors in 1978 and from Wayne State University Law School in 1981. He is a member of the Genesee County Bar Association, State Bar of Michigan, the National Association of Criminal Defense Attorneys, and he served for many years on the Michigan Public Defense Task Force. Glenn maintains a general and appellate practice, in both state and federal courts, and handles cases involving fraud and abuse investigation, professional liability defense, civil rights litigation, criminal

defense, and appellate advocacy. Glenn is also a member of the Eastern District of Michigan Criminal Justice Attorneys (CJA) Panel. He can be reached at: Law Office of Glenn M. Simmington, PLLC; Mott Foundation Building; 503 S. Saginaw St., Ste. 1000; Flint, MI 48502; simmingtonlaw@gmail.com; (810) 600-4211.

Endnotes

1. *United States v. Johnson*, No. 12-20385, 2014 WL 5605280 (E.D. Mich., November 4, 2014), http://www.sado.org/cdn/articles/10437_Opinion-and-Order---US-v-Samuel-Duane-Johnson--Jr.pdf. The magistrate judge's report and recommendation can be found here: http://www.sado.org/cdn/articles/10436_R--R---US-v-Samuel-Duane-Johnson--Jr.pdf.

2 As a general phenomenon, "DWB," or "driving while black," may remain a controversial subject in everyday discussion, but traffic stop statistics persuasively demonstrate that the phenomenon exists. (*See Bureau of Justice Statistics, Police-Public Contact Survey, "Traffic Stops," http://www.bjs.gov/index.cfm?ty=tp&tid=702*.) And disproportionately high arrest and incarceration rates for racial and ethnic minorities in the United States not only have been conclusively demonstrated to exist, but have served as a driving force for numerous sentencing reform efforts nationwide.

3. Think "quality of life," or "broken windows," policing.

4. Such "discoveries" can be made, of course, during purported consensual searches, searches incident to arrest, or when vehicle occupants have been careless enough to leave illegal items "in plain view." However, such "windows of opportunity," to search motorists and their passengers, were not at issue in *Johnson,* as only the arresting officers' alleged basis for *initiating* Mr. Johnson's traffic stop were challenged (successfully) by the Defendant.

5. By statute, "equal *property* rights" guarantees for racial and other minorities can be found in the Civil Rights Act 1868, the Federal Housing Act (FHA), and in the Equal Credit Opportunity Act. These statutes, in effect, outlaw "redlining practices" that discriminate against racial and ethnic minorities' *property* rights and transactions; outside the property rights realm, however, legal protections against such racial and ethnic "neighborhood redlining," by law enforcement, are nowhere to be found.

6. *See* McGarrell, et al., "Reducing Firearms Violence through Directed Police Patrol,*" Criminology and Public Policy, Volume I, Issue I, pp. 119-148, November, 2001.

7. *See ibid.*, pp. 144-45.

8. Michigan's program, approved by Governor Snyder's administration and enforced by Michigan State Police officers whose duties do not involve investigating 911 calls or other citizen complaints, seems typical of programs in place, or formerly in place, in other major urban areas of the country.

9. To his credit, the officer who initiated the traffic stop in *Johnson* conceded, after what could accurately be described as a "persistent" cross-examination, that it was no coincidence that such "hot spots" are designated for "Proactive Direct [traffic] Patrols" while also having been designated as areas with "higher crime rates."

10. Notably, the arresting officer's suspicion was not based on a "LIEN check" — recall that the Defendant was not driving a vehicle registered in his name — but instead on the trooper's observation of the "fake" driver's license that Defendant had supplied when he was stopped.

11. Although the Defendant, upon being confronted by the arresting officer regarding the gun, unsuccessfully attempted to flee on foot, it is undisputed that he made no effort to flee, or to evade the traffic stop, before that time.

12. Although, as noted at the outset, the Government is in the process of appealing the matter to the Sixth Circuit Court of Appeals, the Defendant has, thankfully, been released on bond pending the appeal.

13. While the Magistrate Judge had relied primarily on *Brendlin v. California*, 551 US 249 (2007) and *California v. Hodari D.*, 499 US 621 (1991), the Court's decision *rejecting* the Magistrate's application of those cases was explained succinctly:

> [Regarding the seizure issue] the court does not find any of the cases cited by the parties instructive with respect to this issue, and the Court was not able to find useful cases in its own research. Cases [like *Hodari D.*] discussing a suspect's conduct while fleeing the police do not provide guidance because Defendant was not "fleeing" in response to the activation of the patrol car's emergency lights.

14. Although not expressly referenced in the Court's Opinion and Order, it is of likely significance that, according to testimony from one of the arresting officers, while they engaged in their "Proactive Directed Patrols [in *designated* areas of Flint]," they made an *average of 30 traffic stops per shift.*

Spotlight On: Laurel Kelly Young

Please describe your practice, and tell us where you practice and how long you have been a criminal defense attorney?

I practice in Grand Rapids. I have been a criminal defense attorney since 1987. My first job was with a general practice firm, and I thought maybe I would go into real estate law. They forced me to sign up for the criminal defense appointed list so that I could get "free" trial experience. I fell in love with criminal defense. Now I have honed my practice down to my favorite work which is appeals. I spend 100% of my time on MAACS and retained appellate cases.

Please tell us about one of your interesting cases.

So many interesting stories! That's part of why I love criminal defense. I have a case where a 16-year-old girl was charged as an adult with 2nd degree murder of her boyfriend. She pled to 2nd degree murder and they dropped the felony firearm. It included a sentencing cap of 16 years. It was one of the worst plea deals I had ever seen, AND, to make matters worse, after reviewing her court file including the police reports and other evidence, I came to the conclusion that her suicidal boyfriend had actually committed suicide. There was no physical evidence that she had done it. The challenge to a claim of innocence was that she had been so intoxicated when it happened (she blew a .035 about seven hours after the fact), and after she had sobered up, the police told her that she had shot and killed her boyfriend. She believed them that she must have done it even though she could not remember doing it. We moved to withdraw her plea. I was able to get a *Ginther*-hearing. Her trial attorney admitted that he had never investigated a possible suicide, because, he claimed, she said she did it. The evidence just did not support that theory. The cursory autopsy said it was a homicide because the detectives told the coroner that she shot her boyfriend. Her trial attorney never cross examined the coroner at the preliminary exam. His reason? "Well, because it was Stephen Cohle."

Our motion for plea withdrawal was denied. Our delayed application for leave to file in the Court of Appeals was denied. Then my MAACS appointment ended. I took it to the Michigan Supreme Court on my own because I believe in my client's innocence. The MSC denied us as well. So I intend to do a habeas.

Were experts needed?

I wanted a blood spatter expert because there was no blood on my client. I wanted a gun expert who could have opined regarding the trajectory of the shotgun shell and how that did not line up with my client's height compared to her boyfriend's height. Also, a gun expert could opine that it is possible to press a shotgun to your eye and reach the trigger. An expert on blood alcohol levels could have determined my client's level of intoxication at the time of the shooting. And of course an attorney expert who could opine as to whether trial counsel's choice not to investigate a suicide was reasonable. In this guilty plea appeal, there was no funding for these types of experts. An avenue for reform would necessarily include post-conviction funding for experts.

What significant trends – good or bad -- have you noticed in Michigan criminal law over the years?

I like that the practice of appellate law is going virtual. E-filing is great. I scan in all my documents and transcripts and read them on my iPad. Court reporters are starting to email PDFs so I don't even have to do the scanning. I love the thought that I can work anywhere as long as I have my laptop and my phone.

Do you have any advice for other attorneys?

SADO is an incredible resource. I use the brief bank and forum almost daily. I have found links to information that I had no idea was out there. I have emailed SADO and requested old unpublished opinions and received a copy soon thereafter. They really want to help. The list goes on.

I also think it is important to visit with appointed incarcerated clients. I always learn something from them about their cases, and I generally outline the brief in my head on the drive back to the office.

Do you have any specific advice for new lawyers?

You're going to be working for a long time. Explore until you find that niche where work just doesn't feel like work. My friend's father designed

heating and cooling duct work runs for new construction. Sounds fascinating, right? Yet he would say "I can't believe they are paying me to have this much fun every day." Your passion is out there. If you haven't found it yet, keep looking. You will know it when you see it.

by Neil Leithauser
Associate Editor

Trial Court Successes: January, 2015

We continue our series on trial court victories that are reported in the Forum, SADO's online community for criminal defense attorneys. Subscription information is available at www.sado.org.

Robert J. Engel successfully established his client's incompetency; multiple arson charges were dismissed January 5, 2015, and the client will be committed civilly.

David L. Moffitt obtained disqualification of a federal judge January 7, 2015, in a habeas petition case in the Eastern District, on grounds of conflict due to affinity.

Susan K. Walsh was able to get one year knocked-off from her client's minimum sentence in the 31st Judicial (St. Clair County) Circuit Court following resentencing due to an OV 13 error.

Steve C. Bullock obtained dismissal of a double-murder case in the 3rd Judicial (Wayne County) Circuit Court January 8, 2015, after Mr. Bullock successfully got an identification suppressed.

Kenneth M. Malkin won dismissal of a case January 13, 2015, after the jury was sworn, where the complaining witness admitted lying at the preliminary examination and planned to exercise her 5th Amendment right against self-incrimination at trial.

Mary Chartier and **Takura N. Nyamfukudza** won not guilty verdicts January 14, 2015, in a case in the 7th Judicial (Genesee County) Circuit Court involving charges of assault with intent to murder and felony firearm.

Virginia C. Cairns won not guilty verdicts in a case including a count of assault with intent to murder.

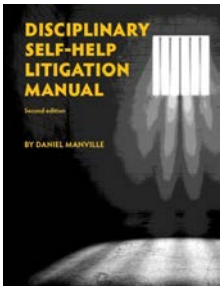
Michael J. Nichols obtained a favorable plea resolution for his client; the client was responsible for careless driving and a PBT refusal, and OWI was dismissed. Each Datamaster test result registered .20.

Andrew P. Abood won a circuit court reversal of a district court's denial of motion to suppress evidence – due to lack of probable cause to arrest in an OWI case – January 22, 2015, in the 30th Judicial (Ingham County) Circuit Court.

Melissa K. Wangler got dismissal of operating without a license and operating without security January 30, 2015, after establishing that the client's twin was the actual driver.

by Neil Leithauser
Associate Editor

Disciplinary Self-Help Litigation Manual, Second Edition



The Disciplinary Self-Help Litigation Manual, Second Edition, by Dan Manville, is the third in a series of books by Prison Legal News Publishing. It is designed to inform prisoners of their rights when faced with the consequences of a disciplinary hearing. This authoritative and comprehensive work educates prisoners about their rights throughout this process and helps guide them at all stages, from administrative hearing through litigation.

This invaluable how-to guide offers step by step information for both state and federal prisoners and includes a 50 state analysis of relevant case law. This book proves to be just as essential for prisoners. While directed at *pro se* prisoner litigants it is extremely useful to lawyers whose clients are subject to penal disciplinary systems. This important new edition is undeniably a vital tool and 'must have' for the serious prisoner rights litigator. The price of the the 368 page book is $49.95 postpaid and may be ordered here: https://www.prisonlegalnews.org/store/products/disciplinary-self-help-litigation-manual/.

Michael L. Mittlestat Becomes SADO Deputy Director

The State Appellate Defender Office (SADO) is pleased to announce the promotion of Michael L. Mittlestat to the position of Deputy Director. The position became vacant at the end of January, 2015, when Jonathan Sacks assumed the leadership of the Michigan Indigent Defense Commission (MIDC), as its Executive Director. Mr. Sacks served for seven years as SADO's Deputy, managing numerous innovative projects and a legal staff of approximately two dozen staff attorneys. The MIDC oversees Michigan's county-funded system for delivery of trial-level criminal defense services.

"Jonathan Sacks leaves a legacy of passion and excellence," says SADO's Director, Dawn Van Hoek. "We look forward to working with him as the IDC tackles the difficult issues ahead, and are confident that he will excel in this arena as well," she adds.

Michael Mittlestat has served as an Assistant Defender at SADO since 2005, following federal court clerkships and seven years at the Washington Appellate Project. Recently, he has taught SADO's Criminal Appellate Practice Clinic at Wayne State University Law School. He is a co-author of SADO's Defender Trial Book, and frequent lecturer for the Criminal Defense Resource Center. Mr. Mittlestat received the 2013 Outstanding SADO Advocate Award, presented by the Appellate Defender Commission, recognizing his work in several landmark appellate cases. That work included outstanding legal advocacy on behalf of clients Rayfield Clary, Denzel Hardy, Ashanti Locket, Anthony Brooks, DeCarlos Hureskin, and Anthony Little, as well as his inspired writing of a position supporting retroactivity of the U. S. Supreme Court's *Miller v Alabama* decision. "Michael enjoys the respect of all, and will be a terrific leader in his new role," Ms. Van Hoek says.

Circuit Court Opinion of the Month: Suppression of Evidence After OWI Stop

An appeal to circuit court, following a denial in the district court of a motion to suppress evidence obtained following an OWI traffic stop, resulted in a suppression of the evidence. The appellant was stopped after an officer saw the vehicle drift past the center of the road and turn without signaling. Sobriety tests – which included a One Leg Stand, Walk and Turn, ABCs, Counting, Months of the Year, and the HGN test – were administered. Additionally, a PBT was administered 8 minutes (not 15 minutes) after the officer's first contact with appellant. The appellant passed the ABCs, Counting and Months' portions of the tests; the officer gave incorrect instructions on performing the Walk and Turn, and the appellant satisfactorily completed a One Leg Stand. The parties stipulated that the HGN test was administered incorrectly, so neither the district, nor the circuit judge, considered the results.

Ingham County Circuit Judge James S. Jamo found that, although not mandatory in Michigan, the National Highway Transportation Safety Administration (NHTSA) Detection and Standardized Field Sobriety Testing Manual (Manual) provides a standardized method of administering and interpreting sobriety tests. Also, the Manual expressly provides that a suspect may be over the legal limit only when "two or more clues or mistakes are observed" in either the One Leg Stand and Walk and Turn tests. The appellant made only one mistake in the Walk and Turn, but had been given incorrect instructions by the officer on how to complete that test. The One Leg Stand revealed only some swaying; however, the officer testified that such swaying could be caused by nerves, or by the cold, windy weather. Judge Jamo found the PBT was incorrectly administered and its results could not be considered for probable cause.

Judge Jamo concluded that "without the benefit of evidence of the improperly administered One Leg Stand, Walk and Turn test, HGN, and PBT," the only remaining evidence the officer could rely upon were the failure to use a turn signal and the drifting over the center of the road, a smell of alcohol, a bar stamp on the appellant's hand, and appellant's watery eyes, and that evidence was insufficient to establish probable cause to arrest.

The defendant was represented by attorney **Andrew P. Abood**. A copy of the opinion in *People v. Lia Lupin O'Black*, Ingham County Circuit Court No. 14-734-AR, is available at http://www.sado.org/cdn/articles/10435_Lia-Lupin-OBlack-Circuit-Court-Opinion-of-the-Mon.pdf.

by Neil Leithauser
Associate Editor

Reports and Studies

Firearms Reference Guide Available

The Federal Firearms Regulations Reference Guide - 2014 Edition (ATF P 5300.4) is now available. Features of the 2014 edition include updated sections on ATF rulings, general information, and questions and answers. The guide may be downloaded free of charge from the United States Department of Justice Bureau of Alcohol, Tobacco and Firearms website, https://www.atf.gov/content/library/firearms-publications-library

This resource is also available in PDF format at https://www.atf.gov/sites/default/files/assets/Library/Publications/atf_p5300.4_federal_firearms_regulations_reference_guide_2014_edition.pdf and available in e-book formats for mobile device like iPhone/ Android and Kindle with links on the publications library page. ***[Our thanks to Bill Schooley for bringing this to our attention].***

New DNA-Test Said to Reveal Person's Facial Features

A new type of DNA testing developed by Parabon Nanolabs in Virginia, can predict or describe a person's physical appearance from a minute amount of DNA, according to a recent report. The DNA phenotyping, called "Snapshot," treats DNA as a "blueprint … a genetic description of a person from which physical appearance can be inferred," according to Dr. Ellen McRae Greytak, director of bioinformatics at Parabon.

The article reports that Snapshot can predict, with a confidence rate of about 80% -- and a 95% confidence rate in determining which phenotypes to exclude -- an individual's traits including skin-, hair- and eye-color, facial-shape, ancestry, and the presence of freckles, so that a "digital mugshot" can be created.

Sources: *Cristina Corbin, "New DNA technique may reveal face of unknown killer in unsolved double-murder," foxnews.com, January 14, 2015: http://www.foxnews.com/us/2015/01/14/new-dna-technique-could-put-face-on-unsolved-double-murder/?intcmp=latestnews*

New Technology Gives Jurors Holodeck-View of Crime-Scene

A January 9, 2015, article at the newscienist.com reports on a new technology, utilizing a video-game/virtual reality headset, Oculus Rift, to potentially allow jurors to get a 3D-view of a crime-scene. A team of researchers with Lars Ebert, at the Institute of Forensic Medicine in Zurich, Switzerland, developed a system they called a "forensic holodeck."

Mr. Ebert, who assists police in gathering evidence, was quoted as saying, "We have detailed measurements and all this 3D information, but then we hand it over on paper, and that comes with a loss of information." The team prepared software for the headset, and the information about a crime-scene could thebe viewed in a 3D reconstruction. With the reconstruction, a viewer could the better understand bullet-trajectory. Normally, "What you have is a line on paper, and it's difficult to get an idea of how it moved in space," he said, "[b]ut the second you see it in 3D, you know where it originated, where it goes, how close all the people and objects are."

The digital reconstruction allows for modification; for example, a particularly gruesome scene could be edited. The article noted that "a potentially traumatic scene, or … distracting and irrelevant details" could be removed. Also, the fact-finder could view a scene from a witness's line-of-sight, which could be helpful in determining whether a witness could have seen an event, said Jeremy Bailenson, a researcher with the Virtual Human Interaction lab at Stanford University in California.

Sources: *Jessica Hamzelou, "Forensic holodeck to transport jury to the crime scene," newscientist.com, January 9, 2015: http://www.newscientist.com/article/dn26764-forensic-holodeck-to-transport-jury-to-the-crime-scene.html#.VM5E4y6Yfct; http://link.springer.com/article/10.1007/s12024-014-9605-0*

by Neil Leithauser
Associate Editor

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 is a sample of some of the questions presented in briefs added to our brief bank in the last few weeks:

BB 241165: STATEMENTS MADE AT THE FORENSIC CENTER ARE ADMISSIBLE ONLY FOR A LIMITED PURPOSE. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT ON THIS BASIS, AND A NEW TRIAL SHOULD BE GRANTED.

BB 240768: DEFENDANT'S CONVICTIONS AND SENTENCES FOR COUNT ONE, TERRORISM, AND COUNT THREE, FALSE REPORT OR THREAT OF TERRORISM, SHOULD BE VACATED, AND THE CHARGES ORDERED DISMISSED WITH PREJUDICE, AS THE MICHIGAN ANTI-TERRORISM ACT DOES NOT APPLY TO THIS CASE.

BB 240965: DEFENDANT'S CONVICTIONS AND SENTENCES SHOULD BE VACATED, AND A NEW TRIAL SHOULD BE GRANTED, BECAUSE THE TRIAL COURT'S ERRONEOUS ADMISSION AS "DEMONSTRATIVE EVIDENCE" OF A REGULAR EXHIBIT (OVER DEFENSE COUNSEL'S OBJECTIONS), AND THE TRIAL COURT'S SUBSEQUENT FAILURE TO PROVIDE A LIMITING INSTRUCTION ON THAT EVIDENCE, CONSTITUTED CLEAR ERROR.

BB 240965: THE TRIAL COURT ABUSED ITS DISCRETION BY IMPROPERLY USURPING THE ROLE OF PROSECUTOR TO ESTABLISH THE REQUISITE STATISTICAL FOUNDATION FOR THE PROSECUTION'S DNA MATCH EVIDENCE.

BB 241171: THE TRIAL COURT ERRED IN REFUSING TO EXCUSE AN ADMITTEDLY BIASED JUROR FOR CAUSE, AND REQUIRED THE USE OF THE FINAL DEFENSE PEREMPTORY CHALLENGE TO REMOVE THAT JUROR, DEFENDANT'S CONVICTIONS SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL.

BB 241291: DEFENDANT'S CONVICTIONS SHOULD BE REVERSED, AND HE SHOULD BE GRANTED A NEW TRIAL, BECAUSE THE PROSECUTOR'S OFFER OF PROOF FOR THE OTHER ACTS EVIDENCE UNDER MRE 404(B) WAS NOT BORNE OUT AT TRIAL, AND THE TRIAL COURT JUDGE DID NOT PROVIDE A LIMITING INSTRUCTION TO EXCLUDE THE OTHER ACTS EVIDENCE AFTER THE PROSECUTOR FAILED TO DEMONSTRATE A COMMON PLAN OR SCHEME.

BB 241370: THE TRIAL COURT DEPRIVED DEFENDANT OF HIS RIGHT TO PRESENT A DEFENSE BY DENYING HIS REQUEST FOR AN ADJOURNMENT SO THAT HE COULD PRESENT AN EXPERT WITNESS, DR. OKLA, AT HIS TRIAL.

BB 241435: THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED DEFENDANT'S DUE PROCESS RIGHTS WHEN ORDERING RESTITUTION FOR CONDUCT WHICH WAS NOT CHARGED AND WHICH CANNOT BE ATTRIBUTED TO DEFENDANT'S CRIMINAL ACTS WHICH UNDERLIE THE CONVICTION IN THIS CASE.

BB 241729: DEFENSE TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN FAILING TO OBJECT TO THE DETECTIVE IN CHARGE OF THE CASE TESTIFYING THAT SHE WROTE A WARRANT REQUEST "DETAILING ALL OF THE PROBABLE CAUSE FOR THE CRIME" AND "WHY I BELIEVE THAT THIS PERSON IS THE ONE WHO COMMITTED IT AND THAT THERE IS A CRIME THAT ACTUALLY HAPPENED" WHICH AMOUNTED TO AN IMPROPER EXPRESSION OF OPINION OF GUILT.

BB 241729: DEFENSE TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTOR SHIFTING THE BURDEN OF PROOF DURING CLOSING ARGUMENT WHEN THE PROSECUTOR STATED, CONCERNING THE COMPLAINANT'S TESTIMONY "WHERE IS THE CONTRADICTION OF THAT? DID YOU HEAR ANY EVIDENCE, WAS ANYTHING PRESENTED TO YOU THAT CONTRADICTS THAT, ANYTHING?" AND FURTHER "WHERE IS THE EVIDENCE THAT THAT DID NOT HAPPEN?"

BB 242423: DUE PROCESS REQUIRES THAT CREDIT BE GRANTED FOR THE TIME DEFENDANT SPENT INCARCERATED, APPROXIMATELY EIGHT MONTHS, EVEN THOUGH THE INSTANT OFFENSE WAS COMMITTED WHILE HE CLOSE TO BEING DISCHARGED FROM PAROLE.

BB 242356: DEFENDANT IS ENTITLED TO PLEA WITHDRAWAL WHERE HIS DEFENSE ATTORNEY FAILED TO ADVISE HIM OF SEX OFFENDER REGISTRATION CONSEQUENCES, INCLUDING A NEW 25-YEAR PERIOD OF REGISTRATION ON THE PUBLIC REGISTRY, THUS VIOLATING THE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND ALSO CREATING AN UNKNOWING AND INVOLUNTARY PLEA

UNDER THE STATE AND FEDERAL DUE PROCESS CLAUSES.

BB 242538: THE TRIAL JUDGE REVERSIBLY ERRED IN ADMITTING, OVER DEFENSE OBJECTION, EVIDENCE OF A HANDGUN FOUND IN A POST-CUSTODY SEARCH OF DEFENDANT'S RESIDENCE, WHERE THERE WAS NO ALLEGATION THAT ANY HANDGUN WAS USED DURING THE INCIDENT, AS THAT EVIDENCE WAS SUBSTANTIALLY MORE PREJUDICIAL THAN PROBATIVE, AND BECAUSE COUNSEL FOR THE CO-DEFENDANT ALSO BROUGHT OUT THAT DEFENDANT'S POSSESSION OF THIS HANDGUN WAS ILLEGAL.

BB 242538: DEFENDANT'S CONFRONTATION RIGHTS UNDER THE SIXTH AMENDMENT WERE VIOLATED WHERE THE TRIAL COURT, OVER OBJECTION, PERMITTED THE PROSECUTION TO INTRODUCE EVIDENCE, BEFORE THE JOINT JURY, OF THE CO-DEFENDANT'S CUSTODIAL STATEMENT TO THE POLICE, WHICH STATEMENT WAS NOT ADEQUATELY REDACTED TO REMOVE ALL REFERENCES TO DEFENDANT'S ALLEGED INVOLVEMENT IN THE CHARGED OFFENSES, AS THE CO-DEFENDANT DID NOT TESTIFY AT THE JOINT TRIAL AND WAS NOT SUBJECT TO CROSS-EXAMINATION, AND THE TRIAL COURT'S LIMITING INSTRUCTION TO THE JURY WAS INSUFFICIENT TO CURE THIS PLAIN CONSTITUTIONAL ERROR.

BB 242755: THE TRIAL JUDGE ABUSED HER DISCRETION IN RULING THE DEFENSE COULD NOT PRESENT ANY EVIDENCE, INCLUDING EXPERT TESTIMONY ON BATTERED PERSON SYNDROME, AS TO THE COMPLAINANT'S CHARACTER AND PRIOR ABUSIVE OR VIOLENT ACTIONS TOWARDS DEFENDANT, AND THUS PRECLUDED THE DEFENSE FROM SEEKING JURY INSTRUCTIONS ON MANSLAUGHTER AS A NECESSARILY INCLUDED LESSER OFFENSE, IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE IN SUPPORT OF THE DEFENSE THEORY.

BB 242755: WHERE THE RECORDED CUSTODIAL STATEMENT BY DEFENDANT SHOWS THE INTERROGATING OFFICER ADMITTEDLY FAILED TO CEASE THE QUESTIONING DESPITE NUMEROUS STATEMENTS BY DEFENDANT THAT HE WANTED TO STOP ANSWERING QUESTIONS, IT WAS PLAIN ERROR FOR THE COURT TO ADMIT THOSE PORTIONS OF THE STATEMENT WHICH WERE SUBSEQUENT TO THE INITIAL ASSERTION OF THE RIGHT TO SILENCE, AS THE PROSECUTION USED THOSE LATER PORTIONS OF THE STATEMENT TO ARGUE THAT THE SHOOTING WAS PREMEDITATED; OR, IN THE ALTERNATIVE, DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL ATTORNEY FAILED TO MOVE THE SUPPRESS THOSE PORTIONS OF THE STATEMENT DESPITE THE CLEAR CONSTITUTIONAL ERROR AND COUNSEL'S RECOGNITION OF THE OFFICER'S REFUSAL TO HALT THE INTERROGATION.

BB 242884: THE TRIAL JUDGE REVERSIBLY ERRED IN OVERRULING REPEATED DEFENSE OBJECTIONS TO EVIDENCE OF ALLEGED PHONE CALLS DEFENDANT MADE FROM THE JAIL BRAGGING ABOUT STARTING FIGHTS AND BEATING PEOPLE UP IN THE JAIL, AS THAT EVIDENCE WAS IRRELEVANT TO ANY ISSUE IN THIS CASE, UNRELATED TO THE CHARGES AGAINST DEFENDANT, AND HIGHLY PREJUDICIAL AS EVIDENCE OF UNRELATED AND UNCHARGED CRIMINAL CONDUCT.

BB 243021: APPELLANT'S DEFENSE WAS THAT HE WAS NEITHER PRESENT NOR INVOLVED IN THE SHOOTING AND HAD BEEN MISIDENTIFIED DUE TO HIS RESEMBLANCE TO ANOTHER PERSON WHO ADMITTED TO POLICE HIS PRESENCE AT THE SCENE. THIS SAME PERSON ALSO ADMITTED TO ANOTHER PERSON THAT HE WAS THE SHOOTER. DEFENSE COUNSEL'S FAILURE TO INVESTIGATE THE CONFESSED SHOOTER, FAILURE TO CONSULT AN EXPERT IN EYEWITNESS IDENTIFICATION AND OTHER FAILURES RELATED TO EXPOSING THE MISIDENTIFICATION OF HIS CLIENT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

BB 243021: DEFENDANT'S SENTENCE OF LIFE WITH THE POSSIBILITY OF PAROLE IS INVALID; THE JUVENILE LIFER STATUTE REQUIRES A SENTENCE OF A TERM OF YEARS OR LIFE WITHOUT THE POSSIBILITY OF PAROLE. BECAUSE THE TRIAL JUDGE REFUSED TO SENTENCE DEFENDANT TO LIFE WITHOUT THE POSSIBILITY OF PAROLE, THE JUVENILE LIFER STATUTE REQUIRES THAT DEFENDANT BE RESENTENCED TO A TERM OF YEARS.

From Other States

Fourth Circuit: Sentencing Judge Gave Too Much Weight to Priors Defendant Committed as Juvenile

The Fourth Circuit Court of Appeals held that an upward variance from the U.S. Sentencing Guidelines Range to a sentence of life imprisonment plus five years was "substantively unreasonable" for a repeat felony offender who was caught distributing PCP while armed with a handgun. The court found that it could not ignore the fact that most of the defendant's serious criminal convictions occurred when he was 18 years or younger. *United States v. Howard*, 2014 BL 340592 (4th Cir., No. 13-4296, 12-04-14); full text at http://www.bloomberglaw.com/public/document/UNITED_STATES_OF_AMERICA_Plaintiff_Appellee_v_DENNIS_RAY_HOWARD_D

Fourth Circuit: Resentencing Judge May Not Consider Defendant's Post-Sentencing Rehabilitation

The Fourth Circuit held that a federal district judge who, at resentencing, decided to grant a government motion for a substantial-assistance departure from a mandatory minimum sentence may not base the extent of the departure on the defendant's efforts at rehabilitation while in prison since the original sentencing. *United States v. Spinks*, 2014 BL 303558 (4th Cir., No. 13-4771, 10-28-14); full text at http://www.bloomberglaw.com/public/document/United_States_v_Spinks_No_13477_1_2014_BL_303558_4th_Cir_Oct_28_20

Pennsylvania: Adequate Review of Client's School Records Would Have Led Counsel to Consult Expert

The Pennsylvania Supreme Court held that a minimally competent defense attorney in a capital case would have consulted a mental health expert to help with mitigation after seeing school records indicating that the defendant was a slow learner, moved a lot, and had been placed in classes for students with social or emotional problems. The court stated that the hiring of a mental health expert would have led to further mitigating evidence that was reasonably likely to have made a difference at the penalty phase of the defendant's trial. *Commonwealth v. Daniels*, 2014 BL 307071, 2014 BL 307071 (Pa., No. 631 CAP, 10-30-14); full text at http://www.bloomberglaw.com/public/document/Commonwealth_v_Daniels_No-631_CAP_2014_BL_307071_Pa_Oct_30_2014_C

Washington: Burden of Proving Consent is Not on Alleged Rapist

The Washington Supreme Court held that placing the burden of proof on a defendant to prove consent in a rape prosecution – even by a preponderance of evidence – violates due process. While the defendant may need to produce evidence to put consent in issue, such evidence need only create reasonable doubt as to the victim's consent. *State v. W.R.*, 2014 BL 307233 (Wash., No. 88341, 10-30-14); full text at http://www.bloomberglaw.com/public/document/State_v_WR_No_883416_2014_BL_307233_Wash_Oct_30_2014_Court_Opinio

Georgia: Infidelity Evidence Relevant to Show Heat of Passion

The Georgia Supreme Court ruled that a murder defendant should have been allowed to present evidence of his wife's extramarital affairs to support his claim that he killed her in the heat of passion during an argument in which she taunted him about her infidelity. The court stated that if the jury had accepted the testimony about the wife confessing her adultery just before she was killed, that evidence might properly have formed a basis for the jury to find that the killing amounted only to voluntary manslaughter. *Lynn v. State*, 2014 BL 309772 (Ga., No. S14A0910, 11-03-14); full text at http://www.bloomberglaw.com/public/document/Lynn_v_State_S14A0910_2014_BL_309772_Ga_Nov_03_2014_Court_Opin

Tenth Circuit: Condition Barring Contact With Own Kids is no Good

The Tenth Circuit held that special conditions of supervised release that forbid a child molester convicted in 2001 to have unsupervised contact with his own minor children imposed a greater restriction on his freedom than "reasonably necessary" within the meaning of the federal supervised-release statute, 18 U.S.C. § 3583(d)(2). The defendant's prior offense was too remote in time, with no other evidence, to provide compelling evidence justifying the infringement upon the defendant's right of familial association. *United States v. Bear,* 2014 BL 309394 (10th Cir. No. 13-6207, 10-31-14); full text at http://www.bloomberglaw.com/public/document/United_States_v_Bear_No_136207_2014_BL_309394_10th_Cir_Oct_31_201

South Carolina: Miller *Bars Even Non-Mandatory LWOP if Judge Did Not Consider Offender's Youth*

The South Carolina Supreme Court held that the Eighth Amendment, as interpreted in *Miller v. Alabama*, prohibits even a discretionary sentence of life imprisonment without parole for a murder committed by a juvenile unless the sentencing judge actually considered the offender's youth. The court stated that it "must give effect to the proportionality rationale integral to *Miller*'s holding-youth has constitutional significance." *Aiken v. Byars*, 2014 BL 318154 (S.C., No. 27465, 11-12-14); full text at http://www.bloomberglaw.com/public/document/TYRONE_AIKEN_MATTHEW_CLARK_ERIC_GRAHAM_BRADFORD_M_HAIGLER_ANGELO

New York: Misleading Pre-Interrogation Advice Invalidated Ensuing Miranda Warnings

The New York Court of Appeals held that police who prefaced their *Miranda* warnings with a scripted "preamble" urging suspects to take advantage of their only opportunity to tell their side of the story before going to court so muddled the message that the suspects' waiver of the right to remain silent and consult an attorney was ineffective. By advising the suspects that speaking would facilitate an investigation, the officers implied that the suspect's words would be used to help them, thus undoing the heart of the warning. *People v. Dunbar*, 2014 BL 302664, (N.Y., No. 169, 10-28-14); full text at http://www.bloomberglaw.com/public/document/People_v_Dunbar_No_169_2014_BL_302664_NY_Oct_28_2014_Court_Opinio

Seventh Circuit: Right to Present Mistake-of-Fact Defense Included Right to Cross-Examine Prosecutor

The Seventh Circuit held that a man accused of falsely stating on a firearms-purchase form that he was not currently under a felony indictment or information should have been allowed to develop a mistake-of-fact defense based on his alleged misunderstanding about the legal effect of a pending plea agreement. The lower court erred when it prevented the defendant from cross-examining the prosecutor from the underlying state case about the terms of the deal and the state's offer to dismiss a felony count. *United States v. Bowling*, 2014 BL 315905 (7th Cir., No. 13-3895, 11-07-14); full text at http://www.bloomberglaw.com/public/document/United_States_v_Bowling_No_133895_2014_BL_315905_7th_Cir_Nov_7_2

Illinois: Counsel Can Oppose Client's Position That Client is Competent to Stand Trial

The Illinois Supreme Court held that the Sixth Amendment does not guarantee a criminal defendant an attorney who will support the defendant's position that he or she is competent to stand trial even when counsel disagrees with that position. The Court stated that the first responsibility of any criminal defense attorney, upon his or her appointment to representation, should be to independently assess whether the client is fit to stand trial. *People v. Holt*, 2014 BL 327050 (Ill., No. 116989, 11-20-14); full text at http://www.bloomberglaw.com/public/document/People_v_Holt_2014_Il_116989_Court_Opinion

Pennsylvania: Defendant's Pre-Arrest Silence Can't be Used as Evidence of Guilt

A divided Pennsylvania Supreme Court held that a non-testifying defendant's state constitutional rights were violated when a prosecutor argued during closing that the jury should infer guilt from the defendant's over-the-phone refusal to come to the police station to answer questions about a missing person. The court stated that the "use of pre-arrest silence as substantive evidence of guilt violates a non-testifying defendant's constitutional rights." *Commonwealth v. Molina*, 2014 BL 327305 (Pa., No. 25 WAP 2012, 11-20-14); full text at http://www.bloomberglaw.com/public/document/Commonwealth_v_Molina_No_25_WAP_2012_BL_327305_Pa_Nov_20_201

Ninth Circuit: Summary of Absent Witness's Remarks Violated The Defendant's Confrontation Right

The Ninth Circuit held that a defendant's Sixth Amendment right to confront adverse witnesses at trial was violated when a DEA agent summarized for the jury a telephone conversation he had with a postal supervisor describing the person who dropped off a parcel full of marijuana. The court rejected the prosecution's argument that there was no violation because the supervisor's actual statements were never offered into evidence. Testimony that summarizes an absent witness's out-of-court declaration can violate the confrontation clause even if the non-testifying party's words aren't offered

verbatim. *United States v. Brooks,* 2014 BL 330954, (9th Cir., No. 13-10146, 11-24-14); full text at http://www.bloomberglaw.com/public/document/United_States_v_Brooks_No_1310146_2004_BL_330954_9th_Cir_Nov_24_2

Second Circuit: Tip About Unsecured Guns Did Not Support Exigency

The Second Circuit held that a gang member's tip that established probable cause to believe that there were unsecured handguns hidden in an abandoned car behind a particular residence did not establish exigent circumstances for police officers to enter the residence's fenced yard without a search warrant. The court found that it was not reasonable for the officers to enter the yard, fatally shooting the family pet in the process, when they had not first attempted to look in the backyard to verify if a car like the one described was even present. *Harris v. O'Hare*, (2d Cir., No. 12-4350-cv, amended 11-24-14); full text at http://pub.bna.com/cl/124350.pdf

Ninth Circuit: Neither Automobile Nor Exigency Exception Justified Warrantless Search of Mobile Phone

The Ninth Circuit held that the U.S. Supreme Court's distinction for privacy purposes between mobile phones and more traditional information "containers" is not limited to the Fourth Amendment's search-incident-to-arrest exception that the justices addressed in *Riley v. California*, 2014 BL 175779, 95 CrL 445 (U.S. 2014). The court ruled that officers who have probable cause to believe that a vehicle contains evidence can not search the digital contents of mobile phones as they search the other items in the vehicle. *United States v. Camou*, 2014 BL 347953 (9th Cir., No. 12-50598, 12/11/14); full text at http://www.bloomberglaw.com/public/document/United_States_v_Camou_No_1250598_2014_BL_347953_9th_Cir_Dec_11_20

Hawaii: Lawyer's Remarks About Protecting Herself Implicated the Right to Conflict-free Counsel

The Hawaii Supreme Court ruled that a trial court abused its discretion when it denied a defense lawyer's motion to withdraw from a case without first delving into the conflict of interest that arose when counsel explained that she needed to withdraw, in part, "to protect myself" from subsequent claims of ineffective assistance of counsel. The lawyer's remarks raised the very real possibility that her personal interest might influence her strategic decisions or lead her to adopt an excessively conservative trial strategy. *State v. Harter*, 2014 BL 346952, (Haw., No. SCWC-12-0000962, 12-10-14); full text at http://www.bloomberglaw.com/public/document/STATE_OF_HAWAII_RespondentPlaintiffAppellee_vs_LETITIA_HARTER_Pe

Iowa: Experts Improperly Vouched for Victim's Credibility

The Iowa Supreme Court held that a "forensic interviewer" may not testify that a suspected sex abuse victim's symptoms were consistent with sexual abuse trauma, nor may the state introduce portions of the expert's report relating that the child's narrative was so significant that it warranted further investigation. The court found that these types of statements "put a stamp of scientific certainty" on a witness's testimony and "tip the scales against the defendant." *State v. Brown*, 2014 BL 341867 (Iowa, No. 12-1633, 12-05-14); full text at http://www.bloomberglaw.com/public/document/State_v_Brown_No_121633_2014_BL_341974_Iowa_Dec_05_2014_Court_Op

New York: Police Should Have Alerted Suspect's Lawyer Before Quizzing Suspect About Different Case

The New York Court of Appeals held that if a represented defendant agrees to help the police investigate an unrelated offense and ends up getting charged with a second crime, the state can not use any statements he made to the police about that crime if his lawyer in the first case was not present. Once an attorney enters the proceeding, the police can not question a defendant in the lawyer's absence unless the defendant and his lawyer execute a waiver. *People v. Johnson,* 2014 BL 353934 (N.Y., No. 218, 12-17-14); full text at http://www.bloomberglaw.com/public/document/People_v_Johnson_No_218_2014_BL_353934_NY_Dec_17_2014_Court_Op

Eighth Circuit: Second Pro Se Filing Should Have Been Allowed as Amendment to Unadjudicated First Filing

The Eighth Circuit held that if a *pro se* prisoner files a second motion for federal habeas corpus-type relief before the first one has been adjudicated, the second filing should not be rejected as an improper successive motion but should instead be liberally construed as a motion to amend the pending motion. This stance is consistent with the position taken by the Second, Ninth, and Eleventh circuits. *United States v. Sellner,* 2014 BL 350656 (8th Cir., No. 13-3794, 12-15-14); full text at http://www.bloomberglaw.com/public/document/United_States_v_Sellner_No_133794_2014_BL_350656_8th_Cir_Dec_15_2

Training Events

The **Criminal Defense Attorneys of Michigan (CDAM),** will present its **"2015 Spring Conference," March 12-14, 2015, at the Marriott Hotel in Troy, Michigan**. The 2015 CDAM conference is funded in part by a grant from the Michigan Commission on Law Enforcement Standards. For additional information and registration visit www.CDAMonline.org or contact CDAM directly at (517) 579-0533.

The **National Association of Criminal Defense Lawyers (NACDL),** will present its **"4th Annual White Collar Criminal Defense College Boot-Camp," March 12-15, 2015, at the Stetson University College of Law in Gulfport, Florida.** This program will cover client retention, investigation in a white collar case, handling searches and grand jury subpoenas, and dealing with parallel proceedings. Participants will have the experience of negotiating a plea, making proffers, and examining which experts to hire and how to protect the client in this process. Interactive sessions with top white collar practitioners will allow the participants to learn trial skills such as opening statements, cross-examination, jury instructions, closing arguments, and sentencing – all in the context of a white collar matter. For additional information and registration visit www.nacdl.org.

The **Oakland County Bar Association Criminal Law Committee (OCBA),** will present **"Anatomy of a Criminal Case - Year XVI: A Brown Bag Lunch Lecture Series," from 11:30am - 12:30pm at the Oakland County Bar Center, 1760 S Telegraph Road, Suite 100, Bloomfield Hills, Michigan on March 17, 2015.** This lecture is $10.00 for OCBA members and $20.00 for non-OCBA members. For more information, call 248-334-3400 or fax registration to 248-334-7757, or register at www.ocba.org.

The **National Association of Criminal Defense Lawyers (NACDL),** will present its **"8th Annual Forensic Science & the Law Conference: Making Sense of Science," April 16-19, 2015, at the Cosmopolitan Hotel in Las Vegas, Nevada.** In the modern world, you need to know and understand the evolving forensic sciences in order to effectively represent your clients. Attend this one-of-a-kind CLE seminar and leave with a better understanding of a wide-array of forensic evidence to add to your arsenal of tools to win your next case. If it involves forensic evidence in a criminal case - we've got you covered at this fantastic CLE, with the biggest national names. For additional information and registration visit www.nacdl.org

The **National Association of Criminal Defense Lawyers (NACDL),** will present its **"6th Annual Post-Conviction Conference: Science, Cell Phones & Social Media - Finding & Using Evidence of Innocence in Post-Conviction Cases," Thursday, April 30, 2015, in Orlando, Florida.** This year's program first addresses statistics for lawyers – a necessary foundation to both understand and challenge many varieties of forensic evidence. Experts will also provide state-of-the-art instruction on topics essential for today's post-conviction litigation: low level DNA mixture interpretation and cell phone tower evidence. In addition, our experienced faculty will focus on all aspects of finding and working with experts, including conducting direct and cross examination of experts in post-conviction hearings. The cutting edge instruction then extends to investigation, in a session on innovative strategies for finding evidence of innocence through social media and other online sources. This training is free of charge to approved participants. For more information and questions about eligibility to attend, contact NACDL Resource Counsel Vanessa Antoun at (202) 465-7663 or vantoun@nacdl.org

The **National Association of Criminal Defense Lawyers (NACDL) and the New York State Association of Criminal Defense Lawyers (NYSACDL),** will present its **"1-day Conference on Criminal Conspiracy," May 15, 2015, at the Millenium Hilton Hotel in New York, New York.** The program will introduce the major evidentiary, elemental, and constitutional challenges that criminal defense attorneys face when their clients are charged with conspiracy and provide you with arguments and sources to use in tackling these difficult cases. For additional information and registration visit www.nacdl.org

The **National Association of Criminal Defense Lawyers (NACDL),** will present its **"5th Annual West Coast White Collar Conference," June 17-19, 2015, at the Paradise Point Resort in San Diego, California.** The focus will be on pure substance, the hottest topics, and offering our attendees the best faculty in the practice of white collar defense, while also providing great networking events and activities. For additional information and registration visit www.nacdl.org

The **Criminal Defense Attorneys of Michigan (CDAM),** will present its **"2015 Summer**

Training," July 11, 2015, from 9am-5pm at the Otsego Club in Gaylord, Michigan. Additional information and registration will be forthcoming.

The **National Association of Criminal Defense Lawyers (NACDL),** will present its **"58th Annual Meeting & Seminar: High Altitude Trial Skills from the Masters of Advocacy," July 23-26, 2015, at the Westin Denver Downtown Hotel in Denver, Colorado.** This unique seminar will allow participants to watch acclaimed trial lawyers use their proven techniques in LIVE DEMOs with real jurors, and learn how to develop fact-based theories and supporting themes that will resonate with jurors throughout trial. Interactive lectures will also include effective opening and closing statements, and creating cross-examinations that work, with the use of real witnesses during the seminar. For additional information and registration visit www.nacdl.org

The **Criminal Defense Attorneys of Michigan (CDAM), and Thomas M. Cooley Law School (TMCLS),** will present its **"2015 Criminal Defense Trial Practice College," August 10-15, 2015, in Lansing, Michigan.** The tuition fee is $1,000-double occupancy accommodations at the Radisson Hotel in downtown Lansing, Michigan; or $1,250 -single occupancy. The fee includes course materials, hotel accommodations and all meals except dinners. Additional information and registration will be forthcoming.

The **Criminal Defense Attorneys of Michigan (CDAM),** will present its **"Advanced Criminal Defense Practice Conference," November 12-14, 2015, at the Park Place Hotel Plaza in Traverse City, Michigan.** Additional information and registration will be forthcoming.

U.S. Supreme Court: Selected Certiorari Granted Summaries

JUVENILES PROSECUTED AS ADULTS
-- Mandatory Adult Sentencing
-- Life Without the Possibility of Parole

Toca v. Louisiana
cert grt'd ___ U.S. ___; ___ S.Ct. ___; ___ L.Ed.2d. ___
(#14-6381, 12-12-14)

The United States Supreme Court granted certiorari limited to the following questions: (1) does the rule announced in *Miller v. Alabama*, apply retroactively to this case; and (2) is a federal question raised by a claim that a state collateral review court erroneously failed to find a *Teague* exception? ***[Editor's note: appeal dismissed by stipulation on 02-03-2015, see U.S. Supreme Court Rule 46].***

MISCELLANEOUS
-- Statutory Interpretation
DEFENSES -- Right to Present

Brumfield v. Cain
cert grt'd ___ U.S. ___; ___ S.Ct. ___; ___ L.Ed.2d. ___
(#13-1433, 12-05-14)

The United States Supreme Court granted certiorari to decide: (1) whether a state court that considers the evidence presented at a petitioner's penalty phase proceeding as determinative of the petitioner's claim of mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002), has based its decision on an unreasonable determination of facts under 28 U.S.C. § 2254(d)(2); and (2) whether a state court that denies funding to an indigent petitioner who has no other means of obtaining evidence of his mental retardation has denied petitioner his "opportunity to be heard," contrary to *Atkins* and *Ford v. Wainwright*, 477 U.S. 399 (1986), and his constitutional right to be provided with the "basic tools" for an adequate defense, contrary to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

MISCELLANEOUS
-- Statutory Interpretation
PRETRIAL MOTIONS AND PROCEDURES
-- Search and Seizure
-- Warrant Requirements
-- Good Faith Exception

San Francisco v. Sheehan
cert grt'd ___ U.S. ___; ___ S.Ct. ___; ___ L.Ed.2d. ___
(#13-1412, 11-25-14)

The United States Supreme Court granted certiorari to decide: (1) whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to

an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody; and (2) whether it was clearly established that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within.

MISCELLENAEOUS
-- Statutory Interpretation

McFadden v. United States
cert grt'd ___ U.S. ___; ___ S.Ct. ___; ___ L.Ed.2d. ___
(#13-4349, 01-16-15)

The United States Supreme Court granted certiorari as to whether, to convict a defendant of distribution of a controlled substance analogue, the government must prove that the defendant knew that the substance constituted a controlled substance analogue, as held by the Second, Seventh, and Eighth Circuits, but rejected by the Fourth and Fifth Circuits. The government does not publish lists of controlled substances; instead, it prosecutes individuals who sell what prosecutors believe to be substances meeting the statutory definition, leaving lay juries to decide whether any given alleged analogue is substantially similar in chemical structure and effect to a scheduled controlled substance, often on the basis on conflicting expert testimony.

MISCELLENAEOUS
-- Statutory Interpretation

Kingsley v. Hendrickson
cert grt'd ___ U.S. ___; ___ S.Ct. ___; ___ L.Ed.2d. ___
(#12-3639, 01-16-15)

The United States Supreme Court granted certiorari to consider whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

MISCELLENAEOUS
-- Statutory Interpretation

Mata v. Holder
cert grt'd ___ U.S. ___; ___ S.Ct .___; ___ L.Ed.2d. ___
(#13-60253, 01-16-15)

The United States Supreme Court granted certiorari to consider whether the Fifth Circuit Court of Appeals erred in this case in holding that it has no jurisdiction to review the petitioner's request that the Board equitably toll the 90-day deadline on his motion to reopen as a result of ineffective assistance of counsel under 8 C.F.R. § 1003.2(c)(2). The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have conclusively and affirmatively held that they have jurisdiction over denials by the Board of Immigration Appeals of requests to equitably toll motions to reopen.

U.S. Supreme Court: Selected Opinion Summaries

PRETRIAL MOTIONS AND PROCEDURE
-- Search and Seizure
-- Motion to Suppress

Heien v. North Carolina
574 U.S. ___; ___ S.Ct. ___; ___ L.Ed.2d. ___
(#13-604, 12-15-14)

The United States Supreme Court affirmed the judgment of the Supreme Court of North Carolina holding that the officer's mistake of law was reasonable, and there was reasonable suspicion justifying the stop under the Fourth Amendment.

The defendant was pulled over after the officer noticed that one of his brake lights was not working. The North Carolina vehicle code requires "a stop lamp" and provides that the lamp "may be incorporated into a unit with one or more other rear lamps." While the statute appears to only require one lamp, the Court reasoned that the word "other" coupled with the lack of state-court precedent interpreting the provision, made it objectively reasonable to think that a faulty brake light constituted a violation. The Court further reasoned that the Fourth Amendment requires officials to act reasonably, not perfectly, and gives those officials fair leeway for enforcing the law. Searches and seizures based on mistake of fact may be reasonable. The limiting factor is that the mistakes must be those of reasonable men. Mistakes of law are no less compatible with the concept of reasonable suspicion.

MISCELLANEOUS
-- Statutory Interpretation

Patrick Glebe v. Joshua James Frost
___ U.S. ___;
135 S.Ct. 429; ___ L.Ed.2d. ___
(#14-95, 11-17-14)

The United States Supreme Court granted the petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis*. The Court reversed the judgment of the Court of Appeals for the Ninth Circuit and remanded the case for further proceedings.

The Washington Supreme Court sustained Frost's conviction and held that the trial court's preventing the defendant from simultaneously contesting liability and arguing duress qualified as a trial error rather than a structural error that required automatic reversal. The state supreme court found that the error was harmless. The Ninth Circuit held that the state court unreasonably applied clearly established federal law by failing to classify the trial court's restriction of closing argument as structural error. The United States Supreme Court held that no clearly established Supreme Court decision stood for the proposition that restriction of summation was structural error, and that no clearly established Supreme Court decision stood for the proposition that requiring tacit admission of guilt was structural error that required automatic reversal.

The Court reasoned that it was not clearly established that the trial court's mistake, if it violated the constitution, were structural error. Most constitutional mistakes call for reversal only if the government cannot demonstrate harmlessness. Only the rare type of error, one that infects the entire trial process and renders it fundamentally unfair, requires automatic reversal. None of the Supreme Court cases clearly requires placing improper restriction of closing argument in this narrow category.

MISCELLANEOUS
-- Statutory Interpretation
JURY -- Selection

Warger v. Shauers
574 U.S. ___; ___ S.Ct. ___; ___ L.Ed.2d. ___
(#13-517, 12-09-14)

The United States Supreme Court affirmed the judgment of the Eighth Circuit Court of Appeals holding that FRE 606(b) precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty during *voir dire*. The court held that whether a juror would have been struck from the jury because of incompetence or bias, the mere fact that a juror would have been struck does not make admissible evidence regarding that juror's conduct during deliberations.

MISCELLANEOUS
-- Statutory Interpretation

Whitfield v. United States
574 U.S. ___; ___ S.Ct. ___; ___ L.Ed.2d. ___
(#13-9026, 01-13-15)

The Supreme Court affirmed the judgment of the Fourth Circuit holding that a bank robber forces a person to accompany him for purposes of §2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance. The defendant was convicted of 18 U.S.C. §2113(e), which establishes enhanced penalties for anyone who forces any person to accompany him without consent in the course of committing or fleeing from a bank robbery. While fleeing from a botched bank robbery, the defendant entered the victim's home and forced her from one room to another, where she suffered a fatal heart attack. This movement was sufficient for a conviction.

POST-TRIAL MOTIONS AND APPEALS
-- Habeas Corpus -- Federal

Jennings v. Stephens
574 U.S. ___; ___ S.Ct. ___; ___ L.Ed.2d. ___
(#13-7211, 01-14-15)

The United States Supreme Court reversed the judgment of the Fifth Circuit and remanded. The Fifth Circuit erred when it determined that it lacked jurisdiction on the defendant's claim of ineffective assistance of counsel under the "*Spisak* theory," that counsel expressed resignation to a death sentence during closing arguments. *Smith v. Spisak*, 558 U.S. 139. The Fifth Circuit concluded that raising this argument required a cross-appeal. The Supreme Court found that the defendant's theory was a defense of his judgment on alternative grounds, and thus he was not required to take a cross-appeal or obtain a certificate of appealability to argue it on appeal.

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

MISCELLANEOUS -- § 1983 Action

David Ayers v. City of Cleveland, et al
773 F.3d 161
(#13-3413, 12-02-14)
Batchelder, GILMAN, Gibbons

In this § 1983 action, the Sixth Circuit declined to address the merits of the qualified-immunity defense, the denial of the pre-verdict motion for judgment as a matter of law, and the challenge to the sufficiency of the evidence at trial because those arguments have been procedurally forfeited, and otherwise affirmed the judgment of the district court. The qualified-immunity defense was forfeited because a party cannot appeal an order denying summary judgment after a full trial on the merits. Even the exception, where an immediate appeal may be pursued when it presents a purely legal issue, is not available here because an immediate appeal is unavailable when the district court determines that factual issues genuinely in dispute preclude summary adjudication. Defendants did not seek such an appeal in a timely manner.

The defendants also forfeited their challenge to the district court's denial of judgment as a matter of law and the sufficiency of evidence at trial. Defendants moved for judgment as a matter of law before the close of evidence. But they failed to make a renewed motion pursuant to Rule 50(b) after the jury reached its verdict, as required by the Federal Rules of Civil Procedure.

CONSTITUTIONAL RIGHTS
-- Right to Bear Arms

Tyler v. Hillsdale County Sheriff's Dept.
775 F.3d 308
(#13-1876, 12-18-14)
BOGGS

This case presents an important issue of first impression in the federal courts: whether a prohibition on the possession of firearms by a person "who has been committed to a mental institution,"18 U.S.C. § 922(g)(4), violates the Second Amendment. Twenty-eight years ago, Clifford Charles Tyler was involuntarily committed for less than one month after allegedly undergoing an emotionally devastating divorce. Consequently, he can never possess a firearm. Tyler filed suit in federal court, seeking a declaratory judgment that § 922(g)(4) is unconstitutional as applied to him. The district court dismissed Tyler's suit for failure to state a claim. Because Tyler's complaint validly stated a violation of the Second Amendment, the Sixth Circuit reversed and remanded.

The court held that Tyler's complaint validly stated a claim for a violation of the Second Amendment. The government's interest in keeping firearms out of the hands of the mentally ill is not sufficiently related to depriving the mentally healthy, who had a distant episode of commitment, of their constitutional rights. The government at oral argument stated that it currently has no reason to dispute that Tyler is a non-dangerous individual. On remand, the government may, if it chooses, file an answer to Tyler's complaint to contest his factual allegations. If it declines to do so, the district court should enter a declaration of unconstitutionality as to § 922(g)(4)'s application to Tyler.

POST-TRIAL MOTIONS AND APPEALS
-- Habeas Corpus -- Federal

Gumm v. Mitchell
775 F.3d 345
(#11-3363, 12-22-14)
Daughtrey, Moore, CLAY

Affirmed the district court's granting of conditional writ of habeas corpus. The Sixth Circuit found that the state violated *Brady* in failing to disclose substantial collection of tips, leads, and witness statements relating to other individuals who had been investigated for the murder; the petitioner was not entitled to relief on his prosecutorial-misconduct claim based solely on the prosecutor's motion to admit hearsay statements contained the a psychiatric report; the prosecutor's remarks regarding the defendant's sexual habits were improper; and the prosecutor's misconduct was flagrant and severe.

POST-TRIAL MOTIONS AND APPEALS
-- Habeas Corpus -- Federal

Bies v. Sheldon
775 F.3d 386

(#12-3431, 12-22-14)
Daughtrey, Moore, CLAY

Affirmed the district court's conditional grant of habeas corpus relief on one basis and denial of relief on all other grounds. The Sixth Circuit found that withheld evidence pertaining to other suspects and that undermined the state's theory of the case was material evidence under *Brady*. The court found that it was undisputed that the State failed to turn over hundreds of pages of evidence gathered during the murder investigation. This evidence was revealed to defense counsel for the first time as part of routine discovery during Bies' federal habeas proceeding, almost nine years after his criminal trial. The undisclosed investigative reports included a substantial collection of tips, leads, and witness statements relating to other individuals who had been investigated for the murder—two of whom had apparently confessed to the crime, and neither of whom was ever ruled out as the perpetrator. The State also withheld witness statements that undermined the State's theory of the case and information that could have been used to further impeach two of the State's witnesses. The State's failure to disclose this collection of evidence violated the defendant's due process rights, as recognized by *Brady* and its progeny.

Michigan Supreme Court: Selected Order Summaries

COUNSEL -- Ineffectiveness Of
-- On Appeal

People v. David Roark
___ Mich. ___ (#148056, 11-19-14)
PRO PER

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Court of Appeals for consideration of the defendant's May 29, 2013 delayed application for leave to appeal as on leave granted. Because the defendant waited more than five months before filing an untimely request for the appointment of appellate counsel, the defendant is not entitled to review under the standard applicable to direct appeals. However, the defendant's previously appointed appellate attorney failed to comply with Administrative Order 2004-6. Counsel did not seek to withdraw pursuant to *Anders v. California*, 386 US 738 (1967). Therefore, costs are imposed against the attorney, only, in the amount of $1,000.

COUNSEL -- Ineffectiveness Of
-- At Guilty Plea

People v. Juan Walker
___ Mich. ___ (#145433, 11-19-14)
MARY OWENS

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Wayne Circuit Court for an evidentiary hearing, pursuant to *Ginther*, as to the defendant's contention that his trial counsel was ineffective for failing to inform him of the prosecutor's offer of a plea bargain to second-degree murder and a sentence agreement of 25 to 50 years. If the defendant establishes that his trial counsel was ineffective in failing to convey the plea bargain, the defendant shall be given the opportunity to establish his entitlement to relief pursuant to Mich. Ct. R. 6.508(D). If the defendant establishes his entitlement to relief, the trial court must determine whether the remedy articulated in *Lafler v. Cooper* shall be applied retroactively to this case.

JUDGE -- Examination of Witnesses

People v. Adam Benjamin Stevens
___ Mich. ___ (#149380, 11-21-14)
DANIEL BREMER

The application for leave to appeal is considered. Oral arguments on whether to grant the application or take other action are to be scheduled. The Jackson Circuit Court is ordered to determine whether the defendant is indigent and, if so, to appoint Daniel D. Bremer, is feasible, to represent the defendant in the Court. The parties shall file supplemental briefs addressing the appropriate standard for determining whether a trial court's questioning of witnesses requires a new trial, and whether that standard was met in this case.

SENTENCING AND PUNISHMENT
-- Consecutive Terms
-- Error in Imposition

People v. Joseph Vincent Randazzo
___ Mich. ___ (#149352, 11-21-14)
SCOTT GRABEL

In lieu of granting leave to appeal, the Michigan Supreme Court reversed in part the judgment of the Court of Appeals, vacated the sentences of the Antrim Circuit Court, and remanded the case to the trial court for resentencing. On remand, the trial court shall impose concurrent sentences or articulate on the record the reason for imposing consecutive sentences.

COUNSEL -- Right To -- For Appeal

People v. Willie Tyjuan Jackson
___ Mich. ___ (#148889, 11-21-14)
PRO PER

In lieu of granting leave to appeal, the Supreme Court vacated the order of the Wayne Circuit Court denying the defendant's motion for relief from judgment, and remanded the case to that court. On remand, the trial court shall order the production of all relevant transcripts and appoint counsel for the purpose of preparing and filing an application for leave to appeal as on direct appeal.

COUNSEL -- Ineffectiveness Of
-- Failing to Investigate and/or
Present Defense
COUSNEL -- Ineffectiveness Of
-- On Appeal

People v. Kendrick Scott
___ Mich. ___ (#148324 & (13), 11-21-14)
DAVID MORAN

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Court of Appeals for consideration of the following issues: (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call a witness at trial; (2) whether the defendant is entitled to a new trial on grounds of newly discovered evidence in light of the proposed evidence related to that witness as an eyewitness to the homicide; and (3) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues on direct appeal. On remand, the Court of Appeals shall remand this case to the Wayne Circuit Court to determine whether the defendant was deprived of his right to the effective assistance of counsel and whether the defendant is entitled to a new trial based on newly discovered evidence. At the conclusion of the hearing, the circuit court shall forward the record and its findings to the Court of Appeals, which shall then resolve the issues presented by the defendant.

COUNSEL -- Ineffectiveness Of
-- Failing to Investigate and/or
Present Defense
COUSNEL -- Ineffectiveness Of
-- On Appeal

People v. Justly Ernest Johnson
___ Mich. ___ (#147410 & (21), 11-21-14)
IMRAN SYED

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Court of Appeals for consideration of the following issues: (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call a witness at trial; (2) whether the defendant is entitled to a new trial on grounds of newly discovered evidence in light of the proposed evidence related to that witness as an eyewitness to the homicide; (3) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues on direct appeal; and (4) if the court determines that the defendant is not entitled to relief, but that the defendant in *People v Kendrick Scott* (Docket No. 148324) is entitled to relief, the Court of Appeals shall determine whether the defendant would have been entitled to relief but for Mich. Ct. R. 6.508(D)(2), and, if so, whether, in the court's judgment, the denial of such relief in that circumstance violates the defendant's constitutional right to due process under either the federal or state constitutions.

On remand, the Court of Appeals shall remand this case to the Wayne Circuit Court to conduct an evidentiary hearing pursuant to *Ginther*, to determine whether the defendant was deprived of his right to the effective assistance of counsel and whether the defendant is entitled to a new trial based on newly discovered evidence. At the conclusion of the hearing, the circuit court shall forward the record and its findings to the Court of Appeals, which shall then resolve the issues presented by the defendant.

SENTENCING AND PUNISHMENT
-- Presentence Reports -- Correction

People v. Paul Joseph Hard
___ Mich. ___ (#149495, 11-25-14)
ARTHUR LANDAU

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Manistee Circuit Court and directed that court to determine

whether the amended copy of the defendant's PSIR, which the circuit judge corrected at the sentencing hearing, has been forwarded to the MDOC. If the amended report has not been forwarded, the court is ordered to do so.

COUNSEL -- Right To -- For Appeal

People v. Sam Daniel Sanders
___ Mich. ___ (#149299, 11-25-14)
PRO PER

In lieu of granting leave to appeal, the Michigan Supreme Court directed the Calhoun Circuit Court to order preparation of a transcript of the October 18, 2013 evidentiary hearing and to forward a copy of the transcript to the parties and to the Supreme Court. The Court further ordered the Calhoun County Prosecuting Attorney to answer the application for leave to appeal within 21 days after the receipt of the transcript. In particular, the prosecuting attorney shall address its role, if any, in the evidentiary hearing, and whether the defendant was represented by appointed counsel. *See* Mich. Ct. R. 6.505(A).

POST-TRIAL MOTIONS AND APPEALS
-- Motions for Relief from Judgment
(Mich. Ct. R. 6.500)
People v. Keith Watkins
___ Mich. ___ (#149273, 11-25-14)
PRO PER

In lieu of granting leave to appeal, the Michigan Supreme Court vacated the March 17, 2014 order of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration in light of the fact that that court's order denying the defendant's motion of relief from judgment stated that "the defendant alleges grounds for relief that were decided against him previously and the defendant has failed to establish that a retroactive change in the law undermines the prior decision," when none of the issues that the defendant raised in his motion for relief from judgment were raised on direct appeal.

SENTENCING AND PUNISHMENT
-- Departure Reasons
-- Upward Departure Reversed
People v. Bret Francis Preece
___ Mich. ___ (#150292 & (12), 11-26-14)
SADO - MARILENA DAVID-MARTIN

In lieu of granting leave to appeal, the Michigan Supreme Court vacated the sentence of the Saginaw Circuit Court and remanded the case to the trial court for resentencing. The trial court's disagreement with the guidelines range for the defendant's offense is not a substantial and compelling reason for an upward departure. On remand, the trial court shall sentence the defendant within the guidelines or articulate on the record a substantial and compelling reason for departing from the guidelines range.

COUNSEL -- Ineffectiveness Of
-- Failure to Investigate and/or
Present Defense

People v. Leo Duwayne Ackley
___ Mich. ___ (#149479, 11-26-14)
ANDREW RODENHOUSE

The Michigan Supreme Court considered the application for leave to appeal and directed the clerk to schedule oral arguments on whether to grant the application or take other action. The parties shall file supplemental briefs addressing whether the defendant was denied the effective assistance of counsel based on trial counsel's failure to adequately investigate the possibility of obtaining expert testimony in support of the defense.

ECONOMIC PENALTIES -- Restitution

People v. Betsy Louise Kwasny
___ Mich. ___ (#148358, 11-26-14)
PRO PER

In lieu of granting leave to appeal, the Michigan Supreme Court vacated that part of the Court of Appeals judgment regarding the restitution order in the lower court and remanded the case to the Court of Appeals for reconsideration in light of *People v. McKinley*, 496 Mich. 410 (2014). The Court of Appeals evaluated the restitution order in accordance with *People v. Gahan*, 456 Mich. 264 (1997), which was overruled in *McKinley*.

SENTENCING AND PUNISHMENT
-- Guidelines
-- Departure Reasons
-- Upward Departure Reversed

People v. Taywon Keshaun Williams
___ Mich. ___ (#149949, 12-23-14)
SADO - BRETT DeGROFF

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Wayne Circuit Court. The trial court articulated substantial and compelling reasons for departing from the guidelines with respect to the defendant's convictions for armed robbery, assault with intent to murder, and torture, but it failed to articulate any rationale for the particular departures made. On remand, the court shall either issue an order that articulates why the extent of the departures is warranted, or resentence the defendant.

GUILTY PLEAS -- Withdrawal Of
-- After Sentencing

People v. Autumn Sheree Belt
___ Mich. ___ (#149914, 12-23-14)
PRO PER

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Kalamazoo Circuit Court, which shall allow the defendant to withdraw her guilty plea pursuant to *People v. Cobbs*, 443 Mich. 276 (1993). The court noted that the defendant's plea proceeding occurred before the effective date of Mich. Ct. R. 6.310(B) (3). The court is further ordered to determine if the defendant is indigent and, if so, to appoint counsel to represent the defendant on remand.

EVIDENCE -- Proof of Other Crimes
(Similar Acts)
-- Res Gestae Exception

People v. Timothy Ward Jackson
___ Mich. ___ (#149798, 12-23-14)
LISA KIRSCH-SATAWA

The application for leave to appeal is considered. The clerk shall schedule oral argument on whether to grant the application or take other action. The parties shall address in their briefs: (1) whether the challenged testimony of Jacklyn Price regarding the defendant's prior sexual relationships was admissible *res gestae* evidence; (2) if so, whether the prosecutor was required to provide notice pursuant to MRE 404(b)(2); and (3) whether, if notice was required, any failure was prejudicial error warranting reversal.

COUNSEL -- Right To -- For Appeal

People v. Kentreze Demetrious White
___ Mich. ___ (#149250, 12-23-14)
PRO PER

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Kent Circuit Court for the appointment of substitute appellate counsel. On remand, substitute appellate counsel may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and any appropriate postconviction motions in the circuit court, within six months of the date of appointment.

COUNSEL -- Right To -- For Appeal

People v. Quinton Michael Goree
___ Mich. ___ (#149213, 12-23-14)
PRO PER

In lieu of granting leave to appeal, the Supreme Court remanded the case to the Kent Circuit Court for the appointment of substitute appellate counsel. On remand, substitute appellate counsel may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and any appropriate postconviction motions in the circuit court, within six months of the date of appointment.

COUNSEL -- Ineffectiveness Of
-- At Guilty Plea

People v. Alan Starr Trowbridge
___ Mich. ___ (#146357), 12-23-14)
MICHAEL FARAONE

The motion to expand the record was granted. The prosecuting attorney was directed to answer the application for leave to appeal, the answer was received, and the application is again considered. The clerk was directed to schedule oral argument on whether to grant the application or take other action. The parties shall address whether the Court of Appeals correctly resolved the defendant's ineffective assistance of counsel claim in light of *People v. Douglas*, 496 Mich. 557 (2014).

OFFENSES -- Child Abuse
-- Instruction on Elements

People v. Shawquanda Borom
___ Mich. ___ (#148674), 12-29-14)
SADO - VALERIE NEWMAN

By order of the Court, the application for leave to appeal is again considered. In lieu of granting leave to appeal, if the prosecutor proceeds to trial on an

aiding and abetting theory, the court is directed to require that if the jury finds the defendant guilty of the second count of first-degree child abuse or felony murder, the jury return a special verdict form specifying whether any such verdict was premised on a theory that the defendant acted as a principal or that the defendant aided or abetted the commission of either of the offenses. *See* Mich. Ct. R. 2.515(A) and Mich. Ct. R. 6.001(D).

MISCELLANEOUS
-- Statutory Interpretation
OFFENSES -- Criminal Sexual Conduct
-- Sufficiency of Evidence

People v. Randall Scott Overton
___ Mich. ___ (#148347, 12-29-14)
SHANNON SMITH

The Michigan Supreme Court denied the application for leave to appeal the judgment of the Court of Appeals because it was not persuaded that the questions presented should be reviewed by the Court. In dissent, Justice Cavanagh would vacate the defendant's CSC-I conviction stating that the plain language of the statute does not encompass the defendant's conduct of instructing the victim to penetrate her vagina with her finger. Justice Cavanagh found that the instruction and the victim's action in response was not an intrusion "of any part of a person's body or of any object" into "another person's body" as required by the statute. M.C.L. 750.520b (1) (a).

Michigan Supreme Court: Selected Leave Granted Summary

MISCELLANEOUS
-- Statutory Interpretation

People v. Paul Charles Seewald
___ Mich. ___ (#150146, 11-26-14)
KEITH MADDEN

The Michigan Supreme Court granted the application for leave to appeal. The Court of Appeals found that the circuit court properly quashed the bindover on the felony charges of committing a legal act in an illegal manner. The court found that the immediate goal of the defendant's misconduct was to defraud the Secretary of State through falsely signed nominating petitions. He, therefore, did not violate M.C.L. 750.157a(d), which requires that defendants conspire to effect a "legal act in an illegal manner." Accordingly, the district court misinterpreted M.C.L. 750.157a(d) and allowed the conspiracy charge against defendants to proceed to circuit court.

The Michigan Supreme Court invited the PAAM and the CDAM to file briefs amicus curiae.

Michigan Supreme Court: Selected Opinion Summaries

DISCOVERY -- Freedom of Information Act

Amberg v. City of Dearborn
___ Mich. ___ (#149242, 12-16-14)
WILLIAM MAZE

The Michigan Supreme Court, in lieu of granting leave to appeal and without hearing oral arguments, reversed and remanded the case for entry of an order denying the defendants' motion for summary disposition and for further proceedings. Leave to appeal in all other aspects was denied.

In this FOIA case, the plaintiff, an attorney, sought the recordings relating to a pending misdemeanor criminal proceeding against his client. Initially, the defendants refused to turn over the recordings claiming that they were not subject to FOIA because the recordings (video surveillance recordings created by private entities) were not public records. The defendants finally produced the recordings and moved for summary judgment, which was granted. The Michigan Supreme Court held that the documents were public and subject to FOIA even though they were created by private entities. The defendants collected the recordings as evidence to support their decision to issue a citation. Accordingly, the recordings were public records because they were in the possession of or retained by the defendants in the performance of an official function. The trial court erred by granting the defendants' motion for summary judgment. Additionally, the fact that the plaintiff's substantive

claim was rendered moot by disclosure of the records was not determinative of the plaintiff's entitlement to fees and costs under M.C.L. 15.240(6). The plaintiff did not abandon his claim for fees and costs. On remand, the plaintiff's action can proceed in the circuit court for consideration, on a proper motion, of whether he is entitled to costs and fees.

JUVENILES PROSECUTED AS ADULTS
-- Mandatory Adult Sentencing
-- Life Without the Possibility of Parole

People v. Deandre Martez Woolfolk
___ Mich. ___ (#149127, 12-02-14)
SADO - JESSICA ZIMBELMAN

The Michigan Supreme Court affirmed the Court of Appeals' judgment holding that a defendant is a juvenile for the purposes of *Miller* when, at the time of the offense, he or she is under the age of 18 as determined by his or her anniversary of birth. The defendant was under the age of 18 when he committed the instant homicide offense and is therefore entitled to be treated in accordance with the rule in *Miller*. Leave to appeal as cross-appellant is denied.

INSTRUCTIONS -- Included Offenses

People v. Thabo Jones
___ Mich. ___ (#147735, 12-23-14)
GARY KOHUT

In this interlocutory appeal, the Michigan Supreme Court reversed the judgment of the Court of Appeals and remanded the case to the circuit court for further proceedings, including entry of an order vacating its ruling granting the defendant's request to instruct the jury on the misdemeanor lesser offense of moving violation causing death. The circuit court erred by granting the defendant's request to instruct the jury on moving violation causing death. The defendant was charged with M.C.L. 257.626(4) (reckless driving causing death), which specifically prohibits giving this instruction when the charged offense is reckless driving causing death. The Legislature acted within its constitutional authority by creating a substantive exception that prohibited the jury's consideration of that lesser offense when the charged offense is reckless driving causing death.

Michigan Court of Appeals: Selected Opinion Summaries

POST-TRIAL MOTIONS AND APPEALS
-- New Trial

People v. Elias Gonzalez-Raymundo
___ Mich. App. ___
(#316744; 319718, 11-18-14)
PC: Boonstra, Markey, Kelly
JAMES CZARNECKI, II

Affirmed the trial court's order granting the defendant a new trial in Docket No. 319718 and dismissed as moot the defendant's appeal in Docket No. 316744.

The trial court erred when it failed to satisfy the duty to affirmatively establish the defendant's proficiency in English or appoint an interpreter in light of the evidence of his limited understanding of English. This error effectively prevented the defendant from being truly present at his trial and arguably interfered with his ability to assist in his defense, including the cross-examination of witnesses. The defendant's trial attorney informed the trial court that the defendant did not want an interpreter due to the prejudice of some people against non-English speaking people. The case proceeded to trial without the interpreter. The defendant appealed his conviction and the trial court granted his motion for a new trial and found that it had erred when it did not have the defendant personally waive simultaneous translation, instead of accepting counsel's word on the subject. The Court of Appeals affirmed the trial court's grant of a new trial.

INSTRUCTIONS -- Included Offenses
-- Requested by Defendant but Refused by Court

People v. Yumar Antonio Burks
___ Mich. App. ___ (#314579, 12-02-14)
PC: Wilder, Fitzgerald, Markey
DANIEL RUST

Affirmed the defendant's convictions and sentences. The trial court erred in refusing to provide the requested instruction on the necessarily lesser included offense of second-degree child abuse. However, the error does not warrant reversal. A review of the entire case does not show that the

defendant merely committed an act likely to cause serious harm, regardless of actual harm, or that the defendant acted recklessly, not knowingly, in causing the injury to the child. The failure to provide the instruction did not undermine the reliability of the verdict and the failure was harmless.

EVIDENCE -- Proof of Other Crimes (Similar Acts)
-- To Show Motive, Intent, Etc.
-- Notice
COUNSEL -- Ineffectiveness Of
-- Failure to Object

People v. Christopher Lee Johnson
___ Mich. App. ___ (#317206, 01-15-15)
PC: Kelly, Beckering, Shapiro
GARY KOHUT

Affirmed the defendant's conviction of second-degree home invasion and his sentence.

The prosecutor's failure to give notice of other acts evidence was plain error. No written notice of the intent to introduce other acts evidence is in the record, and the prosecutor has not referred the court to any proceeding in which oral notice was given. The prosecution also failed to seek an exception from the notice provision on good cause shown. However, given the overwhelming and unrebutted affirmative evidence of the defendant's guilt, independent of other acts evidence, the court concluded that reversal was not warranted in this case.

Defense counsel's failure to object fell below an acceptable standard of reasonableness, and there was no strategic reason for the failure. However, but for counsel's error, there is not a reasonable probability that the result of the trial would have been different.

Michigan Court of Appeals: Selected Unpublished Opinion Summaries

SENTENCING AND PUNISHMENT
-- Guidelines – Departures
-- Departures Proportionality Review

People v. Tigh Edward Croff
Unpublished opinion of 10-23-14
(Court of Appeals #314409)
PC: Gleicher, Servitto, Krause
SADO - DESIREE FERGUSON

Affirmed in part, vacated in part, and remanded for further proceedings following the prosecution's second appeal from the trial court's imposition of a probationary sentence for the defendant's voluntary manslaughter conviction.

On remand, the trial court imposed a slightly longer term of probation and cited an additional ground as support for its determination. The grounds for departure now cited are minimally valid, but the trial court failed to justify the extent of the departure independent of the reasons supporting the departure. On remand, the trial court must consider any up-to-date information regarding the defendant it deems relevant, including his conduct during the course of his probation. If it elects to do so, the trial court may also set forth additional reasons supporting a departure sentence.

SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 11

People v. Hameed Rahim Gibson
Unpublished opinion of 10-23-14
(Court of Appeals #316311)
PC: Saad, O'Connell, Murray
RONALD AMBROSE

Affirmed the defendant's convictions, but remanded for resentencing.

The trial court erred in scoring OV 11 at 25 points. OV 11 is properly scored at 25 points when 1 criminal sexual penetration occurs. However, a trial court cannot score points for the 1 penetration that forms the basis of a first- or second-degree CSC offense. M.C.L. 777.41(2)(c). The prosecution agreed that only one penetration was established at trial, and it was the basis of the CSC III charge. The defendant is entitled to resentencing.

COUNSEL -- Compensation

In Re Attorney Fees of John W. Ujlaky
Unpublished opinion of 10-23-14
(Court of Appeals #316494; 316809)
PC: Meter, Whitbeck, Riordan
JOHN UJLAKY

Affirmed, in both dockets, the trial court's limiting counsel to recovery of the flat rate allowed under a fee schedule used by Kent County to compensate appointed counsel.

The fee schedule does allow for extraordinary fees with written justification and approval. Extraordinary fees must be fees incurred for services rendered that are beyond those usually required. In Docket No. 316494, counsel failed to attach a copy of a motion for extraordinary fees. Instead, he attached a statement of the hours expended and the services provided. Counsel failed to explain how the services rendered were of a character and an amount beyond those normally required in a guilty-plea appeal. Appellate relief was unwarranted.

In Docket No. 316809, counsel again attached no motion, only a statement of fees and services rendered. Although the circumstances of this case suggest that an award of extraordinary fees might have been in order, counsel did not attach a motion to the MAACS form as required and, thus, never offered any explanation to the court regarding the apparent extraordinary nature of the services rendered. Counsel failed to carry his burden and appellate relief was unwarranted.

MISCELLANEOUS

-- Statutory Interpretation

People v. Brandon Michael Hall
Unpublished opinion of 10-23-14
(Court of Appeals #321045)
PC: Borrello, Servitto, Shapiro
DONALD HANN

Affirmed the trial court's order affirming a district court order denying the prosecution's motion to bind over the defendant on 10 counts of felony election law forgery, M.C.L. 168.937, and instead binding him over on 10 misdemeanor counts under M.C.L. 168.544c.

The defendant signed nominating petitions with names other than his own. On the petitions, there are warning provisions contained in M.C.L. 168.544c(1) conveying the illegality of signing someone else's name on the petition. The warnings stated that a violation of this statute constituted a misdemeanor offense. Notwithstanding the warning, the prosecution sought to charge the defendant with 10 felonies. The defendant was not on notice that this offense constituted a felony. Fundamental fairness mandated that the defendant be charged with the misdemeanor offenses.

JURY -- Fair Cross-Section
JUDGE -- Examination of Witnesses

People v. Eric Brooks
Unpublished opinion of 12-11-14
(Court of Appeals #317402)
PC: Borrello, Wilder, Stephens
CRAIG DALY

The Court of Appeals reversed and remanded for a new trial. The prosecutor utilized race-based peremptory challenges during jury selection, violating the defendant's equal protection rights under the rule established in *Batson*. The trial court did not methodically adhere to the *Batson* step in its analysis. The trial court was required to "determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination." This inquiry is a factual determination to be made by the trial court, and will largely turn on the prosecutor's credibility. The trial court never discussed whether the prosecutor was factually correct in asserting that the excluded jurors responded "innocent" to the court's question of how it would rule at the beginning of the trial. The trial court also failed to state whether the prosecutor's explanation was credible. The prosecutor's explanation was not persuasive. No insight was offered into why he found the distinction of answering innocent important, or why he believed that jurors answering innocent would be less favorable to the prosecution. On the whole, the prosecutor's explanation was pretext for discrimination, and to the extent the trial court can be understood as ruling otherwise, its ruling was clearly erroneous. Reversal is required.

Additionally, the trial court's extensive questioning of the defendant violated the defendant's right to a fair trial. A new trial is required because the trial court's extensive questioning of the defendant may have unjustly aroused suspicion in the mind of the jury concerning the defendant's credibility. The exchange between the judge and the defendant reads like an interrogation. In essence, the trial court argued with the defendant regarding his stated reason for placing the shotgun in his mother's house. The trial court took on the role of prosecutor, and used the exchange as an opportunity to argue whether the defendant's explanation was believable. This exchange likely sent a clear message to the jury: that the defendant was not credible. This case was a credibility contest between the victims and the defendant. The trial court's questioning was directly aimed at undermining the defendant's credibility. The trial court's improper questioning of the defendant was not harmless, and reversal is required.

SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 12
SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 13

People v. Demetrious Edward Faulkner
Unpublished opinion of 12-16-14
(Court of Appeals #316064)
PC: Riordan, Beckering, Boonstra
SADO - JACQUELINE McCANN

Affirmed the defendant's convictions, but remanded for resentencing. The trial court erred in scoring ten points for OV 12 because it was not permitted to assess points for the defendant's convictions. The record does not sufficiently support a finding that there were other contemporaneous felonious acts. The defendant should have been scored five points for OV 12.

The trial court erred in scoring the aiding and abetting conduct under OV 13 when it should have been scored under OV 12. OV 13 directs the court to score points for "a continuing pattern of criminal behavior." M.C.L. 777.43(1). This statute contains an express provision prohibiting criminal conduct that was already scored under OV 11 or OV 12. The prosecution concedes that the trial court erred in assessing 25 points under OV 13. The trial court was not permitted to take into account the defendant's second CSC conviction, since it was assessed under OV 11, and it was not permitted to take into account the defendant's aiding and abetting of the unknown accomplice, since it was assessed in OV 12. The defendant is entitled to resentencing on his first-degree CSC offense.

SENTENCING AND PUNISHMENT
-- Credit for Time Spent in Prior Custody

People v. John Roy Bartley
Unpublished opinion of 12-16-14
(Court of Appeals #317465)
PC: Markey, Sawyer, Owens
MICHAEL FARAONE

Remanded to the trial court for clarification related to the defendant's sentence for his parole violation, clarification that his sentences in this case do not begin to run until the defendant has completed the sentence for his parole violation, and recalculation of how many days of jail credit, if any, the defendant should receive for his sentences in this case.

The defendant was on parole at the time he committed the offenses in this case. Therefore, he was required to serve at least the minimum of the sentence for which he was on parole, plus whatever portion, between the minimum and the maximum, of this sentence that the parole board required him to serve for his parole violation, before he began to serve his sentences for the convictions in this case. At the time he committed the current offenses, he had already served the minimum of the sentence for which he was on parole, but the record does not contain any information regarding how much time he was required to serve for his parole violation.

INSTRUCTIONS
-- Failure to Request or Object

People v. Anthony Jerome Steele
Unpublished opinion of 12-16-14
(Court of Appeals #318053)
PC: O'Connell, Borrello, Gleicher
SADO - CHRISTINE PAGAC

Affirmed in part, vacated in part, and remanded for further proceedings. On remand, the trial court will be required to resentence the defendant based on his CSC III convictions. The prosecutor concedes that the trial court erred in giving identical jury instructions for CSC I and the lesser included offense of CSC III. The jury found the defendant guilty of the elements of CSC III. The defendant's CSC I convictions are vacated and the case remanded to the trial court for entry of a judgment of conviction of three counts of CSC III. In the alternative, however, the prosecutor may choose to re-file CSC I charges against the defendant and pursue a new trial.

SENTENCING AND PUNISHMENT
-- Administrative Action

People v. James Jackson
Unpublished opinion of 12-16-14
(Court of Appeals #318372)
PC: Donofrio, Fort Hood, Shapiro
NEIL LEITHAUSER

Affirmed but remanded for the ministerial task of amending the judgment of sentence. The amended judgment of sentence states that the defendant was convicted of possession with intent to deliver less than 25 grams of cocaine, citing M.C.L. 333.7401(2)(a)(*iv*). However, the record is clear that the jury convicted him of the lesser offense of possession of less than 25 grams of cocaine, M.C.L. 333.7403(2)(a)(*v*).

SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 1
SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 2
SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 10

People v. Marquan Antonio Jackson
Unpublished opinion of 12-18-14
(Court of Appeals #316433)
PC: Riordan, Beckering, Boonstra
SADO - CHARI GROVE

Affirmed the defendant's convictions, but remanded for resentencing. The trial court erred in scoring 15 points for OV 1. Fifteen points is appropriate is "a firearm was pointed at or toward a victim…." M.C.L. 777.31(1)(c). However, a trial court must score only 5 points if "a weapon was displayed or implied." M.C.L. 777.31(1)(e). A BB gun was used in the carjacking and armed robbery. The BB gun does not meet the definition of a firearm. Five points should have been scored for the displayed weapon.

The trial court also erred in scoring OV 2 at 5 points. The prosecution concedes that OV 2 was scored incorrectly and should have been scored at zero points. Because there was no evidence that the BB gun was potentially lethal or used in such a way to represent a potentially lethal weapon, zero points should have been scored.

The trial court erred in scoring OV 10 at 15 points. Nothing in the record suggests that the offense was anything other than a spontaneous crime of opportunity. The record does not show any predatory conduct on the defendant's behalf. Predatory conduct is more than purely opportunistic criminal conduct. The defendant is entitled to resentencing because his sentence is based on an inaccurate calculation of the guidelines, which resulted in a sentence outside the proper recommended minimum sentence range.

PROSECUTOR -- Comments
INSTRUCTIONS -- Duty to Charge
-- Essentials of Crime

People v. James William Gore
Unpublished opinion of 12-18-14
(Court of Appeals #317605)
PC: O'Connell, Borrello, Gleicher
SADO - CHRISTOPHER SMITH

Affirmed the defendant's sentences and convictions. The prosecutor engaged in misconduct by asserting in closing argument that one of the victims was not present at trial because he was afraid. And, the trial court should have conducted a more thorough inquiry regarding the witness's absence before deciding not to instruct the jury that it could infer that the missing witness's testimony would have been unfavorable to the prosecution. However, neither error was outcome determinative.

WITNESSES
-- Improper Expression of Opinion

People v. Jimmy Earl McCaskill
Unpublished opinion of 11-18-14
(Court of Appeals #312409)
PC: Meter, Jansen, Wilder
SADO - DESIREE FERGUSON

On remand, the Court of Appeals again reversed and remanded for a new trial.

The trial court erred by permitting an officer to testify that the defendant was the person depicted in still photographs that CVS had created from a surveillance video, which was shown at trial, because the officer was in no better position to identify the person pictured than was the jury. The Court of Appeals found that, given all the witnesses' failures to note that the perpetrator had no teeth, the divergent descriptions of the perpetrator, the strong evidence that the defendant was somewhere else at the time of the robbery, and all but one witness's inability to identify the defendant in a lineup, the jurors would have entertained a reasonable doubt regarding the identity of the robber if they had not been presented with the officer's unqualified assertions that the still photograph depicted the defendant. The erroneous admission of the officer's assertions was not harmless because it is more probable than not that the jury would have acquitted the defendant without this evidence.

SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 12
COUNSEL -- Ineffectiveness Of
-- Opening Door

People v. Darmarroe Dontae Tunstall
Unpublished opinion of 11-20-14
(Court of Appeals #316886)

PC: Kelly, Beckering, Shapiro
JEFFREY SCHRODER

Affirmed the defendant's convictions, but remanded for further proceedings of the scoring of OV 12 and resentencing if necessary.

The defense counsel's performance in mentioning the defendant's status as a parolee fell below the objective standards of reasonableness. Defense counsel's purported reason for eliciting evidence of different addresses of the defendant was to establish that he did not reside at the address in question. Defendant's status as a parolee, however, was irrelevant to his guilt or innocence and to defense counsel's strategy in trying to prove that he did not live at that address. However, reversal is not required because the defendant has failed to establish that, but for counsel's error, there is a reasonable probability that the outcome of the proceedings would have been different. In addition to the corroborated accounts of the direct participants, the jury also heard testimony of incriminating statements made by the defendant in which he admitted that he drove the other participants to the check-cashing sites and that his computer was used in accomplishing the crimes.

The trial court scored 10 points for OV 12, where three or more contemporaneous felonious criminal acts involving other crimes were committed. Although the trial court did not make definitive findings about when the other crimes it scored under OV 12 occurred, it accepted and adopted the prosecutor's argument that the crimes were concurrent. The record does not support, by a preponderance of the evidence, that the other contemporaneous criminal acts have not "and will not result in a separate conviction." M.C.L. 777.42. On remand, the trial court must reconsider the scoring of OV 12 in light of this statutory requirement.

PROSECUTOR -- Comments

People v. Paul Richard Heminger
Unpublished opinion of 11-20-14
(Court of Appeals #316959)
PC: Owens, Markey, Servitto
ANN PRATER

Reversed and remanded for a new trial.

The prosecutor's closing argument was clearly and thoroughly improper. The prosecutor embarked on a political commentary, and a personal diatribe discrediting the MMA as a whole, claiming (without supporting evidence) that its protections are being abused by recreational users and exploitive physicians. She called the Act meaningless, and suggested that those suffering from chronic pain are simply cheating the system. She also denigrated the general population of lawful medical marijuana users, claiming that they attract violence and advocated that everyone be allowed to "walk around stoned." Finally, she stated that it is unfortunate that the jury cannot judge the MMA, explaining that it could only consider the defendant's case "until something changes." By making these unfounded, irrelevant, and inflammatory statements, the prosecutor essentially argued that the defendant's affirmative defense is nothing more than a drain on the community, and that even if he is innocent under the MMA he is simply exploiting the system. As a result, the prosecutor encouraged the jury to convict the defendant despite the protections of the § 8 defense. This affected the defendant's substantial rights.

SENTENCING AND PUNISHMENT
-- Guidelines -- Scoring
- Scoring of Offense Variables (OVs)
-- OV 11
SENTENCING AND PUNISHMENT
-- Guidelines -- Scoring
-- Scoring of Offense Variables (OVs)
-- OV 12

People v. Shantee Brown
Unpublished opinion of 11-20-14
(Court of Appeals #317066)
PC: Borrello, Wilder, Stephens
MICHAEL McCARTHY

Affirmed the defendant's convictions, but vacated the trial court's judgment of sentence and remand for resentencing.

The court erred in scoring 25 points for OV 11. The victim's testimony substantiated only one incident of sexual intercourse, and there was no record evidence of multiple or repeated penetrations. Therefore, because points may not be scored for the one penetration that forms the basis for the conviction, the trial court erred as a matter of law by assessing 25 points for OV 11. The court also erred in assessing 10 points under OV 12, instead of 5 points. A score of 10 points requires two contemporaneous felonious criminal acts against a person. There was only one such act that occurred within 24 hours of the sentencing offense. OV 12 should be scored at 5 points. Remanded for resentencing.

SENTENCING AND PUNISHMENT
-- Departures
-- Departures Proportionality Review

People v. Cordis Henderson
Unpublished opinion of 11-20-14
(Court of Appeals #317322)
PC: Borrello, Wilder, Stephens
SANFORD SCHULMAN

Affirmed in part, but remanded for resentencing or the trial court's articulation of substantial and compelling reasons justifying a sentence departing from the statutory guidelines. The trial court erred when it departed from the guidelines range. The trial court did not specifically state why its imprisonment of the defendant was more proportionate than sentencing the defendant within the guidelines to an intermediate sanction.

SENTENCING AND PUNISHMENT
-- Presentence Reports -- Correction

People v. Quincy Alexander Curry
Unpublished opinion of 11-25-14
(Court of Appeals #317090)
PC: O'Connell, Cavanagh, Fort Hood
DANIEL RUST

Affirmed the defendant's convictions, and remanded for the ministerial task of correcting the judgment of sentence. The judgment of sentence incorrectly indicates that the defendant was sentenced as a fourth-offense habitual offender. The record does not demonstrate that the defendant was sentenced as a habitual offender. This is plain error and remand is necessary for the correction of the judgment of sentence.

SENTENCING AND PUNISHMENT
-- Departure Reasons
-- Upward Departure Reversed

People v. Nancy Edna Johnson
Unpublished opinion of 12-02-14
(Court of Appeals #319816)
PC: O'Connell, Cavanagh, Fort Hood
JONATHAN SIMON

Remanded to the trial court for explanation or resentencing of the defendant's sentence for her carjacking conviction only. Affirmed the remainder of the defendant's convictions and sentences. The guidelines range for the carjacking conviction was 135 to 225 months. The court sentenced the defendant to life in prison without any reference or acknowledgment that it was imposing a departure sentence. The record discloses no discussion by the trial court, or counsel, to justify the departure as required by M.C.L. 769.34(3).

WITNESSES
-- Improper Expression of Opinion

People v. Kaleb Raynardo-Charles Hampton
Unpublished opinion of 12-02-14
(Court of Appeals #315801)
PC: Fitzgerald, Gleicher, Krause
DANIEL BREMER

Reversed and remanded for a new trial. In *People v. Bynum*, 496 Mich. 610 (2014), the expert, Battle Creek police officer Sutherland, impermissibly opined that the defendant acted in conformity with his gang's characteristics and the Michigan Supreme Court affirmed the Court of Appeals' decision reversing the defendant's first-degree murder conviction and remanded for a new trial. This case involves the same officer testifying about the defendant's membership in the gang and that it provided him with the means, motive, and opportunity to commit the alleged offenses. Sutherland further stated that the defendant had actively and intentionally participated in the shooting and that he committed the crime to elevate his status in the gang hierarchy. Defense counsel raised a single objection regarding foundation, not objecting based on MRE 404(a), MRE 702, or MRE 403, and that objection did not pertain to the inadmissible testimony. Sutherland repeatedly told the jury that the facts demonstrated the defendant's guilt. MRE 702 does not allow an expert to offer his or her learned opinion regarding the ultimate question of a defendant's guilt or innocence. The prosecution's introduction of Sutherland's opinion that the defendant committed the murder constituted plain error.

SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 3
SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 12
SENTENCING AND PUNISHMENT
-- Presentence Reports -- Correction

People v. Yolanda Richelle Terrell
Unpublished opinion of 12-09-14
(Court of Appeals #316356)
PC: Kelly, Beckering, Shapiro

JOHN UJLAKY

Affirmed the defendant's sentences, but remanded the case to the trial court to correct the sentencing information report. The trial court erred in scoring OV 3 at 25 points. The record does not show that any of the injuries of the victims were life-threatening or permanently incapacitating. Additionally, the trial court erred in scoring OV 12 at 5 points. The preponderance of the evidence does not establish that any of the remaining victims suffered a serious injury as required by M.C.L. 257.602a(7). OV 12 should have been scored at zero. Even with a reduction of 20 points, the defendant's guidelines range remained the same. Resentencing is not warranted.

SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 19

People v. Ryan Scott Welshans
Unpublished opinion of 12-09-14
(Court of Appeals #318040)
PC: Jansen, Talbot, Servitto
SADO - DESIREE FERGUSON

Affirmed the defendant's convictions, but remanded for further proceedings regarding sentencing. The trial court assessed 10 points for OV 19 because of false statements that the defendant made to the police. There is nothing in the record that indicted that the defendant lied to the lead officer during his interview. The prosecution contended that concessions by the defense counsel were sufficient to sustain the assessment. Given the ambiguity of counsel's position, however, the court was constrained to disagree. It found that the appropriate course was for a remand for further proceedings regarding OV 19. If it is established that the defendant intentionally misled the lead officer, the assessment of OV 19 is appropriate.

ECONOMIC PENALTIES – Restitution
-- Proof of Loss

People v. Mohammed Nayef Al-Khateeb
Unpublished opinion of 12-09-14
(Court of Appeals #318188)
PC: Jansen, Talbot, Servitto
KEVIN LANDAU

Affirmed but remanded for the correction of the judgment of sentence. The trial court required that the amount of restitution be substantiated by documentation, but the judgment of sentence does not reflect that ruling (it only states that the restitution is TBD). The judgment of sentence must be corrected to indicate that the amount of restitution imposed must be determined based on documentation submitted.

WITNESSES – Unsolicited and Volunteered Remarks

People v. Jerome Walter Kowalski
Unpublished opinion of 12-02-14
(Court of Appeals #315495)
PC: Kelly, Sawyer, Meter
SADO - MARLA McCOWAN

Affirmed the defendant's convictions. The trial court did not abuse its discretion when it determined that polygraph references did not deny the defendant his right to a fair trial. The references did not establish that the defendant actually took a polygraph or reference any results. The reference to the detective as a polygraph examiner was inadvertent and brief, and both the questioning by the first officer and the reference by the examiner could be fairly seen to have simply been a part of an ordinary questioning process by investigators. A mistrial was not warranted.

SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 3
SENTENCING AND PUNISHMENT
-- Presentence Reports -- Correction

People v. Richard Steven Gutierrez
Unpublished opinion of 12-23-14
(Court of Appeals #317593)
PC: O'Connell, Borrello, Gleicher
ARTHUR LANDAU

The Court of Appeals affirmed the conviction and sentence of the defendant, but remanded to the trial court for the sole purpose of correcting the PSIR.

The defendant objected to a statement in the PSIR indicating that he had a ninth-grade education. The trial court agreed that it was incorrect and that the defendant had completed two years of college. The PSIR was not amended with the correct information. Remanded for correction of the PSIR with an amended copy forwarded to the Department of Corrections.

The trial court did not err in assessing 10 points for OV 3. The victim did receive medical treatment in the form of antibiotics and Plan B, a medication used to prevent pregnancy.

COUNSEL -- Ineffectiveness Of
-- At Guilty Plea

People v. Derrivis Leonard Parker
Unpublished opinion of 12-23-14
(Court of Appeals #317737)
PC: Murray, Saad, Hoekstra
SADO - CHARI GROVE

Vacated the defendant's judgment of sentence and remanded to Wayne Circuit Court with instructions that the prosecution reoffer the plea agreement and for further proceedings.

The prosecutor erroneously informed the trial court that the defendant's plea would expose him to SORA's registration requirements, the trial court imparted that information to the defendant, defense counsel took no steps to correct the trial court's misapprehension, and the defendant reneged on the plea agreement at the last moment because registration as a sex offender was something that he could not accept. The court concluded that counsel's performance fell below an objective standard of reasonableness. Counsel's error was failing to correct the misapprehension created by the prosecutor's assertion on the record that the defendant would face SORA's registration requirements if he pled guilty.

The defendant has made the requisite showing of prejudice. It is more than reasonably probable that, but for the error, the defendant would have accepted the plea. The only reason he rejected the plea was because he was mistakenly informed that he would have to register under SORA. The plea's terms were less severe than the sentence the defendant received following trial. The plea included the withdrawal of the fourth-offense habitual offender notice and the defendant would have been sentenced within the guidelines.

COUNSEL -- Ineffectiveness Of
-- Failure to Investigate and/or
Present Defense

People v. Larry Manciel
Unpublished opinion of 12-30-14
(Court of Appeals #312804)
PC: Markey, Sawyer, Wilder
RITA YOUNG

Vacated the defendant's convictions and sentences for first-degree home invasion and unarmed robbery and remanded for a new trial.

The defendant was denied the effective assistance of counsel and was prejudiced as a result. Trial counsel testified in the *Ginther* hearing that the defendant admitted to her that he broke into the victim's apartment to steal money. The trial court did not find this testimony credible. This testimony conflicted with the defendant's alibi story and the testimony of the three alibi witnesses, which the court did find credible. Defense counsel did not investigate the defendant's alibi witnesses or call any of them at trial, despite the trial court's finding that she knew about the witnesses. This deprived the defendant of a substantial defense. The alibi evidence was strong and would have been a substantial defense, especially since the identification of the defendant by the victim had many weaknesses. Had counsel called the alibi witnesses, there is a reasonable probability that the outcome of the trial would have been different.

ECONOMIC PENALTIES
-- Restitution -- Extent of Loss

People v. Renee Lee Bullock
Unpublished opinion of 12-30-14
(Court of Appeals #317855)
PC: Jansen, Talbot, Servitto
BEVERLY SAFFORD

Affirmed the defendant's convictions, but remanded the case to the Wayne Circuit Court for a hearing on restitution.

The defendant was convicted of one count of obtaining or using the money or property of a vulnerable adult through fraud, deceit, misrepresentation, coercion or unjust enrichment. M.C.L. 750.174a(4)(a). The PSIR provided that restitution should have been set at $128,960.90, the amount of the victim's money the defendant spent for personal use. The court ordered, without explanation, restitution in the amount of $65,000. The defendant requested, but did not receive, an evidentiary hearing to determine the amount of restitution. Because the defendant requested a hearing, and because the amount outlined in the PSIR was dramatically different from that ordered without explanation, this matter was remanded to the trial court to explain the reason for the restitution amount.

GUILTY PLEAS
-- Specific Performance of Bargain

People v. Charles Darnell Cotton
Unpublished opinion of 12-30-14

(Court of Appeals #321146)
PC: Murray, Saad, Hoekstra
DARRELL BANKS

Vacated the trial court's order denying the defendant's motion to enforce his plea agreement and remanded to the trial court for further proceedings.

The Court of Appeals was unable to judge, based on the record, whether a plea bargain was reached and, if so, what the agreement entailed. There was no written agreement and no record of any plea discussions. The trial court should have assessed the respective credibility of the individuals present for the discussions who recalled the details of the plea agreement. The defendant is entitled to an evidentiary hearing in light of the offer of proof made by the defendant in the form of affidavits provided to the trial court by the defendant's attorney. On remand, if the trial court concludes, after the evidentiary hearing, that an agreement was reached, it should also determine the terms of the agreement and whether the defendant has, to his detriment, performed his obligation under the agreement. If so, the trial court should enforce the agreement by ordering specific performance by the prosecutor.

MISCELLANEOUS
-- Statutory Interpretation

Kent County v. City of Grand Rapids & DecriminalizeGR
Unpublished opinion of 01-08-15
(Court of Appeals #316422)
PC: Boonstra, Donofrio, Gleicher
JACK HOFFMAN

Affirmed the trial court's order granting defendant, City of Grand Rapids, and intervening defendant, DecriminalizeGR, summary disposition regarding the plaintiff's complaint that an amendment to the Grand Rapids City Charter was preempted by state law.

The trial court did not err in granting summary disposition under Mich. Ct. R. 2.116(C)(10). The charter does not conflict with state law, instead it created civil infractions for certain actions related to marijuana. This was not a case where the amendment permits what state law prohibits or prohibits what state law permits as required to show a direct conflict for the purpose of preemption.

ECONOMIC PENALTIES – Restitution
-- Extent of Loss

People v. John William Baker, Jr.
Unpublished opinion of 01-13-15
(Court of Appeals #318688)
PC: Talbot, Cavanagh, Kelly
JOHN UJLAKY

Affirmed the defendant's convictions and sentences for larceny of property more than $20,000, felony firearm, and trespassing, but vacated the order of restitution and remanded for a hearing to determine the proper amount of restitution.

The trial court erred when it ordered the defendant to pay restitution of $25,000. The defendant shot and killed a deer (21-point buck) on a private hunting ranch. A hunting package for a 21-point buck sells for $25,000. While there was evidence that the deer was worth $25,000, it is not clear that the lodge's profits after expenses would amount to $25,000. The actual loss suffered by the lodge has not been determined. Remanded for a restitution hearing.

DEFENSES -- Medical Marijuana

People v. Johnnie Vernon Randall
Unpublished opinion of 01-13-15
(Court of Appeals #318740)
PC: Donofrio, Borrello, Stephens
EDWARD CZUPRYNSKI

Vacated the defendant's convictions and reversed the trial court's denial of the defendant's motion to dismiss because the defendant fell under the protections of § 4 of the MMMA.

The trial court erred as a matter of law when it considered the material seized from the building as being usable marijuana. The material was not dried; therefore, it was not usable marijuana under the MMMA. Testimony from police officers showed that the marijuana was wet, green, and in the drying stage. The trial court also erred when it refused to consider the seized stalks to be "incidental." The Court of Appeals found that the trial court appeared to have conflated the terms "incidental" with the term "negligible." The marijuana had been trimmed and the leaves were drying, making it subordinate to the dried, usable marijuana.

OFFENSES -- Larceny in a Building
-- Sufficiency of Evidence

People v. Anthony Mark Cox
Unpublished opinion of 01-15-15
(Court of Appeals #317617)
PC: Riordan, Markey, Wilder
GEORGE MULLISON

Vacated the conspiracy to commit larceny in a building conviction but affirmed in all other aspects.

The defendant and friends were convicted of breaking into a house and stealing items. The evidence only supported a finding that there was a single agreement that resulted in two separate crimes. The evidence does not support the existence of two agreements, each with a separate objective. Therefore, the evidence supported only one count of conspiracy. Because the crime of larceny in a building could not have occurred without the predicate crime of breaking and entering with intent, and thus there could be no conspiracy to commit larceny in a building without first conspiring to break into, and enter, the building, the Court of Appeals vacated the conviction for conspiracy to commit larceny in a building.

SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 11

People v. Douglas Paul Guffey
Unpublished opinion of 01-15-15
(Court of Appeals #317902)
PC: Donofrio, Borrello, Stephens
JONATHAN SIMON

Affirmed the defendant's convictions, but vacated his sentences and remanded for resentencing.

The trial court erred in scoring 50 points for OV 11. There was no evidence that two or more sexual penetrations arose, sprung, or resulted from a single sentencing offense, i.e., from any one of the offenses resulting in a first-degree CSC conviction. A trial court may not count a sexual penetration that formed the basis for the conviction, but may score all other "sexual penetrations of the victim by the offender arising out of the sentencing offense." M.C.L. 777.41(1)(a). The evidence of his other offenses may be used to assess 25 points for OV 13. The defendant is entitled to resentencing.

SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 12
SENTENCING AND PUNISHMENT
-- Guidelines -- Scoring
-- Scoring of Offense Variables (OVs)
-- OV 13
SENTENCING AND PUNISHMENT
-- Guidelines – Scoring
-- Scoring of Offense Variables (OVs)
-- OV 19
OFFENSES -- Felony Firearm
-- Sufficiency of Evidence
OFFENSES -- Felon in Possession of a Firearm -- Sufficiency of Evidence

People v. Corey Leron Thompson
Unpublished opinion of 01-15-15
(Court of Appeals #318694)
PC: Donofrio, Borrello, Stephens
SADO - CHRISTINE PAGAC

Affirmed the defendant's convictions, but remanded for resentencing.

The Court of Appeals found that there was sufficient evidence to find that the defendant had constructive possession of the firearm found in his vehicle. The defendant was the driver of the vehicle and the firearm was found behind his seat. The gun was not in plain view, and it was discovered beneath a covering when the officer folded up the second row seats to gain access to the vehicle's third row of seats. The defendant's fingerprints were not found on the gun and the vehicle was not registered in his name. The court found that testimony established that the defendant was a drug dealer and that he sold drugs on the night the gun was found. The gun was in close proximity to the defendant and the controlled substances (found in the sun roof).

Neither the PSIR not the trial court offered any explanation for why OV's 12 and 13 should be scored at 10 points. Remanded for articulation of the trial court's decisions. The trial court erred in scoring OV 19 at 10 points for interference with the administration of justice for failing to cooperate with the presentence investigation review process. The defendant has a right to remain silent and not incriminate himself during the penalty phase of the proceedings; his decision to exercise those rights by not cooperating with the preparation of the PSIR was not an interference with the administration of justice for purposes of OV 19.

Training Calendar

Complete details on the training events listed below appear at page 15 of this month's newsletter.

March 12-14, 2015	2015 Spring Conference	CDAM - Troy, MI
March 12-15, 2015	Criminal Defense Boot-Camp	NACDL - Gulfport, FL
March 17, 2015	Know Your Judge: District Court	OCBA - Bloomfield Hills, MI
April 16-19, 2015	Forensic Science and Law Conference	NACDL - Las Vegas, NV
April 30, 2015	Post-Conviction Conference	NACDL - Orlando, FL
May 15, 2015	Criminal Conspiracy	NACDL - NYSACDL - New York, NY
June 17-19, 2015	White Collar Conference	NACDL - San Diego, CA
July 11, 2015	CDAM Summer Training	CDAM - Gaylord, MI
July 23-26, 2015	High Altitude Trial Skills	NACDL - Denver, CO
August 10-15, 2015	CDAM Trial College	CDAM - Lansing, MI
November 12-14, 2015	CDAM Fall Conference	CDAM - Traverse City, MI

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