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RECENT DEVELOPMENTS IN MICHIGAN CRIMINAL LAW

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I. Case Law

A. Fourth Amendment.

Affidavit in Support of Warrant, *Franks* Hearing. *People v Franklin*, 500 Mich 92; 894 NW2d 561 (2017)**(may'17).** An affidavit supporting a search warrant was based on statements from an unregistered confidential informant. The trial court granted a hearing under *Franks v Delaware*, 438 US 154 (1978), and ultimately concluded that the affiant police officer acted with reckless disregard for the truth by not confirming or corroborating the unregistered CI's information, and by not providing evidence under MCL 780.653 that the CI had personal knowledge. The trial court suppressed the evidence against Defendant. The court of appeals reversed the suppression order, holding that the trial court abused its discretion by holding a *Franks* hearing in the absence of the substantial preliminary showing required under *Franks* – that the affiant made a false statement, knowingly or with reckless disregard for the truth, necessary to the probable cause determination. In a unanimous opinion, Justice Wilder not participating, the supreme court reversed the court of appeals, holding that nothing in *Franks*, which concerns when a trial court may not deny a hearing, prevents a trial court from holding a hearing without a substantial preliminary showing. The trial courts have broad discretion in this area, and that discretion was not abused here. As the prosecution never challenged the trial court's decision to suppress the evidence after the hearing, the suppression order was reinstated.

Consent, Unlocked Container Belonging to Passenger where Driver Provides Consent. *People v Mead,* __ Mich App __; __ NW2d __ (2017 WL 3397706, No. 327881, decided August 8, 2017**(aug'17).** Defendant, with a closed backpack in his lap, was riding in the passenger seat of a vehicle pulled over for expired plate. When the driver gave police consent to search the vehicle, and Defendant was ordered to exit, he left the backpack on the floor of the passenger compartment. Police opened the backpack and found drugs. The court of appeals, in an unpublished opinion, affirmed the trial court's denial of a motion to suppress, citing the MSC decision by peremptory order in *People v LaBelle*, 478 Mich 891 (2007), which upheld the search of a passenger's unlocked backpack after the driver consented to a search of the vehicle. The MSC then sent this case back to the court of appeals, asking them to determine whether *Labelle* was distinguishable, whether the record demonstrates that police reasonably believed the driver had common authority over the backpack citing *Illinois v Rodriquez*, 497 US 177 (1990), and whether there were other grounds on which the search could be justified. The court of appeals found no other justification for the search, and concluded that *LaBelle* could not be distinguished. And while application of the *Rodriquez* common authority framework would give Defendant's argument merit, the panel noted that the appeals court had tried to utilize that reasoning in *LaBelle* but had been reversed by the MSC. In affirming their earlier decision the court also noted police reliance on *LaBelle*.

Pretrial Detention. *Manuel v Joliet,* __ US __; 137 S Ct 911 (2017.**(march'17).** Manuel filed a civil action under 42 USC § 1983 after he was locked up for two days based on false statements that led to a probable cause determination. The federal district court dismissed, in part because detention following the initiation of legal process could not give rise to a Fourth Amendment claim. SCOTUS reversed and remanded, holding that because the initial probable cause

determination was based on fabricated evidence, Manuel's pretrial detention stated a Fourth Amendment claim.

Vehicle Search Incident to Arrest. *People v Wood*, __ Mich App __; __ NW2d __ (2017 WL 4158040, No. 331462, decided September 19, 2017**(sep'17).** In this case, the prosecutor appealed dismissal after announcing it could not proceed as the trial court had suppressed the evidence. A state trooper, after pulling Defendant over for speeding, saw "whippet cannisters" which he believed were used for huffing nitrous oxide, and testified that Defendant admitted to huffing four days earlier. After Defendant refused consent the trooper searched the vehicle, finding codeine. The majority found the trial court's suppression proper, citing *People v Mead*, summarized above**,** noting that Defendant was not arrested for huffing but for possession of codeine. Judge Murray, in dissent, disagreed and found that Defendant was subject to arrest for possession of the in plain view cannisters, given his admission to huffing days earlier, and that permitted search of the vehicle. Both the majority and dissent found the prosecutor's appeal proper given that, unlike the situation in *People v Richmond*, 486 Mich 29; 782 NW2d 187 (2010) the prosecutor here did not formally move to dismiss charges.

Vehicle Stop, Detention for Dog Sniff. *People v Kavanaugh*, __ Mich App __; __ NW2d __ (2017 WL 2882721, No. 330359, decided July 6, 2017**(july'17).** Defendant was driving in Berrien County with Florida temporary plates and was pulled over by the MSP for minor traffic violations. After running a computer check, which confirmed Defendant's ownership of the car and revealed no warrants, the trooper told Defendant he was going to issue a warning only, but asked for permission to search Defendant's vehicle. When Defendant refused, the trooper called in a dog and handler, which required a 15-minute wait. The dog alerted and marijuana was found. The panel held that the trial court erred in failing to suppress, finding that while the initial stop was supported, detention of Defendant beyond conclusion of the traffic stop was improper. SCOTUS, in *Rodriguez v United States*, __ US __; 135 S Ct 1609 (2015), has made it clear that reasonable suspicion is required to extend a traffic stop for a dog sniff, and there was none here. The panel specifically noted it was assisted in this determination by the ability to view the videotape of the stop and urged, in a footnote, that the parties supply such videotapes whenever practicable, the court should review them, and they should be made part of the record on appeal.

Warrantless Blood Draw, Revocation of Consent. *People v Woodard*, __ Mich App __; __ NW2d __ (2017 WL 4158047, No. 336512, decided September 19, 2017**(sep'17).** Defendant was pulled over for license plate issues, and suspicion of intoxication progressed from FST to PBT and ultimately led to admitted consent to a blood draw. Several days later, before her blood was tested, through her attorney, Defendant filed a written revocation of consent, and demanded return of her blood. The state, without obtaining a warrant, proceeded to test the blood resulting in a finding of 0.212 BAC. The issue was whether the testing after a consensual blood draw constituted a separate search, and required a warrant after consent was withdrawn. The panel concluded that a subsequent test of validly seized blood does not constitute a separate search for Fourth Amendment purposes, as under a totality of circumstances approach "society is not prepared to recognize a reasonable expectation of privacy in the alcohol content of a blood sample voluntarily given by a defendant to the police for the purposes of blood alcohol analysis."

Warrantless Search of Residence, Standing, Consent, Plain View, Probation Condition. *People v Mahdi,* 317 Mich App 446; 894 NW2d 732 (2016)**(oct'16).** While executing a warrant at an apartment in Pontiac, Michigan, officers observed Defendant near a vehicle, and later viewed a bag of marijuana in the vehicle. After Defendant was seen walking into another apartment, officers knocked on the door and received consent to look for drugs from Defendant's mother, who told police it was her apartment. Police entered and seized a wallet, cell phone, and keys, which provided substantial incriminating evidence. The trial court denied a motion to suppress. The panel concluded that the trial court erred, and suppression should have been granted. The consent did not extend to the items seized, Defendant had standing to contest because there was evidence he lived at his mother's apartment, plain view did not cover seizure of these items because they were not "obviously incriminatory," and the consent provided by Defendant's mother did not cover them. The CA also held that despite the fact that Defendant was on probation, a standard probation search provision would not save this unconstitutional seizure due to lack of record evidence and, again, because of the non-incriminating nature of the items taken. Since highly incriminating evidence flowed from the illegally seized items the panel ordered a new trial.

Warrantless Search, Reasonableness, Attenuation. *People v Maggit,* __ Mich App __; __ NW2d __ (2017 WL 2351500, No. 335651, decided May 30, 2017)**(may'17)**. In this case the court examined a practice employed by the Grand Rapids Police Department of obtaining "no-trespassing letters" from businesses open to the public, and making arrests in part in reliance on those letters. Here the court upheld the trial court's suppression of evidence after an officer, attempting to ferret out drug activity in certain areas in Grand Rapids, relied on such a letter to arrest Defendant who merely walked with another to a corner of a parking lot owned by businesses open to the public during business hours. Defendant fled while being cuffed, and discarded drugs before being apprehended. The panel found that the officer's conduct could not be condoned under the mistake of law doctrine set out in *Hein v North Carolina*, __ US __; 135 S Ct 530 (2014) because, given the elements of the trespassing ordinance at issue, the conclusion that Defendant was violating it was not objectively reasonable. Nor could the seizure of the drugs be saved by the attenuation doctrine under *People v Reese*, 281 Mich App 290 (2008) and *Utah v Strieff*, __ US __; 136 S Ct 2056 ((2016), as the unreasonable attempted arrest, and the subsequent apprehension and seizure of drugs, occurred prior to the discovery of a warrant for Defendant's arrest.

Warrantless Search, Knock and Talk. *People v Frederick & Van Doorne,* 500 Mich 228: 895 NW2d 541 (2017)**(june'17).** After learning that certain Kent County Corrections Officers had obtained marijuana butter from a fellow officer, KANET (Kent Area Narcotics Enforcement Team) officers decided to knock on the door of the alleged supplier without a warrant. When they did so the officer agreed to a search of his home, the marijuana butter was found, and charges were filed. Analyzing the actions of the KANET team under the recent SCOTUS decision in *Florida v Jardines,* 133 S Ct 1409 (2013), the court of appeals majority concluded that the "knock and talk" procedure here did not violate the 4th Amendment as, unlike the officers in *Jardines* who brought a drug sniffing dog to the front door of a home, officers here did not exceed the "implied license" allowing visitors to inquire at a home by approaching and knocking. Defendant's arguments that the manner (multiple armed KANET officers) and timing (early morning) of the knock and talk exceeded the implied license were rejected by the majority. Judge Servitto, in dissent, found the knock and talk procedure unconstitutional (an unreasonable

warrantless search) because it was conducted in the pre-dawn hours, and thus in violation of the "implied license." *People v Frederick & Van Doorne*, 313 Mich App 457; 886 NW2d 1 (2015). In a unanimous opinion the Michigan Supreme Court agreed with the dissenting Judge Servitto, holding that the scope of the implied license to approach a house and knock is time-sensitive. Therefore there was an illegal search and the case was remanded to determine whether subsequent consent was sufficiently attenuated from the illegality to salvage the seizure.

B. Other Pretrial Matters.

Discovery, *Brady* Materiality. *Turner v United States*, __ US __; 137 S Ct 1885 (2017)**(june'17).** In this 6-2 decision (Justice Kagan, joined by Justice Ginsberg, dissenting), the majority agreed with the trial court and the DC Court of Appeals that exculpatory and impeaching evidence prosecutors failed to turn over to the defense prior to trial was not material. Here, suppressed evidence of a lone attacker was not sufficient to overcome the government's multi-witness claim of a large gang attack, and thus the majority concluded that the *Brady* evidence here was not 'material.' There was not a reasonable probability that, had the evidence been disclosed the result would have been different. The dissent disagreed, stating that the suppressed evidence would have cast the trial in a completely different light and that "could well have flipped one or more jurors – which is all *Brady* requires."

Discovery, *Brady* Violation. *People v Dimambro*, 318 Mich App 204; 897 NW2d 233 (2016)**(dec'16).** Defendant was convicted of first degree murder in the death of his girlfriend's two-year-old son. During remand proceedings on an IAC issue it was discovered that the Macomb County Medical Examiner had failed to provide over thirty autopsy photos to either side, despite a specific request by the defense prior to trial. The trial court ultimately granted a new trial on this ground. The majority in this 2-1 decision, after reviewing pertinent statutes, held that a county medical examiner acts on the government's behalf, and evidence within the examiner's control is imputed to the government even if unknown to the prosecution. The majority concluded that the suppressed evidence was material in the *Brady* context. The prosecution position, which had prevailed at trial, was that the child died of abusive head trauma. The suppressed autopsy photos contributed significantly to the conclusion by a defense expert, who testified at the post-trial hearing, that the brain bruising, which played a substantial role in the abusive head trauma diagnosis central to the guilty verdict, was in fact the result of medical intervention. The majority upheld the trial court's grant of a new trial. Dissenting, Judge Jansen disagreed that the medical examiner "falls within the scope of the government," and would not find the suppressed photos material under *Brady*. **Note that on October 6, 2017 Zahra, joined by Markman, CJ, and Wilder, dissented from the MSC denial of leave to the prosecution.**

Discovery and Evidence Preservation. *People v Dickinson*, __ Mich App __; __ NW2d __ (2017 WL 3495392, No. 332653, decided August 15, 2017)**(aug'17).** Dickinson was convicted for both possessing, and delivering, 5.68 grams of heroin. The delivery to her boyfriend took place in prison. She brought the drugs in using a balloon. The MSP lost the balloon and Dickinson argued that this error violated her rights. Dickinson's trial attorney did not raise the

issue at trial, and the COA held that the error did not prejudice her because of the overwhelming amount of other evidence (there was a video of her carrying in and transferring the balloon). Also, the MSP created two police reports, but only turned over the first to Dickinson. The COA held this was a violation, but found that the error was harmless due to "overwhelming" evidence presented at trial (there was a video of her carrying and transferring the balloon).

Double Jeopardy, Delivery and Possession. *People v Dickinson,* __ Mich App __; __ NW2d __ (2017 WL 3495392, No. 332653, decided August 15, 2017)**(aug'17).** Dickinson was convicted for both possessing, and delivering, 5.68 grams of heroin. At issue was whether being convicted of both constituted double jeopardy. Using the *Blockburger* test (284 US 299 (1932)), the COA held the elements of the two offenses showed the two offenses were separate and distinct. Dickinson argued that she could not have delivered the heroin without possessing it, and therefore the possession charge is a lesser-included offense. The COA found that prior case law held otherwise, and courts are directed to examine the abstract legal elements of the two offenses, rather than the facts of each case, in determining whether the protection against double jeopardy had been violated. The Court warned that creating a possession (or constructive possession) element to delivery would allow dealers high in the distribution chain to avoid prosecution.

Double Jeopardy, Delivery and Possession. *People v Baham,* __ Mich App __; __ NW2d __ (2017 WL 4015785, No. 331787, decided September 12, 2017**(sep'17).** Admittedly Defendant's plea to possession of methamphetamine involved the same drugs he pled to manufacturing. Using the "abstract legal elements" test the panel held that these are nonetheless distinct offenses, as each of the offenses contains an element not required for the other, and plea-based conviction of both did not violate double jeopardy.

Double Jeopardy, Issue-Preclusion Component, Inconsistent Verdicts. *Bravo-Fernandez v United States,* __ US __; 137 S Ct 352 (2016)**(nov'16).** Defendants were convicted and acquitted of two counts bearing the same element. After the conviction count was overturned for an unrelated reason, Defendants complained that the government could not try them again on the conviction count based on the issue-preclusion component of the Double Jeopardy Clause. SCOTUS, agreeing with the lower federal courts, held that where, as here, the jury verdicts of conviction and acquittal were irreconcilably inconsistent, the issue-preclusion doctrine does not bar retrial.

Expert Assistance, Right to Independent Expert under *Ake*. *McWilliams v Dunn,* __ US __; 137 S Ct 1790 (2017)**(june'17).** McWilliams was sentenced to death in Alabama. During the sentencing phase McWilliams requested neuropsychological testing. The sentencing court ordered the testing, but it was done by the Alabama Department of Corrections. The ADOC doctor recommended that a second doctor not affiliated with the ADOC perform additional tests. The second doctor's report was not finished until the day before sentencing, and McWilliams' attorney did not have a chance to review it. McWilliams was sentenced to death. McWilliams petition for habeas corpus to the 11th Circuit was denied. The issue was whether SCOTUS's decision in *Ake v Oklahoma*, 470 US 68 (1985), which established that an indigent defendant is entitled to meaningful expert assistance, requires that the expert be independent of the prosecution. In a 5-4 decision, SCOTUS held that a state must provide an indigent defendant with access to an expert witness who is sufficiently available to the defense and independent of

the prosecution to effectively conduct an examination, and assist in the preparation of a defense and presentation of the defense at trial. They held that, in this case, the examinations were insufficient to meet the *Ake* standard because McWilliams did not have adequate time to review the doctor's report.

Fifth Amendment, *Miranda*. *People v Barritt*, 318 Mich App 662; __ NW2d __ (2017 WL 603595, No. 333206, decided February 14, 2017)**(feb'17).** In this interlocutory appeal brought by the prosecution, the panel, in a 2-1 decision, affirmed the trial court's suppression of Defendant's interrogation statements. Although the trial court erred in basing its decision to suppress on MCL 763.7, which defines a "place of detention" for purposes of videotaping police interrogations, the totality of circumstances test revealed that under the circumstances faced by Defendant a reasonable person would not have felt at liberty to terminate the interview and leave. Therefore, Defendant was in custody, and the 90-minute questioning without provision of *Miranda* warnings required suppression of Defendant's statement. The dissent urged that certain circumstances required a totality test result that Defendant was not in custody. **The Michigan Supreme Court, at __ Mich __, No. 155607, September 29, 2017, later vacated the CA determination that Defendant was in custody, and sent the case back to the trial court for determination in the first instance.** The trial court was directed to use the appropriate totality of the circumstances test to assess "(1) whether a reasonable person would have felt that he was not at liberty to terminate the interrogation and leave; and (2) whether the environment presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). See *Howes v Fields*, 565 US 499, 509; 132 S Ct 1181; 182 L Ed 2d 17 (2012); *Yarborough v Alvarado*, 541 US 652, 663; 124 S Ct 2140; 158 L Ed 2d 938 (2004); *People v Elliott*, 494 Mich 292, 308 (2013)."

Preliminary Examination, Admission of Hearsay Lab Reports. *People v Parker*, __ Mich App __; __ NW2d __ (2017 WL 2303336, No. 335541, decided May 25, 2017)**(may'17)**. The majority found an irreconcilable conflict between MCR 6.110(C), which prohibits hearsay at exam, and a 2014 legislative enactment permitting lab reports. See MCL 766.11b(1). The court held that this was a substantive matter, as opposed to a procedural one, as the policy decision involved goes "beyond mere court administration or the dispatch of judicial business," and the statute prevails. Here the district court properly used a lab report showing a BAC of 0.163 to bind Defendant over on an OWI charge over defense objection that the report was inadmissible hearsay. Judge Ronayne Krause concurred in the result only.

C. Confrontation, Counsel, and Other Trial Issues.

Confrontation, Complainant's Preliminary Exam Testimony, Unavailability. *People v Sardy*, 318 Mich App 558; 899 NW2d 107 (2017)**(jan'17).** In *People v Sardy*, 313 Mich App 679; __ NW2d __ (2015), the CA held that because preliminary exam testimony is testimonial, the Confrontation Clause demands unavailability at trial and a prior opportunity to cross examine before it can be admitted. The panel turned back defense challenges based on the fact that the child complainant was not sworn at exam (no objection), the complainant was not shown to be unavailable (lack of memory sufficient), and the cross at preliminary exam was not sufficient for

a variety of reasons, including lack of discovery at exam ("extensive" cross exam was complete enough for Confrontation Clause purposes). Subsequently the MSC remanded back to the CA to assess whether the complainant was unavailable, and to determine whether confrontation rights were violated by the limitation on cross-examination of the complaining witness. On remand the panel vacated two CSC 2 convictions because the trial court did not give Defendant a full opportunity to cross-examine complainant regarding the CSC 2 offenses and her memory loss, after complainant had expressed a lack of memory, and after her preliminary examination testimony had been admitted at trial.

Counsel, Absence at Critical Stage (Preliminary Exam), Harmless Error Review. *People v Lewis,* __ Mich __; __ NW2d __ (2017 WL 3254800, No. 154396, decided July 31, 2017)**(july'17).** Interpreting apparently conflicting precedent of SCOTUS in *Cronic* (denial of counsel at critical stage is structural error) and *Coleman* (sending case back for harmless error review when counsel was denied at preliminary exam, a critical stage), a unanimous court held that *Coleman* controls and returned the instant case to the court of appeals for harmless error review. In the court of appeals the parties are to address the substantive criteria and the procedural framework for harmless error review in these circumstances. Concurring, Justice McCormack outlined the difficulties of conducting this type of harmless error review, and suggested that the evolution of SCOTUS structural error doctrine, and its underlying premise here (assessing the impact of counsel's absence at a critical stage is "exceptionally difficult") lends support to the notion that *Coleman* should be overruled.

Counsel, Ineffective Assistance, Plea Advice. *Jae Lee v United States,* __ US __; 137 S Ct 1958 (2017)**(june'17).** Petitioner, a lawful permanent resident of the US for 35 years, having moved from South Korea with his parents at age 13, pled guilty to an "aggravated felony" pursuant to bad advice from his attorney that he would not face deportation as a result. Despite unrefuted evidence from the plea attorney and Petitioner that deportation was the main issue in the decisional process, the federal district court and the Sixth Circuit rejected Lee's motion to vacate, which he filed upon learning that his conviction would indeed result in his deportation to a country he had little connection with. The Sixth Circuit accepted the government's argument that Lee could not obtain relief because he had little chance of prevailing at trial. In a 6-2 decision the Court reversed, holding that the issue is not whether a defendant has a reasonable chance of prevailing at trial, but whether there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. The facts here clearly indicate Lee would have gone to trial to try to avoid deportation even if his chances were slim.

Counsel, Ineffective Assistance, Race as Future Dangerousness Predictor. *Buck v Davis,* __ US __; 137 S Ct 759 (2017)**(feb'17).** After moving through a labyrinth of procedural issues (*Teague* applicability/waiver, procedural default excusal under *Martinez* and *Trevino,* FRCP 60(b)(6) and COA standards), the Court reached the substantive issue of the Sixth Amendment right to the effective assistance of counsel, and found that under the *Strickland* standard counsel for a capital Defendant erred in admitting testimony from an expert that Defendant's race (black) was predictive of future dangerousness, a factor utilized in sentencing him to death.

Evidence, DNA, Statistical Analysis. *People v Urban,* __ Mich App __; __ NW2d __ (2017 WL 3043789, No. 332734, decided July 18, 2017**(july'17).** Contrary to Defendant's claim, the admitted report of a forensic scientist containing "the testing methodology used, as well as her conclusions and interpretations of the data" met the requirement of "some analytic or interpretive evidence" set out in *People v Coy*, 243 Mich App 283, 294 (2000).

Evidence, Opinion, MRE 701 & 702. *People v Dixon-Bey*, __ Mich App __; __ NW2d __ (2017 WL 4272135, No. 331499, decided September 26, 2017**(sep'17).** After discussing case law on whether police "expert" testimony can come in as lay opinion under MRE 701 or expert opinion testimony under MRE 702, the court held that a detective should not have been allowed to testify regarding the behavior of those who act in self-defense. And while detectives can normally interpret homicide scenes, this detective's expertise did not allow him to offer opinions with respect to the force necessary to stab someone through the chest and into the heart. However, after describing other evidence, the court held these erroneous admissions were not outcome determinative.

Evidence, Other Acts, MRE 404(b). *People v Denson*, 500 Mich 385; __ NW2d __ (2017)(**july'17**). Denson was convicted of assault with intent to do great bodily harm less than murder. Denson assaulted a man who he found in bed with his daughter. The prosecution motioned the trial court to admit evidence of Denson's prior conviction of assault with intent to great bodily harm. Though the trial court held that it would not allow the prosecutor to admit evidence of the conviction, it did allow the prosecution to admit the facts underlying the prior conviction. Denson appealed and the COA affirmed. The MSC reversed, holding that facts of the prior incident should not have been admitted because it was not relevant to a proper purpose under 404(b). The MSC importantly stated that courts commonly abuse the 404(b) rule by admitting prior acts without scrutinizing the logical relevance of the evidence. The evidence must be material AND have probative value. Here, the prosecution alleged that the two acts were sufficiently similar to be admissible, but the MSC explained that, under this theory, the prosecution must meet a "striking similarity standard." When "the prosecution creates a theory of relevance based on the alleged similarity between a defendant's other act and the charged offense, [the Court] requires a striking similarity between the two acts to find the other act admissible." The MSC then found that Denson's prior conviction bore "notable differences" to the current assault. Indeed, the only similarities were that the defendant committed both assaults. Justice Wilder dissented, claiming the error was harmless.

Evidence, Pregnancy, Abortion and Previous Virginity in CSC Prosecution. *People v Sharpe,* 319 Mich App 153; 899 NW2d 787 (2017)**(march'17).** In these consolidated, interlocutory appeals the prosecution contested the trial court's refusal to admit evidence of a teenage complainant's abortion, and the complainant's claim that she was a virgin when Defendant penetrated her and she had not been sexually penetrated by anyone else. The defense contested the trial court's admission of evidence concerning complainant's pregnancy. The panel, interpreting the rape shield statute, MCL 750.520j, and related MRE 404(a)(3), found that all three evidentiary items were admissible as they were not the type of character evidence prohibited by the rape shield rule, were relevant, and were not overly prejudicial. **On October 20, 2017 the Michigan Supreme Court granted leave to appeal in this case. __ Mich __ (Nos. 155747, 155748).**

Evidence, Trial Court's Ruling on Admissibility of Defendant's Statement. *People v Pierson*, __ Mich App __; __ NW2d __ (2017 WL 4015789, No. 332500, decided September 12, 2017**(sep'17).** On appeal of the denial of a motion for relief from judgment under MCR 6.500, the lead opinion held that the trial court committed harmless error when it commented before the jury on its earlier ruling allowing admission of an inculpatory statement. A concurring judge agreed only with the result (affirmance of Defendant's conviction), and the third member of the panel disagreed with the conclusion that the trial court committed error at all in commenting to the jury on its earlier ruling admitting the Defendant's statement.

Expert, Failure to Appoint, Due Process. *People v Agar*, 500 Mich 891; 886 NW2d 717 (2016)**(nov'16).** Defendant was charged with distributing and possessing child sexually abusive material and use of a computer to commit a crime. The court of appeals, in a published decision (314 Mich App 636; 887 NW2d 612), reversed Defendant's convictions, holding that the trial court abused its discretion and denied due process when it refused to appoint a computer forensics expert for the defense at public expense. The MSC, in an order, later modified the result. The high court agreed that the court of appeals was correct that Defendant was improperly denied access to an expert under MCL 775.15, but vacated the court of appeals' holding that due process was denied, and changed relief from reversal to remand for appointment of a qualified expert with allowance for Defendant to challenge his conviction after conclusion of the expert's analysis.

Instructions, Controlled Substances, Possession with Intent to Deliver. *People v Robar*, __ Mich App __; __ NW2d __ (2017 WL 3642680, No. 335377, decided August 24, 2017**(aug'17).** In this interlocutory appeal, the panel clarified that lawful possession, for instance through a prescription, is not a defense to possession with intent to deliver a controlled substance. To escape prosecution for this offense, and assuming there is evidence of an intent to deliver, the defendant must be authorized to deliver, and authorization to possess is not relevant. The amended version of M Crim JI 12.3 accurately states the law and should be used in this case. Although the trial court did not err in concluding that possession of a controlled substance is a necessarily included lesser offense of possession with intent to deliver, it erred in concluding that a valid prescription exempts one from prosecution for possession with intent to deliver. The court also held that because authorization constitutes an exemption or exception to prosecution, and not an essential element, the defendant bears the burden of production and persuasion with respect to a claim that he or she is authorized to possess or deliver. Thus the footnote accompanying bracketed paragraph (6) of M Crim JI 12.2 is inaccurate.

Instructions, Evidence of Good Character, Harmless Error. *People v Lyles*, __ Mich __; __ NW2d __ (2017 WL 3272310, No. 152185, decided August 1, 2017)**(aug'17).** In this 4-3 opinion, the court split on whether the uncontested error in failing to give a requested instruction (M Crim JI 5.8a(1) on character evidence was harmless. The dissent, noting that in this first degree murder prosecution where trial occurred 30 years after the murder, the prosecution evidence focused on allegations that Defendant had abused a woman who happened to be living in the same house as the man who was murdered. Because a key defense character witness focused on Defendant's character for peacefulness, the court of appeals and the MSC dissenters found that failure to give the appropriate instruction, which stated that reasonable doubt could be

founded on character evidence alone, demanded the grant of a new trial. The MSC majority, using the *Lukity* standard ("it is more probable than not that the error was outcome determinative"), found that the character evidence was not strong, and that considering all the evidence in the case the error was harmless.

Instructions, Felony Murder, Waiver. *People v Oros*, __ Mich App __ ; __ NW2d __ (2017 WL 2491890, No. 329046, decided June 8, 2017)**(june'17).** Defendant was convicted of first degree premeditated murder and first-degree felony murder. The predicate offense for felony murder was based on an alleged solicitation scheme, and the prosecution presented the jury with two options, larceny from a person or use of false pretenses to defraud. The panel agreed with Defendant that it was improper to use the false pretenses claim to undergird a charge of felony murder since false pretenses does not constitute a larceny. Because it was impossible to determine on which of the two underlying offenses the jury relied, a new trial was required. The panel rejected the prosecution argument that the error was waived by defense counsel's agreement with the faulty instruction, finding it rose to the level of a due process violation and could not be waived without record demonstration that Defendant understood what he was waiving. **On October 5, 2017 the MSC issued an order scheduling oral argument on whether to grant leave on the premeditated murder conviction result (see pp. 16-17 of these materials).**

Instructions, Keeping/Maintaining Drug House/Vehicle. *People v Norfleet*, 317 Mich App 649; 897 NW2d 195 (2016)**(nov'16).** Defendant was convicted of various drug crimes, including keeping or maintaining a drug house and a drug vehicle under MCL 333.7405(d). The CA admitted that the jury instructions on these two counts were defective as to the elements in that they failed to provide a definition of "keep or maintain," and neglected to instruct on the requirement of continuous use. Nonetheless, the convictions of these offenses were affirmed when the panel concluded, citing *People v Kowalski*, 489 Mich 488 (2011), that based on the evidence the jury would have convicted Defendant if they had been properly instructed.

Instructions, Lesser Offenses. *People v Everett*, 318 Mich App 511; 899 NW2d 94 (2017)**(jan'17)**. Defendant was convicted of numerous assaultive crimes, including murder, as the jury found he fired shots after a neighborhood squabble escalated out of control. As to three counts of Assault with Intent to Murder, the trial court denied a defense request for an instruction on the lesser offense of Assault with Intent to do Great Bodily Harm Less than Murder. After concluding that AWIGBH was a necessarily lesser included offense of AWIM, the panel assumed the trial court erred by failing to give the requested instruction. However, after detailing the evidence, the CA found that "failure to give the requested instruction cannot be said to have undermined the reliability of the verdict" and thus reversal was not warranted.

Judicial Bias. *Rippo v Baker*, __ US __; 137 S Ct 905 (2017)**(march'17).** Defendant moved to disqualify the Nevada trial judge presiding over his murder trial because that judge was the target of a federal bribery probe, and Defendant felt that the state prosecutor who was prosecuting Defendant was involved in the investigation of the judge. The state courts denied relief claiming Defendant did not prove actual bias. SCOTUS vacated the Nevada Supreme Court's judgment and remanded for further proceedings under the correct standard: "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable."

Jury, Misconduct, Intrinsic Evidence. *Pena-Rodriguez v Colorado*, __ US __; 137 S Ct 855 (2017)**(march'17).** After Defendant was convicted of a sexual offense in Colorado two jurors reported to defense counsel that another juror had expressed anti-Hispanic bias toward Defendant and his alibi witness. After outlining the historical reluctance to impeach a verdict with statements of jurors during deliberations (see FRE 606(b)), and the importance of protecting the administration of justice from racial prejudice, the Court, in a 5-3 decision, Roberts, Alito and Thomas dissenting, held that evidence of racial bias during deliberations was sufficient to void the proscription on use of intrinsic evidence to impeach a verdict, as this "implicates unique historical, constitutional, and institutional concerns and, if left unaddressed, would risk systemic injury to the administration of justice."

Jury Verdict, Inconsistent. *People v Davis*, __ Mich App __; __ NW2d __ (2017 WL 2988849, No. 332081, decided July 13, 2017**(july'17).** Defendant was convicted of aggravated domestic assault and assault with intent to do great bodily harm less than murder. While inconsistent verdicts are generally permitted, the statutory language of these offenses make them mutually exclusive, as the domestic assault charge defines an assault "without intending…to inflict great bodily harm less than murder." The panel vacated Defendant's domestic assault conviction.

Witness, Production by Prosecution. *People v Everett*, 318 Mich App 511; 899 NW2d 94 (2017)**(jan'17)**. Defendant was convicted of numerous assaultive crimes, including murder, as the jury found he fired shots after a neighborhood squabble escalated out of control. Defendant's former girlfriend was present during the altercation, and was endorsed by the prosecution pursuant to MCL 767.40a. The Wayne County Prosecutor convinced the trial court that it was not necessary to produce the witness because they had marked her on their witness list with an "&/or" designation. The panel disagreed and held that, in the absence of a stipulation, MCL 767.40a requires the trial court to find good cause to delete a witness from the list. The trial court's failure to make this finding was an abuse of discretion, but no relief was warranted as Defendant could not show prejudice. The failure to sua sponte give a missing witness instruction was not plain error.

Witness Unavailability. *People v Garay*, 320 Mich App 29; __ NW2d __ (2017)(**apr'17**). Garay, who was 16 at the time of trial, was convicted of first degree murder and sentenced to life without the possibility of parole. Two sisters who had been subpoenaed to testify were present in the courtroom, but they refused to testify. The trial court ruled they were unavailable because they had been threatened over social media. Their preliminary exam testimony was admitted at trial. Citing MRE 804(a), the COA held that the trial court did not abuse its discretion because their refusal to testify qualified them as unavailable, and the threats against them justify their absence as "self-preservation." The COA did note that it would have been better for the court to make a record of their unavailability by examining each as to any threats received and the factors that influenced their refusal to testify.

D. Crimes and Offenses, Sufficiency

Child Abuse, Second Degree, Reckless Act. *People v Murphy*, __ Mich App __; __ NW2d __ (2017 WL 4158401, No. 331620, decided September 19, 2017**(sep'17).** Defendant was convicted of second degree child abuse when her 11-month old daughter ingested a morphine pill that may have been dropped by Defendant's mother or her caregiver when her mother was staying in Defendant's home before she died of cancer. The prosecution theory was that Defendant violated MCL 750.136b(3)(a) due to her "reckless act" of lack of home cleanliness, which caused the morphine pill not to have been picked up for several weeks after Defendant's mother's death. The majority determined that failure to clean was not an "act," and reversed Defendant's conviction. Judge Gleicher, concurring, agreed, and would also hold that even if considered an "act," the failure to maintain a clean home does not reach the required level of recklessness, "willfully indifferent to the safety of others" differing substantially from general negligence, required to secure a conviction here.

Child Abuse, Third-Degree, Constitutional Vagueness. *People v Lawhorn*, __ Mich App __; __ NW2d __ (2017 WL 2607946, No. 330878, decided June 15, 2017)(**june'17**). Lawhorn was convicted of third-degree child abuse. She appealed, arguing that the definition of "physical harm" within the third-degree child abuse statute, MCL 750.136b(5), is unconstitutionally vague and does not provide fair notice of the prohibited conduct. The statute defined physical harm as "any injury to a child's physical condition." The COA held that the statute was constitutional, and based its reasoning on three points. First, the court found that one may simply consult a dictionary to ascertain the meanings of "injury" and "physical." Second, the statute contains a provision that allows parents or guardians to use "reasonable force" when physically disciplining children, and thus provides a sufficient standard to prevent the statute from being applied in a subjective manner by law enforcement, judges, or juries. Finally, the fact that the statute contained a scienter requirement alleviated vagueness concerns. The scienter requirement is that that the physical harm either be caused "knowingly or intentionally," or be the result of a knowing or intentional act that poses an unreasonable risk of harm or injury.

Citizenship, Procuring through Illegal Act. *Maslenjak v United States*, __ US __; 137 S Ct 1918 (2017)**(june'17).** 18 USC § 1425(a), in conjunction with 18 USC § 1015(a), criminalizes knowingly procuring naturalization via false statement. In this case Petitioner, an ethnic serb, was permitted refugee status when she claimed her husband hid to avoid serving in the Bosnian Serb Army. She later gained citizenship, claiming she had never lied to gain entry to the US. She was prosecuted when it later was discovered that her husband had in fact served in the Bosnian Serb Army. Reversing the Sixth Circuit, the Court, unanimous as to the result, held that the federal district court's instruction that the government need not prove Petitioner's false statements were material to, or influenced, the decision to approve citizenship, was reversibly erroneous. A fair reading of the statutes in question demands that one can be stripped of citizenship only if commission of an illegal act during the naturalization process played a role in obtaining citizenship.

Controlled Substances, Possession with Intent to Deliver. *People v Robar*, __ Mich App __; __ NW2d __ (2017 WL 3642680, No. 335377, decided August 24, 2017**(aug'17).** In this interlocutory appeal, the panel clarified that lawful possession, for instance through a

prescription, is not a defense to possession with intent to deliver a controlled substance. To escape prosecution for this offense, and assuming there is evidence of an intent to deliver, the defendant must be authorized to deliver, and authorization to possess is not relevant.

Controlled Substances, Possession with Intent to Deliver in a School Zone. *People v English and Smith*, 317 Mich App 607; 897 NW2d 184 (2016)**(oct'16).** Both Defendants were living within 1,000 feet of a high school when charged with possession with intent to deliver drugs, so they were charged under MCL 333.7410(3) which enhances penalties due to proximity to a school. In both cases separate Oakland County judges dismissed the charge because there was no evidence that either Defendant intended to deliver or possess drugs within the school zone. The panel, on this appeal by the prosecution, in a 2-1 opinion, sided with the circuit judges and Defendants. Using the last antecedent rule, in a detailed statutory construction analysis, the majority held it was unambiguous that the phrase "*intent to deliver to another person on or within 1,000 feet of school property or a library a controlled substance"* meant that to sustain this charge the prosecution had to prove that a defendant intended to deliver the drugs in the school zone. The dissent used legislative history to conclude it was sufficient to show that the possession occurred in a school zone

CSC 2, Sufficiency. *People v Deleon*, 317 Mich App 714; 895 NW2d 577 (2016)**(nov'16).** Stating that the testimony of the complainant is sufficient standing alone, the panel found there was ample evidence of sexual contact to uphold Defendant's CSC 2 conviction.

False Statement to Police, Sufficient Evidence to Bind Over. *People v Williams*, 318 Mich App 232; 899 NW2d 53 (2016)**(dec'16).** Defendant was interviewed regarding the death of his girlfriend, and stated he was driving around with two friends during relevant time frames. Because he neglected to inform police of a stop near the deceased's apartment, and did not reveal a third occupant of the vehicle during the time in question, Defendant was charged with providing false and misleading information to police under MCL 750.479c. In this interlocutory appeal the panel found sufficient evidence to bind over under the statute. Defendant's claim that he had simply forgotten the facts he had failed to convey to police due to exhaustion is a defense that can be raised at trial.

Federal Bank Fraud, Sufficiency. *Shaw v United States*, __ US __; 137 S Ct 462 (2016)**(dec'16).** Defendant was convicted under 18 USC § 1344(1), the federal bank fraud statute. He raised a number of arguments suggesting that section 1 of the statute did not apply to him because he sought to defraud the bank depositor, not the bank. Outlining the interest a bank has in a depositor's funds, SCOTUS found all of Defendant's arguments unpersuasive.

Felony-Firearm, Repeat Offense, Priors from Same Transaction. *People v Wilson*, 500 Mich 521; __NW2d __ (2017)**(july'17).** Defendant was convicted of being a third felony-firearm offender and sentenced to 10 years on this offense based on two prior felony-firearm convictions arising out of the same transaction. Relying on *People v Stewart*, 441 Mich 89 (1992), the court of appeals, in an unpublished per curiam opinion, remanded for imposition of sentence as a second felony-firearm offender. A unanimous supreme court found that under the plain language of MCL 750.227b(1) a defendant who has two prior felony-firearm convictions when again

convicted of that offense is a third offender subject to the ten year sentence, regardless of whether the two prior convictions arose from the same transaction. *Stewart* was overruled.

Identity Theft, Sufficiency. *People v Perry*, 317 Mich App 589; 895 NW2d 216 (2016)**(oct'16)**. Defendant was charged with identity theft under MCL 445.65(1), which prohibits a person from using the identifying information of another person to obtain property with the intent to defraud or violate the law. Here it was sufficient that Defendant used the stolen identity of another to fill out a vehicle title for a car he bought with counterfeit money. It did not matter that the victim was not "actually defrauded" by Defendant's use of the stolen identifying information.

Larceny by Conversion. *People v Spencer*, __ Mich App __; __ NW2d __ (2017 WL 3441478, No. 337045, decided August 10, 2017)**(aug'17).** In this Kent County prosecution appeal the panel reversed the trial court's denial of the prosecutor's motion to amend the information to add a count of larceny by conversion of 20k or more (MCL 750.362 and 750.356(2)(a)). Where, as here, a defendant fails to use money delivered by a complainant for an agreed-upon purpose, and also fails to refund the money, the crime of larceny by conversion may be committed. Because a preliminary exam was held on this charge, Defendant cannot claim surprise, and it was an abuse of discretion to deny the prosecutor's motion to amend the information to add the charge of larceny by conversion.

Manufacture of Methamphetamine, Personal Use Exemption. *People v Baham*, __ Mich App __; __ NW2d __ (2017 WL 4015785, No. 331787, decided September 12, 2017**(sep'17).** Counsel was not ineffective for failing to challenge the factual basis of Defendant's plea to manufacturing methamphetamine based on the personal use exception. That exception covers only two of the six activities outlined in the prohibition of manufacture - preparation or compounding. It does apply to production, propagation, conversion, or processing. After defining these terms, the panel held that the personal use exception cannot be claimed for making or cooking methamphetamine. Therefore, defense counsel was not ineffective for failing to raise this issue in the trial court.

Murder, First Degree, Premeditated. *People v Oros*, __ Mich App __ ; __ NW2d __ (2017 WL 2491890, No. 329046, decided June 8, 2017)**(june'17).** Defendant was convicted of first degree premeditated murder and first-degree felony murder. Decedent was stabbed multiple times and set on fire. Construing the statute, the panel first found that there must be evidence of a willful, deliberate, and premeditated killing, and that all three must be found. The court found the evidence of premeditation insufficient after setting out four means the prosecution can use to prove this necessary element. The conviction was reduced to second degree murder. Closely examined were the circumstances surrounding the killing (the brutality of the assault cannot by itself establish premeditation) and Defendant's conduct after the killing (botched coverup attempts do not suggest a pre-offense plan). The panel also reversed Defendant's felony murder conviction due to instructional error. **On October 5, 2017 the MSC issued an order scheduling oral argument on whether to grant the prosecution's application for leave to appeal and requesting supplemental briefing. The statement of questions to be addressed in the MSC order suggest that the CA result may not survive: "whether the Court of Appeals properly viewed the trial record for sufficient evidence of premeditation and**

deliberation in the light most favorable to the prosecution, including drawing all reasonable inferences in favor of the jury verdict…".

OWI, Place of Operation. *People v Rea*, 500 Mich 422; __ NW2d __ (2017)**(july'17).** Defendant was listening to loud music in his car after drinking. At the time police responded to the third noise complaint an officer viewed Defendant pull his car out of the garage, then pull back in. Defendant's car was at all times between the front of his house and his garage, which was behind his house at the end of his driveway. The court of appeals, in a 2-1 decision, held that the prosecution failed to establish that Defendant "operate[d] a vehicle upon….[a] place open to the general public or generally accessible to motor vehicles." *People v Rea*, 315 Mich App 151; 889 NW2d 536 (2016). After hearing oral argument on whether to grant the prosecutor's leave application, the supreme court reversed, holding that the statutory language meant that any location that can be physically reached by a motor vehicle, which included all of Defendant's driveway, is an area where driving under the influence is prohibited. Justice McCormack, joined by Justice Viviano, issued a dissent.

Owning Dangerous Animal Causing Serious Injury, Sufficiency of Evidence to Bind Over. *People v Ridge*, 319 Mich App 393; __ NW2d __ (2017 WL 1488906, No. 333790, 333791, decided April 25, 2017)**(april'17).** In these consolidated cases a husband and wife were charged with owning a dangerous animal causing serious injury under MCL 287.323(2) after their dog attacked a lawn care worker who was treating their neighbor's lawn. Defendants objected to bindover, then moved to quash in circuit court, which motion was denied. The court of appeals granted leave to appeal the denial of the motion to quash and reversed, finding insufficient evidence that the dog was dangerous or that Defendants were aware it was dangerous. The fact that the dog had previously attacked a fence and the tire of a lawnmower did not meet the definition because it must be shown that the dog had previously bitten or attacked a person.

Public Employee, Willful Neglect of Duty, Independent Contractor. *People v Parlovecchio,* 319 Mich App 237; 901 NW2d 406 (2017)**(april'17).** Defendant, the president of Parlovecchio Building Co., entered into an agreement with Wayne County to act as project manager on the Wayne County Jail Project. When the project was not completed, Defendant was indicted under MCL 750.478, which criminalizes the willful neglect of duty of a public employee or person holding public trust. The panel agreed with Defendant that he was an independent contractor, and as such could not be held criminally liable under the statute for contractual violations. The charge against Defendant was dismissed.

Social Media Restriction, Sex Offenders. *Packingham v North Carolina,* __ US __; 137 S Ct 1730 (2017)**(feb'17).** Packingham was convicted of a sex crime against a minor. A North Carolina statute barred Defendant, as a registered sex offender, from accessing any form of social media open to minors. Packingham was arrested when police found an innocuous facebook post he had authored. The issue was whether the North Carolina law prohibiting registered sex offenders from accessing various websites, regardless of whether the sex offender directly interacted with a minor, violated the First Amendment. In a 5-3 decision, SCOTUS held that, in order to be valid under the First Amendment, a content-neutral regulation of speech must be narrowly tailored to serve a significant government interest. Although SCOTUS recognized

that the government has a legitimate interest in protecting children from abuse, it held that this law too broadly restricted access to social media sites and thus violated the First Amendment.

E. Sentencing

Consecutive Sentencing, *Apprendi-Lockridge*. *People v DeLeon,* 317 Mich App 714; 895 NW2d 577 (2016)**(nov'16).** Defendant was convicted of CSC 1 and CSC 2 and the trial court imposed consecutive sentences, relying on MCL 750.520b(3) which permits consecutive sentencing for crimes arising out of the same transaction, a fact not admitted by Defendant nor found by the jury in this case. Nonetheless, the panel found no 6th Amendment violation under the *Apprendi-Lockridge* line of cases. Citing *Oregon v Ice*, 555 US 160 (2009), which was decided after *Apprendi*, the panel agreed that the consecutive sentencing decision is one traditionally in the purview of the judiciary.

Consecutive Sentencing, Discretionary, Standard of Review. *People v Norfleet,* 317 Mich App 649; 897 NW2d 195 (2016)**(nov'16).** Defendant was convicted of five different drug offenses and sentenced as a habitual offender, fourth offense, to five individual sentences with direction that each be served consecutive to the others, the result being Defendant would not be parole eligible for 55 years. Stating this was a question of first impression, the panel held that each determination of consecutive sentencing, where this was discretionary, must be reviewed for an abuse of discretion under *People v Babcock*, 469 Mich 247 (2003), and the trial court must place its rationale on the record for each consecutive sentence. The case was remanded for expansion of the record in this regard. The panel also found a *Lockridge* violation and remanded for the *Crosby* procedure. Finally, as to sentencing, the prosecutor's statement alone was insufficient to sustain, over objection, inclusion of a claim that Defendant was gang affiliated in the presentence report. On remand, these statements must be removed unless a preponderance of the evidence supports them. On remand the trial court ordered only the first two sentences to run consecutively to one another. The remaining sentences were set to run concurrently. The trial court supplied a rationale for the consecutive sentencing, and the CA affirmed. The trial court followed the *Crosby* procedure on remand by stating that it would have imposed the same minimum terms had it been aware the guidelines were advisory rather than mandatory. *People v Norfleet,* __ Mich App __; __ NW2d __ (2017 WL 3614208, No. 328968, decided August 22, 2017**(aug'17).**

Consecutive Sentencing, Erroneous Release from Prison. *People v Parker,* 319 Mich App 410; 901 NW2d 632 (2017)**(april'17).** The panel held that the trial court erred in imposing a consecutive sentence under MCL 768.7a as Defendant was not incarcerated at the timemmitted her present crime, nor was she an escapee or on parole. The fact that the MDOC had erroneously released Defendant over a year prior to commission of the instant offense did not authorize a consecutive sentence.

Costs, Probation Supervision Fee. *In re Killich,* 319 Mich App 331; 900 NW2d 692 (2017)**(april'17).** After pleading no contest to a delinquency petition against her, Petitioner

challenged the $100 probation supervision fee assessed, claiming it wasn't statutorily authorized under the dictates of *People v Cunningham*, 496 Mich 145 (2014). The panel agreed, dismissing several arguments by the prosecution that the fee was permitted under different statutes. The panel did indicate that the reimbursement provision of 712A.18 could be brought to bear, and stated that a fee under this section could be imposed before any expense had been incurred. However, citing *People v Juntikka*, 310 Mich App 306 (2015), the court held that the $100.00 fee imposed here was not authorized by 712A.18 because it was not specific to the Petitioner.

Court Costs. *People v Cameron,* 319 Mich App 215; 900 NW2d 658 (2017)**(april'17).** Defendant was convicted of a felony and was assessed $1,611.00 court costs under MCL 769.1k. The amount was arrived at through a computation by Washtenaw County designed to determine the average cost of a felony prosecution. The panel agreed with Defendant that the imposition of costs was a tax but found it was constitutional as it did not violate the Distinct-Statement Clause or the separation of powers provision of the Michigan Constitution.

Court Costs. *People v Shenoskey and Crawford*, __ Mich App __; __ NW2d __ (2017 WL 2491889, Nos. 332735 and 333375, decided June 8, 2017)(**june'17**). Shenoskey pled guilty to DUI in Mackinac County, and Crawford pled guilty to possession with intent to deliver marijuana in Mecosta County. The CA consolidated the cases because the issue in both is the constitutionality of fees and costs imposed by the courts. Shenoskey argued his $68 fine was unconstitutional because it violated the separation of powers. Citing *People v Cameron*, outlined above, the court found that the costs imposed were a tax and that "even if our Legislature delegated some of its taxing authority to the circuit courts, the Michigan Constitution does not require an absolute separation of powers." Crawford, who was late in paying his fines, argued that the 20% penalty imposed by the court was unconstitutional. He asserted that the penalty was usurious and was imposed for no other reason than his inability to pay. The court rejected both arguments. The court found that the 20% could not be usurious because it was a penalty and not interest. The court also stated that there was a mechanism in place to excuse the imposition of the penalty for a defendant who is unable, through no fault of his or her own, to pay the fine, and therefore his second argument was without merit.

Federal Sentencing Discretion. *Dean v United States*, __ US __; __ S Ct __, No. 15-9260, 2017 WL 1199461, decided April 3, 2017.**(april'17).** Under federal gun laws, Dean was required to serve an added, mandatory 30-year sentence consecutive to his sentences for the predicate crimes. Dean asked the sentencing judge to consider the lengthy mandatory consecutive sentence when imposing sentence on the predicate offenses. The sentencing court held that under the terms of the federal gun law, 18 USC § 924(c), he could not. SCOTUS disagreed, stating that federal courts have long enjoyed discretion concerning the information they can consider in imposing sentence, and nothing in the gun law section restricted that discretion. A unanimous Supreme Court held that the sentence Dean requested, one day on the predicate offenses before he began serving the mandatory 30-year sentence, was permissible, and remanded for resentencing.

Federal Sentencing Guidelines, Crime of Violence, Residual Clause. *Beckles v United States,* __ US __; 137 S Ct 886 (2017)**(march'17).** Under the Armed Career Criminal Act, firearm possession sentences can be increased if a defendant has prior convictions for a "serious drug

offense" or a "violent felony." The definition of a violent felony includes the "residual clause," which covers any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." The clause was held void for vagueness by the Court in *Johnson* v *United States*, 576 US __; 135 S Ct 2551 (2015). In *Beckles*, the Court considered whether the same result should occur for an identical residual clause in the section of the Federal Sentencing Guidelines allowing enhancement as a career offender for a violent felony. The Court held that the guidelines are not subject to a vagueness challenge under the Due Process Clause as they are merely advisory.

Fines and Restitution after Plea. *People v Foster*, 319 Mich App 365; 901 NW2d 127 (2017)**(april'17).** Defendant pled pursuant to a sentence recommendation which made no mention of a fine. Because Defendant was not permitted to withdraw his plea when the trial court at sentencing imposed a $500.00 fine, the fine was vacated. As to the restitution ordered for losses caused by conduct outlined in dismissed charges, the panel sharply narrowed the supreme court's ruling in *People v McKinley*, 496 Mich 410 (2014), holding that it was permissible to order restitution for such charges so long as a defendant agreed to pay this restitution pursuant to a plea bargain. As to the restitution ordered, the court found no proportionality violation, and further ruled against Defendant's argument that the restitution ordered violated the 6th and 14th Amendments under *Apprendi v New Jersey*, 530 US 466 (2000), as restitution is not punishment.

Guidelines Departure post-*Lockridge*. *People v Walden*, 319 Mich App 344; 901 NW2d 142 (2017)**(april'17).** Defendant was convicted of voluntary manslaughter after stabbing and killing the complainant. The high end of the minimum sentencing guidelines range was 107 months. The trial court, recognizing *Lockridge*, departed from this range, and imposed a minimum sentence of 120 months. Assessing *Lockridge's* reasonableness requirement under the *Milbourn* proportionality test as dictated by *People v Steanhouse*, 313 Mich App 1 (2015), lv gtd 499 Mich 934 (2016), the majority upheld the "modest" departure. Judge Gleicher, dissenting on this point, first agreed that it was likely every judge on the court of appeals would agree with the sentence imposed given the facts of this case. However, she would have returned the case to the trial court for resentencing, stating that the trial court "failed to reference any grounds relevant to the principles of proportionality when it departed from the guidelines range," and claiming that the majority affirmed simply because in their view the sentence was appropriate here.

Habitual 4, 25 Year Mandatory Sentence. *People v Pointer-Bey*, __ Mich App __; __ NW2d __ (2017 WL 4521033, No. 333234, decided October 10, 2017)**(oct'17**). To be subject to the mandatory 25-year sentence for offender 4 under MCL 769.12(1)(a), one or more of the previous convictions must be for a *listed prior felony.* Unlike other sections of the habitual offender provisions, which allow for crimes in other jurisdictions that "would have been felonies…in this state if obtained in this state," this section requires violation of a Michigan statute specified in MCL 769.12(6)(a). Therefore, conviction of federal bank robbery cannot be used to subject a Defendant, whose prior offenses do not contain any other listed felonies, to the 25-year mandatory sentence.

Juvenile, Mandatory Life Without Parole. *People v Garay*, 320 Mich App 29; __ NW2d __ (2017)(**apr'17**). Garay, who was 16 at the time of trial, was convicted of first degree murder and

sentenced to life without the possibility of parole. Garay argued that his sentences for life without parole should be reversed because the trial court's findings and reasons for those sentences did not reflect that he was incapable of rehabilitation. To impose a sentence of life without parole for a juvenile, the prosecution must file a motion, and the trial must conduct a hearing. If the court imposes life, it must specify on the record the aggravating facts and circumstances considered in support of the sentence. "This sentence is reserved only for the rarest of juvenile offenders." Using a "a heightened degree of scrutiny," the COA found that the trial court did not properly engage in the process for imposing life without parole. The COA remanded for resentencing and ordered the court to consider the required factors and place its findings on the record, and it must also decide whether defendant is the rare juvenile offender who is incapable of reform.

Juveniles, Mandatory Life Without Parole, Retroactive Application of *Miller*. *People v Meadows*, 319 Mich App 187; 899 NW2d 806 (2017)**(march'17).** Defendant was convicted of first degree murder and sentenced to life without parole after being charged with two deaths resulting from arson committed when he was 16. After *Miller v Alabama*, 132 S Ct 2455 (2012) was ruled retroactive in *Montgomery v Louisiana*, 136 S Ct 718 (2016), MCL 769.25a(4)(c) was implemented, and the prosecution sought a term of years sentence which, under that statutory section, required a minimum sentence between 25 and 40 years, and a maximum sentence of 60 years. The CA held that the trial court's sentence of 25-45 was illegal under the statute and remanded for resentencing to a maximum of 60 years.

Juvenile Sentencing, Opportunity for Parole. *Virginia v LeBlanc*, __ US __; 137 S Ct 1726 (2017)**(june'17).** After the Virginia state courts concluded that their geriatric release program provided sufficient opportunity for parole for juvenile offenders, the Fourth Circuit granted a habeas writ to Petitioner LeBlanc, holding that the Virginia program did not sufficiently comply with SCOTUS's determination in *Graham v Florida*, 560 US 48 (2010). SCOTUS overturned the Fourth Circuit's decision, concluding that the Virginia state court did not unreasonably apply the Court's decision from *Graham*, which required that juveniles convicted of non-homicide crimes have a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. The Court held that *Graham* did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment, because that question was not presented. And it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham*'s requirement.

Lifetime Electronic Monitoring, CSC 1, Sentence Correction. *People v Comer*, 500 Mich 278; 901 NW2d 553 (2017)(**june'17**). Comer pled guilty to first-degree CSC I and then appealed his sentence. The COA vacated the sentence and remanded for resentencing. On remand, Comer was resentenced. The sentencing court did not impose lifetime monitoring at either sentencing. Later, the MDOC notified the Circuit Court that defendant should have been subject to lifetime monitoring, and the trial court resentenced defendant a third time including lifetime monitoring. Comer appealed again, asserting that the trial court did not have authority to impose the monitoring requirement after its previous errors. The issue was whether the court rules authorized the trial court to amend the defendant's judgment of sentence on its own initiative twenty months after the original sentencing, in the absence of a motion filed by any party. The MSC held that, under MCL 750.520b(2)(d), the punishment of lifetime electronic monitoring

must be imposed for ***all*** CSC I sentences (the court rejected the defense argument that under the statutory construct for lifetime monitoring only CSC I offenders who were over 17 while complainants were under 13 were subject to the mandatory lifetime monitoring requirement) when the offender is not imprisoned for life without the possibility of parole under MCL 750.520b(2)(c). The Court further held that, under MCR 6.435 and MCR 6.429, a trial court may not correct an invalid sentence on its own initiative after entry of the judgment. The trial court may only do so upon the proper motion of a party, thereby overruling *People v Harris*, 224 Mich App 597 (1997).

Lockridge, Applicability, Guidelines Departure. *People v Rice*, 318 Mich App 688; 899 NW2d 752 (2017)**(feb'17).** Defendant entered into a *Cobbs* agreement (*People v Cobbs*, 443 Mich 276 (1993)) for a sentence at the low end of the guidelines. After the trial court, in the wake of *Lockridge*, departed below the guidelines, the prosecutor appealed the sentence and the CA granted leave to appeal. The prosecution argued that because the sentence did not depend on judicially found facts, *Lockridge* did not apply and the guidelines were mandatory. The panel disagreed, holding *Lockridge* applies to all cases irrespective of the use of judicially found facts and affirmed Defendant's below guidelines sentence.

Lockridge-Steanhouse. *People v Stevens*, 318 Mich App 115; 896 NW2d 115 (2016)**(nov'16).** In this drunk driving case, where the trial court's departure rationale was substantially stated, the majority felt bound by *Steanhouse* to remand for a *Lockridge-Crosby* procedure so that the sentencing court could assess the proportionality issue concerning departure while understanding that the guidelines are not mandatory. O'Connell, dissenting, urged that *Steanhouse* was wrongly decided and sending this case back was a waste of judicial resources.

***Lockridge-Steanhouse,* and *Milbourn* Proportionality**. *People v Steanhouse*, *People v Masroor*, 500 Mich 453; __ NW2d __ (2017)(**july'17**). *Steanhouse* and *Masroor* pose questions about how to apply MSC's decision in *People v Lockridge*, 498 Mich 358 (2015). There, the MSC held that Michigan's statutory sentencing guidelines scheme was unconstitutional because it created mandatory sentence ranges based on facts that were found by a judge instead of a jury. *Lockridge* corrected the error by making the guidelines ranges non-mandatory. In *Steanhouse*, the trial court sentenced Defendant outside the state's statutory sentencing guidelines range. In a published opinion, the COA sent the case back to the trial court for sentencing relief under *Lockridge*, and ordered that any resentencing must be decided based on the test for proportionality that was described in *People v Milbourn*, 435 Mich 630 (1990). In *Masroor*, the trial judge also departed upward from the guidelines. The COA remanded for the same sentencing remedy as *Steanhouse*, but only because it was required to follow that decision. Unlike the panel in *Steanhouse*, the panel in *Masroor* would not have sent the case back to the sentencing court at all. Instead, it would have itself reviewed the departure for "reasonableness," using the federal test for reasonableness set out in *Gall v United States*, 552 US 38 (2007) instead of the *Milbourn* standard. The MSC held that the holding in *Lockridge* that rendered the guidelines advisory in all applications was reaffirmed. It then clarified that the rule of decision to be applied by the trial courts is the principle of proportionality set forth in *Milbourn*, not the federal statutory factors sought by the panel in *Masroor*. Finally, the MSC held that a remand for a *Crosby* hearing in cases involving departure sentences is unnecessary, explaining that the *Crosby* remand procedure was adopted for the specific purpose of determining whether trial

courts that had sentenced defendants under the mandatory sentencing guidelines had their discretion impermissibly restrained.

OV's 1 & 2, Use of Weapon. *People v Jackson*, __ Mich App __; __ NW2d __ (2017 WL 3160087, No. 332307, decided July 25, 2017)**(july'17**). Jackson pled guilty to an unarmed robbery which involved multiple offenders. Jackson was assessed 15 points for OV 1, aggravated use of a weapon, because a firearm was pointed toward a victim. In addition, 5 points were scored for OV 2 for use of a lethal weapon. Jackson did not have a weapon, and was acquitted of felony firearm, but his co-defendant did (the co-defendant pled guilty to armed robbery). Jackson argued OV 1 & 2 should not be scored. However, under both "if one offender is assessed points for the presence or use of a weapon, [or under OV 2 for "possessing a weapon"] all offenders are to be assessed the same number of points." The COA held that the trial court was correct in its assessment.

OV 4, Psychological Injury to Victim. *People v Wellman*, __ Mich App __; __ NW2d __ (2017 WL 3316956, No. 332429, decided August 3, 2017)**(aug'17).** Wellman was convicted of assault with intent to commit CSC, and the sentencing court assessed him 10 points for OV 4, which considers whether serious psychological injury requiring professional treatment occurred to the victim. There was no evidence that the complainant sought treatment, she did not supply a victim impact statement, and she did not explicitly testify that Wellman caused her psychological injuries. The Court held that OV 4 is appropriate when the defendant's actions caused serious injury and defined that as "having important or dangerous possible consequences" irrespective of whether treatment was sought. The COA held the scoring correct because the complainant explained that the assault was traumatic for her, and that one of the lasting effects on her was how "everyday life was harder for her now. Moreover, her body language was evidence of this difficulty. While testifying she was 'fidgeting' and nervous, not wanting to have to be in the same room as Defendant. She also testified about her 'continuing memory loss.'"

OV 4, Psychological Injury to Victim. *People v Urban*, __ Mich App __; __ NW2d __ (2017 WL 3043789, No. 332734, decided July 18, 2017**(july'17).** Where complainant feared she was going to die, and "wanted to look at pictures of her children as she died," and where her impact statement "confirmed the psychological injury," there was sufficient evidence to score OV 4 at 10 points.

OV 5, Psychological Injury to Victim's Family. *People v Calloway*, 500 Mich 180; 895 NW2d 165 (2017)**(may'17).** Defendant was sentenced to 20 to 50 years after being convicted of second degree murder on an aiding abetting theory. Although the victim's family members described psychological trauma, the court of appeals found that 15 points should not have been scored under OV 5 because there was no showing of present intent to seek professional treatment. Interpreting the statute, the supreme court reversed on this point, and held that the trial court must only find serious psychological injury that "may require professional treatment in the future."

OV 7 Aggravated Physical Abuse. *People v Urban*, __ Mich App __; __ NW2d __ (2017 WL 3043789, No. 332734, decided July 18, 2017**(july'17).** Defendant's use of guns, and his continuous threats to rape and kill the complainant, along with other behavior "designed to keep

[complainant] captive emotionally as well as physically, was sufficient evidence of "sadism, torture, or excessive brutality" to score OV 7 at 50 points in this case where Defendant was convicted of unlawful imprisonment and assault with a dangerous weapon

OV 8, Victim Asportation or Captivity. *People v Barrera,* 500 Mich 14; 892 NW2d 789 (2017)**(april'17).** Charged with CSC 1, Defendant pled to lesser offenses. The sentencing court, over objection, scored 15 points for OV 8, victim asportation or captivity, because Defendant took the victim to his bedroom where he sexually assaulted her. In a unanimous per curiam opinion, in lieu of granting leave to appeal and without oral argument, the MSC clarified that 15 points is properly scored under OV 8 where, as here, the complainant is moved to a location of greater danger. The doctrine that kidnapping cannot be charged where movement or asportation is merely incidental to an underlying offense does not apply in this context.

OV 9, Number of Victims. *People v Ambrose,* 317 Mich App 556; 895 NW2d 198 (2016)**(oct'16).** Defendant was convicted of assault on his pregnant girlfriend, and at sentencing the trial court upheld the scoring of OV 9 at 10 points for 2-9 victims. Defendant argued that the complainant's embryo could not be counted as a victim, and therefore OV 9 should have been scored at 0 points. The panel disagreed, stating that, for purposes of OV 9, placing the fetus at risk was sufficient for scoring without the need to define the fetus as a "person," and distinguished this case on that basis from the decision in *People v Jones,* __ Mich App __; __ NW2d __ (2016 WL 5480686, No. 332018, decided September 29, 2016), summarized in section D of these materials.

OV 9, Number of Victims. *People v Walden,* 319 Mich App 344; 901 NW2d 142 (2017)**(april'17).** Defendant was convicted of voluntary manslaughter after stabbing and killing the complainant. The court upheld scoring of 10 points under OV 9 because there were others in the vicinity at the time Defendant swung the knife.

OV 13, Pattern of Criminal Behavior. *People v Jackson,* __ Mich App __; __ NW2d __ (2017 WL 3160087, No. 332307, decided July 25, 2017)(**july'17**). Jackson pled guilty to unarmed robbery. In order to score 25 points for OV 13, the trial court was required to find that defendant had engaged in a pattern of felonious criminal activity by committing three or more crimes against a person (including the instant offense) within five years of the sentencing offense. Jackson argued that the trial court incorrectly scored OV 13 at 25 points by counting prior misdemeanor convictions that were attempted crimes against a person. The COA held that, under OV 13, some attempted assaultive crimes are to be considered the same as the actual crime, and Jackson's fit into that category (the statute, MCL 777.19, provides a list of all the attempted crimes that fit in this category).

OV 14, Leader in Multiple Offender Situation. *People v Dickinson,* __ Mich App __ ; __ NW2d __ (2017 WL 3495392, No. 332653, decided August 15, 2017)**(aug'17).** Dickinson was convicted for both possessing and delivering 5.68 grams of heroin to her boyfriend in prison, and the trial court assessed 10 points for OV 14 which is only proper if a defendant was a "**leader** in a multiple offender situation." Dickinson argued that her boyfriend was the leader and she was

an unsuspecting dupe. The COA held that Dickinson's conduct in sourcing, acquiring, and delivering the heroin to her boyfriend, who was locked up, was indicative of her leadership role.

OV 19, Interference with the Administration of Justice. *People v Smith,* 318 Mich App 281; 897 NW2d 743 (2016)**(dec'16).** Defendant, after shoplifting from a Meijer store, ran and hid from police, breaking into and hiding in a camper in a residential area. The panel held that the act of running and hiding from police was sufficient to constitute interference with the administration of justice under OV 19. Moreover, 15 points was warranted because breaking into the camper constituted force used against the property of another during the interference.

OV 19, Threatening Security of Penal Institution. *People v Dickinson,* __ Mich App __; __ NW2d __ (2017 WL 3495392, No. 332653, decided August 15, 2017)**(aug'17).** Dickinson was convicted for both possessing and delivering 5.68 grams of heroin to her boyfriend in prison, and the trial court assessed 25 points for OV 19, which is warranted when a defendant's criminal conduct threatens the security of a penal institution. Dickinson argued that OV 19 only applies for smuggling weapons, but the COA held that bringing in drugs threatened the safety and security of both the guards and other prisoners, and upheld the scoring.

Proportionality Review after *Lockridge*. *People v Dixon-Bey*, __ Mich App __; __ NW2d __ (2017 WL 4272135, No. 331499, decided September 26, 2017**(sep'17).** The majority agreed that a sentence of 35-70 years for second-degree murder was not proportionate to the offense or the offender. The standard is whether the trial court abused its discretion by violating the principle of proportionality. See *People v Steanhouse*, *People v Masroor*, __ Mich __; __ NW2d __ (2017 WL 3137553, Nos. 152849, 152946-8, decided July 24, 2017). The majority found that a "15-year upward departure was unreasonable and that, based on the record before us, the trial court abused its discretion by violating the principle of proportionality." Judge Boonstra, in a partial dissent, would have found the 35-year minimum sentence reasonable.

Proportionality Review after *Lockridge*. *People v Lawhorn*, __ Mich App __; __ NW2d __ (2017 WL 2607946, No. 330878, decided June 15, 2017)(**june'17**). Lawhorn argued that her sentence of one year in jail with five years probation was unreasonable given that her minimum guidelines range was 0 to 11 months. Based on the MSC's decision in *People v Lockridge*, 498 Mich. 358 (2015), a trial court may, but is no longer required to, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less. Courts review any departure (one month here) for reasonableness under the "principle of proportionality" test. "Principle of proportionality" requires a sentence "to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." The COA then described five factual bases to conclude that Lawhorn's sentence was reasonable under this test, and noted that the trial court's factual findings were not clearly erroneous.

Restitution, Accumulated Vacation and Sick Leave. *People v Turn,* 317 Mich App 475; 896 NW2d 805 (2016)**(oct'16).** Defendant was convicted of assault with intent to do great bodily harm, and sentenced as a third offender to 18 ½ to 35 years. After a restitution hearing the trial court ordered him to pay, along with other amounts, $2,153.77 for accumulated sick and vacation leave time that complainant used while unable to work. Defendant challenged this amount as not

specifically provided for by MCL 780.766(3) and MCL 769.1a. The panel disagreed, holding that general provisions of the Crime Victims Rights Act and the general restitution statute allowed for this recovery, which represented an actual loss to the complainant.

Restitution, Course of Conduct. *People v Bryant,* 319 Mich App 207; 900 NW2d 360 (2017)**(feb'17).** Charged with home invasion and felony firearm, Defendant pled to felony-firearm 2d and was ordered to pay $1,000.00 in restitution for the theft of two firearms in the home invasion. After a remand from the MSC for consideration under *People v McKinely,* 496 Mich 410 (2014), the CA upheld the restitution order, stating that the predicate felony for the felony-firearm offense was home invasion, and it was appropriate for the trial court to consider the full course of conduct of the home invasion when setting a restitution amount after Defendant's guilty plea.

Restitution, Governmental Costs of Investigation/Prosecution. *People v Wahmhoff,* 319 Mich App 264; 900 NW2d 364 (2017)**(feb'17).** Defendant crawled into a pipe at an Enbridge facility before 7 AM and announced he was not leaving until 5 PM as he wanted to disrupt Enbridge operations for a full day as a protest. Police and other first responders arrived early, and had to wait the full day until Defendant exited the pipe and was arrested. He was convicted of trespassing and resisting and obstructing, placed on probation, and ordered to pay $4,301.28 in restitution, the approximate cost of the wait time for the governmental entities that were on scene for a full day. The panel found the restitution order was an abuse of discretion as it was not specifically determined as to costs directly caused by defendant's criminal offense. Restitution cannot be ordered for the ordinary, general cost of investigation or operation incurred by governmental entities responding to crime.

Sentence Agreement, *Cobbs* and Sentencing Guidelines. *People v Smith,* 319 Mich App 1; 900 NW2d 108 (2017)**(feb'17).** Defendant reached a sentence agreement with the prosecution, as outlined in *People v Cobbs,* 443 Mich 276 (1993), that called for a sentence at the low end of the guidelines. However, the guidelines utilized by the court were higher than the guidelines as scored in the Sentencing Information Report (SIR). The panel held that, in part because Defendant did not agree on a specific sentence but in fact a sentence at the low end of the guidelines, the agreement requires a sentence at the low end of properly scored guidelines. The case was remanded for resentencing at the low end of properly scored guidelines, or the provision of an opportunity for Defendant to withdraw his guilty plea.

F. Miscellaneous

Appeal, Timing of Notice. *Manrique v United States,* __ US __; 137 S Ct 1266 (2017)**(april'17).** Defendant filed a notice of appeal after the entry of the judgment of conviction, but failed to file a second notice after a delayed restitution order was entered. The Court held that the first notice of appeal does not "spring forward" to allow appeal of a later entered restitution order. Unless a defendant files another notice of appeal after entry of the later order, he may not challenge that order on appeal if the Government objects.

Assigned Counsel Fees, Reimbursement. *People v Jose,* 318 Mich App 290; 896 NW2d 491 (2016)**(dec'16).** Defendant was convicted of criminal sexual conduct after a jury trial. This conviction was reversed due to ineffective assistance of trial defense counsel, who neglected to obtain critical evidence supporting Defendant's position that the charges were based on a false allegation. New counsel was appointed and the prosecutor voluntarily withdrew all charges through entry of a nolle prosequi order. The panel held that, although new counsel earned $900.00 before the charges were dropped, and the trial court ordered payment of that amount by the county, the court erred in ordering Defendant to reimburse that amount. MCL 768.34 clearly prohibits an order to reimburse any costs where a criminal defendant has been acquitted or "discharged…for want of prosecution." MCR 6.005(C) cannot save the reimbursement order as that provision allows contribution at the time of representation, not reimbursement after representation has ended.

Bail Bond Forfeiture. *In re Forfeiture of Bail, People v Stanford,* 318 Mich App 330; 898 NW2d 226 (2016)**(dec'16).** Defendant failed to appear in his criminal case and the trial court ordered his surety, Leo's Bail Bonds Agency Company, to forfeit the $10,000.00 bond. The panel held that the trial court failed to comply with MCL 765.28(1) by sending notice of the forfeiture a day late to the surety (notice has to be sent immediately but no later than 7 days), and therefore payment was not required.

Forfeiture, Joint and Several Liability. *Honeycutt v United States,* __ US __; 137 S Ct 1626 (2017)**(mar'17).** Two brothers were involved in a conspiracy to distribute a product used in meth production. The government sought six-figured judgments against both. One brother conceded that the other (Honeycutt) had no controlling interest in, nor profit from, the sales. The government still asked the trial court to hold Honeycutt jointly and severally liable for the profits. The Sixth Circuit agreed that the brothers, as co-conspirators, were jointly and severally liable. The Supreme Court reversed in an 8-0 decision. They held that forfeiture under section 853(a)(1) is limited to property the defendant himself acquired as the result of the crime.

Gun Rights. *Michigan Gun Owners, Inc. v. Ann Arbor Public School,* 318 Mich App 338; 897 NW2d 768 (2016)**(dec'16).** Plaintiffs brought an action against Ann Arbor Public Schools after the school system banned possession of weapons on their premises. Plaintiffs argued that the school system was a local unit of government and state law preempted any regulations adopted by the school system. Therefore it was permissible to "open carry" a weapon on school grounds. The panel disagreed and upheld the circuit court decision that the school system had the power to ban weapons on school grounds. A similar result, upholding banning of weapons by the school district, was reached in *Michigan Open Carry, Inc. v Clio Area School District,* __ Mich App __; __ NW2d __ (2016 WL 7253451, No. 329418, decided December 15, 2016)**(dec'16).**

Habeas, Procedural Default. *Davila v Davis,* __ US __; 137 S Ct 2058 (2017)**(june'17).** In this case trial defense counsel objected to a jury instruction which was given by the court and Defendant was convicted. Direct appeal counsel failed to raise the issue and state postconviction counsel did not challenge direct appeal counsel's failure in this regard. On federal habeas, Petitioner's counsel sought to extend *Martinez v Ryan,* 566 US 1 (2012) to allow state postconviction counsel's failure to raise the ineffectiveness of direct appeal counsel to act as cause to overcome procedural default. *Martinez* had modified *Coleman v Thompson's* refusal to

allow state postconviction counsel's failures to serve as cause to allow this for claims dealing with ineffectiveness of trial counsel where the state appeal process was designed to deal with those claims after direct appeal. In a 5-4 decision the Court refused to extend Martinez to allow the ineffective assistance of postconviction counsel to provide cause to excuse the procedural default of ineffective assistance of appellate counsel claims.

Habeas, Procedural Default, Death Penalty Phase. *Jenkins v Hutton,* __ US __; 137 S Ct 1769 (2017)**(june'17).** In a per curiam opinion the Court held that the Sixth Circuit erred in holding that it could review Petitioner's defaulted penalty phase instructional issue under *Sawyer v Whitley*, 505 US 333 (1992). Neither Petitioner nor the Sixth Circuit were able to show that, if properly instructed, no reasonable juror would have concluded that aggravating circumstances outweighed mitigating circumstances in this case.

Jurisdictional Defect, Successive Motion for Relief from Judgment. *People v Washington,* __ Mich App __; __ NW2d __ (2017 WL 2988940, No. 336050, decided July 13, 2017**(july'17).** On direct appeal a decade earlier, the CA remanded for resentencing. The Defendant filed an application for leave to appeal in the Michigan Supreme Court, and before that application was denied the trial court resentenced Defendant. In 2016, having lost his direct appeal and his first Motion for Relief from Judgment, the Defendant filed a successive MRJ under MCR 6.500, arguing that the trial court lacked jurisdiction to resentence Defendant while his application for leave to appeal was pending in the Michigan Supreme Court. The trial court agreed and granted resentencing. On appeal from this decision, the panel agreed with the prosecution that the issue did not meet the two exceptions allowing a successive MRJ under MCR 6.502(G): a retroactive change in the law or new evidence. However, the panel affirmed the trial court's grant of resentencing, holding that jurisdictional defects can always be corrected, and while the trial court used the wrong vehicle to cure the jurisdictional defect, this ruling "may be upheld on appeal where the right result issued, albeit for the wrong reason."

Medical Marijuana, § 4 Immunity. *People v Manuel,* 319 Mich App 291; 901 NW2d 118 (2017)**(april'17).** A Michigan State Police detective executed a warrant at Defendant's home while Defendant was buying 12 marijuana plants from another individual. A search of the premises located a total of 71 plants and a claim of over 1,000 grams of marijuana. Defendant was a qualifying patient and a primary caregiver for five patients, so he was permitted to have 72 plants and about 425 grams of usable marijuana under the MMMA. The panel upheld dismissal of charges by the Ingham County trial court, finding no clear error in the trial court's determination that the higher weight found by police was not "usable" marijuana as it was drying. The fact that the delivered marijuana was not yet locked up did not invalidate Defendant's § 4 immunity as he was in the process of receiving it and was intending to move it to a locked storage area. Nor did Defendant's purchase from a presumably unregistered individual negate his immunity. Acquiring marijuana that does not exceed the statutory limits does not rebut the presumption that Defendant was engaged in the medical use of marijuana and Defendant was not transferring marijuana to an unregistered individual.

Medical Marijuana, § 4 Immunity, Prior Felony Conviction. *People v Tackman,* 319 Mich App 460; 901 NW2d 638 (2017)**(may'17).** In three consolidated cases the court of appeals, reversing dismissal by the trial court, held that two of the Defendants were not protected by § 4

immunity because they had previously been convicted of felonies and the failure of the state to revoke their caregiver cards was irrelevant. The amounts each possessed were over the allowance for patients under the MMMA. The third Defendant, convicted of manufacturing marijuana for watering his neighbor's plants while the neighbor was away, tried to piggyback on the neighbor's immunity to avoid prosecution, but because the neighbor was one of the first two Defendants discussed above, the failure of the neighbor's immunity denied the third Defendant protection under the MMMA.

Medical Marijuana, Prosecution under Transportation Statute. *People v Latz*, 318 Mich App 380; 898 NW2d 229 (2016)**(dec'16).** MCL 750.474, passed after the MMMA was enacted, makes it a misdemeanor to transport marijuana in a vehicle unless the marijuana is inaccessible. The majority in this 2-1 opinion found the transportation statute in conflict with the MMMA and thus determined that the MMMA preempted the later statute. Since there was no dispute that Defendant was in compliance with the MMMA, he could not be prosecuted and the charges were dismissed. The dissent found no conflict but determined that if Defendant was in compliance with the MMMA he would be immune from prosecution under the transportation statute. The dissent would remand for a determination of whether Defendant was in compliance with the MMMA. There was no timely appeal to the Michigan Supreme Court.

Monetary Penalties, Return after Vacation of Conviction. *Nelson v Colorado*, __ US __; 137 S Ct 1249 (2017)**(april'17).** Petitioners Shannon Nelson and Alonzo Madden were convicted of crimes in Colorado and ordered to pay costs, fees, and restitution. After the state took a portion of these monetary penalties Nelson's convictions were reversed and she was acquitted of all charges on retrial, while Madden's convictions were reversed and vacated on direct and postconviction review and the State elected not to retry him. Colorado refused to refund the monies taken, claiming that under the State's Compensation for Exonerated Persons Act the State is permitted to keep assessments paid unless a defendant proves innocence under the Act. The Court, in a near unanimous opinion, Thomas, J. dissenting, held that Colorado's scheme was a denial of due process and ordered the funds returned.

Plea Advice, Knowing and Voluntary, Possible Sentence. *People v Winters*, __ Mich App __; __ NW2d __ (2017 WL 3043991, No. 333009, decided July 18, 2017)(**july'17**). Winters entered a no contest plea to second-degree arson and attempted arson. The prosecutor stipulated that the court misinformed Winters as to the maximum sentence he faced if he pled guilty to attempted arson. The COA held that the error was harmless because Winters was advised that his possible maximum sentence was higher than the actual maximum sentence (he was told his maximum would be 20 years when it was 10).

Plea Advice, Knowing and Voluntary, Possible Sentence. *People v Pointer-Bey*, __ Mich App __; __ NW2d __ (2017 WL 4521033, No. 333234, decided October 10, 2017)**(oct'17**). The trial court abused its discretion when it denied Defendant's motion to withdraw his plea after Defendant was not advised of the maximum possible sentence for felon-in-possession, one of eight counts charged. The case was remanded to allow the Defendant to withdraw his plea in its entirety (he pled guilty to all counts charged) or allow the plea and sentence to stand pursuant to MCR 6.310(C). Moreover, the plea proceedings were defective under MCR 6.302(B)(2) because a federal firearm conviction was used to enhance the charge against Defendant to felony-firearm

second, and the statute clearly indicates previous firearm convictions under this construct must be obtained under MCL 750.227b(1). At a minimum the sentence of 5 years is invalid and must be corrected to 2 years.

Plea Bargain, Resignation from Public Office. *People v Smith,* __ Mich App __; __ NW2d __ (2017 WL 3614229, No. 332288, decided August 22, 2017**(aug'17).** Defendant, a Michigan State Senator, became involved in an altercation with his ex-wife, which resulted in felony charges by the Wayne County Prosecutor. A plea bargain resulted in a conviction of malicious destruction of property, a ten-month jail sentence, and a five-year probationary period. The terms of the plea also required Defendant to resign his State Senate seat, and to forego running for public office during the probationary period. At sentencing the trial court voided the public office terms of the agreement as a violation of the separation of powers clause, and refused to allow the prosecution to withdraw from the plea agreement. In a 2-1 decision the CA upheld the trial court's rulings. The dissent would approve of a defendant voluntarily resigning from public office and/or forbearing future public office pursuant to terms of a plea deal. The dissent also would hold that the trial court abused its discretion when it refused to allow the prosecutor to withdraw from the plea deal and reinstate charges. **On September 11, 2017, the Michigan Supreme Court issued an order directing scheduling of oral argument and submission of supplemental briefing. __ Mich __ (No. 156353).** This order contained an extended discussion, in the form of a concurrence and a concurrence dissent, outlining a 4-3 disagreement over the refusal to expedite the case because Defendant was running for a seat on the Detroit City Council.

Pretrial Detention, Civil Action. *Ziglar v Abbasi et al.,* __ US __; 137 S Ct 1843 (2017)**(june'17).** In this complex civil litigation, six of the hundreds of illegal aliens rounded up after the 9/11 attacks filed a class action after they were held for 3-6 months in a federal facility, then deported. In a 4-2 opinion, three justices not participating, the Court reversed the 2d Circuit and held that the claims of the detainees against federal officials under *Bivens v Six Unknown Fed. Narcotics Agents*, 403 US 388 and 42 USC § 1985 (3) could not go forward.

Public Trial, Structural Error, IAC. *Weaver v Masssachusetts,* __ US __; 137 S Ct 1899 (2017)**(june'17).** Weaver was tried in a courtroom that was too small to accommodate all potential jurors. To make room for as many as possible, the trial court excluded all members of the public including Weaver's mother. Weaver did not object at the time, nor did he raise this issue on direct appeal. Five years after his conviction, he filed a secondary appeal seeking a new trial arguing that his attorney was ineffective by failing to object to the courtroom closure. He was denied. SCOTUS found that, in the context of a public trial violation during jury selection, where the error is neither preserved nor raised on direct review but is raised later via an ineffective assistance claim, the defendant must demonstrate prejudice. A public trial violation is a structural error, which "affect[s] the framework within which the trial proceeds," but does not necessarily lead to unfairness. SCOTUS, in a 7-2 decision, held that, because Weaver did not show a reasonable probability of a different outcome but for counsel's failure to object, or that counsel's shortcomings led to a fundamentally unfair trial, he is not entitled to a new trial.

Tobacco Act, Invoices and Liability, Manufacturing. *People v Shami,* 318 Mich App 316; 897 NW2d 761 (2016)**(dec'16).** The trial court erred in dismissing charges under MCL

205.426(1) of the Tobacco Products Tax Act (TPT) because that section requires a retailer to keep invoices for 4 months at the location where the tobacco is sold and Defendant here failed to comply. Moreover, contrary to the trial court's finding, individual liability accrued to Defendant because, although he was not the 'licensee,' he managed the day to day business of the store selling the tobacco. Finally, the trial court erred in dismissing the manufacturing charge against Defendant as blending different types of tobacco to create his own brand was sufficient to require a manufacturing license which Defendant did not possess. **On June 21, 2017, the MSC directed scheduling of oral argument on whether to grant Defendant's application for leave to appeal.**

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

I. Double Jeopardy

***Currier v. Virginia* (to be argued February 2018)**
Does a defendant who consents to severance of the charges against him lose the right to claim that the issue-preclusive effect of an acquittal at the first trial bars the second trial?

II. Search and Seizure

A. What Constitutes A Search—Expectations of Privacy

***Carpenter v. United States* (to be argued December 2017)**
Does the Fourth Amendment permit the government to obtain, without a warrant, historical cell phone tracking data showing the movements of a person for a long period (in this case, 127 days)?

***Byrd v. United States* (to be argued January 2018)**
Does a person who is not on a rental car contract but is driving with the consent of the renter have an expectation of privacy in the rental car?

B. The Automobile Exception

***Collins v. Virginia* (to be argued January 2018)**
Does the automobile exception permit the police to enter the curtilage (in this case, by walking up the driveway to the side of the house) in order to search a vehicle without a warrant?

III. Confessions—The Fifth Amendment Right

***Hays, Kansas v. Vogt* (to be argued January 2018)**

Does the Fifth Amendment right not to have a compelled statement used against the defendant in a "criminal case" bar the use of such a statement at a probable cause hearing?

IV. Right to Counsel--Ineffective Assistance

McCoy v. Louisiana **(to be argued January 2018)**
Is trial counsel ineffective for conceding that the defendant is guilty as charged over the defendant's objection in a "strategic" effort to obtain a lighter sentence?

V. Guilty Pleas

Class v. United States **(to be argued October 4, 2017)**
Does a guilty plea waive all challenges to the constitutionality of the statute of conviction?

VI. Post-Conviction Relief – Habeas Deference

Wilson v. Sellers **(to be argued October 30, 2017)**
Whether a habeas court should "look through" a summary state appellate court order and review the merits of the last reasoned decision on the claim instead of treating that summary appellate order as a decision on the merits.

II. Legislative Update

The following are brief summaries of key Public Acts. Much of this legislation is extremely complex, and a full understanding demands that the public acts be read completely. Copies of the legislation can be obtained at http://www.michiganlegislature.org/.

2016 PA 32 & 34, effective 6/6/16. This package updates and revises provisions regarding installation and operation of breath alcohol ignition interlock devices, and provides sentencing guidelines for violations.

2016 PA 46, effective 6/13/16. Amends the vehicle code to specify that penalties for moving violation causing death or serious impairment apply to those operating vehicles on a highway or an area open to the public, including parking lots.

2016 PA 62, effective 7/4/16. Creates the Human Trafficking Notification Act, requiring posting of notices at highway rest stops, airports, adult entertainment establishments, and properties that have been found to be a nuisance for prostitution or human trafficking, among other locations.

2016 PA's 87 & 88, effective 7/25/16. Increase penalty for assault on a pregnant woman, repeat offense, and classify as a 5-year Class E felony.

2016 PA's 89 & 90, effective 7/25/16. Establishes 93-day misdemeanor (1-year misdemeanor for repeat offenses) for intentional dissemination of sexually explicit visual material of another individual (over 18) without consent.

2016 PA 111, effective 8/8/16. Sets graduated misdemeanor penalties for maliciously damaging, destroying, or tampering with a traffic control device.

2016 PA's 125-128, effective 8/23/16. Reduces penalty for attempt to solicit another to buy/obtain ephedrine/pseudoephedrine for purpose of manufacturing methamphetamine to 1-year misdemeanor (currently a 5-year felony). Establishes a 5-year stop-sale alert for person convicted of such an attempt. Enhances penalties for manufacturing meth within 1,000 feet of a school or library.

2016 PA's 149 & 150, effective 9/7/16. Criminalizes coercing an unwilling woman to get an abortion. The definition of "coercion" set out in MCL 750.462a is imported. This act is a misdemeanor with graduated fines. If committed in the course of stalking or assault the offense is a felony with variable classification and statutory maximum depending on the underlying offense.

2016 PA's 234-236, effective 9/22/16. Requires MSP to create and maintain a public threat alert system. Establishes a felony offense for intentional false reporting of a public threat, sets up sentencing guidelines for this offense, and provides for reimbursement for expenses of a false report.

2016 PA's 242 & 243, effective 9/22/16. Allows MSP to set up pilot programs for roadside drug testing. Requires submission to preliminary oral fluid analysis, provides for admissibility of results, and establishes penalties for failure to submit.

2016 PA's 281-283, effective 12/20/16. Regulates medical marijuana sales and facilities. Allows for sale of marijuana infused products.

2016 PA's 307 & 308, effective 1/4/17. Expands exemption from prosecution for possession or use of a controlled substance for those seeking medical assistance, or accompanying another who was seeking assistance, for a drug overdose or other perceived medical emergency arising from drug use.

2016 PA's 336-338, effective 3/14/17. Allows victims of human trafficking to expunge adult convictions or juvenile adjudications for statutory and local ordinance-related prostitution offenses. Extends the Safe Harbor Law to include prosecutions of violations of local ordinances

corresponding to the prostitution statutes. Creates a 15-year felony for human trafficking crimes resulting in an individual engaging in prostitution.

2016 PA's 343 & 344, effective 3/29/17. Creates the Wrongful Imprisonment Compensation Act, allowing qualifying exonerees to receive $50,000.00 per year of incarceration. Requires MDOC to provide reentry services to those discharged because their conviction or sentence was reversed, vacated, or overturned.

2016 PA 354, effective 3/21/17. Removes the ability of a successor judge to bar parole for a parolable lifer by filing objections. The successor judge is still able to file objections. The actual sentencing judge can still block parole with objections but only if he or she is still in office.

2016 PA 357 & 358, effective 1/1/18. Changes first offense MIP from a misdemeanor to a civil infraction, but allows it to remain a "prior conviction" for driver license suspension penalty for later offenses.

2016 PA 418, effective 4/4/17. The the bill eliminates the requirement that a bond be provided by a person claiming interest in property subject to forfeiture proceedings to cover the costs and expenses of those proceedings.

2016 PA's 439-444, effective 1/4/17. Moves the Michigan Indigent Defense Commission from the judicial branch to the Department of Licensing and Regulatory Affairs.

2016 PA 480, effective 4/6/17. Amends the penal code to include, as fourth-degree vulnerable adult abuse, acts that pose an unreasonable risk of harm or injury to a vulnerable adult, regardless of whether physical harm resulted.

2016 PA's 485 & 486, effective 4/6/17. Establishes a felony offense for selling or offering to sell travel services for the purpose of engaging in prostitution or human trafficking, and provides sentencing guidelines.

2016 PA's 487 & 488, effective 4/6/17. Amends the child care licensing act to specify that, if an intentional violation of a rule promulgated under the act and in effect on January 1, 2017, causes the death of a child, the violation is punishable as second-degree child abuse. In addition, an offender's license or registration must be permanently revoked. Such a violation is included in the acts that constitute second-degree child abuse in the penal code.

2016 PA 547, effective 1/10/17. Amends sentencing guidelines regarding illegal sales under the Michigan Medical Marijuana Act.

2016 PA's 548 & 549, effective 4/10/17. Includes synthetic equivalents of marijuana in the penalties for the manufacture or delivery of marijuana, or possession with intent to manufacture or deliver, and provides sentencing guidelines for this offense.

2017 PA's 1-18, effective 6/29/17. This criminal justice reform package, spearheaded by State Senator John Proos (R – St. Joseph) was designed to limit recidivism and update parole and probation policies. The package establishes a maximum of 30 days incarceration for parolees who commit technical violations, sets up a program to standardize parole violation consequences, and allows a judge to reduce a defendant's parole term after half is completed. MDOC must develop rehab plans and programming for younger offenders. The legislation also requires data collection, additional reporting, and coordination between state departments.

2017 PA's 29 & 30, effective 8/7/17. Establishes a 5-year felony for intentionally aiming a beam of directed energy emitted from a directed energy device, including laser beam devices, at an aircraft or a moving train, and sets up sentencing guidelines for this offense.

2017 PA 34, effective 8/21/17. Removes restrictions for deferral and dismissal of prostitution related offense for victims of human trafficking.

2017 PA 41, effective 5/23/17. Clarifies that certain social media internet games are not considering gambling under the Michigan Penal Code.

2017 PA's 51 & 52, effective 9/13/17. Increases juror compensation and mileage allowance and provides additional funding to State Court Administrator for juror management programs.

2017 PA 53, effective 9/13/17. Allows expert testimony on behavior patterns of human trafficking victims in prosecutions under the human trafficking provisions of the penal code if otherwise permitted under the rules of evidence.

2017 PA 64, effective 6/30/17. Extends sunset on ability of courts to assess costs for actual court operations until 10/17/20. This allowance had been set to expire on 10/17/17.

2017 PA's 68-79, 81, effective 10/9/17. This package of bills was designed to deal with a perceived problem of genital mutilation, and provides criminal penalties and civil actions. The package extends criminal and civil SOL's, requires public education about the problem, and provides sanctions against health care workers.

2017 PA 85, effective 1/8/18. Prohibits or limits release of police body cam recordings in certain circumstances, prescribes minimum retention periods, allows agencies to charge a fee for a copy of a body cam recording, and requires law enforcement agencies to develop a written policy regarding use of cameras.

2017 PA's 86-87, effective 10/10/17. Increase penalties for certain liquor sale violations and add guidelines for a class F felony punishable by 4 years imprisonment.

2017 PA 89, effective 10/10/17. Provides that a court order is needed to conduct a PBT of a minor who does not consent. **Note that a later Public Act, signed by the Governor on 10/5/17 and effective the same day, changed the effective date of this provision to 1/1/18.**

2017 PA 95, effective 10/11/17. Provides amendments, many technical, to the CPL provisions.

2017 PA 96, effective 10/11/17. Repeals penalties for sale or possession of switchblades.

2017 PA 105, effective 7/13/17. Amends the Medical Marihuana Facilities Licensing Act to revise background check provisions.

2017 PA's 119 & 120, effective 9/20/17. Defines and regulates independent expenditure committees (IEC's) under the Michigan Campaign Finance Act and provides criminal penalties and sentencing guidelines.