TIEBER LAW OFFICE

RECENT DEVELOPMENTS IN MICHIGAN CRIMINAL LAW 2018-2019

I. Case Law

A. Fourth Amendment.

Arrest, Retaliatory, Probable Cause. *Lozman v City of Riviera Beach, Florida,* __ US __; 138 S Ct 1945 (2018)**(june'18).** Lozman filed suit under 42 USC § 1983 after he was arrested while making comments at a public city council meeting. While conceding probable cause to arrest, Lozman claimed the arrest was ordered in retaliation for his earlier speech criticizing the city. In an 8-1 decision the Court vacated the ruling of the 11th Circuit, and held that probable cause does not defeat a claim of retaliatory arrest on these facts. Lozman must still show that retaliation for his earlier speech was a but-for cause of his arrest.

Photograph and Print Procedure, Constitutionality. *Johnson and Harrison v Vanderkooi,* 502 Mich 751; 918 NW2d 785 (2018)**(july'18).** Johnson and Harrison, in separate incidents, were subjected to the Grand Rapids Police Department's emerging policy of photographing and printing (P & P) during a "field interrogation" or "stop" even though there was no probable cause to arrest. Both sued the city under, in part, 42 USC 1983. The trial court granted summary disposition to the city and the police, finding there was no showing the P & P procedure was unconstitutional. The CA affirmed in separate opinions. In a unanimous opinion as to result, the Supreme Court held that the CA erred by affirming the trial court's grant of summary disposition. Material issues of fact were raised regarding whether the police department's custom of photographing and printing individuals when there was no probable cause for arrest had become city policy. The cases were remanded to the CA for that court's determination of whether the P & P's at issue violated Fourth Amendment rights.

Search, Cell-Site Location Information, Warrant. *Carpenter v United States,* __ US __; 138 S Ct 2206 (2018)**(june'18).** Federal prosecutors used cell-site location information (CSLI), obtained under the Stored Communications Act, to pinpoint Defendant's location at the time of a series of robberies, information that substantially contributed to his conviction. In a 5-4 decision, the Court held that in light of the privacy interests at stake, a warrant supported by probable cause is needed to obtain this personal location information maintained by a third party. The showing required under the Stored Communications Act (reasonable grounds for believing the records were relevant and material to an ongoing investigation) falls short of the probable cause required for a warrant. The majority noted that exigent circumstances may support a warrantless search for CSLI information.

Search, Open View Doctrine. *People v Barbee,* 325 Mich App 1; 923 NW2d 601 (2018)**(june'18).** Police stopped next to Defendant's vehicle on a public street, illuminated the car with a flashlight, claimed to notice furtive movement, and moved into a

position from which they asserted they observed a firearm. Defendant was convicted of various firearm offenses after a bench trial and on appeal argued trial defense counsel was ineffective for failing to challenge the search and seizure. The panel, Judge Jansen concurring in the result only, upheld the seizure, concluding that Defendant "did not have a reasonable or legitimate expectation of privacy in the vehicle that was parked on a public street" and that use of a flashlight to illuminate a darkened area does not constitute a search or implicate Fourth Amendment concerns.

Vehicle Search; Probable Cause. *People v Anthony,* __ Mich App __; __ NW2d __ (2019 WL 290026, No. 337793, decided January 22, 2019)**(jan'19)**. Defendant was charged with several weapon violations after a gun and ammunition were found in his pickup truck after a search. Police approached Defendant's truck, believing it was parked in the middle of a public street. This was disputed by the trial court, who found the "stop" unlawful, and concluded there was no reasonable suspicion for police to approach the vehicle. The trial court suppressed the firearm evidence and the prosecution appealed. The majority first found that police needed no justification to approach Defendant's vehicle on a public street, even assuming it was lawfully parked. Police did not seize Defendant by pulling alongside his vehicle without engaging their overhead lights or impeding his progress, and this was not a traffic stop. Probable cause for a search was gained when the officer, once alongside Defendant's vehicle, smelled burning marijuana, and it was error to suppress the evidence. The majority held that the MMMA did not dictate that this smell failed to provide probable cause. In dissent, Judge Gleicher found that police in fact detained Defendant without probable cause based on a traffic violation that was pretextual and found to be so by the trial court.

Vehicle Stop; LEIN Information on Lack of Insurance. *People v Mazzie,* __ Mich App __; __ NW2d __ (2018 WL 5275321, No. 343380, decided October 23, 2018)**(oct'18)**. In this interlocutory appeal the prosecution contested the trial court's order of suppression after Monroe police stopped and searched a vehicle leading to discovery of drugs. The reason for the stop was LEIN information supplied by the Secretary of State indicating that the vehicle was not insured. The trial court found that the stop was unlawful because the LEIN information failed to provide police with reasonable suspicion, as it was updated by the Secretary of State only twice a month. The panel disagreed, relying on a 10th Circuit decision by now Justice Gorsuch to determine that the insurance information was not stale, and provided reasonable suspicion for the stop. The panel also disagreed with Defendant that the confidentiality provisions of MCL 257.227(4) and MCL 500.3101a(3) render the

stop unlawful. The trial court's order suppressing the evidence was reversed and the case was remanded for further proceedings.

B. Other Pretrial Matters.

Confrontation, Preliminary Exam. *People v Olney*, __ Mich App __; __ NW2d__ (2019 WL 1211501, No. 341984, decided March 14, 2019)(**march'19**). While the rules of evidence apply during a preliminary examination, the right of confrontation does not. Here, the defendant was charged with first-degree home invasion, assault by strangulation, interfering with electronic communications, and domestic violence. The complainant failed to appear at the preliminary examination. As such, and in accordance with MCL 768.81(2), the district court permitted a police officer to testify regarding statements that the complainant-declarant made as substantive evidence for the purpose of establishing probable cause. The circuit court granted the defendant's motion to quash because (1) the complainant was never declared "unavailable"; and (2) the officer's testimony violated the Confrontation Clause of the Sixth Amendment. The Court of Appeals reversed because it agreed with the government's argument that MCL 768.27c contains no requirement that the complainant-declarant be unavailable in order to admit evidence of a statement that otherwise satisfies the statutory requirement.

Double Jeopardy, Issue Preclusion, Consent. *Currier v Virginia*, __ US __; 138 S Ct 2144 (2018)**(june'18).** Defendant Currier, charged with burglary, larceny, and unlawful possession of a firearm by a convicted felon, chose to sever his trials because his prior record also consisted of burglary and larceny, and introduction of that record, allowed to prove the felon in possession charge, would likely prejudice him with respect to the instant burglary and larceny charges. After he was acquitted, Currier sought to prevent the government from trying him on the felon in possession charges on double jeopardy grounds. Minimally, he argued, the prosecution should be prohibited from litigating the instant burglary and larceny charges at his second trial on the felon in possession charge. The Virginia courts approved his conviction as a felon in possession at an unrestricted trial. In a 5-4 decision the Court held that the Double Jeopardy Clause is not violated where a defendant, under these circumstances, elects to have the offenses tried separately.

Expert, Appointment for Indigent Defendant. *People v Kennedy*, 502 Mich 206; 917 NW2d 355 (2018)**(june'18).** Wayne County Circuit Judge Craig Strong denied Defendant's pretrial request for appointment of a DNA expert in this cold case murder prosecution. In a split, unpublished decision the CA affirmed Defendant's first-degree murder conviction, finding no abuse of discretion in denial of an expert because, under *People v Tanner*, 469 Mich 437 (2003), interpreting MCL 775.15, Defendant failed to establish a "nexus" between the facts of the case and the need for an expert. A unanimous Supreme Court held that the due process analysis of *Ake v Oklahoma*, 470 US 68 (1985), not MCL 775.15 or *Tanner's* "nexus" test, governs the issue of appointment of an expert

for an indigent defendant, and to the extent *Tanner* suggests otherwise it was overruled. The MSC held that in applying *Ake's* due process analysis an indigent defendant requesting appointment of an expert must show the trial court that there is a reasonable probability that an expert would be of assistance, and that denial of an expert would result in a trial that was fundamentally unfair. The CA opinion was vacated, and the case was remanded to that court for application of this standard. On August 8, 2018 the CA granted a joint motion to remand to the trial court for expansion of the record filed by SADO's Erin Van Campen, and joined by the Wayne County Prosecutor's Office.

Fifth Amendment, *Miranda*. *People v Barritt*, 325 Mich App 556; __ NW2d __ (2018)**(aug'18).** In this interlocutory appeal brought by the prosecution, the CA, in a 2-1 decision in 2017 (318 Mich App 662), affirmed the trial court's suppression of Defendant's interrogation statements. That panel held that though 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. In September of 2017 the Michigan Supreme Court (501 Mich 872) 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)." On remand from the MSC, the trial court again granted Defendant's motion to exclude his statements, and found Defendant was in custody for *Miranda* purposes, a conclusion the majority affirmed using a detailed totality of circumstances analysis. In dissent Judge Boonstra, using the same test, would have found that Defendant was not in custody at the time of police interrogation and would reverse the trial court's grant of the motion to suppress.

Identification, Suggestive, *Wade* Hearing. *People v Craft*, 325 Mich App 598; __ NW2d __ (2018)**(aug'18).** The trial court did not err in curtailing the *Wade* hearing to testimony from lineup counsel. Two eyewitnesses testified at trial, and the defense failed to show why that testimony was insufficient for the panel to address suggestibility. Nor did the defense explain what additional witness testimony was needed on the issue. The panel further disagreed that the corporeal lineup was impermissibly suggestive, as the physical differences among the six lineup participants, which included Defendant, were "not so dramatic," and Defendant was not the only lineup participant wearing an orange jumpsuit. The latter conclusion was buttressed by the fact that key witness identification was based solely on Defendant's facial features.

Preliminary Examination, Probable Cause on Identity. *People v Fairey*, 325 Mich App 645; __ NW2d __ (2018)**(aug'18).** Shepard Fairey, an acclaimed street artist, traveled to Detroit after being commissioned to create murals on buildings. While in Detroit in 2015 he made media comments suggesting he would be "doing stuff" on Detroit streets. A

Detroit police detective found 14 Fairey posters on "mostly abandoned buildings or bridge and railroad abutments." Fairey was charged and bound over on one count of malicious destruction of a building, $20,000.00 or more (MCL 750.380(2)(a)) and two counts of malicious destruction of property (MCL 750.379). The circuit court granted a motion to quash principally because the prosecution failed to establish Fairey's identity as the "tagger." The panel affirmed, holding that identity is an essential element of every crime and to bind over the prosecution must "produce evidence that a crime was committed and that probable cause exists to believe that the charged defendant committed it." Fairey's "admissions" were nothing more than "an artist playing a street-smart scoundrel," and failed to provide probable cause of identity required for the bindover.

Statute of Limitations, Tolling While Out of State. *People v James,* 326 Mich App 98; __ NW2d __ (2018)**(oct'18)**. Defendant was charged with CSC III involving alleged sexual assaults while Defendant was visiting Michigan in the 1990's. The SOL periods expired in 2006 and 2007, and based on this the trial court dismissed the charges. However, CSC III is a crime for which the SOL is tolled while the person charged is not in the state. The CA reversed the trial court's dismissal of the charges, holding that the tolling provision applies if the individual charged is living outside the state even though the crime has not yet been reported, the individual ultimately charged is not a suspect, and no charges have been filed. The panel held that tolling in these circumstances does not violate a defendant's right to travel or to equal protection.

C. Confrontation, Counsel, and Other Trial Issues.

Counsel, Ineffective Assistance and Plain Error. *People v Randolph,* 502 Mich 1; 917 NW2d 249 (2018)**(june'18).** Testimony at a *Ginther* hearing ordered by the CA established that police searched Defendant's bags improperly, finding incriminating evidence. The CA affirmed the trial court's finding that there was no ineffective assistance of counsel for failing to move to suppress prior to trial. The panel held that since there was no plain error, Defendant could not establish his IAC claim. In a unanimous opinion written by Justice Viviano (Clement, J not participating), the Supreme Court held that plain error and IAC are separate claims with different legal elements. Moreover, analyzing those elements demands focus on different facts as to each error, and involve different records. A defendant is not precluded from establishing *Strickland* prejudice under an IAC claim simply because he cannot establish prejudice under plain error review. The CA also erred in conflating IAC and plain error standards when analyzing an evidentiary issue that involved trial counsel's failure to object to the admission of preliminary gunshot residue test results. The case was remanded to the CA for an assessment of the IAC claims under the *Strickland* standard, something the CA panel had not done when it found no plain error. There is good language in the opinion regarding the need for additional evidentiary development at a *Ginther* hearing when litigating IAC claims.

Evidence, DNA, Admissibility, MRE 702. *People v Muhammad,* 326 Mich App 40; __ NW2d __ (2018)**(oct'18)**. At Defendant's bench trial the court admitted the testimony of a prosecution expert regarding results from STRmix probabilistic genotype testing. After a masked robber fled the scene, losing a shoe, and after the MSP lab could not reliably test the shoe for DNA because it contained a four-donor mixture, the shoe was sent to

Mitotyping Technologies. After one expert at this private lab found a "degraded" DNA profile, and could not exclude Defendant, another expert, Dr. John Buckleton, Ph.D., performed statistical interpretation of the DNA profile using the STRmix software program. He concluded that the results of the STRmix analysis showed a one in one hundred billion chance that someone other than Defendant could produce the DNA profile in question. When the defense objected to introduction of this evidence, the trial court conducted a *Daubert* hearing. Despite problems with this methodology, including miscalculation of some results in Australia, the trial court, after examining *Daubert* factors, allowed admission, and the court of appeals affirmed.

Evidence, Expert Testimony, "Definite Pediatric Physical Abuse," Shaken Baby Syndrome. *People v McFarlane,* 325 Mich App 507; __ NW2d __ (2018)**(aug'18).** Defendant was sentenced to 15-25 years in prison after a jury convicted him of first degree child abuse when his 9 week old infant, who had had a prenatal stroke causing substantial brain shrinkage, exhibited subdural hematoma and retinal hemorrhage. The infant's 5-year-old half-sister testified that after Defendant had punished and spanked her she went to her room but "peeked into the living room," and saw Defendant shaking the infant. A "child abuse pediatrician" presented by the prosecution testified that the infant's injuries could have been caused by someone violently shaking her or "by throwing her onto a couch or other soft surface." This doctor testified that she diagnosed the infant with "definite pediatric physical abuse," and that this case was a "definite case of abusive head trauma." The panel found that this expert's claim that the injuries amounted to clear child abuse were "irrelevant and inadmissible as a matter of law." However, in light of several factors, including that the defense presented three doctors who refuted this testimony, and given the lack of objection, the testimony was not outcome determinative, and Defendant's conviction was affirmed.

Evidence, Expert Testimony, MRE 702. *People v Brown,* __ Mich App __; __ NW2d __ (2018 WL 5275779, No. 339318, decided October 23, 2018)**(oct'18).** The trial court did not abuse its discretion by qualifying a nurse as an expert in sexual assault trauma, despite the fact that the witness in this CSC case did not have her SANE certification. MRE 702, which governs the admissibility of expert testimony, does not require certification by the state.

Evidence, Expert Testimony, MRE 702. *People v McKewen,* __ Mich App __; __ NW2d __ (2018 WL 5304942, No. 339068, decided October 25, 2018**(oct'18).** The trial court in this assault case did not err in permitting a cardiothoracic, general, and trauma surgeon to testify, as an expert witness, that the complainant's wound was due to a stab using a knife. Unlike MCL 600.2169, which governs the standard of care in medical malpractice cases, MRE 702 does not demand that an expert be board certified in a particular area, such as forensic pathology.

Evidence, Other Acts, MRE 404(b). *People v Wilder,* 502 Mich 57; 917 NW2d 276 (2018)**(june'18).** During Defendant's trial on CCW, felon-in-possession and felony-firearm offenses, Defendant's wife offered evidence that she did not see Defendant with a gun on the date of his apprehension, to her knowledge Defendant did not own a gun, and she had no weapons in the house. The prosecutor impeached her by first asking whether she knew Defendant to carry weapons, and upon getting a denial was permitted to question her about Defendant's prior weapons convictions. The CA found no error. In a 4-3 decision the Supreme Court determined that impeachment of a fact witness with the

Defendant's prior convictions did not fall under MRE 608 or MRE 609. Assessing impeachment by contradiction under MRE 404(b), the prosecutor's tactics were improper here because the questions about whether the witness had ever seen Defendant with guns in the past did not contradict her specific trial testimony that she did not see Defendant armed on the date at issue, and that to her knowledge Defendant did not own a gun, and she had no guns in the home. Reversing the CA, the majority held that the trial court erred in permitting cross-examination of Defendant's wife on this point. The case was remanded for determination of whether the error was harmless.

Evidence, Other Acts, MRE 404(b). *People v Crawford*, 325 Mich App 14; 923 NW2d 296 (2018)**(june'18).** After the CA affirmed in an unpublished opinion, the MSC remanded to the CA for consideration of whether the it was error to admit similar acts evidence of a 2011 armed robbery in an armed robbery trial. The MSC ordered reconsideration in light of its recent decision in *People v Denson*, 500 Mich 385; 902 NW2d 306 (2017). Because the defense here involved, in part, innocent intent, the majority found that the prior robbery was admissible to show criminal intent. Dissenting in part, Judge Markey held that it was error to admit the prior robbery because the inference showing intent could only be the impermissible propensity to commit such a crime. Judge Markey, however, found the improper admission harmless.

Evidence, Other Acts, MRE 404(b), Timing and Substance. *People v Felton*, __ Mich App __; __ NW2d __ (2018 WL 4927169, No. 339589, decided October 2, 2018)**(oct'18).** Defendant, who was black, was convicted of possession with intent to deliver less than 50 grams of cocaine and heroin in Kalkaska County. After a car in which Defendant was a passenger was stopped, and drugs were found on the white driver, the driver claimed Defendant had passed the drugs to him and thus avoided conviction. At the last minute the prosecution provided notice of intent to present two items of other acts evidence under MRE 404(b). The first was testimony by a retired narcotics detective that Defendant had sold the detective drugs in 2013 in Macomb County, while the second was a claim from an illegal drug user in Kalkaska County that Defendant had recently sold him drugs. The panel found the untimely notice prejudicial, and not excused, and ruled that the other acts evidence was inadmissible procedurally. Moreover, substantively the other acts evidence was also inadmissible, requiring reversal. The prior acts did not establish a common scheme or plan, and the overwhelming import of this evidence was that Defendant had a propensity to sell drugs. Finally, the panel found that the evidence was not harmless.

Evidence, Sexual Photos of Underage CSC Complainant, Admissibility under MRE 401, 403. *People v Brown*, __ Mich App __; __ NW2d __ (2018 WL 5275779, No. 339318, decided October 23, 2018)**(oct'18).** Defendant was charged with multiple counts of CSC with an underage complainant. The prosecution sought to admit 11 of 45 sexually explicit photos found on Defendant's phone, and the trial court pared this down to 4, which the court found admissible as they were determined relevant under MRE 401 and not overly prejudicial under MRE 403. Defendant claimed on appeal that the photos were graphic and repulsive, and that because the complainant could offer testimony describing the photos their admission was more prejudicial than probative under MRE 403, and should have been excluded. The CA, after analysis, found the photos relevant. The appellate court determined that the trial court's action in admitting 4 of the 11 photos offered by the prosecution was not an abuse of discretion.

Evidence, Pregnancy, Abortion and Previous Virginity in CSC Prosecution. *People v Sharpe*, 502 Mich 313; 918 NW2d 504 (2018)**(july'18).** 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 CA, 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. *People v Sharpe*, 319 Mich App 153 (2017)**.** The Supreme Court determined that none of the evidence falls under the scope of the rape-shield statute since evidence of pregnancy, abortion and prior virginity are not specific instances of sexual conduct. Because all three evidentiary points were relevant under MRE 402, and all three points were not unfairly prejudicial when balanced against their probative value under MRE 403, the conclusion of the CA that all three points were admissible was affirmed.

Instructions, Common Meaning, Waiver. *People v Miller*, __ Mich App __; __ NW2d __ (2019 WL 208053, No. 338453, decided January 15, 2019)**(jan'19).** Defendant was tried on a charge of identity theft under MCL 445.65 for obtaining utility services using his ex-wife's name, date of birth, and social security number. The jury asked for a definition of "obtain." After meeting with counsel, both of whom agreed with this resolution, the court told the jury there was no definition available and advised the to use their general knowledge and every day experience to define the word obtain. The panel held that defense counsel's agreement waived any error. Further, there was no plain error as the word "obtain" is familiar to lay people and is within "ordinary comprehension."

Instructions, Moving Violation Causing Impairment, Causation. *People v Czuprynski*, 325 Mich App 449; __ NW2d __ (2018)**(aug'18).** Using principles of statutory construction, the majority concluded that the statute of conviction, MCL 257.601d(2), moving violation causing serious impairment of bodily function, requires a causal link between the moving violation and the injury. Because M Crim JI 15.19, covering this offense, indicates that operation of a vehicle alone must be the factual and proximate cause of the injury, it is deficient. In ruling that this was harmful error, the majority indicated that the trial court's response to a jury question, which response included a "mostly correct" answer, but which also included a reference back to the faulty standard instruction, an incorrect answer, provided no clarification. Also contributing to the prejudicial error conclusion was the fact that there was substantial evidence that the complainant, who had a 0.19 BAC and ran into the street in front of Defendant's vehicle while dressed in black at night, caused the accident. Judge Meter issued a concurrence/dissent arguing that the correct portion of the answer to the jury question was sufficient to fairly present the issue. ***On 12/2/18 the MSC ordered the parties to file supplemental briefing on harmless error, citing People v Schaefer, 473 Mich 418 (2005). The briefing, including an amicus brief by Tim Baughman for PAAM, was completed on 1/18/19.***

Instructions, Oral Presentation to Jury, Waiver. *People v Traver*, 502 Mich 23; 917 NW2d 260 (2018)**(june'18).** Defendant was convicted of felonious assault, MCL 750.82, and Felony Firearm, MCL 750.227b arising from a parking dispute with a neighbor. In a 2-1 decision, Judge Sawyer dissenting, the CA reversed the convictions, holding that the trial court's provision of written instructions was insufficient when it failed to orally charge the jury on the elements of the offenses, and when the written instructions

completely omitted the elements of the felony firearm charge. *People v Traver,* 316 Mich App 588 (2016). In a 5-2 decision the Supreme Court held that the court rules regarding instructions require that the trial court orally deliver instructions to the jury. Here, however, defense counsel's repeated approval of the instructions waived any error due to the lack of oral presentation or claimed deficiencies with the instruction on felony firearm. In separate concurrence/dissents, Justices Zahra and Viviano felt the court rules did not require that instructions be provided orally. They both urged that the rules be amended to mandate oral provision of instructions by the trial court.

Instructions, Supplemental on Omitted Counts. *People v Craft,* 325 Mich App 598; __ NW2d __ (2018)**(aug'18).** The trial court omitted instructions on two counts and after a question was raised by the jury, the court gave supplemental instructions on those counts. The panel rejected the defense argument that the prosecution waived the ability to request the supplemental instruction on the missing counts by expressing satisfaction with the original, incomplete instructions. This type of waiver is a restriction on appeal only. The defense argument that covering two counts in supplemental instructions was structural error was "creative" but "ultimately unavailing" as the jury was not misled.

Jury Verdict, Inconsistent. *People v McKewen,* __ Mich App __; __ NW2d __ (2018 WL 5304942, No. 339068, decided October 25, 2018**(oct'18).** Defendant was convicted of felonious assault and assault with intent to do great bodily harm less than murder. Citing *People v Davis,* 320 Mich App 484; 905 NW2d 482 (2017), lv gtd 910 NW2d 301 (2018), the court held that while inconsistent verdicts are generally permitted, the statutory language of these offenses make them mutually exclusive, as the felonious assault charge defines an assault "without intending…to inflict great bodily harm less than murder." The panel vacated Defendant's felonious assault conviction. Judge Gadola filed a dissent.

Support Animal for Adult CSC Complainant. *People v Shorter,* 324 Mich App 529; 922 NW2d 628 (2018)**(june'18).** In a 2-1 decision the court held that it was improper to allow a support animal to accompany an adult complaining witness in a CSC case. The majority initially found that *People v Johnson,* 315 Mich App 163 (2016), allowing a support animal for a child witness, was not controlling. Because there was no evidence that the complainant here was a "vulnerable adult" as defined in MCL 600.2163a, that section is not applicable. Allowing a support animal and its human handler to accompany an able-bodied adult complainant to "control her emotions" where the prosecution claimed that the complainant's emotional reaction at the time of the alleged act showed Defendant's guilt does not aid the truth-finding process. The jury was entitled to evaluate complainant's emotional state uninfluenced by this support. This error was harmful where there were no witnesses other than Defendant and complainant and where the only forensic evidence showed a different male's DNA present. Judge O'Brien dissented, agreeing that the trial court erred in allowing the support but finding it harmless.

D. Crimes and Offenses, Sufficiency.

Animal-Fighting, Sufficiency. *People v James,* __ Mich App __; __ NW2d __ (2019 WL 452826, No. 339504, decided February 5. 2019)**(feb'19).** Defendant, charged with two counts of animal-fighting pursuant to MCL 750.49(2)(a), was convicted and sentenced to

2-8 years in prison. Police found claimed evidence of animal-fighting at Defendant's home while serving a controlled substances warrant. This evidence included the condition of several of Defendant's dogs, and certain equipment, such as a treadmill and a "flirt" pole. Defendant argued there was insufficient evidence to convict. Defendant claimed that the pole and treadmill were used to prepare the dogs for shows. At trial a dog show judge testified for the defense that he had seen Defendant present dogs at six or more shows. The panel concluded there was sufficient evidence to establish that Defendant knowingly owned and used two of the dogs for fighting or "baiting." This evidence included the equipment Defendant possessed, the age and location of injuries to the two dogs, their exhibited temperament, and the manner in which the dogs were housed at Defendant's residence.

Defenses, Delegation, Unauthorized Practice of Health Profession. *People v Langlois,* 325 Mich App 236; __ NW2d __ (2018)**(july'18).** The prosecution brought an interlocutory appeal when the trial court refused its request to preclude Defendant's delegation defense. Defendant, a veterinarian whose license was revoked, was charged with unauthorized practice under MCL 333.16294 after he performed surgeries on animals in the company of a licensed veterinarian. After Defendant moved to quash, claiming the licensed veterinarian had delegated to Defendant the surgical tasks he performed, the prosecution moved to preclude presentation of the delegation defense to the jury. The trial court denied the motion, stating there was no statutory prohibition of surgery and it was a jury question. The panel reversed and precluded the defense on the basis that the statutory structure clearly indicated that delegation was improper where the conduct that led to suspension of Defendant's license demonstrated that he did not possess the requisite judgment of a licensee.

Federal Armed Career Criminal Act, Burglary as Predicate Offense. *United States v Stitt,* __ US __; 139 S Ct 399 (2018)**(dec'18).** Defendants were convicted of possession of a firearm in two separate cases, and sentenced to a 15 year minimum as demanded by the Armed Career Criminal Act for those with three prior violent felonies. Violent felonies include state convictions for burglary punishable by more than a year. Reversing two federal courts of appeal the Court unanimously held that the term "burglary" in the Armed Career Criminal Act includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation.

Federal Armed Career Criminal Act, Robbery as Predicate Offense. *Stokeling v United States,* __ US __; 139 S Ct 544 (2019)**(jan'19).** After Defendant was convicted of firearm possession he objected to the 15 year minimum sentence imposed under the Armed Career Criminal Act, claiming that his actions during a Florida robbery were insufficient to define it as a violent felony for ACCA purposes. In a 5-4 decision the Court disagreed, concluding that a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance qualifies as an offense using "physical force" within the meaning of the Armed Career Criminal Act (ACCA), 18 U. S. C. §924(e)(2)(B)(i).

Felony-Firearm, Predicate Offense. *People v Washington,* 501 Mich 342; 916 NW2d 477 (2018)**(june'18).** Contrary to the result reached by a 2-1 majority in the CA on this point, the Supreme Court unanimously held that the offense of maintaining a drug house can serve as the predicate felony for a felony-firearm conviction. Even though maintaining a drug house (MCL333.7405(1)(d)) is labeled a misdemeanor, it is punishable by not more than two years, and therefore it is punishable by imprisonment in a state prison. Under the

penal code offenses punishable by imprisonment in a state prison are considered felonies. If follows under the clear language of the penal code that one is guilty of felony-firearm if carrying or possessing a firearm while maintaining a drug house.

Identity Theft, Sufficiency. *People v Miller*, __ Mich App __; __ NW2d __ (2019 WL 208053, No. 338453, decided January 15, 2019)**(jan'19).** Defendant was convicted of identity theft, MCL 445.65, for obtaining utility services under his ex-wife's name and social security number. Defendant disputed "providing" his ex-wife's name and social security number to begin the service. However, the statute does not require this for conviction since *providing* another's personal information to a utility or other service provider is not an element of the offense. It was sufficient that Defendant continued to obtain the services under his ex-wife's name.

Jury Tampering. *People v Wood*, __ Mich App __; __ NW2d __ (2018 WL 6517606, No. 342424, decided December 11, 2018)**(dec'18).** Defendant became interested in a criminal case involving the charge of draining of wetlands, attended a pretrial hearing for this case, and returned to the courthouse on the day set for trial to distribute pamphlets. These pamphlets, received by two prospective jurors, among other things encouraged jurors to vote their conscience, and stated that jurors cannot be forced to obey their oath. The wetlands criminal case settled before trial and no jury was selected. Defendant was charged with misdemeanor jury tampering under MCL 750.120a(1) and was ultimately convicted by a jury. He brought a number of challenges before the Circuit Court and the CA. All were rejected by the Circuit Court and the CA majority. Defendant argued that because no panel was convened in the underlying criminal case at issue, there was no "juror" within the meaning of the statute to tamper with. Using jury definitions and statutory construction the CA majority rejected this argument, and determined that the term "juror" included those summoned for jury duty. Defendant also argued that as applied the statute violated the First Amendment. The lower courts held that this argument failed, focusing on the jury finding that Defendant attempted to willfully influence the decision of jurors in a particular case. Arguments on vagueness and overbreadth were also rejected. Judge Murphy dissented, urging that because the two potential jurors who received pamphlets were never sworn as jurors in a particular case the statute was not violated.

Murder, First Degree, Premeditated. *People v Oros*, 502 Mich 229; 917 NW2d 559 (2018)**(july'18).** 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, a panel of the CA found there was insufficient evidence to sustain the premeditated murder conviction, finding that there must be evidence of a willful, deliberate, and premeditated killing, and that all three must be found. The CA panel, after setting out four means the prosecution can use to prove this necessary element, found the evidence insufficient, and reduced the conviction 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 cover-up attempts do not suggest a pre-offense plan). The panel also reversed Defendant's felony murder conviction due to instructional error. *People v Oros*, 320 Mich App 146 (2017). In a 5-2 opinion, the MSC disagreed with the CA on the sufficiency issue, and reinstated Defendant's premeditated murder conviction. Viewing the record as a whole, and considering the evidence in a light most favorable to the prosecution, the majority found that the jury had sufficient evidence to determine that defendant had time to

evaluate his choices before taking action to kill the victim. The dissent, written by Justice McCormack, and joined by Justice Viviano, urged that the majority essentially overruled *People v Hoffmeister*, 394 Mich 155 (1975). Here the evidence merely established the possibility of premeditation and deliberation, and *Hoffmeister* correctly required evidence sufficient for a rational trier of fact to infer proof beyond a reasonable doubt that the decision to kill was premeditated and deliberated.

Sex Offender Registration, Vagueness. *People v Patton*, 325 Mich App 425; __ NW2d __ (2018)**(aug'18).** Defendant was charged with violating the sex offender registration act by violating the sections requiring reporting of all telephone numbers registered to the individual or routinely used by the individual and e-mail and instant message addresses assigned to the individual or routinely used by the individual. The trial court denied Defendant's motion to dismiss on vagueness grounds, accepting the prosecution invitation to sever the "routinely used" prohibition of the statute which had been found vague by the CA in *People v Solloway*, 316 Mich App 174 (2016). Here there was evidence that the phone was "registered to" Defendant and at least one e-mail address was specifically registered to Defendant by name.

E. Sentencing.

Costs, Attorney Fees. *People v Lewis*, __ Mich __; __ NW2d __ (2018 WL 6817063, No. 156092, decided December 27, 2018)**(dec'18).** Defendant was convicted of CSC I and other crimes and sentenced to 25-50 years in prison. The trial court's assessment of costs included $3,625.00 in appointed counsel fees, and this calculation did not include a finding of fact. Interpreting MCL 769.1k(1)(b)(iii) and (iv), the Court unanimously reversed the CA and held that the language "without separately calculating those costs" in section (iii) applied only to that section, which covered general court costs. The trial court is required to find facts and determine the cost of providing legal assistance to a defendant before this particular cost can be assessed and the case was remanded for that purpose.

Ex Post Facto Clause on Imposition of Lengthier Sentence. *People v Odom*, __ Mich App __; __ NW2d __ (2019 WL 1140323, No. 339027, decided March 12, 2019)**(march'19).** The Michigan Court of Appeals decided that a retroactive application of the Michigan Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), did not violate the ex post facto clauses of the state and federal constitutions, even though the defendant was sentenced to a lengthier term of incarceration when his case was remanded for resentencing. The Defendant had previously appealed his 210 to 420-month sentence for armed robbery, claiming that the trial court engaged in judicial fact-finding to increase the then mandatory sentencing guideline range. The Supreme Court ultimately agreed and ordered the defendant to be resentenced pursuant the reasoning followed in *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005). At resentencing, the judge determined that, based on the seriousness of the crime, he felt that the sentence was too light. The trial court upped the sentence to 360-720 months.

Juvenile Sentencing, Mandatory Life Without Parole, Jury Sentencing. *People v Skinner and Hyatt*, 502 Mich 89; 917 NW2d 292 (2018)**(june'18).** In a 4-2 opinion the MSC agreed with a 4-3 conflict panel ruling in the CA, and held that a judge, not a jury, is permitted to make the decision, under the *Miller v Alabama* standard, and in accord with the provisions set forth in MCL 769.25, to sentence a juvenile defendant to life without

parole. The majority further held that review of this decision by the trial court is for abuse of discretion, and not de novo. Both cases were remanded to the CA for review of the life without parole sentences imposed on Defendants Skinner and Hyatt under the proper standard. In dissent, Justice McCormack, joined by Justice Bernstein, would hold that because a logical reading of MCL 769.25 requires a trial court to make factual findings beyond those found by a jury to sentence a juvenile to life without parole, that statutory provision is unconstitutional.

Juvenile Sentencing, Parolable Life Sentence. *People v Williams,* __ Mich App __; __ NW2d __ (2018 WL 6252929, No. 339701, decided October 23, 2018)**(oct'18).** Under the guidelines set by the SCOTUS decisions in *Miller v Alabama* and *Montgomery v Louisianna*, Defendant's mandatory nonparolable life sentence for first degree murder was vacated, and Defendant was resentenced to 25-60 years on that conviction. Defendant was also convicted of a count of second degree murder, and was originally sentenced to parolable life on that conviction. Defendant filed a Motion for Relief from Judgment under MCR 6.500, arguing that his parolable life sentence also violated *Miller* and *Montgomery*, and the trial court agreed. The CA reversed, finding that the relevant SCOTUS decisions promised a meaningful opportunity for parole, and the original parolable life sentence provided that to Defendant. Defendant's argument that in light of *Miller* and *Montgomery* Defendant's original sentence must be considered to be based on inaccurate information and misconceptions of law was also rejected. Defendant's MRJ motion was denied.

Federal Sentencing Guidelines, Reconsideration after Reduction in Range. *Hughes v United States,* __ US __; 138 S Ct 1765 (2018)**(june'18).** Under 18 USC § 3582(c)(2), a federal sentencing judge may reconsider a sentence imposed after a "Type-C" agreement when the Federal Sentencing Commission has subsequently lowered the applicable range. Though advisory, the guidelines are the starting point for all federal sentences. In the absence of clear indication based on the record that the sentencing court would have imposed the same sentence regardless of the guidelines, the defendant is eligible for relief under 3582(c)(2) after the guidelines range has been lowered.

Federal Sentencing Guidelines, Reconsideration after Reduction in Range. *Koons et al. v United States,* __ US __; 138 S Ct 1783 (2018)**(june'18).** Unlike in Hughes, summarized above, in this case the federal sentencing court discarded the guidelines in these drug cases because the mandatory minimums were over the top end of the guidelines ranges, and then departed below the minimums due to defendants' cooperation. Thus when the Sentencing Commission reduced the base offense levels for crimes to which these petitioners pled, they were not eligible for relief under 18 USC § 3582(c)(2).

Federal Sentencing Guidelines, Reconsideration after Reduction in Range. *Chavez-Meza. v United States,* __ US __; 138 S Ct 1959 (2018)**(june'18).** The sentencing court originally imposed a sentence at the bottom of the guidelines range. After the range was lowered by the Sentencing Commission, Defendant sought relief under 18 USC § 3582(c)(2). The sentencing court granted relief but imposed a sentence that, while lower than the original, was above the new bottom of the range. The Court held that the sentencing judge's use of a form, which indicated that Defendant's motion, sentencing factors and the relevant guidelines policy statement were considered, was adequate explanation for the new sentence.

Federal Sentencing Guidelines, Scoring Error. *Rosales-Mireles v United States,* __ US __; 138 S Ct 1897 (2018)**(june'18).** Defendant's guidelines were erroneously scored, wrongly counting a state misdemeanor conviction twice, affecting the range. The Fifth Circuit refused to grant relief because Defendant had not established that the mistake would affect the "fairness, integrity, or public reputation of judicial proceedings" as neither the error nor the resulting sentence shocked the court's conscience. In a 7-2 decision the Supreme Court reversed and remanded for resentencing, holding that the standard employed by the Fifty Circuit was too strict. Generally plain error in sentencing affecting a defendant's rights is sufficient to grant resentencing.

Felony Firearm, Consecutive Sentencing. *People v Coleman/Roberts,* ___Mich App ___; ___ NW2d ___ (2019 WL 1302201, Nos. 339482 and 340368, decided March 21, 2019)(**march'19**). The government took exception to the trial court's decision to amend the judgement of sentence to make Coleman's felony-firearm sentence consecutive only to his felon-in-possession sentence. The Court of Appeals analyzed several unpublished opinions, with inconsistent outcomes, before it followed the example of the ones that concluded a felony-firearm sentence must be served consecutive with the sentence for the one predicate felony. As such, the Court of Appeals affirmed the circuit court's holding that Coleman's sentences were rendered invalid by making his felony-firearm sentence consecutive to all his other sentences.

Fines, Excessive. *Timbs v Indiana,* __ US __; __ S Ct __ (2019 WL 691578, No. 17-1091, decided February 20, 2019)**(jan'19).** Timbs pled guilty to controlled substance and theft offenses. When he was arrested Police seized a $42,000 Land Rover that Timbs had purchased with insurance money he received when his father died. The prosecution sought civil forfeiture of the vehicle, claiming it had been used to transport drugs. The trial court denied this, claiming it was excessive in light of the fact that Timbs' maximum fine for the drug offense was $10,000.00. The Indiana Supreme Court ultimately reversed the trial court, holding that the Eighth Amendment's Excessive Fines Clause does not apply to state action. SCOTUS disagreed, unanimously (Gorsuch and Thomas filed concurring opinions), and sent the case back for further proceedings in line with its ruling that the Excessive Fines Clause of the Eighth Amendment constrains the states. The Court rejected the prosecution's argument that forfeitures should not be treated as fines in this context.

***Lockridge,* Retroactivity on Collateral Review.** *People v Barnes* 502 Mich 265; 917 NW2d 577 (2018)**(july'18).** Defendant filed a successive postconviction action under MCR 6.500, arguing that he should be given the benefit of the *Lockridge* ruling and resentenced under advisory guidelines. In a unanimous opinion, after assessing the considerations for retroactive application on collateral review, the MSC determined that *Lockridge* is prospective only in this respect.

OV 13, Pattern of Criminal Behavior. *People v McFarlane,* 325 Mich App 507; __ NW2d __ (2018)**(aug'18).** Where the record showed only two offenses against a person the trial court erred in in finding Defendant had committed three felony offenses against a person within the past five years, scoring 25 points for this OV. Even though Defendant's minimum sentence was within the corrected grid after subtracting 25 points, resentencing was ordered as defense counsel was ineffective for failing to object. This issue was raised by Defendant in a Standard 4 brief.

OV's – Propriety of Scoring after Remand for Resentencing when Not Previously Scored, Other OV and General Sentencing Issues. *People v Lampe*, __ Mich App __; __ NW2d __ (2019 WL 845856, No. 342325, decided February 21, 2019)**(feb'19).** After Defendant received 10-15 years on each of two counts of CSC 3 for an assault on a thirteen-year-old boy, resentencing was ordered due to a scoring error as to PRV 5. On resentencing Defendant received 9-15 years on each count, the minimum exceeding the high end of the guidelines range (57-95 months) by 13 months. Defendant first procedurally challenged the scoring of OV's 3 and 10 because they had not been scored at the original sentencing. The court rejected this claim, stating that when a resentencing is ordered, the new sentencing is de novo, and the scoring of these two variables was not inconsistent with the previous order of the appellate court. The court then turned back substantive attacks on OV 3 (physical injury), OV 4 (psychological injury, OV 10 (exploitation of vulnerable victim through predatory conduct), and OV 11 (2 or more penetrations) after detailed factual assessment. Finally, the court concluded that the "out of guidelines" sentence was adequately explained by the trial court, and was proportionate under *Milbourn*.

Probation, Extending after Expiration. *People v Vanderpool*, 325 Mich App 493; __ NW2d __ (2018)**(aug'18).** Consistent with the MSC decision in *People v Marks*, 340 Mich 495 (1954), interpreting a prior statutory provision, the majority held that a trial court, under MCL 771.2(5), has authority to modify and extend probation at any time within the statutory maximum period, even after the original period set by the court expires. Judge Jansen, concurring in part and dissenting in part, agreed that the trial court had authority to extend Defendant's probationary period, but it was a violation of due process to do so without notice.

Sexually Delinquent Person, One Day to Life. *People v Arnold*, 502 Mich 438; 918 NW2d 164 (2018)**(july'18).** Defendant was convicted of being a sexually delinquent person (SDP) after being charged with aggravated indecent exposure. He was sentenced to 25-70 years on the SDP count (although aggravated indecent exposure is a two-year misdemeanor, the statutory sentencing guidelines designate an SDP designation with this offense as a class A felony, which resulted in Defendant here being placed in an F-III cell with a minimum range of 135-225 months, which was then doubled as Defendant Arnold was also convicted of being a fourth-offense habitual offender, allowing a minimum sentence within the guidelines range of up to 37.5 years). In *People v Campbell*, 316 Mich App 279 (2016), a case decided while a reconsideration request was pending in Defendant Arnold's case, the panel ordered resentencing to one day to life under MCL 750.335a(2)(c), holding that this sentence was mandatory for a defendant convicted of indecent exposure by a sexually delinquent person. On reconsideration the CA panel in *Arnold*, following *Campbell*, remanded this case for entry of a sentence of one day to life. After granting leave to the prosecution, the MSC overruled *Campbell* and held that the one day to life sentence was not mandatory, but instead is an optional sentence for those convicted of five crimes, including aggravated indecent exposure, while being designated a sexually delinquent person. The Court further held that if the sentencing judge chose this option, it was not modifiable and must be set at one day to life, and this sentence is an exception to the indeterminate sentencing statute's (MCL769.9(2)) ban on "life tails." Finally, recognizing the tension between the statutory one day to life option and the sentencing guidelines, now rendered advisory after *Lockridge*, the Court remanded the case

to the court of appeals to determine what sentencing options were available under the current statutory framework. The Court identified a series of questions that "may be helpful but are not necessarily dispositive" for the court of appeals and parties to focus on in reaching a determination.

F. Miscellaneous.

Breach of Sentencing Agreement. *People v Anderson,* __ Mich App __; __ NW2d __ (2018 WL 6004463, No. 339275, decided November 15, 2018)**(nov'18)**. Defendant was convicted of first degree home invasion and other crimes, and sentenced with minimums up to 81 months and maximums up to 240 months. After agreeing to testify at his brother's trial that his brother participated in the home invasion, Defendant's sentence was substantially reduced per agreement. Then Defendant testified at a motion for new trial in his brother's case that he had perjured himself at his brother's trial and the brother had not participated in the home invasion. Defendant appealed the subsequent reinstatement of his original sentences. The panel held that the trial court properly rescinded the sentencing agreement and imposed the original sentence. Defendant, through his testimony at his brother's motion for new trial, breached a contractual bargain with the prosecution and the prosecutor had the right to rescind the agreement. The case was remanded with instruction to follow the *Lockridge* procedure in relation to the original sentence.

Civil Fee Debt Blocking Criminal Legal Process. *In re Jackson,* __ Mich App __; __ NW2d __ (2018 WL 6815416, No. 339724, decided December 27, 2018)**(dec'18)**. Defendant, who is indigent, brought an action for superintending control in the CA, alleging that the circuit court failed to rule on a motion for reconsideration in his underlying criminal case. Because the request for superintending control is technically a civil action, Defendant's litigation was dismissed based on MCL 600.2963(8) because he owed fees in relation to a previous civil action. After the matter was remanded by the Michigan Supreme Court, the CA ruled that MCL 600.2963(8), as applied here, was unconstitutional, as the matter was criminal in nature for purposes of the federal constitutional right of access to the courts.

Gun Rights. *Michigan Gun Owners, Inc. v. Ann Arbor Public School & Michigan Open Carry, Inc. v Clio Area School District*, 502 Mich 695; 918 NW2d 756 (2018)**(july'18).** In the Ann Arbor case, 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. A panel of the CA disagreed and upheld the circuit court decision that the school system had the power to ban weapons on school grounds. 318 Mich App 338 (2016). A similar result, upholding banning of weapons by the school district, was reached in the Cio Area School District case by the same CA panel. 318 Mich App 356 (2016). In a 4-3 opinion the Supreme Court upheld the CA determinations in these cases. All members of the Court agreed that the legislature has not preempted the field of firearm legislation, but the dissenters felt that the school districts may well have exceeded their authority in banning what the state permits, under a theory of conflict preemption. As explained by Justice Clement's concurrence in the majority decision, the majority did not reach this argument because the parties abandoned it.

Habeas, Standard of Review. *Sexton v Beaudreaux,* __ US __; 138 S Ct 2555 (2018)**(june'18).** In a Per Curiam opinion, Justice Breyer dissenting, the Court admonished the 9th Circuit for granting habeas relief on IAC grounds relating to identification procedures. The Court determined that the 9th Circuit decision "ignored well-established principles. It did not consider reasonable grounds that could have supported the state court's summary decision, and it analyzed respondent's arguments without any meaningful deference to the state court."

Immunity, Speech or Debate Clause, Legislative Actions. *People v Courser,* __ Mich App __; __ NW2d __ (2018 WL 5275256, No. 341817, decided October 23, 2018)**(oct'18).** Defendant was charged with perjury when he allegedly lied during a House Select Committee hearing investigating alleged misconduct on his part. When the state trial court denied Defendant's motion to dismiss due to legislative immunity under Michigan's constitutional Speech or Debate Clause, Const. 1913, art. 4, § 11, the CA granted an interlocutory appeal. The CA agreed with the trial court, holding that Defendant's testimony before the legislative committee was not a legislative act, and that Defendant's conversations with legislative staff that were at the heart of the perjury charge were administrative in nature, and thus not protected under the Speech or Debate Clause.

Medical Marijuana, § 4 Immunity, Usable v Unusable MJ. *People v Mansour,* 325 Mich App 339; __ NW2d __ (2018)**(july'18).** In *People v Manuel*, 319 Mich App 291; 901 NW2d 118 (2017) the CA upheld dismissal of charges under § 4, despite the total weight exceeding limits under that section, 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. In *Mansour,* the panel determined that the *Manuel* court failed to take into account the "second prong" of the analysis in an earlier case, *People v Carruthers*, 301 Mich App 590; 837 NW2d 16 (2013), which essentially states that possession of any amount of unusable marijuana will defeat a § 4 immunity claim. The panel affirmed the trial court's order denying Mansour's motion to dismiss under § 4 of the Michigan Medical Marijuana Act ("MMMA"), MCL 333.26421 et seq.

Motion for Relief from Judgment, Newly Discovered Evidence. *People v Johnson & Scott,* 502 Mich 541; 918 NW2d 676 (2018)**(july'18).** Defendants were convicted of first-degree felony murder and other crimes at a jury and a bench trial in Wayne County Circuit Court before Judge Prentis Edwards. The murder occurred in 1999. The convicting evidence consisted of testimony from two individuals (Burnette and Jackson) who were in the neighborhood at the time of the shooting and implicated both Defendants. In one of a series of motions for relief from judgment (MRJ) under MCR 6.500, Johnson asserted recantation by Burnette and Jackson, Burnette directly, and Jackson through a statement by a relative that he had lied at both trials. This motion was denied. In a later MRJ filed by Johnson, and in Scott's first and only MRJ, both raised testimony by one of the children (Skinner) of the victim, who was 8 years old at the time of the murder and was in a vehicle with his mother, the victim, when the shooting took place. Skinner attested that neither defendant was the shooter. The trial court and the CA denied relief to both Defendants without a hearing. The Michigan Supreme Court then remanded both cases to the CA for consideration as on leave granted, and further directed that a hearing be provided in the trial court. After an evidentiary hearing the trial court and the CA again denied relief. In a 4-1 decision, Justices McCormack and Wilder not participating, the Supreme Court reversed and granted new trials to both Defendants. The majority held that Skinner's

testimony would make a different result probable on retrial, and met the standards for grant of a new trial due to newly discovered evidence. Importantly the majority determined that, though considered and rejected in a separate and earlier MRJ brought by Defendant Johnson, the recantation evidence as to Burnette and Jackson could be considered in assessing whether Skinner's testimony would make a different result probable on retrial.

Plea Bargain, Resignation from Public Office. *People v Smith,* 502 Mich 624; 918 NW2d 718 (2018)**(july'18).** 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. *People v Smith,* 321 Mich App 80 (2017). The Supreme Court, in a series of varied opinions concurring and dissenting, held 1) that part of the CA opinion regarding resignation from public office was vacated as the issue was moot when it reached the CA; 2) it was unnecessary to address the separation of powers argument in relation to the bar-to-office provision of the plea agreement as this provision violated public policy; and 3) the prosecutor should have been permitted to withdraw from the plea agreement because one of its key provisions, the bar-to-office provision, was voided.

Plea, Clarity of Sentencing Agreement. *People v Brinkey,* __ Mich App __; __ NW2d __ (2019 WL 637847, No. 342419, decided February 14. 2019)**(feb'19).** Defendant pled to OWI 3d and minor traffic offenses with an understanding that he would be sentenced pursuant to recommendation. When the trial court announced he could not abide the recommendation Defendant withdrew his plea. At a later pre-trial hearing Defendant again pled, this time with a "*Cobbs* cap," which limited the minimum sentence to 2 years. After Defendant was sentenced to 2-25 years imprisonment, he again tried to withdraw his plea and was rebuffed by the trial court. After assessing the pertinent court rules and case law, the panel held that the trial court failed, at the second plea hearing, to assure a voluntary and understanding plea, particularly with regard to sentencing consequences, under MCR 6.302. The case was remanded to allow plea withdrawal.

Plea Waiver, IAC for Failure to File Appeal. *Garza v Idaho,* __ US __; __ S Ct __ (2019 WL 938523, No. 17-1026, decided February 27, 2019)**(feb'19).** Defendant pled guilty in two Idaho felony matters and signed waivers of his right to appeal in both. Nonetheless, Defendant repeatedly requested that his attorney file a notice of appeal. His attorney refused, pointing to the waivers. The Idaho courts affirmed, holding that the SCOTUS decision in *Roe v Flores-Ortega*, 466 US 668 (2000), did not apply due to the appeal waivers. *Flores-Ortega* held that it was ineffective assistance of counsel to fail to file a notice of appeal when requested to do so by the client, and prejudice is presumed. In *Garza,* in a 6-3 opinion, SCOTUS disagreed with the Idaho courts and found that simply filing a notice of appeal does not breach the plea agreement, despite the waivers. There

may indeed be issues outside the scope of the waivers. The presumption of prejudice applies, and Defendant's appeal rights were restored.

Plea Withdrawal, SORA Consequences. *People v Coleman/Roberts*, ___Mich App ___; ___ NW2d ___ (2019 WL 1302201, Nos. 339482 and 340368, decided March 21, 2019)(**march'19**). In these companion cases, Ernest Coleman and Lillian Roberts both pleaded guilty to various counts for their roles in the kidnapping, torture, and ultimate murder of a 13–year–old boy. Roberts appealed the trial court's denial of her motion to withdraw her plea. She successfully petitioned the court to withdraw her guilty plea to unlawful imprisonment based on her attorney's failure to advise her of the plea consequences. However, the request to withdraw her plea as a whole was denied because the trial court treated the plea-based convictions as severable. The government conceded the trial court's error; the Court of Appeals vacated the trial court's order and remanded to allow Defendant's withdrawal of her entire plea.

G. SCOTUS PREVIEW

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I. Double Jeopardy

***Gamble v. United States* (argued December 5, 2018)**

Should the Court overrule the "separate sovereign" exception to the Double Jeopardy Clause?

II. Search and Seizure

A. Warrant Exceptions

***Mitchell v. Wisconsin* (to be argued April 23, 2019)**

Does a law allowing the police to draw blood from an unconscious motorist create an exception to the warrant requirement?

B. Investigatory Stops and Reasonable Suspicion

***Kansas v. Glover* (to be argued November 2019)**

Absent any information to the contrary, does an officer have reasonable suspicion to believe that the registered owner of a vehicle is the person who is driving it?

III. Right to an Impartial Jury—*Batson* Challenges

***Flowers v. Mississippi* (argued March 20, 2019)**

In a case in which prior convictions had repeatedly been overturned because the prosecutor committed *Batson* violations, did the Mississippi Supreme Court correctly apply *Batson* this time by crediting the prosecutor's race-neutral reasons to strike five of the six potential black jurors?

IV. Right to a Unanimous Jury

***Ramos v. Louisiana* (to be argued October 2019)**

Does the Fourteenth Amendment fully incorporate the Sixth Amendment right to a jury trial, including the requirement of a unanimous verdict?

V. Right to Present a Defense

***Kahler v. Kansas* (to be argued October 2019)**

May a state completely abolish the insanity defense?

VI. Right to Counsel--Ineffective Assistance

***Garza v. Idaho*, 139 S.Ct. 738 (2019)**

The presumption of prejudice from *Roe v. Flores-Ortega* applies even when counsel refuses the defendant's request to file a notice of appeal because the plea agreement included an appeal waiver.

VII. Right to a Unanimous Jury

***Ramos v. Louisiana* (to be argued October 2019)**

Does the Fourteenth Amendment fully incorporate the Sixth Amendment right to a jury trial, including the requirement of a unanimous verdict?

VIII. Sentencing and Punishment

A. Excessive Fines

***Timbs v. Indiana*, 139 S.Ct. 682 (2019)**

The Fourteenth Amendment incorporates the Eighth Amendment Excessive Fines Clause against the states and thereby may limit excessive civil and criminal forfeitures.

B. Mandatory Minimums—the *Apprendi* Rule

***United States v. Haymond* (argued February 26, 2019)**

Does a federal statute violate the Fifth and Sixth Amendments right to a jury trial by requiring a judge to impose a mandatory minimum term of re-imprisonment upon the judge's finding, by a preponderance, that a defendant on supervised release has violated the terms of that release by committing a specified new crime?

C. Juvenile Sentencing—the *Miller v. Alabama* Rule

***Mathena v. Malvo* (to be argued October 2019)**

Did *Montgomery v. Louisiana*, which held that *Miller* applied retroactively to cases no longer on direct review, also expand *Miller* to apply to cases in which juveniles received life without parole under sentencing schemes that did not require that sentence?

Last updated April 1, 2019

II. Legislation

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/.

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.

2017 PA's 152 & 153, effective 2/6/18. Delays until 10/1/2021 the date on which BAC for OWI will increase from .08 to .10 and continues certain guidelines scores for .08 through that date.

2017 PA 160, effective 1/1/18. Recently a first offense for Minor in Possession (MIP) has been changed to a civil infraction (see 2016 PA 357 & 358 above). In order to better make this determination this act requires an abstract of court record for finding of responsibility or admission of responsibility in juvenile court for MIP to be sent to the Secretary of State.

2017 PA's 161-163, effective 2/11/18. Requires certification by SCAO of certain specialty courts, such as drug treatment courts and veterans treatment courts.

2017 PA 174, effective 2/19/18. Allow notice of failure to appear to be served on surety by first class mail or e-mail.

2017 PA 191, effective 3/7/18. Currently the MDOC cannot employ anyone convicted of a felony. This act modifies that prohibition under certain circumstances and after following strict procedures.

2017 PA 194-195, effective 3/13/18. Continues immunity for prostitution related offenses for police officers investigating prostitution offenses, but does not allow acts of penetration under this immunity.

2017 PA 235, effective 1/1/18. Modifies time frames for driver license suspension for first offense MIP violations, which are now classified as a civil infraction.

2017 PA 241, effective 3/21/18. This act would add retail fraud, dealing in stolen or embezzled property or motor vehicles, and failure to make a court-ordered court appearance to those crimes which may require court ordered reimbursement for law enforcement costs.

2017 PA's 246-255, effective 12/27/17, with some provisions effective 3/2/18. Opioid reform package, including a provision requiring parental authorization before issuing a prescription for opioids to a minor, and another requiring review of a patient's prescription history before prescribing opioids.

2017 PA's 256-259, effective 3/28/18. These acts update licensing provisions for childcare facilities in line with revised federal standards and make changes to the sentencing guidelines to reflect these revisions.

2017 PA's 265-267, effective 3/28/18. Covering only a handful of offenders, these provisions abolish the mandatory life sentence without parole imposed for repeat drug offenders, create a mechanism allowing parole eligibility after 5 years for those offenders currently still serving on these repeat offenses, and revise sentencing guidelines to reflect the changes.

2018 PA 5, effective 4/26/18. Expands MSP director's authority to confer arrest powers on security personnel protecting state-owned or state-leased buildings.

2018 PA 10, effective 1/26/18. Amends the Medical Marijuana Facilities Licensing Act, and further defines the interaction between the Department of Licensing and Regulatory Affairs and municipalities regarding medical marijuana facilities.

2018 PA's 27-30, effective 5/22/18. This package of bills repeals Michigan's current explosives law, and adopts federal regulations regarding handling and permitting for explosives. Violations are punishable by a two year misdemeanor and sentencing guidelines are provided.

2018 PA's 43-50, effective 3/1/18 and 3/31/18. Accelerates the phase out of driver responsibility fees, provides for debt forgiveness, and offers participation in a workforce training payment program as an alternative to payment of the fees.

2018 PA's 65-67, effective 6/2/18. Provides for destruction of all biometric data and other materials, and removes LEIN information, for a person who was falsely accused of a crime and arrested.

2018 PA's 95 & 96, effective 7/1/18. Prohibits possession of ransomware with intent to use or employ it on a computer or network without authorization. Sets punishment as a three-year felony and provides guidelines.

2018 PA 98, effective 4/2/18. Allows a higher percentage of oleoresin capsicum, the active ingredient, in spray or foam pepper spray used for self-defense and by law enforcement agencies. Allows inclusion of an ultraviolet dye for identification purposes.

2018 PA 99, effective 7/1/18. Restricts court authority over loss of driver's license privileges imposed by the Secretary of State for certain offenses.

2018 PA 102, effective 7/4/18. Expands the databases into which law enforcement personnel must enter data regarding missing persons and unidentified bodies.

2018 PA 107, effective 7/4/18. Classifies tianeptine sodium, approved in other countries for treatment of major depressive disorders, but unscheduled for use in the United States, as a schedule 2 controlled substance (high potential for abuse). This drug is claimed to achieve an opioid-like high in sufficient doses.

2018 PA 119, effective 7/25/18. Amends the human trafficking chapter of the penal code to specify that "coercion" would include facilitating or controlling an individual's access to a controlled substance.

2018 PA 124, effective 12/31/18. Amends the sentencing guidelines to conform to repeal of sections of the laws governing elections.

2018 PA 136, effective 8/8/18. Prohibits sale or distribution of nitrous oxide to person under 18 and establishes civil fine.

2018 PA 142, effective 8/8/18. Requires successful completion of Michigan Youth Challenge Academy to be considered when determining whether to set aside juvenile adjudication.

2018 PA's 144-146, effective 8/8/18. This package of bills prohibits those convicted, or adjudicated in the juvenile system, for sexual misconduct from attending the same school as the complainant.

2018 PA 147, effective 8/14/18. In response to *People v Dunbar*, 499 Mich 60 (2016), the legislature determined that vehicles whose license plate is blocked by a device like a tow ball, bike rack, removable hitch, or objects carried in these devices, do not violate the Michigan Vehicle Code's proscription of obscured license plate.

2018 PA 148, effective 8/14/18. Michigan currently has a six-year SOL for armed robbery under the catch-all provision. This act expands the statute of limitations to ten years for RA, and the ten years runs from when the offense is committed OR, if the offense is reported to police within one year and the perpetrator is unknown, from the point that the perpetrator is identified by his or her legal name.

2018 PA 149, effective 8/14/18. Allows county sheriff to release prisoners on medical probation or medical release under certain circumstances, and permits release of prisoners by the county if their life expectancy is less than six months.

2018 PA 153, effective 5/23/18. Requires adult and juvenile defendants be present during victim impact statement at sentencing or juvenile disposition.

2018 PA's 182-183, effective 10/10/18 (182) & 6/12/18 (183). Relaxes SOL for juvenile complainants in CSC cases, allows SOL to run after identification where DNA is involved, and extends SOL in civil cases to recover damages for criminal sexual conduct under the RJA.

2018 PA's 186-189, effective 9/11/18. This package prohibits promotion of or participation in pyramid schemes, sets penalties, and defines involvement of attorney general.

2018 PA 212, effective 9/24/18. Adds persons whose license is suspended or revoked by another state to statute punishing causing death or serious bodily impairment while driving on revoked/suspended license.

2018 PA 214, effective 12/23/18. Amendments to Michigan Indigent Defense Act, primarily concerning financial coverage by the state and local units of government.

2018 PA 282, effective 9/27/18. Permits use of courtroom support dog by children or vulnerable adults under certain circumstances.

2018 PA 283-285, effective 9/27/18. Repeals crime of "false protest" regarding damage to marine vessel (MCL 750.106) (essentially insurance fraud).

2018 PA 286, effective 6/29/18. Repeals crime of improperly selling or using animals permanently unfit for work (MCL 750.59).

2018 PA 339, effective 12/12/18. Revises parole process, specifically requiring use of a list of circumstances constituting substantial and compelling *objective* reasons when denying departure from parole guidelines in the case of a prisoner with high probability of parole.

2018 PA's 343 & 344, effective 1/14/19. Allows witness statements to be used for training in another county with nondisclosure agreements signed by trainees, and with consent of non-offending parent or legal guardian for use of statements of minors.

2018 PA 370, effective 3/17/19. Expands circumstances under which certain individuals could make victim impact statements if victim were deceased, mentally incapacitated or consents to the designation.

2018 PA 371, effective 3/17/19. Includes sexual abuse, assault, or rape among the harm or acts covered by the Student Safety Act for which the public may submit a report to the Attorney General.

2018 PA 372, effective 3/1/19. Allows evidence of a prior sexual assault to be admitted in a prosecution for sexual assault under MCL 768.27b, including sexual assaults committed over ten years prior to the charged offense under certain circumstances.

2018 PA's 373, 374 & 375, effective 3/17/19. Increases penalties for certain child sexually abusive material offenses, provides a mandatory minimum sentence for repeat offenders, and provides guidelines.

2018 PA 391, effective 3/19/19. Exempts person with disability from need for drivers license for power-driven mobility device unless driven on city streets/highways.

2018 PA's 435, 436 & 437, 548-551, effective 3/21/19 and 3/28/19 This package of bills requires involvement of law enforcement in planning and preparedness, developing model practices, and even construction by school districts to ensure student safety. Creates a school safety commission within the Department of State Police.

2018 PA 442, effective 3/21/19. Restricts the state, other than law enforcement, from using drones to gather evidence or information except under certain circumstances.

2018 PA 443, effective 3/21/19. Makes revisions to membership on the Michigan Indigent Defense Commission.

2018 PA's 444, 445, 446, 468 & 469, effective 3/21/19, 3/27/19 & 3/29/29. Criminalizes certain operations with drones, including interfering with corrections or law enforcement facilities. Expands the definition of public official, and includes corrections officers, in outlining crime of interference with officials by use of drones, and provides sentencing guidelines

2018 PA 448, effective 3/21/19. Amends penal code to include railroad police officer in the definition of peace officer.

2018 PA's 452 & 652, effective 3/21/19 & 3/28/19. Enhances penalties for animal cruelty and provides guidelines.

2018 PA's 457 & 528, effective 3/27/19 & 3/28/19. Criminalizes "cyberbullying" as a misdemeanor and adds felony offenses for a continuing pattern causing injury (5 year felony) or death (10 year felony) and provides guidelines.

2018 PA 461, effective 3/29/19. Revises provisions for disposition of animals involved in animal fighting offenses and provides for costs.

2018 PA's 525 & 526, effective 3/28/19. Increases payments to health care providers who conduct sexual assault medical forensic exams from $600 to $1,200 under the Crime Victim's Compensation Act, and provides direction for expenditures under the Sexual Assault Victims' Medical Forensic and Treatment Act.

2018 PA 531, effective 3/28/19. Adds educational requirement for a prisoner to obtain a certificate of employability from MDOC and removes four year limit for validity of the certificate.

2018 PA's 532 & 637, effective 3/28/19. Provides misdemeanor offense for threatening violence at a school, and a ten year felony if threat is accompanied by an overt act toward completion, or with specific intent to carry out the threat, and provides guidelines.

2018 PA's 537 & 587, effective 3/28/19. Refines elements and penalties for having sex while AIDS infected, and provides revised guidelines.

2018 PA 576, effective 12/28/18. Extends for 4 years, through 1/12/23, the Criminal Justice Police Commission, which researches, and makes recommendations for alterations to, the sentencing guidelines.

2018 PA's 582 & 583, effective 1/1/19 & 12/28/28. Criminalizes operating a marijuana facility without a license and provides guidelines.

2018 PA's 590, 591 & 592, effective 3/28/19. This package establishes juvenile mental health courts.

2018 PA 617, effective 3/28/19. Allows law enforcement to initiate investigation of possible financial neglect or abuse of a vulnerable or elder adult after responding to a complaint of physical abuse.

2018 PA 620, effective 12/28/18. Establishes a five year felony for election forgery, defined as making, filing or publishing a false document, or a document with false signatures, with the intent to defraud, and provides guidelines.

2018 PA's 650 & 661, effective 12/28/18. Amends the Michigan Election Law to provides misdemeanor and felony penalties for various forms of fraud involving petitions, and provides guidelines.

2018 PA 657, effective 3/28/19. Provides for court ordered assessment for an alcohol dependence diagnosis, and to determine whether an individual would benefit from MAT (medication-assisted treatment), for those with two or more prior OWI related convictions.