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May a Prosecutor Ethically Imply to Jury that Drinking Driver has Tolerance to Alcohol?

The goal of this article is to help defense attorneys prevent prosecutorial misconduct in cases involving the misuse of alcohol, such as those involving allegations of intoxicated driving. In such cases, prosecutors often, though likely by accident, commit misconduct during trial when they suggest to a jury that the accused is an “experienced drinker,” can “hold his liquor,” or to in any other way suggest or imply that the defendant has developed tolerance to alcohol. As will be shown below, these statements or suggestions are not supported by the scientific literature and therefore are substantially misleading to the fact-finder.

What is Prosecutorial Misconduct?

In *Berger v. United States*, the Supreme Court set forth the role of a prosecutor in a criminal case. *Berger* indicates that the government’s interest in a criminal prosecution “is not that it shall win a case, but that justice shall be done,” and that it is therefore a prosecutor’s duty “to refrain from improper methods calculated to produce a wrongful conviction [even] as it is to use every legitimate means to bring about a just one.”¹ The responsibility to ensure justice rather than conviction is reflected also in the ABA model rules of professional conduct for prosecutors.²

In the decision, the Court set forth a now incomplete list of possible misconduct at the defendant’s trial including:

- misstating the facts in cross-examination of witnesses;
- putting words not said into the mouths witnesses;
- suggesting by his questions that proofs were made that were not;
- pretending to understand that a witness had said something which he had not said;
- assuming prejudicial facts not in evidence;
- bullying and arguing with witnesses; and
- conducting himself in a thoroughly indecorous and improper manner.

Other things have since been added to this list, including:

- misstating the law in argument to the jury (by implication misstating the science would be misconduct as well).³

The prosecutor should refrain from making any argument that would divert the jury from its duty to decide the case on the evidence.⁴ Making a statement known to be false constitutes “overstepp[ing] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.”⁵ Providing the following information to a prosecutor in advance of trial, in a letter or in a motion, means that any statements or inferences about a defendant’s tolerance to alcohol are no longer “accidental,” but instead are “known to be false.”

The Existence of Behavioral Tolerance to Alcohol is not Supported by the Scientific Literature.

Before looking at the literature itself, it’s helpful to understand how different words are used and defined. In this context, “tolerance may result from two separate mechanisms; dispositional (or metabolic) and functional.”⁶ Functional tolerance is a synonym for behavioral tolerance.

The expression “behavioral tolerance” often is used simply to refer to a drug’s decreased potency in affecting a specified behavior after repeated or continuous exposure to the drug.⁷ On the other hand, with “metabolic tolerance, the drug is metabolized or inactivated at an increased rate after chronic administration.”⁸ The range of metabolic tolerance, or “burn rate” of alcohol, is .08 to .35.⁹ One study showed that the mean burn rate for drunk drivers was .19, while the range was .09 - .29.¹⁰

The easiest way to think of the difference between behavioral and metabolic tolerance is to think of it this way; metabolic tolerance will dictate how many drinks it takes to get to a given bodily alcohol level (BAC). Behavioral tolerance, to the extent that it exists, will dictate how a person behaves at that BAC.

When a prosecutor says a person has become tolerant to alcohol, she presumably means behaviorally tolerant, though it’s unlikely she understands the distinction. This should be true though because metabolic tolerance is rarely an issue in a drunk driving trial. If a person exhibits a BAC of

.20, then one would expect he or she to behave like a person with a .20 BAC. If a person appears “sober” at a .20, then a prosecutor may argue that it’s because of tolerance. While this may appeal to common sense and experience, it’s very simply wrong. If the statement is “knowingly” wrong, then it can amount to misconduct.

A recent study¹¹ on this issue longitudinally examined alcohol-induced psychomotor performance impairment over a 5–6-year interval in habitual heavy and light drinkers who were followed from early to mid-adulthood. The resulting science journal article has this to say about behavioral tolerance to alcohol:

The theory of behavioral tolerance to alcohol posits that greater experience with drinking to intoxication leads to less impaired cognitive and psychomotor performance. However, the degree to which behavioral tolerance develops or changes over time in adults due to repeated heavy alcohol drinking has not been clearly demonstrated.

Behavioral tolerance of humans to alcohol is also complicated. Chronic alcohol use kills white brain cells, and this should lead to motor and cognitive dysfunctions. However, the brain makes up for these defects by essentially changing or re-wiring the circuits, effectively “borrowing” brain power from other undamaged areas of the brain.¹² Scientists call this “compensatory recruitment.”

The study found that heavy drinkers (HDs) showed some behavioral tolerance as it relates to fine motor skills, but that they actually had little or no behavioral tolerance on tasks requiring more complex motor processing skills, frontal lobe-mediated executive processing of short-term memory, precisely the kinds of things necessary to properly perform roadside sobriety tasks.¹³

The study concludes:

In sum, this study provided evidence of heavy drinkers’ acquired behavioral tolerance over a 5-year period on a task of fine motor speed but not on a cognitively more complex task requiring motor speed but also executive functioning skills of encoding, set-shifting, and short-term memory. Our unique longitudinal dataset enabled elucidation of the changes accompanying persistent excessive drinking in humans, with results showing that neurobehavioral

skills associated with frontal lobe functioning are less likely to undergo acquired behavioral tolerance in excessive drinkers than are fine motor skills.

How to Approach this Issue at Trial

It is likely that most prosecutors do not set out to obtain a conviction through misconduct. Furthermore, it is likely that those who make these arguments honestly believe them to be true. Since they are not, the first thing to do is to make prosecutors aware of this issue, which is two-fold. First, it assumes facts not in evidence because to reach behavioral tolerance one must be a heavy drinker. This is a fact that would almost never be in evidence in a criminal case. Second, as we have seen, this argument is not supported by the scientific literature. Therefore, it may be possible to prevent this form of misconduct by simply educating the prosecutor. This can be accomplished by simply furnishing the prosecutor with a copy of the referenced article in advance of trial.

A second option would be to file a motion with the court asking the judge to order the prosecutor not to make these arguments. This option should rarely be necessary after pursuing option one, which is education. Finally, be prepared to make an objection at trial, and when necessary, to ask for a mistrial. Failing to do so may mean that the tables are turned, and instead of prosecutorial misconduct, the defendant now has a claim for ineffective assistance.

by Patrick T. Barone

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Birmingham and Grand Rapids, the Firm exclusively handles DUI cases, often representing the accused Health Care Professionals. Since 2009, the Firm has been included in US News & World Report's America's Best Law Firms. Mr. Barone has an "AV" rating from Martindale-Hubbell, is rated "Seriously Outstanding" by Super Lawyers, and "Outstanding/10.0" by AVVO. Find him on the web: www.BaroneDefenseFirm.com.

Endnotes

1. *Berger v. United States*, 295 U.S. 78 (1935).
2. ABA Standard 3- 1.2(c). The Function of the Prosecutor.
3. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).
4. ABA Standard 3-5.8(d). Argument to the Jury.
5. *Berger v. United States*, 295 U.S. 78, 84 (1935).
6. Garriott, Manno, *Medicolegal Aspects of Alcohol*, Fifth Edition, Ch. 2, pg. 39 (2008).
7. *Encyclopedia of Drugs, Alcohol, and Addictive Behavior*, The Gale Group Inc., 2001.
8. Garriott, Manno, *Medicolegal Aspects of Alcohol*, Fifth Edition, Ch. 2, pg. 39 (2008).
9. Jones, *Id.* Ch. 3, pg. 88.
10. *Id.* at 89.
11. Brumback, et. al, Alcohol-induced performance impairment: a 5-year re-examination study in heavy and light drinkers, *Psychopharmacology*, February 2017.
12. *Id.*
13. *Id.*

Citizens Alliance on Prisons and Public Spending (CAPPS)

Speaker Announces Mental Health Focus

On July 17, House Speaker Tom Leonard (R - District 93) announced a bipartisan task force, C.A.R.E.S. (Community, Access, Resources, Education, and Safety). Reps. Hank Vaupel (R-District 47) and Klint Kesto (R - District 39) co-chair the 14-member task force.

In the last newsletter, we reported on the July 31 C.A.R.E.S. Task Force hearing hosted at the Livingston County EMS building in Howell.

The House C.A.R.E.S Task Force is examining issues similar to those discussed in House Law and Justice Committee hearings on May 23 and 30. We anticipate legislation related to these issues to be introduced in the Fall. Visit CAPPS website (<http://2015capps.capps-mi.org/>) for more details on the hearings.

CAPPS has long been concerned with the over incarceration of people with mental illness. This is an important issue, and we are pleased that the Speaker and the C.A.R.E.S Task Force are advancing this discussion.

(continued)

Southwest Michigan Calls For Improved Mental Health Services

On August 17, the C.A.R.E.S. Task Force hosted a meeting at the Hope Network office in Grand Rapids. Hope Network is an organization providing services that improve the independence of vulnerable populations.

Rep. Kesto (R – District 39) opened the hearing by saying that he is seeking “insightful and cutting edge policy recommendations that makes Michigan a better place for everyone.” Rep. Durhall III (D – District 5) said he would like the system to “be proactive, rather than reactive.”

Megan Pena, director of clinical services at Hope Network, encouraged legislators to gain a greater understanding of adverse childhood experiences (ACEs) and the use of tools to address risk and needs. Pena indicated individualized services allow for a treatment plan designed to provide the appropriate level of care.

William DeBoer, president of KPEP, a residential and non-residential community-service provider in Kalamazoo, outlined programs proven effective in helping formerly incarcerated people. KPEP partners with the MDOC on the Parole Certain Sanction Program (PCSP), which provides substance abuse treatment services. DeBoer also discussed a variety of KPEP programs offering workforce development training. He said:

There are many employers who want to hire formerly incarcerated people. Employers are desperate for employees and willing to provide on-the-job training for individuals who can pass a drug test and show up for work.

Dennis Van Kampen, president of Mel Trotter Ministries, said that 20 percent of those they served in 2016 had a mental health diagnosis. Mel Trotter Ministries is a faith-based organization offering housing, recovery, and job readiness services to vulnerable populations in the Grand Rapids area.

Van Kampen urged a collaborative approach to supporting people with mental illness and said:

There is no hope without collaboration. This problem is far too large for any one organization to impact. If we all come together, I think this is a solvable problem.

Brian Vork, executive director of the 70X7 Life Recovery, an organization providing housing, recovery, and job readiness services, indicated the recidivism rate for program participants is under five percent. He said relationship development is critical for returning citizens, and:

We are dealing with a population that has been programmed to death. What people really need is relationships. When people leave prison they are looking for care and trust from service providers and people in the community.

Retired Judge Harvey Hoffman, legislative director of the Michigan Association of Treatment Court Professionals, discussed Michigan’s 180 treatment courts. He is the primary author of Michigan’s drug treatment court statute and co-author of the veteran’s treatment court statute.

People convicted of violent crimes are not eligible for diversion under the mental health court statute. Under a narrow set of circumstances, people convicted of violent crimes are allowed to participate in veteran courts. Judge Hoffman described pending legislation to amend the mental health court statute to align it with the limited exceptions in the veteran court statute. This will provide increased access to mental health courts for people convicted of violent crimes.

Dr. Cara Poland, MD, a physician at Spectrum Health’s Center for Integrative Medicine and the president of the American Society of Addiction Medicine, offered a series of recommendations to improve the treatment of individuals suffering from opioid addiction. She urged improved substance abuse treatment for incarcerated individuals and providing access to medication that assist people through their recovery.

Chris Beck, prosecuting attorney at the Kent County Prosecutor’s Office, shared Kent County’s success in providing crisis intervention training (CIT) to a small and growing number of police officers. The training allows officers to better serve individuals experiencing mental health issues. Beck urged this training to be offered statewide through training academies.

A Request For Access, Sustainability, And Trauma Services

The August 29 C.A.R.E.S. Task Force hearing was in Auburn Hills at the Oakland Community Health Network (OCHN). OCHN professionals, Oakland County law enforcement, local leaders, and public health representatives from the private and public sector offered solutions for improved mental health services. National and local crime survivor advocates shared personal stories and urged enactment of policies that create safe communities and help crime survivors heal.

Christina Nicolas, OCHN administrator of substance abuse prevention and treatment services, outlined the importance of formal and informal supports for people in recovery while seeking true treatment needs. She said that “treatment is effective and recovery is possible.” OCHN offers follow-up services for people released from jail, especially those that are a high risk for overdosing.

Cathie Yunker, OCHN administrator of access and acute care, highlighted Medicaid challenges. Medicaid is not available during incarceration, and upon release it must be reactivated, resulting in a delay in accessing critical services. Yunker urged task force members to address this barrier to funding and treatment as sustainable funding streams are critical to the delivery of services. Many of the OCHN programs are funded through a “patchwork of sources,” making strategic planning difficult.

Megan E. Noland, director of government affairs at the Oakland County Sheriff's Office, discussed the increased number of people in jail with mental health issues – approximately 35 percent of the jail population. The jail has become a “de facto” mental health facility.

Oakland County has provided crisis intervention training (CIT) to 120 officers from 19 different agencies across the county. As a result, Noland said:

We are seeing an increase in access to supportive services and diversion from jail.

Barb Hankey, manager of the Oakland County Community Corrections Division (OCCCD), discussed the importance of sharing resources. The OCCCD provides a wide array of sentencing alternatives for individuals with nonviolent convictions. Their Community Access Liaison offers a variety of supportive services for individuals with mental health issues, in collaboration with OCHN.

Elizabeth Kelly, executive director of the Hope Warming Center, also partners with the OCHN on services for homeless residents at two homeless shelters. The Warming Center works to find permanent housing opportunities and services for homeless individuals that often cycle through many systems before getting the resources they need.

Two members of the Oakland County Board of Commissioners, Shelley Taub and Helaine Zack, described services for the county's most vulnerable populations. Both discussed the importance of individualized services and the need to stabilize funding for the provision of services in the county.

Brent Wirth, chief executive officer of the Easterseals Michigan, an organization serving children and adults with disabilities and/or special needs, described the importance of private and public partnerships to deliver a full scope of services.

Julie Sysco, chief executive officer of the Havenwyck Hospital, echoed the importance of community partners to deliver quality services. Havenwyck Hospital is a licensed psychiatric and substance abuse facility providing behavioral health and substance abuse services for children, adolescents, and adults.

Seema Sadanandan, managing director of the Alliance for Safety and Justice (ASJ), works to create new pathways for public safety that elevate the needs of crime survivors. ASJ is a national crime survivor organization that advances a balanced approach to justice.

Sadanandan stated that a large portion of Michigan's public safety dollars are focused on corrections rather than prevention and healing services. She provided a range of recommendations including incentivizing treatment of incarcerated people, removing prohibitions that inhibit people from working or securing occupational licenses, and using validated evidence-based practices to make decisions throughout the criminal justice system.

Amy Conkright, co-founder of Still Standing Against Domestic Violence, shared her personal experience with violence in the home and how it was perpetuated in her adult life. Still Standing is a nonprofit organization serving men, women, and children affected by domestic violence through education, prevention, and awareness. Conkright advocated for solutions that focus on rehabilitating individuals, families, and communities.

Dionne Wilson, national crime survivor advocate at the ASJ, provided powerful testimony about her experience as the widow of a police officer who lost his life in the line of duty. She shared her personal journey of healing, which led to her support of new safety priorities. Wilson did not find restoration in the death sentence received by the man who killed her husband. She said:

It did not repair the harm. When I realized it didn't fix it, I pulled back and realized there were so many more opportunities in the life of the young man that killed my husband.

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She commended Rep. Kesto for “getting in front of the drivers of crime and really addressing them.” She concluded by saying:

The policies we have had over the past 20 – 30 years have not made our communities safer.

Additional personal success stories were shared by Stephanie Laird, advocate, Deb Monroe, chief executive officer of Recovery Concepts, and Stacy

Burns, president of the Drug Free All Stars. All expressed the importance of the community services they received in their healing process.

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

Online Brief Bank

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

BB 298258: The trial court violated defendant’s due process rights by failing to consider an updated presentence report.

BB 297666: The constitutional error in the total deprivation of defendant’s Sixth Amendment right to counsel at the preliminary examination is not harmless error.

BB 297765: The trial judge abused his discretion in denying the defense request for a further continuance of the trial, to allow the defense more time to locate and present an important defense witness, in violation of defendant’s constitutional right to present witnesses in his defense.

BB 297914: Defendant was denied his right of confrontation and his right to fair trial by the admission, over objection, of taped conversations, and in particular the statements of a non-testifying confidential informant.

BB 297914: The trial court clearly erred and denied defendant a fair trial by denying the motion to recuse the prosecutor due to a conflict of interest.

BB 298303: Defendant’s right to due process was violated by the trial court’s denial of access to the complainant’s counseling records, where there is a reasonable probability that those records contain information necessary to the defense.

Facial-Recognition Technology Developments

AI prediction of criminal propensity, political leanings, sexual identity

A Stanford University professor, Michal Kosinski, recently stated that computer algorithms can, with high accuracy rates, determine from photographs a person’s conservative or liberal political leanings, whether a person is gay or straight, determine the person’s intelligence level, and a person’s predisposition for criminal behavior. “The face is an observable proxy for a wide range of factors, like your life history, your development factors, whether you’re healthy.” It would be easy,

according to the professor, for an algorithm to determine if a person is a psychopath or has high tendencies towards criminal behavior.

Professor Kosinski was quoted as saying, “The technologies sound very dangerous and scary on the surface, but if used properly or ethically, they can really improve our existence.” Critics have concerns about the artificial intelligence relying on biased data and algorithms, and possible error “is particularly alarming in the context of criminal justice, where machines could make decisions about people’s lives – such as the length of a prison

sentence or whether to release someone on bail – based on biased data from a court and policing system that is racially prejudiced at every step.”

Sources: Sam Levin, “Face-reading AI will be able to detect your politics and IQ, professor says,” *theguardian.com*, September 12, 2017: <https://www.theguardian.com/technology/2017/sep/12/artificial-intelligence-face-recognition-michal-kosinski>

U.S. Navy funds research team for widespread computer surveillance

A research team at Cornell University received a grant from the U.S. Navy for development of a computer system that can “conduct surveillance as a single entity with many eyes.” The system, Convolutional-Features Analysis and Control for

Mobile Visual Scene Perception, links robotic surveillance systems to “identify objects and track objects and people from place to place.”

Sources: Jasper Hamill, “BIG BRO-BOT U.S. Navy funds development of robot surveillance system which can spy on humans in incredible detail,” *thesun.co.uk*, April 11, 2017: <https://www.thesun.co.uk/tech/3307230/u-s-navy-funds-development-of-robot-surveillance-system-which-can-spy-on-humans-in-terrifying-detail> “New Grant! Convolutional-Feature Analysis and Control for Mobile Visual Scene Perception,” *Lisc.mae.cornell.edu*, February 22, 2017: <http://lisc.mae.cornell.edu/wordpress/?p=196>

***by Neil Leithauser
Associate Editor***

Reports and Studies

Study Examined the Impact of Facial Features in Sentencing Decisions

Researchers examined photographs of 1,119 males convicted of felonies in Minnesota to determine whether their facial appearances had an apparent impact on the sentences received. Four research assistants – two male, two female, two black, one white, and one Hispanic – were tasked with applying scores to the photographs for factors such as attractiveness, “baby-face,” “mature-face,” and dangerousness.

The researchers found that the more attractive the male defendant, or the more baby-faced the person appeared, the less likely the person would be incarcerated. Attractive and baby-faced males were perceived as less threatening. Defendants with facial tattoos were more than twice as likely to be incarcerated as were defendants without facial tattoos. However, males with facial scars received less severe sentences.

Generally, blacks, Hispanics, and Native Americans were perceived as more threatening than whites; Asian defendants were perceived as the least threatening.

Sources: Friends of TFC, “How men’s facial features may influence criminal sentencing,” *thefifthcolumnnews.com*, June 27, 2017: <http://thefifthcolumnnews.com/2017/06/how-mens-facial-features-may-influence-criminal-sentencing/>

Link to Abstract of Study: Brian D. Johnson and Ryan D. King, “FACIAL PROFILING: RACE, PHYSICAL APPEARANCE, AND PUNISHMENT,” June 6, 2017, printed in *Criminology*, Volume 55, Issue 3, August, 2017: <http://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12143/full>

***by Neil Leithauser
Associate Editor***

From Other States

Pennsylvania: Most Recent Sex Offender Registration Law Could Not be Applied Retroactively to Defendant

Defendant was convicted of sex offenses prior to the effective date of Pennsylvania’s most recent sex

offender registration law. The Pennsylvania Supreme Court held that the law could not be applied retroactively to defendant because it would inflict greater punishment on defendant than the law in effect at the time defendant committed the crimes.

Commonwealth v. Muniz, 2017 BL 248645, Pa., No. 47 MAP 2016, 07-19-17: full text at http://www.bloomberglaw.com/public/document/Commonwealth_v_Muniz_No_47_MAP_2016_2017_BL_248645_Pa_July_19_2017?

Third Circuit: Petitioner's Right to a Fair Trial Was Violated Where the Prosecutor Did Not Correct Witness's False Statement and Used it in Closing Arguments

During petitioner's murder trial, the prosecutor's witness testified that she did not expect any benefit from her testimony. The prosecutor knew she was getting favorable treatment and failed to correct her and restated her claim in closing arguments. The Court of Appeals for the Third Circuit held that this violated defendant's right to a fair trial and granted habeas petition. *Haskell v. Superintendent Greene SCI*, 2017 BL 266640, 3d Cir., No. 15-3427, 08-01-17: full text at http://www.bloomberglaw.com/public/document/Haskell_v_Greene_SCI_No_153427_2017_BL_266640_3d_Cir_Aug_01_2017?doc_id=.

D.C. Circuit: Defendant Was Entitled to a New Trial Where Defense Counsel Failed to Call a Mental Health Expert Regarding Online Fantasy Chats

At defendant's trial for attempted coercion and enticement of a minor with intent to engage in illicit sexual conduct, he testified that his online chats with what was actually a detective were just fantasy. The Court of Appeals for the D.C. Circuit reversed his conviction finding that his lawyer's failure to call a mental health expert regarding online fantasy chats was ineffective assistance. *United States v. Laureys*, 2017 BL 275690, D.C. Cir., No. 15-3032, 08-08-17: full text at http://www.bloomberglaw.com/public/document/United_States_v_Laureys_No_153032_2017_BL_275690_DC_Cir_Aug_08_20.

California: Defendant's Confrontation Rights Were Violated Where Prosecution Was Allowed to Admit Hearsay Statement for Improper Purpose

Defendant testified at her murder trial that her dead boyfriend committed the murder, and the prosecution was allowed to admit the boyfriend's prior statement blaming her. The California Supreme Court ruled that the admission of the boyfriend's statement was inadmissible hearsay that

violated defendant's confrontation rights because it was put before the jury for the purpose of describing the manner of the victim's death and not for the permissible purpose of attacking defendant's truthfulness on the witness stand. *People v. Hopson*, 2017 BL 229791, Cal., No. S229791, 07-03-17: full text at http://www.bloomberglaw.com/public/document/People_v_Hopson_No_S228193_2107_BL_229791_Cal_July_03_2017_Court?doc_id=X1MAF62V0000N.

Massachusetts: State Cannot Hold Undocumented Immigrant for Federal Officials on Civil Immigration Detainer After State Criminal Charges Were Dismissed

Defendant, an undocumented immigrant, was charged with robbery and bail was set. The charges were later dismissed, but state officers held him on a request from federal immigration officials based on a civil immigration detainer. The Massachusetts Supreme Court held that with no state charges pending the state officers could only hold defendant by arresting him and the civil immigration detainer did not give them that power. *Lunn v. Commonwealth*, 2017 BL 254784, Mass., SJC-12276., 07-24-17: full text at http://www.bloomberglaw.com/public/document/Lunn_v_Commonwealth_No_SJC12276_2107_BL_254784_Mass_July_24_2017?doc_id=XSSFHH60000N

Massachusetts: Evidence Found on Camera During Warrantless Search of Arrestee Must Be Suppressed

Defendant was convicted of gun charges after the police searched his backpack incident to his arrest finding a digital camera that they searched without a warrant finding pictures of defendant next to firearms. The Massachusetts Supreme Court found that its constitution and the logic of the U.S. Supreme Court's decision in *Riley v. California* (holding that warrants are needed to support searches of mobile phones of arrestees) supported suppression of the evidence and reversal of the conviction. The inventory exception did not apply because inventories are meant to safeguard and catalog property, not to investigate crimes. *Commonwealth v. Mauricio*, 2017 BL 282921, Mass., SJC-12254, 08-14-17: full text at http://www.bloomberglaw.com/public/document/Commonwealth_v_Mauricio_No_SJC12254_2017_BL_282921_Mass_Aug_14_20?doc_id=X49E5250000N.

Fourth Circuit: Defendant Was Entitled to a New Trial Where Trial Judge Made Prejudicial Comments About Diversity Immigrant Visa Program During Trial

Defendant applied for a permanent resident visa under the Diversity Immigrant Visa Program and was charged with visa fraud because he did not list his traffic tickets on his application for citizenship. The trial court's comments during the trial, criticizing Congress for creating the program and suggesting that people who use it come from the bottom hundred countries in the world, do not need any discernible skill or education, and will probably "drag along" their "ten kids and four wives" when they come, were so prejudicial they were plain error entitling defendant to a new trial. *United States v. Lefsih*, 2017 BL 283233, 4th Cir., No. 16-4345, 08-14-17: full text at

<http://src.bna.com/rG4>.

D.C. Circuit: Failures of a Warrant to Search and Seize Mobile Phones and Electronic Devices Required Reversal of Gun Conviction

Defendant's conviction for being a felon in possession of a firearm was vacated where the gun was found during the execution of a warrant that lacked probable cause and was overbroad. The warrant allowed police to search for and seize any mobile phones and other electronic devices without proof that the subject of the investigation even owned a mobile phone. The good-faith exception to the exclusionary rule did not save the warrant because of the severity of the failures of the warrant. *United States v. Griffith*, 2017 BL 289587, D.C. Cir., No. 13-3061, 08-18-17: full text at

<http://www.bloomberglaw.com/public/document/United States v Griffith No 133061 2017 BL 289587 DC Cir Aug 18 2?doc id=XJC4USQG000N>.

Fourth Circuit: Government May Only Restrain Assets That Are Directly Subject to Forfeiture as Property Traceable to a Charged Offense

An en banc panel of the Fourth Circuit ruled that the government cannot restrain untainted substitute assets before trial. The government sought to restrain the sale of property that defendant was trying to sell after he was accused of participating in a conspiracy to defraud the U.S. while serving in

Afghanistan. The court found that 21 U.S.C. § 853 only permits pretrial restraint over assets directly subject to forfeiture as property traceable to a charged offense, overruling precedents to the contrary and vacating the district court's order. *United States v. Chamberlain*, 2017 BL 284723, 4th Cir., No. 16-4313, 08-18-17: full text at <http://www.bloomberglaw.com/public/document/United States v Chamberlain No 164313 2017 BL 289952 4th Cir Aug ?doc id=X1C81BJ90000N>.

Tenth Circuit: Protective Sweep Doctrine Did Not Apply Where There Was No Proof of Unknown Dangerous People in the Home

The protective sweep doctrine did not cover guns found during a warrantless search of a residence where the guns were found after the police secured the arrestee in another part of the home and there was no proof of any unknown dangerous person hiding in the home. The court held that the guns should be suppressed but remanded for a determination as to whether there was proper consent for the search. *United States v. Nelson*, 2017 BL 288223, 10th Cir., No. 16-3292, 08-17-17: full text at

<http://www.bloomberglaw.com/public/document/UNITED STATES OF AMERICA Plaintiff Appellee v STEPHEN M NELSON D?doc id=X2GCSFS0000N>

First Circuit: Fact That Defendant Was Sought for Drug Trafficking Did Not Support Protective Sweep

Defendant was allowed to challenge the denial of his motion to suppress in spite of his guilty plea where the trial court went to extreme lengths to preserve the right, repeatedly saying that the right to appeal the denial would remain open. The court reversed the denial of the motion to suppress finding that the fact that the arrestee was being sought for drug trafficking did not, standing alone, give officers the right to perform a protective sweep on the ground that there may be another person in the home who posed a danger to officer safety. *United States v. Delgado-Prez*, 2017 BL 286875, 1st Cir., No. 15-2247, 08-16-17: full text at

<http://www.bloomberglaw.com/public/document/United States v DelgadoPrez No 152247 2017 BL 286875 1st Cir Aug ?doc id=X18D7T970000N>.

Spotlight On: Barton W. Morris, Jr.



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

In law school, I clerked for Judge David F. Breck in the Oakland County Circuit Court. Through that experience, I knew I wanted to be a litigator, specifically helping and defending people. Arguing legal issues to judges and factual stories to juries seemed absolutely fascinating. I graduated and passed the bar in 1998 and have practiced only criminal defense in Metro Detroit and Michigan in state and federal courts ever since.

Because DUI cases are so abundant in our society, I took on a lot of those cases and very quickly realized in order to represent my clients well it was necessary to receive training in two important areas that law school does not teach: forensic science and how to win jury trials. With those two goals in mind I attended and accomplished the two most rewarding professional endeavors of my career. In 2011, I graduated from the Gerry Spence Trial Lawyer's College, and in 2014, I became Michigan's first, and presently only, American Chemical Society's certified Forensic Lawyer-Scientist.

Please tell about one of your interesting or unusual cases. What were the theories of the parties?

I tried a DUI case when the client had an Orajel (alcohol) soaked cotton swab in their mouth at the time of the breath test. The officer did not bother to remove it thinking that it would not affect a breath alcohol test. The prosecution believed that to be the case as well. The client was found not guilty.

A woman driving home from work was encountered by an intoxicated man walking on a busy freeway. Through no fault of her own she struck and killed that pedestrian. Because a fatality was involved, the MSP requested consent for a blood test and my client agreed, knowing that she had not consumed any drugs or alcohol that day. The MSP chemical test identified active THC in her blood measured at 8 nanograms per milliliter (8 ng/ml). She was not a registered medical marijuana patient at the time of the accident but had been one prior.

Her medical marijuana patient card had expired. We successfully argued a medical marijuana section 8 defense, which allowed us to use the Michigan Medical Marijuana Act defense at trial and required the prosecution to prove intoxication. The People were not able to do so, and the client was rightfully found not guilty of operating while intoxicated causing death. During litigation of the case, she had submitted to, and passed, a polygraph test where the question was whether she consumed any marijuana 24 hours before the accident. She had not, which goes to prove that active THC can remain in a person's blood for an extended period of time despite abstinence, which is contrary to people's general understanding, but there are scientific studies to support it.

Were experts required?

I believe utilizing experts is the key to success in the successful practice of any field of law. They allow a litigator to be creative with defense theories and, at the same time, provide a practical education to the lawyer that can be built upon in subsequent cases. My expert in this case had previously performed experiments to demonstrate how mouth alcohol (alcohol originating from the oral cavity and not the lungs) would adversely affect the test. The expert's testimony was persuasive, and the client was exonerated.

An expert was not necessary for the THC death case.

What trends have you noticed in Michigan criminal law?

Michigan's criminal law is shaped by two groups of people, innovative and hard-working litigators and the appellate bench both in Michigan and the Sixth Circuit. I have seen how really smart and aggressive lawyers argue unique theories to these appellate courts, which shapes our criminal jurisprudence in ways that protect our individual constitutional protections. I have also seen how conservative courts interpret factual scenarios to curtail those same protections. For instance, new medical marijuana laws are helping more people avoid being wrongfully arrested and imprisoned for simple possession cases. On the other hand, courts recently seem to be very conservative on applications regarding search and seizure. The most promising trend is the marijuana movement because too many people, especially minorities, are being arrested and jailed for being in

possession of a plant which is far less dangerous to public health than alcohol.

How could our criminal justice system be improved?

Our state system of criminal justice works really well, except when court appointed attorneys are not paid what they are worth. Unfortunately, most people accused of a crime cannot afford their own attorney. Indigent defense lawyers need to be better compensated to motivate defenders to perform the work necessary to effectuate justice.

Do you have any advice for lawyers new to the practice of criminal law?

My best advice is to specialize in one area of law and do whatever is necessary to perform in that area the best you can. Once you master that area, move on to another. Also, take pride that criminal defense lawyers have the privilege to represent people in some of the most important situations in their lives. If we do a great job, we can really make a difference in their lives and in our society. Without great criminal defense lawyers, the other side will get away with whatever they want, and as a consequence, we all suffer.

Mr. Morris' website:
<http://michigancriminalattorney.com/>

***by Neil Leithauser
Associate Editor***

Trial Court Successes: August, 2017

Below are trial court victories of our subscribers as reported on SADO's Forum—an online community for criminal defense attorneys. Subscribers are encouraged to submit their stories of success on SADO's Forum and/or directly to Associate Editor Neil Leithauser at nleithauserattorney@comcast.net. SADO's CDRC Subscription information is available by contacting Heather Waara at hwaara@sado.org.

Adil Haradhvala had multiple recent successes. In the 16th Judicial (Macomb County) Circuit Court, **Mr. Haradhvala** – in four separate cases – secured a dismissal of a case charging felonious assault and assault and battery; negotiated a favorable plea in a case resulting in a 12-month jail sentence and avoiding the statutory 25-year minimum term for certain habitual offenders; secured a favorable jail-only sentence for a client facing prison for several cocaine delivery charges; and negotiated a CSC2 case down to a CSC4 conviction with a 91 day, time-served jail sentence. In the 37th Judicial District Court (Warren), **Mr. Haradhvala** obtained a favorable plea down from a 5-year felony to a misdemeanor and, in the 41-B Judicial District Court (Clinton Township), obtained a dismissal of an assault with intent to do great bodily harm charge.

Mitchell T. Foster won a not guilty verdict August 10, 2017, in the 3rd Judicial (Wayne County) Circuit Court with a successful stand your ground defense.

Jonathan B.D. Simon won a not guilty verdict August 14, 2017, in the 3rd Judicial (Wayne County) Circuit Court in a case charging felonious assault, felon in possession of a firearm, carrying a concealed weapon, and felony firearm.

John W. Ujlaky secured sentence credit for his client in the 6th judicial (Oakland County) Circuit Court, 15 days to 151 days.

Rita O. White obtained a directed verdict of acquittal August 25, 2017, in the 3rd Judicial (Wayne County) Circuit Court in a case charging felon in possession of a firearm and felony firearm.

Susan K. Walsh obtained a reduction in restitution, from \$451 to \$203, for her client in the 16th Judicial (Macomb County) Circuit Court. **Ms. Walsh** also obtained a four-month reduction in a client's minimum prison term in a case in the 10th Judicial (Saginaw County) Circuit Court.

***by Neil Leithauser
Associate Editor***

The State Appellate Defender Office is now on Facebook. "Like" us by searching "State Appellate Defender" on Facebook or find us here:

<https://www.facebook.com/sadomich>



Training Events

LOCAL Training Events

October 5, 2017 - CDAM at the OCBA

The Oakland County Bar Association will present The Art of Private Investigation: A Brown Bag Mini Series. The next sessions include: October 12, 2017 - The State of the Law, and October 17, 2017 - The Investigator's Perspective. All seminars will take place at the OCBA Offices. For additional information, call 248-334-3400 or to register online visit www.ocba.org.

October 15, 2017 - The Hero's Journey: An Intro to Story Telling in Action

Presented by the Michigan Psychodrama Center, this small workshop will be given in Birmingham Michigan on October 15, 2017, and is limited to not more than 15 participants. In 1949 Joseph Campbell first published his seminal work, "Hero with a Thousand Faces." In it, he shares his insights that became known as the Hero's Journey. This universal story structure is found in oral storytelling, myth, religion, and mythic traditions. The pattern of creation and destruction describes the prototypical adventure of the archetype, the protagonist Hero, who leaves the comforts of home and embarks on a journey to receive and achieve great gifts, which are then brought back to the group, tribe, or civilization. In this one-day introduction to psychodrama workshop, participants will learn how to apply this model to their own life-story and the stories of others. Action learning will be employed using archetypes that exemplify the journey; both those universal and personal. The goal of the workshop is to learn a model to utilize to warm up and begin the process of storytelling in action. Lawyers can use these methods to more powerfully tell their client's stories at trial. The cost is \$45-\$110, and registration is available via <http://www.eventbrite.com> or visit <http://www.michiganpsychodramacenter.com/>.

October 19, 2017 - MAACS New Roster Attorney Orientation (by invitation only)

MAACS will present its Annual Fall Orientation in Detroit on Thursday, October 19, 2017, at the State Appellate Defender Office in Detroit from 9am - 5:30pm. Registration begins at 8:30am. To register online, visit <https://maacsorientation2017.eventbrite.com>.

October 20, 2017 - MAACS Annual Fall Training

MAACS will present its Annual Fall Training at the Western Michigan University Thomas M. Cooley Law School in Auburn Hills, Michigan on Friday, October 20, 2017, AND at a second location in

Lansing, Michigan on Friday, October 27, 2017. To register for the Auburn Hills training location visit <https://maacstraining2017auburnhills.eventbrite.com>.

October 27, 2017 - MAACS Annual Fall Training (second location)

MAACS will present its Annual Fall Training at the Western Michigan University Thomas M. Cooley Law School in Lansing, Michigan on Friday, October 27, 2017. To register for the Lansing training location visit <https://maacstraining2017lansing.eventbrite.com>.

November 9-11, 2017 - CDAM's 2017 Fall Conference

CDAM will present its 2017 Fall Conference at the Boyne Mountain Resort in Boyne Mountain, Michigan. Keynote Speakers are Lars Daniel and Larry Daniel! For additional information and online registration visit <https://cdam.wildapricot.org/event-2622778>.

December 5, 2017 - Informational Session for Friends and Family of the Incarcerated

The State Appellate Defender Office will host its next Informational Session for Family and Friends of the Incarcerated on Tuesday, December 5, 2017 from 5:30-7:00pm in Detroit. SADO staff will be on hand to address the process of appealing a conviction and how an appeal is different from the trial or plea proceedings, and will inform attendees about the visiting policies of the MDOC and how to communicate and stay connected with incarcerated loved ones. Specific topics may vary slightly depending on what attendees wish to discuss. This free session is open to all, including attorneys and professionals. Light refreshments will be provided. If you plan to attend, please call 313-256-9833 at least two days in advance to RSVP. See flyer for details, http://www.sado.org/content/pub/10779_2017-Family-Outreach-Calendar.pdf. For questions about the event, or to RSVP, please contact Marilena David-Martin at mdavid@sado.org or call 313.256.9833.

February 3, 2018 - Bibliodrama as a Warm-up to Psychodrama: Seeing your Story in the Universal Story of Others

Presented by the Michigan Psychodrama Center, this small workshop will be given in Birmingham Michigan on February 3, 2018, and is limited to not more than 15 participants. Ironically, the magic in storytelling, the feelings of awe, wonder, and connection with its characters, most often comes from what's left out. The magic arises not from

what's told, but from the uncertainty and tension created within the story's gaps and ambiguities. Western literature tends to fill in these gaps, leaving little to the imagination, yet the trade-off is stories that are far less compelling than those told in the ancient works of literature. Using the underlying framework of psychodrama, participants will learn a new way of storytelling and interpretation applicable to their stories and the stories of others. In this workshop, we will explore the most famous murder of all time - Cain's murder of his brother Abel! Full of archetype and the universal feelings and experiences of envy, shame, and sibling rivalry, this workshop works as both a stand-alone as well as a continuation of the Hero's Journey workshop. Useful for lawyers wanting to explore the universal shadow sides that plague all of humanity, as well as learning the technique of Bibliodrama and psychodrama as vehicles for exploration and storytelling. The cost is \$45-\$110 and registration is available via <https://www.eventbrite.com> or visit <http://www.michiganpsychodramacenter.com/>.

NATIONAL Training Events

October 25-28, 2017 - NACDL's 2017 Fall Meeting & Seminar

NACDL's 2017 Fall Meeting & Seminar, "*Wicked Good Defenses for Common Street Crimes*," will take place in Boston, Massachusetts from October 25-28, 2017. From the streets to the courtroom - join your nationwide NACDL colleagues in Boston to learn the best defense techniques for the most common crimes from today's leading criminal defense practitioners! Prof. Ogletree is a prominent legal theorist who has made an international reputation by taking a hard look at complex issues of law and by working to secure the rights guaranteed by the Constitution for everyone equally under the law. Professor Ogletree opened the offices of The Charles Hamilton Houston Institute for Race and Justice in September 2005 as a tribute to the legendary civil rights lawyer and mentor and teacher of such great civil rights lawyers as Thurgood Marshall and Oliver Hill. The Institute has engaged in a wide range of important educational, legal, and policy issues over the past 6 years. For additional information and registration visit <https://members.nacdl.org/event-details>.

November 16-17, 2017 - Zealous Advocacy in Sexual Assault & Child Victims Cases

NACDL's 8th Annual Zealous Advocacy in Sexual Assault & Child Victims Cases Seminar will take place in Las Vegas, Nevada. Every year, NACDL identifies the hottest topics and most pressing issues when defending these cases, and brings-in

nationally-renowned lawyers and experts to help you prepare for battle. You will learn the best strategies for dealing with sex trafficking allegations, cases involving alcohol and memory, DNA mixtures, child witnesses, forensic exams, cell phone evidence, and much more. Much like all NACDL programs, this event also presents the unique opportunity to develop both professional and personal contacts where you can experience the camaraderie of being with criminal defense lawyers from all around the world. Don't miss this exciting educational opportunity. Attend this highly-rated one-of-a-kind NACDL seminar and leave with a better understanding of defending sex crimes cases in order to effectively represent your clients before, during, and after trial. Additional information and registration visit <https://members.nacdl.org/event-details>.

December 6-9, 2017 - NLADA's Annual Conference

Join us in Washington, D.C., from December 6-9, 2017, for the 2017 NLADA Annual Conference at the Renaissance Washington Downtown Hotel. This year's conference theme is "Safeguarding Justice for All." Justice, fairness, and equality are the bedrock principles of our nation and cornerstones of our democracy, and it is the responsibility and privilege of legal professionals to ensure that these principles apply equally to every individual. Lawyers and advocates in the NLADA community are on the front lines working to make equal justice a reality every day by providing low-cost or pro bono legal services and pushing for policies that support equal access to our justice system for all, regardless of income. NLADA's Annual Conference is the leading national training event of the year for the civil legal aid, indigent defense, and public interest law communities. The conference offers advocates the substantive information and professional skills they need to respond to the legal needs of low-income people, provides unparalleled opportunities to meet and exchange ideas with colleagues from across the country, and helps fulfill continuing legal education requirements. For additional information and online registration visit <http://www.nlada.org/2017-annual-conference>.

January 18-21, 2018 - 2018 Appellate Defender Training

The 2018 training takes place in New Orleans! The National Appellate Defender Training (ADT) offers an intensive, four-day learning experience designed specifically for attorneys who represent indigent defendants in criminal and delinquency appeals in the state and federal court systems. The National

Juvenile Defender Center joins as sponsor for a Juvenile Skills Writing Track, where defenders who work on cases involving juveniles can improve their advocacy skills. This national skills training brings together court and appellate public defenders at the state and federal levels, assigned counsel, contract defenders, and Criminal Justice Act private attorneys for a multi-day program. ADT uses a “learning-by-doing” teaching methodology: participants will bring their own case files to work on during the program, and they will be asked to apply to their case the practice methods presented through ADT plenary presentations and materials. For additional information and online registration visit <http://www.nlada.org>.

January 21-24, 2018 - Advanced Criminal Law Seminar

NACDL’s 38th Annual Advanced Criminal Law Seminar will be held from January 21-24, 2018, at the St. Regis Resort in Aspen, Colorado. Now in our 38th year, NACDL’s Advanced Criminal Law Seminar is often described as “An experience to remember!” Presented in cooperation with NACDL and Victor Sherman, there is nothing else like this ultimate networking and CLE event for the criminal defense bar. Intended for both veteran and young lawyers, it is bar-none the best criminal defense seminar in the country set in the best ski town in Colorado. Plan now for your family winter getaway

in fantastic Aspen where you’ll find a world-class skiing environment, unlimited daily activities for the kids, shopping, and restaurants that rival any place in the world, AND ... an unparalleled CLE with a star-studded faculty discussing the latest topics and trends! Program agenda, online registration and additional information available [here](#).

April 18-21, 2018 - Spring Meeting & Seminar

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

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

Defendant’s Rights Under the Confrontation Clause Were Not Violated in Money Laundering Trial Where Recorded Statements Were Not Used to Prove the Truth of the Matter Asserted

Defendant was convicted of two counts of money laundering and one count of attempted money laundering after an undercover officer taped conversations where defendant agreed to launder money by copying the scheme of the fictional character Saul Goodman from Breaking Bad. The court held that defendant’s Confrontation Clause rights were not violated when he was denied the opportunity to cross-examine the undercover officer because the officer’s statements were used to show that the officer represented the money to be drug money and that defendant believed him and were not used to prove the truth of the matter asserted. Also, the trial court’s error, if any, in permitting

admission of evidence that defendant left his prior employment with the prosecutor’s office because he was arrested for possession of cocaine was harmless because evidence of defendant’s arrest was consistent with his own testimony about his history of substance abuse and the evidence of his guilt was overwhelming. *United States v. King*, __ F.3d __ (2017 WL 3319290). **WITNESSES – Confrontation/Cross-Examination – Right To, EVIDENCE – Proof of Other Crimes (Similar Acts).**

Defendant’s Speedy Trial Right Was Not Violated Where Defendant Did Not Assert His Right to a Speedy Trial Until After His Conviction Was Vacated on Collateral Review

Defendant’s Sixth Amendment right to a speedy trial was not violated despite over a ten-year delay

between indictment and trial where the delay was attributable to the court, the government, and defendant; delay resulted from a defective plea and sentencing process; defendant did not assert his speedy trial right until after his conviction; and sentence was vacated on collateral review and defendant was not prejudiced by the delay. *United States v. Sutton*, 862 F.3d 547 (2017). **PRETRIAL MOTIONS AND PROCEDURE – Speedy Trial Violation – Constitutional Right to Speedy Trial.**

Petitioner Granted Habeas Where There Was Insufficient Evidence to Support First-Degree Murder Conviction

The 6th Circuit reversed the district court's denial of habeas finding that the Michigan Supreme Court's rejection of petitioner's claim that insufficient evidence supported her conviction for first-degree felony murder was contrary to, or involved unreasonable application of, *Jackson v. Virginia*, 443 U.S. 307 (1979). The inculpatory evidence that implicated petitioner was insufficient to overcome the reasonable doubt created by the presence of an unknown woman's blood on the victim's shirt, and it was impossible to see how a rational jury could have found petitioner guilty beyond a reasonable doubt without an explanation for the blood. *Tanner v. Yukins*, __ F.3d __ (2017 WL 3481867). **OFFENSES – Murder, First – Degree - Sufficiency of Evidence.**

Michigan Supreme Court: Cases for Argument – October, 2017

The following cases are scheduled to be argued before the Michigan Supreme Court at its October session.

CALENDAR CASES – OCTOBER 11-12, 2017

***People v Boban Temelkoski*, Docket No. 150643**

Issues: (1) whether this case should be held in abeyance pending final action by the United States Supreme Court in *Does #1-5 v Snyder*, 834 F.3d 696 (CA 6, 2016); (2) whether a criminal defendant is denied due process of law if a statute offers a benefit in exchange for pleading guilty, the defendant's plea is induced by the expectation of that benefit, but the benefit is vitiated in whole or in part; and (3) whether the Wayne Circuit Court had jurisdiction over the defendant's SORA claim.

Summary: In 1993, the 19-year-old defendant committed second-degree criminal sexual conduct. He pled guilty to the offense under the Holmes Youthful Trainee Act (HYTA), which allows a young offender to be placed on probation for a number of years, and if probation is successfully completed, to avoid a felony conviction. At the time, "success" also guaranteed that a trainee would suffer no civil disability because of HYTA status and the record of criminal proceedings would be closed to the public. While the defendant was still on probation in 1995, the Legislature enacted the Sex Offenders

Registration Act (SORA), which required a defendant convicted of second-degree criminal sexual conduct to register with the police for 25 years. That registration later became public. The Legislature subsequently imposed additional requirements on registered offenders and, in 2011, required lifetime registration for certain offenders, including the defendant. The defendant seeks removal from the registry, arguing that registration has become cruel and unusual punishment and that it is an ex post facto law. The trial court granted the defendant's motion. The Court of Appeals reversed. The Supreme Court granted leave to appeal in 2015, and heard oral argument in December 2016. In May 2017, in light of new developments, the Court voted to hear reargument. **Argument:** October 11, 2017 (morning).

***People v Tia Marie-Mitchell Skinner*, Docket No. 152448 (to be argued together with *Hyatt*, Docket No. 153081)**

Issue: Whether the decision to sentence a juvenile to life without parole under MCL 769.25 must be made by a jury beyond a reasonable doubt.

Summary: The 17-year-old defendant enlisted friends to kill her parents, and they succeeded in killing one of them. The defendant was convicted of first-degree premeditated murder and sentenced to mandatory life without parole. After the United States Supreme Court held in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), that a mandatory sentencing scheme of life in prison

without the possibility of parole for juvenile offenders is unconstitutional, the Michigan Legislature enacted MCL 769.25, providing for a term of years for juveniles who commit first-degree murder (or certain other offenses), unless the prosecution files a motion seeking life without parole, and the trial court holds a hearing. In this case, following a hearing, the defendant was resentenced to life without parole, over defense objection that this decision could only be made by a jury under *Apprendi v New Jersey*, 530 US 466, 476; 120 S Ct 2348; 147 L Ed 2d 435 (2000), in light of *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), and *Miller v Alabama*. In a split decision, the Court of Appeals agreed with the defendant and remanded for resentencing before a jury. *Argument*: October 12, 2017 (morning).

ORAL ARGUMENT ON APPLICATIONS – OCTOBER 11-12, 2017

***People v Kenya Ali Hyatt*, Docket No. 153081 (to be argued together with *Skinner*, Docket No. 152448)**

Issue: Whether the Court of Appeals conflict-resolution panel erred by applying a heightened standard of consideration and review for sentences imposed under MCL 769.25.

Summary: The 17-year-old defendant helped family members to carry out a plan to rob a security guard of his firearm. During the robbery, the guard was fatally shot. The defendant was convicted of first-degree felony murder and, after a hearing on the prosecutor's motion, the trial court sentenced him to life without parole under MCL 769.25. The Court of Appeals held that it was bound to follow *People v Skinner*, 312 Mich App 15 (2015), but declared a conflict, expressing its opinion that a jury need not make the sentencing decision. Subsequently, the Court of Appeals convened a conflict-resolution panel, which unanimously agreed that no jury is needed. However, a four-judge majority of the conflict panel nevertheless ordered resentencing, believing that the trial court had erred by failing to decide whether the defendant exhibited “irreparable corruption” so as to deserve life without parole. The conflict panel declared that sentencing courts must start with the understanding that, more likely than not, life without parole is not a proportionate sentence for a juvenile. The conflict panel also declared the appellate standard of review in these cases to be “abuse of discretion” based on the notion that sentencing a juvenile to life without parole is

“inherently suspect” and probably disproportionate. *Argument*: October 12, 2017 (morning).

***People v Theodore Paul Wafer*, Docket No. 153828**

Issues: Whether the trial court erred by denying the defense request for a jury instruction on the rebuttable presumption of MCL 780.951, which applies when a defendant uses deadly force against an individual who is in the process of breaking into the defendant's dwelling, and, if there was instructional error, whether it was harmless.

Summary: In the early morning hours of November 2, 2013, 19-year-old Renisha McBride, appeared at the defendant's Dearborn Heights home a few hours after being involved in a car accident. She pounded on the doors of the home—alternating between the front and side doors. The defendant woke up startled and retrieved a firearm he kept in his home. He would later tell the police that, when he opened the front door, McBride ran at him and he discharged his weapon, killing her. He called 9-1-1. In speaking with the police, the defendant gave inconsistent versions of the incident. At a trial on charges of second-degree murder, statutory manslaughter, and felony-firearm, the defendant claimed that he acted in self-defense, believing that someone was trying to break into his home. The jury found the defendant guilty of all charges. The Court of Appeals, in a split decision, affirmed. *Argument*: October 12, 2017 (afternoon).

***People v Roderick Louis Pippen*, Docket No.153324**

Issue: Whether the defendant was denied the effective assistance of counsel based on trial counsel's failure to adequately investigate and present the testimony of a witness who was present at the time of the alleged offense.

Summary: The defendant was arrested in 2008 after a police officer observed him and another man (Michael Hudson) both throw guns under a vehicle. It was later determined that the gun thrown by the defendant had been used during a carjacking in which the victim was fatally shot. The defendant was bound over to circuit court in 2010 on charges of first-degree felony murder, felon in possession of a firearm, and felony-firearm, but the circuit court granted his motion to dismiss the charges, finding that there was insufficient evidence presented to support the bindover. In 2011, the Court of Appeals reversed and remanded for further proceedings, concluding that the evidence established probable

cause to believe that the defendant committed the charged crimes. The Supreme Court denied interlocutory appellate review. The charges were reinstated and, at trial, a codefendant testified that he, the defendant, Hudson, and a fourth man were together on the night in question and that he saw the defendant shoot the victim. The jury found the defendant guilty of all charges. On the defendant's motion for a new trial, an evidentiary hearing was held regarding his claim that appointed defense counsel rendered ineffective representation by failing to call Hudson as a defense witness at trial. The trial court held that the defendant had failed to establish that counsel was ineffective where the trial strategy not to call Hudson was reasonable. The Court of Appeals affirmed. *Argument*: October 12, 2017 (afternoon).

ORAL ARGUMENT ON APPLICATION – SPECIAL SESSION – OCTOBER 25, 2017

People v Thomas, Docket No. 155245

Issues: Whether the single photographic identification method used in this case was so suggestive that it created a substantial likelihood of misidentification, and, if so, whether the

complainant's in-court identification was admissible because it had an independent basis.

Summary: After the complainant was shot in the leg on a Detroit street, he was taken to a hospital where he identified defendant from a single cell-phone photo of defendant taken by a police officer. On defendant's motion, the trial court suppressed the pre-trial identification as unduly suggestive and unnecessary. It also suppressed the complainant's in-court identification of defendant, ruling that the identification had no independent basis. The prosecution appealed, and the Court of Appeals majority reversed and sent the case back to the circuit court for further proceedings. One judge dissented, stating that that "[t]here is not a single case in Michigan jurisprudence in which the prosecution has been permitted to introduce a one photo identification of a stranger." *Argument*: October 25, 2017, 1:00 p.m., Cass Technical High School, Detroit, MI.

The above issues and summaries are taken or adapted from the summaries on the Michigan Supreme Court's website. The full summaries and the briefs filed in the cases can be found at <http://courts.mi.gov/courts/michigansupremecourt/oral-arguments/2017-2018/pages/default.aspx>

Michigan Supreme Court: Selected Opinion Summaries

Whether Defendant is Entitled to Reversal of His Conviction After Wayne Circuit Deprived Him of Counsel at His Preliminary Examination is Subject to Harmless Error Review

In lieu of granting leave to appeal, the Supreme Court reversed the judgment of the court of appeals and remanded to the court of appeals for a determination as to whether the deprivation of counsel at defendant's preliminary examination was harmless error. The Court found that the statement in *United States v. Cronin*, 466 U.S. 648 (1984), that if a defendant is denied counsel at a critical stage of a criminal prosecution automatic reversal is required, was dictum. The Court held that the holding in *Coleman v. Alabama*, 399 U.S. 1 (1970), that the deprivation of counsel at a preliminary examination is subject to harmless-error review, was not dictum and was binding precedent. *People v. Gary Lewis*; __ Mich. __ (#154396, 07-31-17); SADO - Chari K. Grove. **COUNSEL -- Right To -- At Arraignment and Preliminary Hearing.**

Wayne Circuit's Denial of Defendant's Request for Instruction That Evidence of Good Character Alone Could Create a Reasonable Doubt Was Harmless Error

In lieu of granting leave to appeal, the Supreme Court reversed the judgment of the court of appeals and reinstated defendant's conviction for first-degree murder. The Court held that the trial court's denial of defendant's request for an instruction informing the jury that defendant's good-character evidence alone could create a reasonable doubt was harmless error. The Court stated that the court of appeal's critical error was focusing on the importance of the good-character instruction to defendant's defense strategy instead of evaluating the likelihood of defendant prevailing on that strategy. *People v. William Lyles, Jr.*; __ Mich. __ (#153185, 08-01-17); MAACS - Daniel J. Rust. **INSTRUCTIONS -- Character Evidence, POST-TRIAL MOTIONS AND APPEALS -- Harmless Error Test.**

Michigan Court of Appeals: Selected Opinion Summaries

Kent Circuit Erred When it Denied the Prosecutor's Motion to Amend the Information to Reinstate a Count of Larceny by Conversion

The trial court denied the prosecutor's motion to amend the information to reinstate a count of larceny by conversion of \$20,000 or more, and the prosecutor appealed by leave granted. The complainant alleged that defendant used money he received from a loan agreement for personal items and expenses in a manner inconsistent with specific conditions of the loan agreement. The court held that there was evidence that complainant intended to retain legal title to the loan proceeds until such time as the loan proceeds were actually used for their intended purpose. Therefore, because there was evidence that at least \$20,000 of the loan proceeds were used by defendant in a manner contrary to the loan agreement prior to the completion of the agreement, there was sufficient evidence establishing probable cause to believe that defendant committed the crime of larceny by conversion, and the circuit court abused its discretion when it denied the prosecutor's motion. *People v. Jay Spencer*; __ Mich. App. __ (#337045, 08-10-17); Peter P. Walsh. **OFFENSES – Larceny by Conversion – Sufficiency of Evidence.**

Branch Circuit Did Not Err When it Denied Defendant's Motion for Acquittal After Conviction for Delivering Drugs to a Prison Inmate

Defendant was found guilty of drug offenses after she was video-recorded by a prison visiting room camera passing drugs to the inmate she was visiting at Lakeland Correctional Facility. The court rejected defendant's argument that her double jeopardy rights were violated because she was punished twice for the same conduct inasmuch as her convictions for delivering heroin and possession of heroin arose out of a single event. The court found that possession of a controlled substance is not a lesser, necessarily included offense of delivery and that, while defendant may have completed the crime of possession of heroin before delivering it, the prosecution was not required to prove possession to convict her of delivery and vice versa.

The court also held that defendant's right to due process was not violated when the police disposed of the balloon that the drugs were found in thus

depriving her of the opportunity for DNA testing because there was no evidence of bad faith on the part of the police, the balloon was disposed of according to standard police protocol, and the evidence was overwhelming at trial.

Although the prosecution committed a discovery violation when it failed to discover and disclose and second police report, the court found the error was harmless where the record supported the conclusion that, even if defendant had obtained the second police report in advance of trial and prepared her defense in the manner she contended she may have done, it would have made no difference to the outcome of the trial.

Finally, the court found that the guidelines were correctly scored. OV 14 (offender's role) was correctly scored where defendant procured heroin, possessed it for a period of time, transported it to the prison, and delivered it to the inmate who could not leave the prison to procure it himself. It was reasonable for the trial court to infer that defendant exercised independent leadership. OV 19 (threat to the security of a penal institution) was properly scored at 25 where defendant's delivery of a dangerous drug into the prison threatened the safety and security of both the guards and prisoners. The court found that OV 19 does not apply only to offenders who smuggle weapons or other mechanical destructive devices into a prison. *People v. Vicki Dickinson*; __ Mich. App. __ (#332653, 08-10-17); MAACS - Ronald D. Ambrose. **CONSTITUTIONAL RIGHTS – Double Jeopardy – Multiple Punishments, PROSECUTOR – Suppression of Evidence Through Loss, Negligence, Etc., DISCOVERY – Prosecutor's Case File, SENTENCING AND PUNISHMENT – Guidelines – Scoring – Scoring of Offense Variables(OVs) – OV14 Offender's Role, SENTENCING AND PUNISHMENT – Guidelines – Scoring-Scoring of Offense Variables(OVs) – OV19 – Threat to the Security of a Penal Institution or Court or Interference with the Administration of Justice.**

Delta Circuit Properly Scored OV 4

The court affirmed defendant's sentence for assault with intent to commit criminal sexual conduct finding that OV 4 (psychological injury to a victim) was correctly scored where the victim, although not seeking or receiving professional

treatment, stated that since the assault everyday life was harder for her, she was fidgeting and nervous at trial not wanting to be in the same room as defendant, she was suffering from digestive issues, and she was on disability for her anxiety and PTSD. The court extended the Michigan Supreme Court's ruling in *People v. Calloway*, __ Mich. __ (#153636, 05-19-17), which held that OV 5 (psychological injury to victim's family) was correctly scored at 15 in spite of the fact that the family members were not, at the time of sentencing, seeking or receiving professional treatment or carrying the intent to do so. Given the similarity between M.C.L. 777.34 (OV 4) and M.C.L. 777.35 (OV 5) the court extended the analysis in *Calloway* to OV 4. *People v. Michael Wellman*, __ Mich. App. __ (#332429, 08-03-17); MAACS - Terence R. Flanagan. **SENTENCING AND PUNISHMENT – Guidelines – Scoring – Scoring of Offense Variables(OVs) – OV4 Psychological Injury to a Victim, MISCELLANEOUS – Statutory Interpretation – Rules of Statutory Interpretation.**

Jackson Circuit Properly Denied Defendant's Motion to Suppress Finding That Defendant Lacked Standing

On remand from the Michigan Supreme Court to address defendant's Fourth Amendment right against unreasonable searches, the court again affirmed the denial of defendant's motion to suppress and his conviction. Defendant was convicted of possessing methamphetamine for drugs recovered from a backpack that he was holding on his lap in the passenger seat of a vehicle stopped for expired plates where the driver consented to a search of the vehicle. The court held that defendant lacked standing to challenge the search under the holding in *People v. LaBelle*, 478 Mich 891 (2007), where defendant was a passenger in a vehicle, defendant did not challenge the stop, the driver consented to the search of the vehicle, and the officer searched and found drugs in an unlocked backpack in the vehicle's passenger compartment.

The Supreme Court also directed the court to address whether the officer reasonably believed that the driver had common authority over the backpack in order for the driver's consent to justify the search under *Illinois v. Rodriguez*, 497 U.S. 177 (1990). The court stated that because defendant lacked standing and because current Michigan law does not apply *Rodriguez's* common authority framework to warrantless searches of containers in automobiles, it would decline to apply *Rodriguez's* common authority framework to this case.

The Supreme Court finally directed the court to determine whether other grounds justified the search of the backpack. The court found that no other grounds justified the search opining that, (1) the *Terry* search exception did not apply where the officer did not testify that he had a reasonable belief that defendant or the driver could gain immediate control of a weapon, (2) the officer lacked probable cause for a lawful arrest as is required to permit a search incident to arrest, (3) the record did not contain evidence that the officer had probable cause to search the backpack in the automobile, (4) the record lacked evidence to determine that the officer conducted a proper inventory search, and (5) the inevitable discovery exception does not apply where the prosecution advanced no arguments that the police inevitably would have discovered the contents of the backpack. *People v. Larry Mead*, __ Mich. App. __ (#327881, 08-08-17); In pro per. **PRETRIAL MOTIONS AND PROCEDURE – Search and Seizure – Standing to Suppress Evidence.**

Wayne Circuit Properly Declared a Portion of Defendant's Plea Requiring Him to Resign His Senate Seat Unconstitutional and Properly Denied the Prosecution's Motion to Vacate the Plea

The prosecution appealed by leave granted the trial court's order declaring a portion of defendant's plea agreement void and the trial court's denial of the prosecution's motion to vacate defendant's plea to charges resulting from a domestic dispute after the trial court sua sponte ruled that the provisions of the plea agreement requiring defendant to resign his Senate seat and to refrain from public office while on probation violated the constitutional principle of separation of powers and infringed on the people's right to choose their representatives and declared those portions of the plea agreement void. The court of appeals originally dismissed the appeal as moot, but the matter was remanded by the Michigan Supreme Court as on reconsideration granted. The court affirmed the decision of the trial court finding that the prosecution's offering of the plea agreement was an unconstitutional attempt to violate the separation of powers because the prosecution attempted to invade the role of punishing and expelling a member of the state Senate, which is reserved solely for the Legislature. Also, if the trial court were to enter such an order, even with the agreement of the parties, it would be tacit approval to the terms and a violation of the Michigan Constitution. The fact that defendant voluntarily relinquished his seat is irrelevant as he did not have the constitutional right to use his elected office as a

bargaining chip because the constitutional rights associated with his office were not for his individual benefit but the benefit of the people who elected him.

The court further held that the trial court did not abuse its discretion when it denied the prosecutor's motion to vacate the plea, noting that if a prosecutor is aware in the future that using the threat of criminal charges against a member of the legislative branch will only be punished by allowing them to go back to the negotiating table after the courts discover their wrongdoing, there will be little impetus to stop the practice. The court also stated in a footnote in response to the dissent's dismissal of the possibility of prosecutor's misusing the office that it was made aware that in direct response to this case, the Wayne County Prosecutor's office, at least temporarily, instituted a policy of "no plea offers" to all defendants appearing before the trial court judge assigned to this matter. *People v. Virgil Smith*; — Mich. App. __ (#332288, 08-22-17); SADO - Valerie R. Newman. **GUILTY PLEAS – Withdrawal Of – After Sentencing, CONSTITUTIONAL RIGHTS – Separation of Powers.**

Grand Traverse Circuit Properly Recognized That it Could Not Impose Multiple Consecutive Sentences as a Single Act of Discretion and Imposed Only One Consecutive Sentence

After remand requiring the trial court to set forth particularized reasons underlying each separate consecutive sentence with reference to the specific offenses and the offender, the trial court amended its previous sentencing order by only imposing two of the five controlled substance convictions under M.C.L. 333.7401 to run consecutive as opposed to all five. The court found that the trial court properly followed its directive and stated its rationale as to why it believed the strong medicine of a consecutive sentence was appropriate, that being defendant's extensive violent criminal history, multiple failures to rehabilitate, and the manipulation of several less culpable individuals in his ongoing criminal operation, finding that this combination of facts was sufficient to depart from the heavy presumption in favor of concurrent sentences. The trial court also properly recognized that it could not impose multiple consecutive sentences as a single act of discretion and would need additional reasons for imposing more consecutive sentences and correctly issued a judgment in which the remaining sentences were all to be served concurrently. *People v. Ronald Norfleet (After Remand)*; — Mich. App. __ (#328968, 08-22-

17); MAACS - Dana Bruce Carron. **SENTENCING AND PUNISHMENT – Consecutive Terms – Controlled Substances Act.**

Muskegon Circuit Erred When it Ruled That Defendant Could Avoid Prosecution for Possession with Intent to Deliver with a Valid Prescription

After defendant was bound over on drug charges, the prosecution appealed by leave granted three pretrial rulings. First, the court held that the trial court erred when it granted defendant's motion to use the former version of M Crim JI 12.3, which defendant contended would have exempted him from prosecution for possession with intent to deliver if he had a valid prescription. The court found that the amended version of M Crim JI 12.3, which phrases the relevant inquiry as being whether a defendant was legally authorized to deliver the controlled substance, as opposed to being legally authorized to possess, comports with the statutory definition of the offense and accurately states the law. The amended version does not conflict with Michigan caselaw because both the Court of Appeals and the Supreme Court have recently employed at least two formulations of the elements of possession with intent to deliver a controlled substance and only one of those formulations included as an element that a defendant was not authorized to possess the controlled substance, and that formulation was developed in the context of offenses involving cocaine, in which the possible possession of a prescription was not at issue.

The court also held that the trial court did not err by concluding that simple possession is a necessarily included lesser offense of possession with intent to deliver a controlled substance, but did err when it concluded that having a valid prescription, which exempts a defendant from prosecution for simple possession under M.C.L. 333.7403(1), applies with equal force to the offense of possession with intent to deliver a controlled substance under M.C.L. 333.7401(1). Instead, to establish an exemption, a defendant must show that he or she was authorized to deliver the controlled substance possessed by either having a valid license to deliver the substance or by falling within one of the exceptions to the general licensure requirement.

Finally, the court held that the trial court erred when it held that defendant bore only the burden to produce some competent evidence of his authority to possess or deliver the controlled substance after which the burden of persuasion shifted to the

prosecution to prove that defendant lacked such authority beyond a reasonable doubt. The court held that the footnote accompanying bracketed paragraph (6) of M Crim JI 12.3 does not accurately state the law, which is that a defendant claiming an exception or exemption under the controlled substances act bears both the burden of production and persuasion and must demonstrate by a preponderance of the evidence that he or she is legally authorized to deliver a controlled substance. *People v. Jason Robar*, __ Mich. App. __ (#335377, 08-24-17); Thomas Gerald Oatman. **OFFENSES – Controlled Substances, Delivery or Sale – Included Offense, OFFENSES – Controlled Substances, Delivery or Sale – Instruction on Elements.**

Eaton Circuit Did Not Err When it Allowed Admission of DNA Evidence Without Testimony of Likelihood of a Match Where This Was Contained in the Scientist's Admitted Report

Defendant's assault convictions and sentences based in part on DNA evidence were affirmed. The court held that the trial court did not err when it allowed admission of DNA evidence even though the witness was not asked at trial to provide any empirical data to define the statistical parameters of a DNA match. Because the scientist's report containing testing methodology as well as her conclusions and interpretations of the data was admitted into evidence, this constituted some analytical or interpretive evidence concerning the likelihood or significance of a DNA profile match, and there was no plain error. Trial counsel's failure to object to the DNA evidence was trial strategy where its admission supported aspects of defendant's defense.

The court further rejected defendant's other ineffective assistance arguments finding that (1) eliciting testimony from the complainant regarding defendant's illegal possession of a sawed off shotgun may have supported defendant's theory that the complainant fabricated a story involving an illegal weapon that was never found, (2) objecting to the prosecutor's questions concerning defendant's Islamic religious practices would have been futile where the prosecutor did not seek to inflame the jury and thus did not commit misconduct, and (3) other failures to object were not outcome determinative.

Finally, the court held that the trial court correctly scored OV4 (psychological injury to victim) where the complainant feared that she was going to die, was seeing a therapist, and having nightmares and flashbacks and a daily struggle with emotional stability. The court likewise correctly scored OV7 (aggravated physical abuse) where the record contained substantial evidence that defendant's prolonged behavior appeared to be designed to keep the complainant captive emotionally as well as physically and that it went beyond the bounds of his crimes and was egregious and sadistic, including threatening to kill and rape the complainant and beating and kicking her over a 4-hour period. *People v. James Urban*; __ Mich. App. __ (#332734, approved for publication 08-31-17); SADO - Peter Jon Van Hoek. **EVIDENCE – DNA, COUNSEL – Ineffectiveness Of – Trial Tactics and Strategy, SENTENCING AND PUNISHMENT – Guidelines – Scoring – Scoring of Offense Variables(OVs) – OV4 Psychological Injury to a Victim, SENTENCING AND PUNISHMENT – Guidelines – Scoring – Scoring of Offense Variables(OVs) – OV7 Aggravated Physical Abuse.**

**Michigan Court of Appeals:
Selected Unpublished Opinion Summaries**

Wayne Circuit Erred When It Denied Defendant's Motion to Adjourn and Thereby Deprived Defendant of His Right to Present a Defense

Defendant's convictions were vacated where the trial court abused its discretion when it denied defendant's motion to adjourn and thereby deprived defendant of his right to present an alibi defense. Factors supporting this conclusion included: (1) defendant asserted his constitutional right to effective assistance of counsel and due process in his motion, (2) defendant had legitimate reasons to

assert that right because the relevant documents were material to his alibi defense, (3) defendant had not been negligent because defense counsel hired a private investigator and filed a written motion that laid out the defense and the need for adjournment, (4) there were no previous adjournments, and (5) defendant was prejudiced by the denial as the sought after documents would be outcome determinative. *People v. Aurelio Vasquez*; Unpublished opinion of 07-18-17 (COA# 331181) Sanford A. Schulman. **PRETRIAL MOTIONS AND PROCEDURE – Continuance/Adjournment.**

Wayne Circuit Erred When it Failed to Seek the Views of Counsel Prior to Making its Decision on a Crosby Remand

Defendant was convicted by jury of armed robbery and related offenses and ultimately granted a *Crosby* proceeding on the ground that the trial court had used judicial fact-finding to score OV3. On remand, the trial court denied resentencing. The panel reversed the order of the trial court and remanded holding that the trial court did not properly comply with *Crosby* when it failed to seek the views of counsel prior to entering its order. *People v. Jawanta Covington*; Unpublished opinion of 07-18-17 (COA# 335036) MAACS - Kristina Larson Dunne. **SENTENCING AND PUNISHMENT -- Guidelines -- Appellate Review -- General Rules.**

Berrien Circuit Erred When it Used the Two-Year Misdemeanor of Maintaining a Drug House as the Underlying Felony Charge to Felony-Firearm

The majority of defendant's convictions were affirmed, but his felony firearm conviction was vacated where the only underlying charge for the felony-firearm offense was maintaining a drug house, which is a two-year misdemeanor not a felony. The panel held that although maintaining a drug house is defined as a felony by the Code of Criminal Procedure, that felony definition cannot be used to make a two-year misdemeanor offense that is located in a different act such as the Penal Code or the Public Health Code into a felony for purposes of the felony-firearm statute. *People v. Tarone Washington*; Unpublished opinion of 07-06-17 (COA# 330345). SADO - Marilena David-Martin. **OFFENSES -- Felony Firearm -- Sufficiency of Evidence, MISCELLANEOUS -- Statutory Interpretation**

Wayne Circuit Erred When It Did Not Accurately Reflect the Sentences in the Judgment of Sentence

Defendant's convictions and sentences were affirmed, but the matter was remanded to the trial court for the ministerial task of correcting the clerical error in the judgment of sentence, which did not accurately reflect the sentences imposed for felon-in-possession and felony-firearm. *People v. Jabari Regains*; Unpublished opinion of 07-20-17 (COA# 330129) MAACS - Michael J. McCarthy. **POST TRIAL MOTIONS AND APPEALS -- Appeals -- Remedies.**

Macomb Circuit Erred When It Denied Defendant's Request for an Instruction on the Lesser Included Offense of AWIGBH

Defendant's conviction for first-degree murder was affirmed, but the panel vacated defendant's conviction and sentence for AWIM. The panel held that the trial court erred when it failed to give a requested instruction for the lesser included offense of AWIGBH where the complainant testified that defendant did not begin stabbing him until he had defendant in a chokehold and that when released defendant fled the scene rather than re-engage the complainant. Because this evidence supported the lesser included offense, it was not harmless error for the trial court to fail to give the instruction. *People v. Steven Neuman*; Unpublished opinion of 07-25-17 (COA# 331400) SADO - Douglas W. Baker. **INSTRUCTIONS -- Included Offenses -- Requested by Defendant But Refused by Court, OFFENSES -- Assault With Intent to Murder (AWIM) -- Included Offense.**

Saginaw Circuit Erred When It Scored OVs 9, 10 and 14

Defendant's securities convictions and sentence were affirmed, but the matter was remanded for correction of the guidelines. The panel held that the trial court misscored OV 9 (number of victims) by looking beyond the sentencing offense to defendant's overarching criminal scheme that placed a significant number of people in danger of property loss by defrauding investors and selling unregistered securities. Defendant's conduct during the sentencing offense placed only the complainant in danger of losing property. OV 10 (exploitation of vulnerable victim) was also misscored because, while complainant might have been susceptible to defendant's persuasion, there was no evidence or indication that she met the definition of a "vulnerable person." The panel found that OV 14 (offender's role) was likewise misscored holding that although the court is to consider the entire criminal transaction it is not allowed to consider all criminal transactions in any way related to the sentencing offense. Although there was evidence that defendant employed people to help market the limited partnerships, there was no evidence that anyone other than defendant was involved in selling securities to the complainant. Although amendment to the guidelines would lower the grid level, the panel did not remand for resentencing because the trial court exceeded the guidelines finding that they did not adequately address the seriousness of defendant's actions and the departure sentence was

within the range of principled outcomes. *People v. Joel Wilson*; Unpublished opinion of 07-25-17 (COA# 332124) Stephen Cornish. **SENTENCING AND PUNISHMENT – Guidelines – Scoring – Scoring of Offense Variables(OVs) – OV9 Number of Victims, SENTENCING AND PUNISHMENT – Guidelines – Scoring – Scoring of Offense Variables(OVs) – OV10 Exploitation of Vulnerable Victim, SENTENCING AND PUNISHMENT – Guidelines – Scoring – Scoring of Offense Variables(OVs) – OV14 Offender’s Role.**

Macomb Prosecutor’s Misconduct Denied Defendant a Fair and Impartial Trial Requiring Reversal of Defendant’s CSC Conviction

Defendant’s CSC third conviction and sentence were reversed, and the matter was remanded for a new trial. The panel held that the prosecutor committed misconduct that denied defendant a fair and impartial trial where the prosecutor made improper character references during her cross-examination of defendant about similar acts testimony that was irrelevant to establish that defendant employed a common plan or scheme. It was clear that the prosecutor’s questioning was used to besmirch defendant’s character by implying that he lacked the characteristics of a “perfect gentleman” even after he admitted that he was not one. Likewise, the prosecutor’s comments during closing and rebuttal arguments, that defendant “was a sick rapist, who’s sadistic, and has been getting away with this for years,” were improper because they used the other-acts evidence to draw a propensity inference and were statements that were unsupported by the evidence. Because of the nature of this credibility case, the pervasiveness of the improper character inferences and the limited probative value of the other-acts evidence, the prosecutor’s misconduct affected defendant’s substantial rights. Moreover, due to the widespread and seemingly intentional nature of the misconduct, the panel concluded that, independent of defendant’s guilt or innocence, the error seriously affected the fairness and integrity of the judicial proceedings. *People v. Charles Confere*; Unpublished opinion of 08-10-17 (COA# 331619); MAACS - Mark G. Butler. **PROSECUTOR – Comments – Concerning the Evidence, PROSECUTOR – Summation.**

Kalamazoo Circuit Erred When it Failed to Make a Ruling on Both Prongs of the Defense of Insanity

Defendant’s conviction for first-degree murder was vacated, and the matter was remanded.

Defendant’s bench trial solely entailed stipulated facts and the testimony of two competing experts on the defense of insanity. The panel held that the trial court improperly ruled that once it determined that defendant had the substantial capacity to appreciate the nature and quality or the wrongfulness of his conduct it did not have to render a finding on the second prong for an insanity defense concerning the ability to conform one’s conduct to the requirements of the law. The panel noted that it could not discern from the record that the trial court merely misspoke and remanded for a finding by the trial court on the second prong. *People v. Jermal Clark*; Unpublished opinion of 08-10-17 (COA# 332297); MAACS - William F. Branch. **DEFENSES – Insanity.**

Remand to Hillsdale Circuit Required for Clarification of Advisory Guideline Range Used at Sentencing

Defendant’s convictions were affirmed, but the matter was remanded for clarification from the trial court as to the advisory guideline range used at sentencing. It was undisputed that defendant’s sentencing range was 12-24 months, but at sentencing the trial court stated that the range was 24-57 months. Because it was impossible to conclude from the record whether the trial court misspoke or relied on inaccurate information, remand was required. Resentencing is required if the trial court relied on the incorrect range, but if not, the sentence is affirmed. *People v. David Ames*; Unpublished opinion of 08-10-17 (COA# 333239); SADO - Marilena David-Martin. **SENTENCING AND PUNISHMENT – Guidelines – Appellate Review.**

Washtenaw Circuit Erred When it Denied Defendant’s Request to Amend the PSIR to Correct a Statement That Was Not Supported by the Record

Defendant’s convictions were affirmed, but the matter was remanded for correction of the PSIR where the evidence in the record did not support the statement in the PSIR that defendant pointed a gun at the complainant. Because the trial court did not rely on the challenged information, however, defendant was not entitled to resentencing. *People v. Christopher Nicholson*; Unpublished opinion of 08-10-17 (COA# 333546); MAACS - John D. Roach, Jr. **SENTENCING AND PUNISHMENT – Presentence Report – Correction.**

Chippewa Circuit Erred When it Denied Defendant’s Motion to Remove Probation Condition Banning Her Use of the Internet

Defendant pled guilty to aggravated indecent exposure, and the trial court sentenced defendant to a five-year probation, which included as a condition that defendant not own, possess, or use any computer or any device capable of connecting to the internet either directly or indirectly through a third-party provider or reside in any residence in which these are present. The panel reversed the trial court's denial of defendant's motion to remove the computer ban, holding that the broadness of the probation condition and the failure to tailor it to defendant's rehabilitation required vacation of the condition and remand to the trial court for a hearing on whether the internet restrictions were warranted and, if so, for the trial court to tailor those internet restrictions to conform to the purpose behind defendant's individualized order of probation. *People v. Cristy Wilson*; Unpublished opinion of 07-27-17 (COA# 330799) SADO - Desiree M. Ferguson. **PROBATION -- Conditions Of -- Other Specific Terms.**

Genesee Circuit Erred When it Scored OV 2

In these consolidated cases, defendants' convictions were affirmed, but defendant Lay's sentence was vacated, and his matter was remanded for resentencing. The panel held that OV 2 (lethal potential of weapon possessed) was misscored at 10 where neither victim clearly identified the length of the rifle barrel on the record and their descriptions tended to suggest that the rifle may not have been a "short barreled rifle," and thus, the proper score for OV 2 was five points. Because this error altered the minimum range, defendant Lay was entitled to resentencing. *People v. Antonio Lay*; *People v. Kashif Reynolds*; Unpublished opinion of 08-03-17 (COA#s 330802, 331143) David L. Moffit. **SENTENCING AND PUNISHMENT -- Guidelines -- Scoring -- Scoring of Offense Variables(OVs) -- OV2 Lethal Potential of the Weapon Possessed.**

Wayne Circuit Erred When it Ruled That Defendant's Felony Firearm Sentence Should Run Consecutive to All of His Other Sentences and When it Failed to Give a Basis For Costs

Defendant's convictions were affirmed, but the matter was remanded for amendment of the judgment of sentence where the trial court erred when it ruled that defendant's felony firearm sentence would run consecutive to all his other sentences. The panel held that defendant's felony firearm sentence should be consecutive only to his armed robbery sentence where the felony firearm statute precludes CCW as a predicate felony and the

prosecutor did not list defendant's assault charge as a predicate felony in the information. Also, the trial court failed to establish a factual basis on the record to support the assessment of court costs requiring remand for a hearing. *People v. Donnie Thomas-Dawson*; Unpublished opinion of 08-03-17 (COA# 332339) MAACS - Arthur H. Landau. **SENTENCING AND PUNISHMENT -- Consecutive Terms-Felony Firearm, ECONOMIC PENALTIES -- Costs.**

Wayne Circuit Properly Reversed the Parole Board's Decision to Revoke Petitioner's Parole

The decision of the trial court reversing the Michigan Parole Board's decision to revoke petitioner's parole was affirmed. Petitioner was given a 5-year continuance of his sentence when inaccessible firearms lawfully owned by another were found in the bedroom where he was staying. After finding that the trial court applied the proper de novo standard to petitioner's due process issues, the panel held that the trial court properly concluded that the administrative law examiner's (ALE) finding of constructive possession was contrary to law where the ALE clearly relied on an improper formulation of constructive possession when it explicitly stated that it found the ownership of the firearms and ammunition and the fact that the guns were inaccessible to petitioner "immaterial" and where the ALE did not make any factual findings at all on the issue of petitioner's knowing power or intention to exercise dominion or control at any given time over the firearms or ammunition. Because the ALE failed to make any findings of fact to support the inference that petitioner intended to exercise dominion or control over the bedroom or any of its contents, petitioner's violation of parole was not proven by a preponderance of the evidence and remand to the Board was required for a new hearing.

The panel also found that the trial court properly applied the law when it found that the language of the relevant parole conditions was unconstitutionally vague as applied to petitioner where there was no language in the conditions sufficiently specific to guide a parolee's conduct if the parolee is required to avoid any situation that would place him within knowing proximity to firearms or ammunition.

Lastly, the panel held that the trial court did not err when it determined that the Board's imposition of a mandatory 60-month continuance in cases of firearm possession without consideration of mitigating circumstances constituted an abuse of discretion requiring reversal. The panel found the

Board's departure from the ALE's recommended 36-month continuance without explanation to be evidence of a standard five-year continuance in cases involving firearms possession and evidenced the Board's failure to contemplate the mitigating circumstances present in this case and found that there was no evidence to support the inference that the Board considered the mitigating circumstances. *Kelly v. Parole Board*; Unpublished opinion of 08-03-17 (COA# 334960) Daniel E. Manville. **CONDITIONS OF CONFINEMENT – Parole – Conditions Of, CONDITIONS OF CONFINEMENT – Parole – Revocation.**

Wayne Circuit Erred When it Failed to Give a Basis For Costs

Defendant's sentence was affirmed, but the matter was remanded where the trial court failed to give an explanation and factual basis for the costs imposed. *People v. Toney Lindsey*; Unpublished opinion of 08-08-17 (COA# 331833) MAACS - Gary Strauss. **ECONOMIC PENALTIES – Costs.**

Remand to Wayne Circuit Required for Correction of the PSIR

Defendant's conviction and sentence were affirmed, but the matter was remanded for the ministerial task of correcting the PSIR regarding defendant's birthplace. As to disparities alleged by defendant in his employment history, the panel noted that it could decline to grant relief because this claim of error was not adequately supported by an offer of proof. However, the panel found that the more appropriate approach would be to allow the issue to be addressed on remand and corrected if supported with an offer of proof. *People v. Michael Messer*; Unpublished opinion of 08-08-17 (COA# 332080) SADO - Erin Renee Van Campen. **SENTENCING AND PUNISHMENT – Presentence Report – Duty to Update.**

Macomb Circuit Erred When it Imposed a Departure Sentence and Failed to Acknowledge That Certain Factors Were Already Considered in the OV's and Used Defendant's Defensive Attitude as a Reason to Depart

Remand was required for a second resentencing where, pursuant to *People v. Steanhouse*, ___ Mich ___ (#s 152671, 152849, 152871, 152872, 152873, 152947, and 152948, 07-24-17), the trial court abused its discretion in applying the principal of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed. The panel held that the trial court erred

when it failed to acknowledge that certain factors were already considered under the OV's and when it used defendant's defensive attitude regarding the offense as a basis for the departure. The panel stated that, on remand, the trial court must address whether its cited departure reasons were given inadequate weight under the sentencing guidelines and should redirect its concern regarding defendant's claims of innocence toward his potential for rehabilitation. *People v. Johnnie Rogers*; Unpublished opinion of 08-08-17 (COA# 332624) MAACS - Alona Sharon. **SENTENCING AND PUNISHMENT – Guidelines – Appellate Review – Departure Reasons.**

Remand Required so that Ingham Circuit May Consider Whether to Use its Discretion to Issue a Consecutive Sentence

Defendant's conviction was affirmed, but the matter was remanded for a redetermination regarding whether consecutive sentencing should apply and whether defendant was entitled to sentencing credit. Defendant's conviction resulted from his assault on another prisoner while residing in jail awaiting trial. At sentencing, the prosecutor argued that a consecutive sentence was mandatory, and the trial court ordered a consecutive sentence with no sentencing credit. On appeal, the prosecutor conceded that because defendant was not serving a sentence at the time of the assault, consecutive sentencing was discretionary under M.C.L. 750.506a(2). *People v. Jonathon Purnell*; Unpublished opinion of 08-08-17 (COA# 333288) MAACS - Gary Strauss. **SENTENCING AND PUNISHMENT – Consecutive Terms – Prisoners, Parolees, and Escapees.**

Wayne Circuit Erred When it Denied Minor Respondent's Motion to Withdraw Plea Where There Was an Insufficient Factual Basis for the Plea

Remand was required to allow the prosecution an opportunity to establish a factual basis for fourth-degree CSC where the trial court abused its discretion when it denied respondent's motion to withdraw the plea on the ground that the questioning at the plea did not establish a sufficient factual basis to support a CSC-IV adjudicative finding pursuant to Mich. Ct. R. 3.941(C)(3)(a). If the prosecutor is unable to establish a factual basis, the plea must be set aside. *In re Sh'Marr X. Jackson, Minor, People v. Sh'Marr X. Jackson*; Unpublished opinion of 08-29-17 (COA# 331632); William E. Ladd. **GUILTY PLEAS – Factual Basis.**

Training Calendar

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

October 5, 2017	CDAM at the OCBA	OCBA - Bloomfield Hills, MI
October 6, 2017	Michigan Rules of Evidence	CAP - Detroit, MI
October 12, 2017	The State of the Law	OCBA - Bloomfield Hills, MI
October 15, 2017	Michigan Psychodrama Center	MPC - Birmingham, MI
October 17, 2017	The Investigator's Perspective	OCBA - Bloomfield Hills, MI
October 19, 2017	New Roster Attorney Orientation	MAACS - CDRC - Detroit, MI
October 20, 2017	MAACS Annual Fall Training	MAACS - CDRC - Auburn Hills, MI
October 25-28, 2017	2017 Fall Meeting & Seminar	NACDL - Boston, MA
October 27, 2017	MAACS Annual Fall Training	MAACS - CDRC - Lansing, MI
November 3, 2017	Anatomy of a Murder Case	CAP - Detroit, MI
November 9-11, 2017	CDAM's 2017 Fall Conference	CDAM - Boyne Mountain, MI
November 16-17, 2017	Zealous Advocacy & Child Victim Cases	NACDL - Las Vegas, NV
November 17, 2017	Sentencing Update	CAP - Detroit, MI
December 1, 2017	MSC Update	CAP - Detroit, MI
December 5, 2017	Informational Session for Friends/Family	SADO - Detroit, MI
December 6-9, 2017	NLADA's Annual Conference	NLADA - Washington, D.C.
January 12, 2018	USSC Update	CAP - Detroit, MI
January 18-21, 2018	Appellate Defender Training	NADL - New Orleans, LA
January 21-21, 2018	Advanced Criminal Law Conference	NACDL - Aspen, CO
January 26, 2018	DNA, <i>Daubert</i> and <i>Starmix</i>	CAP - Detroit, MI
February 3, 2018	Michigan Psychodrama Center	MPC - Birmingham, MI
February 9, 2018	Effective Use of Technology	CAP - Detroit, MI
February 23, 2018	Anatomy of a Criminal Sexual Conduct Case	CAP - Detroit, MI
March 9, 2018	Pre-Trial Motion Practice	CAP - Detroit, MI
March 23, 2018	Search & Seizure	CAP - Detroit, MI
April 18-21, 2018	Spring Meeting & Seminar	NACDL - New York, NY

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