WHAT TRIAL LAWYERS NEED TO KNOW ABOUT THE APPELLATE PROCESS

(And Why We Sometimes Have to Accuse You of Ineffective Assistance of Counsel)

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TABLE OF CONTENTS

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- Under MI Const 1963, Art. 1, §20 and MCR 7.203(A), a defendant has an appeal of right from his trial conviction and from all final orders and judgments.

- This right to a first appeal is not a federal constitutional right but a state may grant a constitutional right to appeal and Michigan does (Art. 1, §20) as part of the rights of an accused in criminal prosecutions.

- Michigan's right to appeal is to the first level of appeal, i.e., to the Michigan Court of Appeals. Appeal to the Michigan Supreme Court is second level of appeal and, therefore, by application for leave to appeal.

I. AN APPEAL IS NOT A "DO OVER"

"This Court disfavors consideration of unpreserved claims of error". *People v. Carines*, 460 Mich 750, 761 (1999); *People v. Mateo*, 453 Mich 203 (1996).

MCL 769.26. ERROR IN PLEADING OR PROCEDURE: EFFECT

> Sec. 26. No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

MCL 769.26 is a legislative directive to presume the validity of a verdict and to reverse only for those errors that affirmatively appear to undermine the validity of the verdict. *People v. Lukity*, 460 Mich 484 (1999).

MCR 2.613. LIMITATIONS ON CORRECTIONS OF ERROR

> **(A) Harmless Error**. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise

disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

(B) Correction of Error by Other Judges. A judgment or order may be set aside or vacated, and proceeding under a judgment or order may be stayed, only by the judge who entered the judgment or order, unless that judge is absent or unable to act. If the judge who entered the judgment or order is absent or unable to act, an order vacating or setting aside the judgment or order or staying proceedings under the judgment or order may be entered by a judge otherwise empowered to rule in the matter.

(C) Review of Findings by Trial Court. Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.

MRE 103. RULINGS ON EVIDENCE

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggesting to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in the rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

II. HOW TO PRESERVE ERROR FOR APPEAL

CJI2d 2.10 - Objections

During the trial the lawyers may object to certain questions or statements made by the other lawyers or witnesses. I will rule on these objections according to the law. My rulings for or against one side or the other are not meant to reflect my opinions about the facts of the case.

Sixth Circuit Pattern Jury Instructions, 1.09 Lawyers' Objections

(1) There is one more general subject that I want to talk to you about before I begin explaining the elements of the crime charged.

(2) The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

(3) And to not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

OBJECT! OBJECT! OBJECT! OBJECT! OBJECT! OBJECT!
(To the question! To the answer! To the evidence! To the order of denial! To the procedure!)

Objections must be TIMELY and SPECIFIC. *People v. Standifer*, 425 Mich 543 (1986)

A. WHY MUST AN OBJECTION BE TIMELY?

The purpose of requiring a timely objection is to give the trial court an opportunity to correct the error. *People v. Jones*, 468 Mich 345 (2003). A timely objection on the record, with a response by opposing counsel and a ruling by the judge, creates an appropriate record for appellate review. *Heshelman v. Lombardi*, 183 Mich App 72 (1990).

B. WHEN IS AN OBJECTION "UNTIMELY"?

Objection to admission of photos after jury retired to deliberate is untimely. *McAtee v. Guthrie*, 182 Mich App 215 (1989).

Objection to prior testimony is untimely when not raised until cross-examination of witness. *In re Weiss*, 224 Mich App 37 (1997).

C. HOW "SPECIFIC" MUST THE OBJECTION BE?

An objection without a reason does not preserve an issue for appeal. *People v. Ackerman*, 257 Mich App 434 (2003).

The precise ground of the objection must be stated. *People v. Watts*, 145 Mich App 760 (1985).

The arguments or theories raised in the trial court are the only ones preserved for appeal. *People v. Kilbourn*, 454 Mich 677 (1997).

An objection based on Rules of Evidence does not preserve an issue of whether the evidence violated the Confrontation Clause of the Michigan and federal constitutions. *People v. Coy*, 258 Mich App 1 (2003); *People v. Bauder*, 269 Mich App 174 (2005).

D. OFFERS OF PROOF

In order to preserve an objection to evidence ruled inadmissible, the proponent of the evidence must make an offer of proof and theory of admissiblity on the record. *People v. Hackett*, 421 Mich 338 (1984); *People v. Hampton*, 237 Mich App 143 (1999); *People v. Byrne*, 199 Mich App 674 (1993) (evidence barred by rape shield law may not be).

E. BUT SEE:

Defendant adequately preserved his objection to excluded impeachment evidence and, contrary to the Court of Appeals, need not have made an offer of proof to preserve the issue of his excluded evidence. *People v. Snyder*, 462 Mich 38 (2000).

III. WAIVER AND FORFEITURE (What Happens to the Issue When you Don't Object)

People v. Carter, 462 Mich 206, 214-215 (2000):

An error is **forfeited** if

- there is a failure to object at trial or to timely assert a right
- a forfeited error can be reviewed on appeal if Defendant makes a showing of "manifest injustice;", i.e., if convincing, Court of Appeals will review for plain error.
- forfeiture is considered neglect by counsel, but it may be strategic

An error is **waived** if

- there is an affirmative response on an issue
- waiver is usually made by counsel but binds the defendant, even as to most constitutional issues; *New York v. Hill*, 528 US 110 (2000) (counsel's agreement to an initial trial date beyond timeframe of IAD waives those timeframes); NO APPELLATE PARACHUTES!
- waiver can be of an issue or a remedy
- a waived error is "extinguished;"
- completely bars appellate review

See: *People v. Riley*, 465 Mich 442 (2001) for good discussion of the legal differences between waiver and forfeit.

IV. FEDERAL CASE LAW IN MICHIGAN COURTS

> State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.

O'Sullivan v. Boerckel, 526 US 838, 844 (1999).

Except for the Supreme Court of the United States, federal courts have no appellate authority over state courts; federal courts decisions, except for decisions of

the Supreme Court of the United States, are not precedential or binding on state courts. *Walters v. Nadell*, 481 Mich 377 (2008).

Michigan courts are obliged to enforce federal constitutional rights as interpreted by the Supreme Court of the United States. But Michigan is not required to incorporate federal principles in its own constitutional jurisprudence. *Sitz v. Department of State Police*, 443 Mich 744, 759-760 (1993).

Michigan courts are not bound by federal precedent in interpreting state law. *Continental Motors Corp. v. Muskegon Twp*, 365 Mich 191, 194 (1961).

But where Michigan and the U.S. Constitution contains virtually identical provisions, such as the Sixth Amendment and Article 1, §20, the federal construction of the federal provision should be followed absent compelling reasons for a more expansive interpretation of the state provision. *Sitz v. Department of State Police*, 443 Mich 744 (1993).

Similarly, the Fourth Amendment and Michigan Constitution, Art. 1, §11 guarantee the right of persons to be secure against unreasonable searches and seizures. *People v. Kazmierczak*, 461 Mich 411 (2000). "Absent compelling reasons," §11 of the Michigan Constitution is construed to provide same protection as the Fourth Amendment. *People v. Levine*, 461 Mich 172, 178 (1999).

A. PARALLEL FEDERAL/STATE CONSTITUTIONAL PROVISIONS

4th Amendment Search and Seizure/Const. 1963, Art.1 §11

5th Amendment Due Process/Const. 1963, Art. 1 §17

5th Amendment Double Jeopardy/Const. 1963, Art. 1 §15

6th Amendment Right to Jury Trial/Const. 1963, Art. 1 §14

6th Amendment Right to Speedy Trial, Assistance of Counsel, Confrontation/Const. 1963, Art. 1 §20

V. I'M A STATE COURT TRIAL ATTORNEY, WHY SHOULD I CARE ABOUT MY CLIENT'S FEDERAL HABEAS RIGHTS?

Another Avenue for Appeal and Relief: Review by the Federal Courts

If a federal claim of error has been adjudicated on the merits in the state proceedings, federal habeas relief is available if the state court decision was (1) contrary to, or (2) an unreasonable application of, (3) clearly established federal constitutional principles as determined by decisions of the Supreme Court, or if (4) the state court decision was based on an unreasonable determination of the facts in light of (5) the evidence presented in the state court proceedings. 28 USC §2254(d)(1) and (2).

"Adjudicated on the merits" is NOT the test – "presented" and "exhausted" is!

VI. WHAT DO I HAVE TO DO IN STATE COURT TRIAL PROCEEDINGS TO PRESERVE MY CLIENT'S CHANCE FOR HABEAS RELIEF?

In order to preserve your client's right to seek federal habeas relief on a claimed error, you must "fairly present" it as a federal constitutional error in the trial court, the COA, and the MSC. This is called "exhausting a claim".

A. How do you "Present" and "Exhaust" a Federal Claim in State Court?

"Fairly presenting a claim" means presenting the facts and analyzing them under a single federal theory of error to the state courts. A claim of error is presented in federal terms to a state court when it is argued in (1) federal case law employing constitutional analysis or (2) state case law which explicitly relies on federal constitutional analysis, or (3) it is presented in words which indisputably present a federal constitutional issue, i.e. ineffective assistance of counsel, cruel and unusual punishment, or (4) alleges facts within mainstream constitutional analysis. *McMeans v. Brigano*, 228 F3d 674, 681 (6th Cir., 2000).

- The claims of error must be presented in the same specific constitutional and factual framework at each level of the state process. *Picard v Connor*, 404 US 270 (1971).

- General allegations of violations of "due process" or "fair trial" do not convert state trial errors into federal constitutional claims. *McMeans*, 228 F3d at 681.

- ♦ The claims of error only have to be presented to the state courts in federal constitutional terms. They do not have to be adjudicated on their merits by the state courts. *Smith v. Digmon*, 434 US 332 (1978).

- ♦ Michigan courts will often ignore claims of federal constitutional error if the issue can be resolved in terms of state constitutional or non-constitutional law.

- ♦ **Caution**: Do not assume a state case analyzing a state constitutional provision with an identical federal counterpart is based on federal constitutional analysis.

- ♦ A defendant's Std. 11 pro se brief which raises federal constitutional claims, preserves issues not raised by counsel. Cf: *McMeans, supra*.

"Exhausting" a claim of error means the claim has been raised in one full round of the state's appellate process, including the seeking of discretionary review in the Michigan Supreme Court. *O'Sullivan v. Boerkel*, 526 US 838 (1999).

VII. FEDERAL HABEAS AND MCR 6.500: WHAT MUST I DO IF THE TRIAL (AND/OR APPELLATE) ATTORNEY DIDN'T "FEDERALIZE" THE CLAIM OF ERROR ?

MCR 6.500 et. seq. permits a defendant to move for relief from judgment after direct appeal.

- ♦ A "6.500" is the only way to raise claims of federal constitutional error which were not raised at the trial or on direct appeal.

- ♦ But MCR 6.508 prohibits a grant of relief on any ground (other than jurisdictional defects) which could have been raised on direct appeal, unless the defendant demonstrates "cause" and "prejudice".

- ♦ If Defendant fails to show "cause" and "prejudice" for constitutional claims which could have been raised on direct appeal but were not, Defendant has procedurally defaulted the federal claims and his habeas petition will be dismissed.

- ♦ A 6.500 virtually mandates claims of IAC and IAAC for failure to raise flaims of federal constitutional error during direct appeal because the IAC/IACC claims must themselves be presented as exhausted.

VIII. SELECTED CASES FOR SELECTED CLAIMS OF FEDERAL CONSTITUTIONAL ERROR.

A. Prosecutorial Misconduct - Due Process/5th Amendment

Donnolly v. Christoforo, 416 US 637 (1974) (Prosecutorial misconduct which deprives defendant of fair trial is constitutional error)

Berger v. United States, 295 US 78 (1935) (Prosecutor must ensure fair trial not conviction, improper insinuations to jury equal error)

United States v. Young, 470 US 1 (1985) (Prosecutorial conduct must be viewed in the context of the whole trial, expressions of personal belief in the truth of testimony is error)

Santobello v. New York, 404 US 257 (1971) (where plea is induced in any way by promise of prosecutor, promise must be fulfilled).

Gordon v. Kelly, 2001 WL 145144 (6th Cir., 2001) (prosecutorial misconduct in implying witness feared defendant and jury should too)

Kincade v. Sparkman, 175 F3d 444 (1999) (Prosecutor's closing remarks that defendant had committed other crimes not in evidence were reversible error)

United States v. Carroll, 26 F3d 1380 (6th Cir., 1994) (Criteria for assessing prosecutorial misconduct)

United States v. Leon, 534 F2d 667 (6th Cir, 1976) (prosecutor's remarks that gambling destroys inner cities is reversible error).

United States v. Francis, 170 F3d 546 (1999) (State's Improper bolstering/vouching for witnesses' truthfulness is constitutional error).

Martin v. Burke, 234 F3d 1269 (6th Cir., 2000) (relief granted where prosecutor failed to fulfill plea bargain promise to recommend a 10-20 year sentence.)

Boyle v. Million, 201 F3d 711 (6th Cir., 2000) (relief granted where prosecutor's conduct during trial was "so deplorable as to define the term 'prosecutorial misconduct'.")

B. Prosecutorial Vindictiveness

United States v. Goodwin, 457 US 368 (1982)

United States v. Anderson, 923 F2d 450 (6th Cir, 1991)

C. Judicial Misconduct

Jenkins v. United States, 380 US 445 65) (court's statement to jury in response to note re: their inability to agree on verdict, that "You have got to reach a decision in this case" was coercive).

Packer v. Hill, 2002 WL 47063 (9th Cir., 2002) (trial court's statements to "hold out juror" resulted in coerced verdict).

North Carolina v. Pearce, 395 US 711 (1969) (presumption of vindictiveness when heavier sentence is imposed after original sentence was vacated, but presumption is overcome if sentencing court can justify heavier sentence)

D. Juries

Nevers v. Killinger, 169 F3d 352 (6th Cir., 1999) (fair trial denied due to extraneous influences on jury)

Batson v. Kentucky, 476 US 79 (1986) (fair trial requires inquiry into use of peremptory challenges to strike jurors in protected classes)

E. Ineffective Assistance of Counsel

Strickland v. Washington, 466 US 668 (1984) (Standard for effectiveness)

Evitts v. Lucey, 469 US 387 (1984) (Ineffective assistance of appellate counsel)

Roe v. Flores- Ortega, 120 S.Ct. 1029 (2000) (Counsel did not file Notice of Appeal, but did not get defendant's consent. Not per se ineffective, but close to being so)

Kimmelman v. Morrison, 477 US 365, 381; 106 SCt 2574; 91 LEd 2d 305 (1986) (Failure to bring a dispositive motion can constitute ineffective assistance of counsel. Further, counsel's or a defendant's waiver of the substantive claim does not preclude the assertion of the ineffective assistance of counsel claim.)

Groseclose v. Bell, 130 F3d 1161 (1997) (defense strategy v IAC)

Workman v. Tate, 957 F2d 1339 (6th Cir., 1992) (IAC where counsel failed to interview and call 2 witnesses identified by Defendant who would have been helpful to defense)

Tucker v. Prelesnik, 181 F3d 747 (6th Cir., 1999) (IAC for failure to obtain medical records which would have established that Defendant could not run in the manner described by the victim)

Northrop v. Trippett, 265 F3d 372 (6th Cir., 2001, unpublished) (IAC due to failure to file a motion to suppress based on anonymous tip without any corroboration)

Washington v. Hofbauer, 228 F3d 689 (6th Cir., 2000) (IAC for failing to object to improper egregious closing arguments)

Mitchell v. Mason, 257 F3d 554 (6th Cir, 2001) (constructive denial of counsel where defense counsel was suspended from practice during critical periods before trial and did not meet with Defendant sufficiently for adequate representation)

Magana v. Hofbauer, 263 F3d 542 (6th Cir,. 2001) (IAC where attorney failed to understand and convey true value of plea offer).

F. Sufficiency of the Evidence

In re: Winship, 397 US 358 (1970) (Proof beyond reasonable doubt is component of due process)

Jackson v. Virginia, 443 US 307 (1979) (Standard of review of sufficiency of evidence claims)

Apprendi v. New Jersey, 530 US 466 (2000) (other than a prior conviction, any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt).

United States v. Booker, 125 S Ct 738 (2005) (A mandatory guideline sentencing scheme which requires judicial factfinding is unconstitutional).

G. Miranda Rights

Miranda v. Arizona, 384 US 436 (1966)

Edwards v.. Arizona, 451 US 477 (1981) (once an accused has invoked his right to have counsel present during a custodial interrogation, he is not subject to further interrogation until counsel has been made available unless the accused initiates the contact with authorities).

Dickerson v. United States, 530 US 428 (2000) (*Miranda* warnings are constitutionally based).

Thompson v. Keohane, 516 US 99 (1995) (Whether defendant is in custody is mixed question of fact and law reviewed *de novo)*

H. Fourth Amendment - Knock and Announce

Wilson v. Arkansas, 514 US 927 (1995) (4th Amendment incorporates the common law requirement that police entering a dwelling must “knock and announce” before attempting forcible entry. Test is “reasonableness under the circumstances”.)

Richards v. Wisconsin, 520 US 385 (1997) (no blanket exceptions to "knock and announce" requirement)

United States v. Dice, 200 F3d 978 (6th, 2000) (Violation of Ohio knock and announce rule requires suppression). Use to challenge *People v Vasquez*, 461 Mich 235 (1999) and *People v Stevens*, 460 Mich 626 (1999)

I. Fourth Amendment - Exceptions to the Warrant Requirement

Mincey v. Arizona, 437 US 385 (1978) (No exigent circumstances exception to warrant requirement at murder scene)

Thompson v. Louisiana, 469 US 17 (1984) (No "crime scene" exception to the warrant requirement)

United States v. Johnson, 22 F3d 674 (6th Cir, 1994) (Rescue of 14-year-old held against her will and sexually assaulted in locked apartment justifies entry to rescue but not search of closets after rescue is concluded)

J. Fourth Amendment - Search Warrants

Franks v. Delaware, 438 US 154 (1978) (Challenges to veracity of search warrant averments)

Roviaro v. United States, 353 US 53 (1957) (Production of informant)

Florida v. Jimeno, 500 US 248 (1991) (consent to search must be specific and may be limited)

Florida v. J.L., 529 US 266 (2000) (anonymous tip which cannot be corroborated as to allegations of illegal behavior does not establish reasonable suspicion for a *Terry* investigative stop).

K. Right to Remain Silent - Fifth Amendment

Estelle v. Smith, 451 US 454 (1981)

Griffin v. California, 380 US 609 (1965) (References to defendant's failure to testify are error)

Doyle v. Ohio, 426 US 610 (1976) (State's references to post-*Miranda* silence to impeach violate due process)

Mitchell v. United States, 119 S.Ct. 1307 (1999) (Right to remain silent survives guilty plea and extends through sentencing)

Lent v. Wells, 861 F2d 972 (1988) (Where defendant did not testify or present evidence, prosecutor's references to "uncontroverted evidence" violated defendant's privilege against self-incrimination)

Combs v. Coyle, 205 F3d 269 (6th Cir, 2001) (use of defendant's pre-arrest pre *Miranda* statement ("Talk to my lawyer") as substantive evidence of defendant's purpose and prior calculation and design", issues contest at trial, violates privilege against self-incrimination). The holding in *Combs* invites reevaluation of *People v Reavy*, 436 M 197 (1990) and *People v Schollaert*, 194 MA 158 (1992).)

McGraw v. Holland, 257 F3d 513 (6th Cir., 2001) (Defendant's absolute right to remain silent must be scrupulously honored)

L. Confessions

Maine v. Moulton, 474 US 159 (1985) (state violates right to counsel when it allows codefendant, acting undercover, to record incriminatory conversations with defendant.)

McNeil v. Wisconsin, 501 US 171 (1991) (Violation of 6th Amendment right to counsel means statements are inadmissible)

Arizona v. Fulminate, 499 US 279 (1991) (Statements induced by threats/promises are involuntary)

County of Riverside v. McLaughlin, 500 US 44 (1991) (Due process violated if excessive detainment of defendant or to delay an arraignment for purposes of prolonging an interrogation.)

McGraw v. Holland, 257 F3d 513 (6th Cir., 2001) (habeas relief granted where state courts unreasonably applied USSC precedent re: honoring defendant's exercise of right to remain silent)

M. Double Jeopardy- Fifth Amendment

Blockburger v. United States, 284 US 299 (1932) (Test is whether each offense has same elements) NOTE: Michigan uses a different test for legislative intent; *People v Robideau*, 419 M 458 (1984) and rejects *Blockburger* test.

Schiro v. Farley, 510 US 222 (1994) (Successive prosecutions)

United States v. Ursery, 518 US 267 (1996) (Successive punishments)

Hudson v. United States, 522 US 93 (1997) (Multiple criminal punishments)

United States v. Halper, 490 US 435 (1989) (Civil sanctions so onerous as to be "criminal")

N. Identification Procedures

Neil v. Biggers, 409 US 188 (1972) (Test is totality of circumstances which indicates reliability)

Manson v. Braithwaite, 432 US 98 (1977) (Reliability of identification is key inquiry)

Simmons v. United States, 390 US 377 (1968) (Suggestive photos)

United States v. Wade, 388 US 218 (1967) (pretrial identification procedures and in-court identification)

O. Right to Present Defense - Fifth and Sixth Amendment

Ungar v. Sarafite, 376 US 575 (1964) (Refusal to grant continuance at trial is constitutional violation)

Crane v. Kentucky, 476 US 683 (1986) (Right to present defense does not hinge on consideration of merits of proposed defense)

California v. Trombetta, 467 US 479 (1984) (State's failure to preserve exculpatory evidence violates due process)

P. Duty to Disclose Exculpatory Evidence

Brady v. Maryland, 373 US 83 (1963) (prosecutor has constitutional duty to turn over material exculpatory evidence and evidence in mitigation of punishment)

Strickler v. Greene, 527 US 263 (1999) (defense attorney may reasonably rely on State's "open file" policy as satisfying *Brady* obligation)

Kyles v. Whitley, 514 US 419 (1995) (*Brady* violation may occur if police withhold exculpatory evidence from prosecutor)

United States v. Bagley, 473 US 667 (1985) (Failure to disclose impeachment evidence is *Brady* violation)

Napue v. Illinois, 360 US 264 (1959) (Failure to correct false testimony by state witness is *Brady* violation)

Campbell v Marshall, 769 F2d 314, 321 (6th Cir., 1985) cert. den., 475 US 1048; 106 SCt 1268; 89 LEd 2d 576 (1986). (A defendant who pleads guilty may still argue that his plea was invalid because it was made in the absence of *Brady* material.)

Q. Witness Bias

Davis v. Alaska, 415 US 308 (1974) (Constitutional right to confront witnesses is right to cross-examine. Witness' motive for testifying (bias) is always relevant. Refusing to allow Defendant to cross-examine key prosecution witness regarding his status as a probationer after adjudication as juvenile delinquent violates 6th Amendment Confrontation Clause because witness' probationary status was relevant to his bias (under pressure to implicate Defendant and divert attention from himself as a possible suspect).

Delaware v. Van Arsdall, 475 US 673 (1986) (forestalling inquiry into state's dismissal of public drunkenness charge against witness violated Defendant's rights under Confrontation Clause).

R. Right to Counsel - Sixth Amendment

Geders v. United States, 425 US 80 (1976) (Court's order to attorney not to speak to client during overnight recess in trial violates right to counsel)

Weatherford v. Bursey, 429 US 545 (1977) (Intrusion in attorney-client relationship not per se unconstitutional, but requires showing of prejudice)

United States v. Bryant, 545 F2d 1035 (6th Cir., 1976) (Denial of consultation with client during one hour lunch break denies defendant right to counsel)

Caver v. Straub, 349 F3d 340 (6th Cir., 2003) (reinstruction of a jury is a "critical state" requiring presence of defense counsel)

S. Confrontation - Sixth Amendment

Crawford v. Washington, 541 US 36 (2004) (Rejecting *Ohio v Roberts*, 448 US 56 (1980) as the test for hearsay and holding that Confrontation Clause only allows the admission of testimonial statements from witnesses who are absent from trial if the declarant is unavailable and Defendant had a prior opportunity to cross-examine.)

Davis v. Washington, 547 US 813 (2006) statements made to 911 are not testimonial and are admissible; statements made to investigating authorities are testimonial and not admissible except by declarant's testimony).

Melendez-Diaz v. Massachusetts, 557 US__; 129 S Ct 2527; 174 LEd 2d 314 (2009) (affidavits of drug analysis are testimonial and inadmissible unless right of confrontation is waived).

California v. Green, 399 US 149 (1970) (Cross-examination is "greatest legal engine ever invented for the discovery of truth")

Chambers v. Mississippi, 410 US 284 (1973) (Right to confrontation may trump state procedural rules)

Bruton v. United States, 391 US 123 (1968) (Admission at Defendant's trial of non-testifying co-defendant's statements that implicate Defendant violates Confrontation Clause)

Lilly v. Virginia, 119 S.Ct. 1887 (1999) (Non-testifying accomplice's confession violates confrontation clause. Declarations against penal interest are "presumptively unreliable and to rebut this presumption, we must evaluate the indicia of reliability associated with each individual remark or declaration made by the co-defendant".)

Vincent v. Seabold, 226 F3d 681 (A state court which refuses to recognize the binding effects of *Lilly* is acting unreasonably) NOTE: *Vincent's* analysis is a direct rejection of the analysis of the Michigan Supreme Court in *People v Poole*, 444 Mich 151 (1993).

Dorchy v. Jones, 398 F3d 783 (6th Cir., 2005) (Under *Ohio v Roberts*, Sixth Amendment is violated when out-of-court testimony and statement were admitted under then MRE 804(b)(6), the "residual hearsay" rule.)

Bulls v. Jones, 274 F3d 329 (6th Cir., 2001) (*Bruton* violation where non-testifying co-defendants' unredacted statements were admitted as substantive evidence of guilt)

T. Jury Instructions

Sullivan v. Louisiana, 508 US 275 (1993) (constitutionally deficient reasonable doubt instruction requires reversal)

Sandstrom v. Montana, 442 US 510 (1979) (Jury instructions which shift burden of proof on elements of offense are unconstitutional)

Barker v. Yukins, 199 F3d 867 (6th Cir., 2000) cert den (2000) (Failure to instruct fully on defendant's theory of self-defense not harmless error. Michigan COA erred in weighing factual evidence and concluding what jurors might have done if properly instructed.)

U. Eighth Amendment

United States v. Bajakajian, 524 US 321 (1998) (Discusses limits on forfeiture under the 8th Amendment prohibition against cruel/unusual/excessive penalties).

V. Harmless Error

Chapman v. California, 386 US 18 (1967) (the standard for reviewing constitutional error on direct appeal is whether the error was harmless beyond a reasonable doubt).