SENTENCING LAW UPDATES

WAYNE COUNTY CRIMINAL ADVOCACY PROGRAM

November 18, 2016, Anne Yantus[1]

NEW FROM THE MICHIGAN LEGISLATURE

OV 7: This variable was amended effective January 5, 2016, to provide for an assessment of points when "[a] victim was treated with sadism, torture, excessive brutality *or similarly egregious conduct* designed to substantially increase the fear and anxiety a victim suffered during the offense." 2015 PA 137, amending MCL 777.37 (amended language in italics).

Fine or Imprisonment: MCL 769.5 was amended effective March 14, 2016, to clarify that when a statute provides for a fine and imprisonment, the court may impose imprisonment without the fine or a fine without imprisonment. If a statute provides for a fine or imprisonment, the court may impose both in its discretion. The Legislature also repealed MCL 769.2, effective March 14, 2016, to remove the sentencing court's authority to order a state prisoner or county jail inmate to serve the sentence in solitary confinement or at hard labor. 2015 PA 216, amending MCL 769.5 and MCL 769.2.

Manufacture Meth Near School/Library: Effective August 23, 2016, an individual who manufactures methamphetamine on or within 1,000 feet of school property or a library is subject to not more than twice the penalty for the underlying offense. MCL 333.7410(6).

HYTA: Significant amendments took effect August 18, 2015. The eligible age limit has been raised to 23 (offense must have been committed *before* the offender's 24th birthday), although the prosecutor's consent is required for crimes committed between the ages of 21 and 23. Prison is still an option, but it may not exceed two years (previously three years) and there is a list of ineligible offenses for the two-year prison option. A one-year term of probation may be imposed *to follow* a prison or jail term. See MCL 762.11 *et seq.*

PENDING IN THE MICHIGAN SUPREME COURT

Lockridge Issues: Granting leave from the decisions in *People v Steanhouse*, 313 Mich App 1 (2015), and *People v Masroor*, 313 Mich 358 (2015), the Court will decide four questions: (1) whether the Michigan sentencing guidelines remain mandatory for cases involving no judicial fact-finding; (2) whether the Court is being asked to overrule the remedy set forth in *People v Lockridge*, 498 Mich 358 (2015); (3) how *stare decisis* affects the analysis for question number 2; and (4) the appropriate standard of review for sentences in a post-*Lockridge* world. *People v Steanhouse and Masroor*, 499 Mich 934; 879 NW2d 252 (May 25, 2016).

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SORA, HYTA & Punishment: The Michigan Supreme Court has granted leave to determine whether (1) SORA requirements constitute punishment, (2) whether SORA is punishment as applied to an individual who successfully completes HYTA, (3) whether sufficient due process is afforded by the SORA statutory definition of "conviction" to include HYTA matters, (4) if SORA is not punishment, does the Act nevertheless violate due process, (5) is there an ex post facto violation where subsequent requirements such as the public registry are applied to individuals already on the registry, and (6) is there cruel and/or unusual punishment under SORA? *People v Temelkoski*, 498 Mich 942; 872 NW2d 219 (12/18/15).

Lifetime Electronic Monitoring: The Supreme Court has granted mini oral argument in two cases to address the scope of Michigan's mandatory lifetime electronic monitoring statutes. In the case of *People v Comer*, ___ Mich ___; 876 NW2d 581 (April 1, 2016), the Court will decide whether LEM applies to all first-degree CSC convictions or only those with a victim under the age of 13. The Court will also address whether the trial court was authorized to amend the judgment of sentence to add LEM twenty months after sentencing and on its own motion. In the case of *People v Roark*, ___ Mich ___ ; 876 NW2d 581 (April 1, 2016), the Court will hear mini argument over whether a defendant may prevail on a motion for relief from judgment with respect to an argument that he was not accurately advised regarding LEM before entering his guilty plea in 2008, and whether he must demonstrate that he would not have pleaded guilty but for this mistake.

Timeliness of the Habitual Offender Notice: The Supreme Court will hear mini oral argument in a case where the habitual offender notice was filed with the felony complaint and warrant in the district court and was part of an unsigned felony information found in the circuit court file. The Court has asked "whether serving the habitual offender notice prior to the defendant's arraignment on the information satisfies the 21-day requirement under MCL 769.13," and "if not, whether the harmless error rules apply to the failure to serve the habitual offender notice within the 21-day time requirement under MCL 769.13." *People v Swift*, ___ Mich ___ (Docket No. 151439, 10/12/16).

> The Supreme Court had earlier granted mini oral argument in another case to address whether the habitual offender notice was timely filed where defendant acknowledged receiving the felony complaint with the habitual offender notice in the district court, but notice was not timely served on defendant and his attorney in the circuit court. *People v Muhammad*, 497 Mich 988; 860 NW2d 926 (2015) (prosecutor's appeal). Following oral argument, the Supreme Court vacated the opinion of the Court of Appeals (which found harmless error) and remanded for a determination of whether the trial court's order dismissing the habitual offender notice was erroneous, noting that the prosecutor had conceded it did not timely serve the notice under MCL 769.13. The Supreme Court added that the Court of Appeals should "determine whether the trial court erred by concluding that the proper remedy for the prosecutor's statutory violation was dismissal of the habitual offender notice[,]" and directed the Court of Appeals to consider the case of *In re Forfeiture of Bail Bond*, 496 Mich 320; 852 NW2d 747 (2014). *People v Muhammad*, 498 Mich 909; 870 NW2d 729 (2015). In an unpublished opinion dated December 22, 2015, the Court of Appeals affirmed the trial court's dismissal of the habitual offender notice. The Court of Appeals reasoned that the habitual offender statute states that the prosecutor "shall" file the notice within a specified time period, and the Supreme Court concluded in the *Forfeiture of Bail Bond*

case that "[w]here a statute provides that a public officer 'shall' do something within a specified period of time and that time period is provided to safeguard someone's rights or the public interest, . . . it is mandatory, and the public officer is prohibited from proceeding as if he or she with the statutory notice period." *In re Forfeiture of Bail Bond*, 496 Mich at 339. For this reason, the Court of Appeals concluded that the remedy of dismissal was appropriate. *People v Muhammad (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2015 (Docket No. 317054).

Note, effective January 1, 2017, MCR 6.112 will no longer state that the harmless error rule that applies to amendments of the felony information and indictment does *not* apply to amendment of the habitual offender notice. The Supreme Court deleted language previously found in subsection (G) which provided: "This provision [the harmless error rule that precluded dismissal of a case for certain ministerial amendments of the felony information, absent objection and a showing of prejudice] does not apply to the untimely filing of a notice of intent to seek an enhanced sentence." The Court also amended subsection (H) to now provide that "the court before, during, or after trial may permit the prosecutor to amend the information or the notice of intent to seek enhanced sentence unless the proposed amendment would unfairly surprise or prejudice the defendant."

RECENTLY DECIDED BY THE MICHIGAN SUPREME COURT

***Scoring Errors After* Lockridge:** The Supreme Court denied leave to appeal after hearing mini oral argument on two questions: "(1) whether a defendant can be afforded relief from an unpreserved meritorious challenge to the scoring of offense variables through a claim of ineffective assistance of counsel, see *People v Francisco*, 474 Mich 82, 89 n 8 (2006); and (2) the scope of relief, if any, to which a defendant is entitled when the defendant raises a meritorious challenge to the scoring of an offense variable, whether preserved or unpreserved, and the error changes the applicable guidelines range, whether the defendant's sentence falls within the corrected range or not. See *id.* at 89-90; see also *People v Kimble*, 470 Mich 305, 310 (2004)." *People v Douglas*, 499 Mich 935; 879 NW2d 250 (May 25, 2016).

Scoring Errors After Lockridge: In an order, the Supreme Court remands for resentencing where the trial judge departed from the sentencing guidelines range in part because of the defendant's pattern of prior narcotic offenses, but failed to score OV 13 for that same pattern. As the trial judge was required to assign the highest number of points applicable under OV 13 – which would be 10 points in this instance - and because the recommended range would change, the defendant was entitled to resentencing under *People v Francisco*, 474 Mich 82 (2006). *People v Geddert*, ___ Mich ___ (Docket No. 151280, 9/21/16). See also *People v Johnson*, ___ Mich ___ (Docket No. 150703, 10-26-16) (error in scoring of PRV 1, remanded for resentencing pursuant to *People v Francisco*); *People v Chandler*, __ Mich __ (Docket No. 151219, 11/2/16) (resentencing if error in scoring OV 10, otherwise *Lockridge-Crosby* review).

OV 8 and Incidental Movement of Victim The Supreme Court dismissed the appeal after hearing mini oral argument to determine whether the Court of Appeals erred in finding movement that was only incidental to the crime and therefore not scorable under OV 8. The

case centered on whether the movement that would support an assessment of points for asportation cannot be movement that is inherent in the sentencing offense and arguably incidental to the offense, in this case operating while intoxicated second offense with a passenger under the age of 16. The Court of Appeals concluded in an unpublished decision that the movement was merely incidental and not scorable, but Judge Murray dissented believing the "merely incidental" exception found in case law is not found in the statute. The Supreme Court vacated the Court of Appeals judgment granting resentencing and dismissed the defendant's application for leave to appeal. *People v Abrego*, 499 Mich 923; 878 NW2d 478 (May 20, 2016).

OV 10 and Predatory Conduct: Following mini oral argument, the Supreme Court concluded that offense variables may *not* be scored based solely on the co-offender's conduct unless the variable specifically permits this. The trial court erred in scoring 15 points for predatory conduct under OV 10 based solely on the conduct of the co-offenders. *People v Gloster*, 499 Mich 199; 880 NW2d 776 (May 24, 2016).

Double Enhancement: SORA and Habitual Offenders: After granting leave to appeal, the Supreme Court concluded that SORA-1 (first violation of SORA), SORA-2 (second violation of SORA) and SORA-3 (third violation of SORA) are separate offenses and the Legislature intended to allow enhancement of these sentences under the habitual offender laws. A sentence may be enhanced as a second habitual offender under MCL 769.10 even when the same prior conviction is used to support the second offense provisions of SORA-2. *People v Allen*, 499 Mich 307 (June 15, 2016), reversing 310 Mich App 328 (2015).

NEW ABILITY TO PAY COURT RULE

Effective September 1, 2016, several court rules including MCR 6.425 and MCR 6.445 were amended to reflect new rules for the incarceration of individuals who cannot pay court-ordered financial obligations. The Supreme Court added subsection 3 to MCR 6.425(E), now specifying that a trial court may not sentence an individual to incarceration or revoke probation for a failure to pay unless the trial court finds on the record that defendant is able to comply without "manifest hardship" and the defendant has not made good faith efforts to pay. In determining whether there would be "manifest hardship," the trial court should consider the defendant's employment history and employability, the willfulness of the failure to pay, the defendant's financial resources, basic living expenses and any other special circumstances. If the trial court finds a manifest hardship, it may set up a payment plan or waive all or part of the amount owed to the extent permitted by law.

REVISED HABITUAL OFFENDER COURT RULE

Effective January 1, 2017, MCR 6.112 (Information or Indictment) has been amended to delete language that the harmless error rule does not apply to the untimely filing of a notice of intent to seek an enhanced sentence. Further, the court rule now provides that the prosecutor, with court approval, may amend the notice of intent to seek enhanced sentence "before, during, or after trial" unless the proposed amendment "would unfairly surprise or prejudice the defendant."

NEW CASE LAW

Speedy Sentencing

The Sixth Amendment right to speedy trial does not apply at sentencing. The right protects the presumption of innocence and "loses force upon conviction." Relief for delay in sentencing may be available by statute or other rule, and inordinate delay may be addressed under the Due Process Clause of the Fifth and Fourteenth Amendments. *Betterman v Montana*, 136 S Ct 1609, 1614; 194 L Ed 2d 723 (May 19, 2016).

Full Retroactivity of Miller v Alabama

On January 25, 2016, the United States Supreme Court held the rule of *Miller v Alabama*, 132 S Ct 2455 (2012), is a substantive rule of federal constitutional law that is fully retroactive to cases on collateral review in the state and federal courts. The premise that "children are constitutionally different" creates a rule that eliminates life without parole for the class of juvenile offenders whose crimes reflect transient immaturity. A sentence of life without parole "is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption." The sentence of life without parole for juveniles whose crimes reflect transient immaturity, i.e., the vast majority of juvenile offenders, is excessive and precluded under the Eighth Amendment. *Montgomery v Louisiana*, 136 S Ct 718, 726 (2016).

While the Supreme Court concluded its opinion with the announcement that resentencings are not necessarily required, and the state may remedy the error by permitting juvenile homicide offenders to be considered for parole, slip op at 21, the Michigan statute sets forth a procedure that requires resentencing where the options are limited to a term of years (minimum term between 25 and 40 years, maximum term 60 years) or a sentence of life without parole. MCL 769.25a. The prosecutor has 30 days to provide a list of defendants who must be resentenced to the chief circuit judge of that county (viz. by March 28, 2016). The prosecutor has 180 days to file a motion for resentencing in cases where a sentence of life without parole is requested (viz. by August 24, 2016). If the prosecutor does not file a motion for resentencing, the defendant must be resentenced to a term of years within the limits specified above. The timing requirements run from the date the decision in *Montgomery v Louisiana* becomes final. MCL 769.25a.

Juvenile Offenders and Jury Sentencing

There is no Sixth Amendment right to jury trial to determine whether a juvenile offender should be sentenced to life without parole for first-degree murder. The maximum sentence for a juvenile convicted of first-degree murder as an adult is life without parole. The legislature's implementation of the *Miller* decision in MCL 769.25 simply establishes "a procedural framework for protecting a juvenile's Eighth Amendment rights at sentencing," and does not involve fact-finding that increases the maximum possible penalty. *People v Hyatt*, ___ Mich App ___ (Docket No. 325741, 7/21/16), slip op at 13.

The imposition of a life-without-parole sentence for a juvenile is not contingent on a finding of fact, although the sentencing judge must take into account the *Miller* factors when

imposing a sentence of life without parole in order to protect a juvenile's Eighth Amendment right to a proportionate, individualized sentence. The considerations required by *Miller* are sentencing factors, not elements. The *Miller* decision requires a hearing which may involve conflicting evidence and the sentencing judge's finding of fact when reviewing that evidence, but no specific finding of fact is required before the imposition of a life-without-parole sentence. *Hyatt*, slip op at 13 - 16.

The analysis under *Miller* acts as a means of mitigating the punishment because it acts "to caution the sentencing judge against imposing the maximum punishment authorized by the jury's verdict, a sentence which *Montgomery* cautioned is disproportionate for 'the vast majority of juvenile offenders . . . .'" *Hyatt*, slip op at 18 (internal citation omitted).

The *Milbourn* proportionality standard applied with "a heightened degree of scrutiny" is appropriate for appellate review purposes. Slip op at 25-26. A sentence of life without parole for a juvenile is "inherently suspect" and "more likely than not" disproportionate. Slip op at 26-28.

"[T]he fact that a vile offense occurred is not enough, by itself, to warrant imposition of a life-without parole sentence." *Hyatt*, slip op at 24. The sentencing court must consider the particular juvenile as well as the particular offense. *Id.* "[G]iven the unique and transient qualities of youth, even the most thorough, well intentioned, and earnest sentencing courts encounter a significant risk of reaching the wrong conclusion about a juvenile's character being irreparably corrupt." *Id.*

In determining whether the sentencing court abused its discretion under the *Milbourn* standard, certain situations constitute an abuse of discretion: (1) where the sentencing court fails to consider a relevant factor that should have received significant weight; (2) where the court gives significant weight to an improper or irrelevant factor; (3) where the court considers only appropriate factors, but commits clear error of judgment "by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." *Hyatt*, slip op at 27.

Note, under MCR 7.215(J)(6), the *Hyatt* decision is now binding on all other panels of the Court of Appeals and implicitly overrules the decision in *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (8/20/15).

GPS Monitoring of Sex offenders

On March 30, 2015, the United States Supreme Court concluded that lifetime electronic monitoring is a search under the Fourth Amendment. The Court remanded to the North Carolina Supreme Court to decide whether the monitoring was an unreasonable search. *Grady v North Carolina*, 575 US ___; 135 S Ct 1368 (2015).

> Under Michigan law, mandatory lifetime electronic monitoring of an individual convicted of second-degree criminal sexual conduct involving a victim under the age of 13 is *not* an unconstitutional search, and does not constitute cruel or unusual punishment. There is likewise no double jeopardy violation where the legislature provided for imprisonment and lifetime monitoring as punishment for a crime. *People*

v Hallak, 310 Mich App 555 ; 873 NW2d 811 (2015), rev'd on other gds 876 NW2d 523 (Mich, 2016).

Both the Michigan Supreme Court and Michigan Court of Appeals have concluded that lifetime monitoring *is* punishment. *People v Cole*, 491 Mich 325, 336; 817 NW2d 497 (2012); *Hallak, supra.* Recently, the Michigan Court of Appeals concluded that lifetime monitoring is precluded by the Ex Post Facto Clause where the crime was committed before the Michigan Legislature enacted the lifetime monitoring provisions. *People v Mathis*, unpublished opinion per curiam of the Court of Appeals, issued January 14, 2016 (Docket No. 323821).

Where the trial court failed to order mandatory lifetime monitoring at the time of sentencing, it may correct the sentence at any time through the resentencing process. A sentence that requires lifetime monitoring is invalid without it. *People v Comer*, 312 Mich App 538; 879 NW2d 306 (2015), mini oral argument granted on this issue, 876 NW2d 581 (Mich, 4/1/16). See also *People v Harris*, 224 Mich App 597; 569 NW2d 525 (1997) (trial court may correct invalid sentence at any time; trial court properly resentenced defendant when it learned of his true identity, prior record, escape status and the requirement of mandatory consecutive sentencing).

Sexually Delinquent Person

When an individual is sentenced for indecent exposure as a sexually delinquent person under MCL 750.335a, the mandatory sentence is one day to life and the sentencing guidelines do not control. *People v Campbell*, ___ Mich App ___ (Docket No. 324708, 7/14/16). The amended statutory language contained in MCL 750.335a became effective February 1, 2006, and now provide for a mandatory sentence. (Note, this rule does not necessarily apply to sentencing an individual as a sexually delinquent person for other crimes such as gross indecency.)

Criminal Sexual Psychopathic Person

The classification of criminal psychopathic person no longer exists as the statute that provided for such classification was repealed in 1968. *People v Campbell*, *supra*.

Felony Sentencing via Video Conference Technology

MCR 6.006(A) does not include *felony* sentencings in the proceedings where a defendant's appearance by video conference technology is permitted. Moreover, "virtual appearance is not a suitable substitute for physical presence," it "dehumanizes the defendant," and it is inconsistent with the "intensely personal" nature of the felony sentencing process. The right to allocute "stems from our legal tradition's centuries-old recognition of a defendant's personhood." "Abundant social science research demonstrates that video conferencing 'as a mediation technology' may color a viewer's assessment of a person's credibility, sincerity, and emotional depth." Some studies suggest there is risk of a harsher sentence for a defendant who appears via video conference technology. *People v Heller*, ___ Mich App ___ (Docket No. 324708 (7/14/16).

Although the Michigan Supreme Court proposed a court rule amendment that would have allowed the defendant to consent to his or her appearance by video at a *felony* sentencing hearing, and the Court heard public comment on the proposal, the Court ultimately did not adopt the proposal. See Admin File 2013-18, Order of September 21, 2016 (adopting some amendments, but not the proposed amendment of MCR 6.006 that would have permitted video appearance at a felony sentencing hearing).

Timeliness of Habitual Offender Notice

The 21-day deadline found in MCL 769.13 runs from the arraignment on the information (or waiver of arraignment) in the circuit court, not the arraignment on the complaint and warrant in the district court. *People v Richards*, ___ Mich App ___ (Docket No. 325192, 6/7/16).

No Consecutive Sentencing with Federal Supervised Release

While MCL 768.7a authorizes a consecutive sentence for a felony committed in Michigan while on federal parole, see *People v Phillips*, 217 Mich App 489; 552 NW2d 487 (1996), it does *not* include a felony offense committed in Michigan while on federal supervised release. *People v Clark*, ___ Mich App ___ (Docket No. 322852, 4/19/16).

Consecutive Sentencing for "Same Transaction" Offenses

In an order that provides little guidance for other cases, the Supreme Court disagreed with the Court of Appeals that it could not be concluded that the two separate assaults constituted the "same transaction" for purposes of consecutive sentencing under the first-degree CSC statute, but remanded to the circuit court for the sentencing judge to identify specific evidence from which one could conclude that consecutive sentencing was warranted or, if lacking that evidence, to impose concurrent sentences. *People v Harper*, 498 Mich 968; 873 NW2d 304 (1/29/16).

Plea Advice on Consecutive Sentencing

In a case where the defendant was convicted of armed robbery, assault with intent to do great bodily harm and felony-firearm, and the trial judge failed to inform the defendant of the mandatory two-year term of imprisonment for the felony-firearm conviction and the fact that the felony-firearm sentence would be served consecutively, the trial judge did not abuse its discretion in granting plea withdrawal with respect to all three convictions. *People v Blanton*, ___ Mich App ___ (Docket No. 328690; 8/30/16).

Alleyne and CSC First Degree 25-Year Mandatory Minimum Term

While the Michigan Supreme Court denied leave to appeal in this case involving two convictions of CSC first-degree with a victim under 13 years of age, a defendant 17 or older, and sentences of 23 to 50 years imprisonment (rather than the mandatory minimum term of 25 years), Justice Markman wrote a long concurring opinion pointing out the questionable plea bargain that amended the charge to delete the defendant's age from the felony information in order to avoid the mandatory minimum term. He concurred in the denial of leave to appeal, however, because under *Alleyne v United States*, 133 S Ct 2151 (2013), the defendant's age was an element of the offense and had to be alleged in the information in

order to support the mandatory minimum term. *People v Keefe*, 872 NW2d 688 (2015). See also *People v Gardner*, unpublished opinion per curiam of the Court of Appeals, issued December 29, 2015 (Docket No. 323883) (defendant's age of 17 or older is an element of the crime that must be submitted to the jury in order to support the 25-year mandatory minimum term for CSC first degree with victim under the age of 13).

Probation Search

The Michigan Court of Appeals concluded that without proof that defendant's probation conditions included a warrantless search, it could not assume a warrantless search was valid under *United States v Knights*, 534 US 112 (2001). It also refused to affirm the seizure of items pursuant to the warrantless search where the items were not obviously incriminating on their face. *People v Mahdi*, ___ Mich App ___ (Docket No. 327767, 10/11/16).

Parole Consideration via Mandamus

Defendant-Petitioner was convicted of armed robbery and sentenced as a habitual offender in 1996. With disciplinary credits, he was eligible to be considered for parole in 2013, but the parole board refused to consider him because the sentencing judge had not granted written approval for parole as required for individuals sentenced as habitual offenders under the old system of disciplinary credits. See MCL 769.12(4)(a). The defendant sued for a writ of mandamus. The Court of Appeals agreed the parole board had a duty to consider the defendant for parole, noting the defendant had a right to a parole eligibility report and parole interview under MCL 791.234 and 791.235. In this setting, and once the parole board's consideration is complete and parole has been deemed proper for the individual, the board must obtain the sentencing judge's approval before granting parole (rather than vice versa where the sentencing judge grants approval before preparation of the parole eligibility report and the parole interview). *Hayes v Parole Board*, 312 Mich App 774; ___ NW2d ___ (2015).

Presumptive Parole:

HB 4138 passed the House on October 1, 2015, and is now before the Senate Government Operations Committee where it faces strong challenge from Attorney General Bill Schuette.

SORA as Retroactive Punishment

The Michigan Sex Offender Registration Act (SORA) imposes punishment. The retroactive application of SORA's 2006 and 2011 amendments to individuals required to register before the amendments took effect violates the federal Ex Post Facto Clause. US Const, art 1, § 10. Cl 1. "A regulatory regime that severely restricts where people can live, work, and 'loiter,' that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting . . . is something altogether different from and more troubling than Alaska's first-generation registry law [previously upheld in *Smith v Doe*, 538 US 84 (2003)]." *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 8/25/16).

SORA Unconstitutionally Vague

Requirement under SORA that registrants report all telephone numbers and email addresses "routinely used" under MCL 28.727(1)(h)&(i) is unconstitutionally vague. *People v Solloway*, ___ Mich App ___ (Docket No. 324559, 6/30/16).

SORA and HYTA Offenders

The Michigan Sex Offender Registration Act (SORA) "does not violate the Ex Post Facto Clause or amount to cruel or unusual punishment because it does not impose punishment[,]" and therefore the trial court erred when it found to the contrary as applied to a 19-year old offender who successfully completed HYTA for a charge of CSC second-degree involving a 12-year old girl. *People v Temelkoski*, 307 Mich App 241; 859 NW2d 743 (2014), lv gtd 872 NW2d 219 (2015). (Oral argument to be heard this fall in the Michigan Supreme Court.)

SORA and Recapture Provision

The recapture provision of MCL 28.723(1)(e), which requires registration of an individual previously convicted of a listed offense who did not have to register but who is convicted of a new felony offense on or after July 1, 2011, is not an unconstitutional ex post facto law as applied to an individual whose earlier conviction and sentence preceded the creation of Michigan's SORA in 1995. The recapture provision enhances the consequences of the new conviction, not the old one. There is likewise no cruel or unusual punishment, despite the court's acknowledgment that student safety zone laws impose affirmative restraints, resemble banishment and promote deterrence, because the laws are rationally connected to a nonpunitive purpose of protecting public safety and are not excessive. In the same vein, in-person reporting requirements, while they impose affirmative restraints and arguably resemble conditions of probation and supervised release, are not punishment as they are rationally connected to ensuring public safety and are not excessive. *People v Tucker*, 312 Mich App 645; 879 NW2d 906 (2015). (Note, the decision in *Does v Snyder*, *supra*, directly contradicts portions of the *Tucker* opinion.)

Presentence Report Challenge to Victim Impact Statement

A defendant may challenge the victim impact statement where it goes beyond the victim's subjective opinions about the impact of the crime and includes factual allegations of uncharged crimes. *People v Maben*, 313 Mich App 545; 884 NW2d 314 (2015).

Restitution

Following the rule of *People v McKinley*, 496 Mich 410 (2014), the Court of Appeals recently concluded that $900 of the $2,564 restitution order was improper as it represented restitution for a course of conduct going beyond the sentencing offense. *People v Johnson*, ___ Mich App ___ (Docket No. 325857, 4/19/16).

The *McKinley* rule precludes restitution for charged and **dismissed** offenses as well as uncharged conduct. *People v Corbin*, 312 Mich App 352; 880 NW2d 2 (2015).

Restitution must be based on losses that are a direct result of the crime using a factual and proximate cause analysis. The Crime Victims Rights Act, MCL 780.766 *et seq*, permits restitution "only for losses factually and proximately caused by the defendant's offense . . . ." *People v Corbin*, 312 Mich App 352; 880 NW2d 2 (2015).

Although the restitution statutes permit restitution for lost wages, "lost earning capacity" is not the same as "income loss" and the restitution for lost earning capacity is not permitted *People v Corbin*, *supra*.

When calculating restitution for medical and related professional services that are "reasonably expected to be incurred relating to physical and psychological care," the standard is one of "reasonableness." The statutory language does not require absolute precision in the calculation, but "speculative or conjectural losses are not reasonably expected to be incurred." Restitution for future damages may require "reasonable certainty" that the future consequence will occur. "An informed guess as to the victim's future psychological therapy costs does not equate with an amount 'reasonably expected to be incurred.'" *People v Corbin, supra*.

Because the Michigan restitution statutes require full restitution to the victim under subsection (2) of MCL 769.1a and MCL 780.766, the trial court properly ordered restitution to the victim for his lost leave time (sick, vacation and personal) although the restitution statutes do not expressly address restitution for lost leave time. The victim no longer could use these days and could not receive compensation for the days upon his termination from employment, and thus suffered a monetary loss. *People v Turn*, ___ Mich App ___ (Docket No. 327910, 10/11/16).

The Michigan restitution statutes require full restitution that is not limited by a civil judgment that found no right to damages due to the bank's full credit bid on mortgaged property. *People v Lee*, ___ Mich App ___ (Docket No. 322154, 2/2/16)

The trial court did not err in holding defendant and his co-defendants jointly and severally liable for restitution where defendant acted in concert with three others in a scheme that caused financial loss to the bank. *People v Lee*, ___ Mich App ___ (Docket No. 322154, 2/2/16).

Court Costs

Court costs, as opposed to the cost of prosecution, are not permitted under MCL 771.3(5) (the probation statute with authority for some costs). *People v Butler-Jackson*, 499 Mich 963; 880 NW2d 544 (2016), reversing in part 307 Mich App 667 (2014) (note, this case does not address court costs under the amended provisions of MCL 769.1k).

Unauthorized Fine

Following the rule of *People v Cunnigham*, 496 Mich 145 (2014), that there must be express statutory authority for an award of costs, the Court of Appeals concluded there must be express statutory authority for the imposition of a criminal fine. Where the crime of assault with intent to commit sexual penetration does not authorize the imposition of a fine, the trial court erred in ordering a fine. *People v Johnson*, 314 Mich App 422; __ NW2d ___ (2016).

The trial court erred in ordering a fine in conjunction with a prison sentence for criminal sexual conduct in the first- and second-degree as neither statute authorizes a fine. *People v Johnson*, ___ Mich App ___ (Docket No. 325857, 4/19/16) (Note, this is a different *Johnson* case.)

Incarceration for Failure to Pay Child Support

Imprisonment is not precluded for a failure to pay child support as the order of child support is not considered a debt. *People v Iannucci*, ___ Mich App ___ (Docket No. 323605, 3/18/16).

Expungement of Driving Record

While the trial court may accept a guilty plea to OUIL Causing Injury and then dismiss the case following a delay of sentencing under MCL 771.1, the trial court has no authority to order the Secretary of State to remove information previously sent to them about the conviction and now reflected in the official driving record maintained by the Secretary of State. *People v McCann*, ___ Mich App ___ (Docket No. 325281, 3/22/16).

MICHIGAN SENTENCING GUIDELINES

ADVISORY GUIDLEINES FOR ALL CASES AFTER *LOCKRIDGE*: Judicial fact-finding "remains part of the process in calculating the guidelines" post-*Lockridge* "as long as the guidelines are advisory only." *People v Biddles*, ___ Mich App ___ (Docket No. 326140, 6/30/16).

ADVISORY GUIDELINES AT RESENTENCING: When a case is returned to the trial court for resentencing due to scoring error in a post-*Lockridge* setting, the trial court must consider advisory rather than mandatory guidelines. *Lockridge* does not eliminate judicial fact-finding using advisory guidelines. *People v Biddles*, ___ Mich App ___ (Docket No. 326140, 6/30/16).

LOCKRIDGE APPLIES TO ALL CASES PENDING ON DIRECT REVIEW: The *Lockridge* decision applies to all cases pending on direct review when the *Lockridge* decision was released. Where defendant's case was pending on direct review and defense counsel conceded the new *Lockridge* decision applied, no error occurred and defendant also waived any argument against retroactivity. *People v Richards*, ___ Mich App ___ (Docket No. 325192, 6/7/16).

LOCKRIDGE AND INTERMEDIATE SANCTIONS: In a case where the sentencing guidelines provided for an intermediate sanction (viz. 0 to 17 months) and the trial court imposed a minimum prison sentence of 16 months, the Court of Appeals held that the intermediate sanction range was now advisory after *Lockridge* and the trial court did not have to articulate substantial and compelling reasons for a departure. Going further, the Court of Appeals noted that the sentence was *within* the range and it was not a departure. and hence the appellate court must affirm the sentence. *People v Schrauben*, 314 Mich App 181; ___ NW2d ___ (2016). *Note, this opinion conflicts with People v Stauffer*, 465 Mich 633 (2002), *where the Michigan Supreme Court concluded that a prison sentence represents a departure from an intermediate sanction range. See also MCL 769.33(b) (intermediate sanction defined as non-prison sentence).*

SCORING ERROR RENDERS LOCKRIDGE ERROR MOOT: When the reviewing court is presented with an evidentiary challenge to the scoring and a constitutional challenge under *Lockridge*, the court must first resolve the evidentiary challenge. If the evidentiary challenge necessitates resentencing, the *Lockridge* error becomes moot (although the guidelines will become advisory at resentencing). *People v Biddles, supra.* See also *People v Sours*, ___ Mich App ___ (Docket No. 326140, 6/30/16) (concluding *Lockridge* error moot where resentencing ordered due to error in scoring OV 19).

DICTA: SCORING ERROR RENDERED MOOT BY DEPARTURE: In a case involving an upward departure, the Court of Appeals first concluded that there was no error in scoring OV 9, but if there had been error, it would have been rendered moot by the upward departure that was "reasonable" given the "minor extent of the departure" and the trial court's lengthy articulation of reasons for the departure. *People v Ambrose*, ___ Mich App ___ (Docket No. 327877, 10/25/16).

SCORING ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL: Where trial counsel waived error in the scoring of OV 1 at sentencing, the error may nevertheless be raised on appeal through a claim of ineffective assistance of counsel. Where defendant can show both error in the scoring and an altered range, s/he is entitled to resentencing. *People v Biddles,* ___ Mich App ___ (Docket No. 326140, 6/30/16).

ADMITTED FACTS FOR PURPOSES OF *LOCKRIDGE* ANALYSIS: A trial court does not err in scoring mandatory sentencing guidelines based on admitted facts under *Lockridge*. Admitted facts are those "*formally* admitted by the defendant *to the court*, in a plea or testimony or by stipulation or by some similar or analogous route." *People v Garnes*, ___ Mich App ___ (Docket No. 324035, 7/19/16).

OFFENSE VARIABLES AND MULTIPLE-OFFENDER RULE: The instruction found in OVs 1, 2 and 3 to score co-offenders the same in a multiple-offender situation does not apply where the co-defendants are convicted of different crimes. *People v Biddles*, ___ Mich App ___ (Docket No. 326140, 6/30/16). See also *People v Johnston*, 478 Mich 903, 904; 732 NW2d 531 (2007) (same). In cases where the multiple offender instruction of OVs 1, 2 and 3 applies, it allows assessment of points where the conduct was that solely of the co-offender(s). *People v Biddles, supra.*

OFFENSE VARIABLES AND CO-OFFENDERS: Offense variables may *not* be scored based solely on the co-offender's conduct unless the variable specifically permits this. The trial court thus erred in scoring 15 points under OV 10 for predatory conduct based solely on the conduct of the co-offenders as OV 10 does not contain an instruction (like that found in OVs 1, 2, 3) for scoring co-offenders the same number of points. *People v Gloster*, 499 Mich 199; 880 NW2d 776 (2016).

OFFENSE VARIABLES AND *MCGRAW* RULE: OV 1, OV 3 and OV 4 are *McGraw* variables and the scoring must be limited to the facts of the sentencing offense (not conduct that occurs before or after). *People v Biddles,* ___ Mich App ___ (Docket No. 326140, 6/30/16).

TEN-YEAR GAP RULE: A non-scorable misdemeanor (false information to police regarding seat belt) may be considered when determining whether there is a ten-year gap for purposes of scoring the Prior Record Variables. *People v Butler*, ___ Mich App ___ (Docket No. 327430, 6/2/16).

PRV 5: A misdemeanor conviction for malicious use of a telecommunications device is a scorable misdemeanor as it would appear to be a crime against the person. *People v Maben*, 313 Mich App 545; 884 NW2d 314 (2015).

> **Unpublished:** Error to score PRV 5 for retail fraud charge that did not result in conviction where defendant pled guilty but the case was dismissed pursuant to *nolle prosequi* order entered under the delayed sentencing statute, MCL 771.1). *People v Delarye*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2016 (Docket No. 327775).

OV 1: Offense Variable 1 is a *McGraw* variable. There was no evidence defendant's possession of a weapon after the shooting offense, resulting in his conviction of felon in possession of a weapon, entailed the discharge of a weapon for purposes of scoring 25 points under OV 1. Further, this was not a multiple offender case as the co-defendant was convicted of different offenses. *People v Biddles*, ___ Mich App ___ (Docket No. 326140, 6/30/16).

OV 3: The trial court did not err in scoring 10 points where the victim was choked by his brother to the point of losing consciousness or nearly losing consciousness, he defecated in his pants, suffered a red neck and sore throat and told police officers that he intended to seek medical treatment. *People v Maben*, 313 Mich App 545; 884 NW2d 314 (2015).

OV 3: Offense Variable 3 is a *McGraw* variable. The trial court erred in assessing 100 points under OV 3 where defendant was acquitted of the murder and assault with intent to murder charges and convicted only of felon in possession of a weapon. As an evidentiary matter, there was no evidence that the death of the victim resulted from or was factually caused by defendant's possession of a weapon after the shooting. This was also not a multiple-offender case for scoring purposes where the co-defendant was convicted of different offenses. *People v Biddles*, ___ Mich App ___ (Docket No. 326140, 6/30/16).

OV 4: Offense Variable 4 is a *McGraw* variable. The trial court erred in scoring ten points as there was no evidence a victim suffered serious psychological injury as a result of defendant's being a felon in possession of a gun after the shooting incident. *People v Biddles*, ___ Mich App ___ (Docket No. 326140, 6/30/16).

OV 4: Ten points properly scored where the victim indicated in a letter to the court that the past three years had been "a struggle for him psychologically" and the trial court remarked that it would be ignoring the obvious to say there were no signs or evidence at trial that the victim suffered serious psychological injury requiring professional treatment, especially because the business that was defrauded (a funeral home) was the victim's life work. *People v Schrauben*, 314 Mich App 181; ___ NW2d ___ (2016).

OV 7: This variable was amended effective January 5, 2016, to provide an assessment of points when "[a] victim was treated with sadism, torture, excessive brutality *or similarly egregious conduct* designed to substantially increase the fear and anxiety a victim suffered during the offense." 2015 PA 137, amending MCL 777.37.

OV 7: OV 7 is a *McGraw* variable. The scoring of is limited to the facts of the sentencing offense and may not include conduct that occurred before or after the sentencing offense. The trial court erred in assessing 50 points for conduct that occurred before the sentencing offense was committed although it involved on-going sexual abuse of the same victim by the same defendant. *People v Thompson*, ___ Mich App ___ (Docket No. 318128, 3/29/16).

OV 8:

> **Unpublished:** Error to score OV 8 based solely on the co-defendant's conduct of forcibly moving the victim to another room. *People v Bridgemani*, unpublished opinion per curiam of the Court of Appeals, issued July 26, 2016 (Docket No. 327102).

OV 9: A "victim" under OV 9 need not be a person and may include an unborn fetus. A victim is "'one that is acted on' by defendant's criminal conduct and placed in danger or loss of life, bodily injury, or loss of property." *People v Ambrose*, ___ Mich App ___ (Docket No. 327877, 10/25/16), slip op at 4, quoting in part *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). [Note, under OV 3, the Michigan Supreme Court has held that a victim is "any *person* who is harmed by the defendant's criminal actions." *People v Laidler*, 491 Mich 339, 348; 817 NW2d 517 (2012) (emphasis supplied).]

OV 9: Where the offense chosen for scoring of the guidelines was carrying a weapon (concealed or in a vehicle) under MCL 750.227, and apparently there were not multiple victims for this offense, the trial court erred in scoring ten points under OV 9 under the rule of *People v McGraw*, 484 Mich 120 (2009). *People v Nawwas*, 499 Mich 874; 876 NW2d 246 (2016).

OV 9: Applying the *McGraw* rule, the trial court erred in assessing ten points under OV 9 where defendant was convicted of being a felon in possession of a weapon and there was no evidence this crime placed anyone in danger of physical injury or loss of life. *People v Biddles*, ___ Mich App ___ (Docket No. 326140, 6/30/16).

OV 10: The trial court erred in scoring 15 points for predatory conduct based solely on the conduct of the defendant's co-offenders. *People v Gloster*, 499 Mich 199; 880 NW2d 776 (2016).

OV 19: Error to score OV 19 for failure to report to parole agent where that conduct occurred before the sentencing offense was committed and "did not hinder the process of administering judgment for the sentencing offense." Moreover, the sentencing offense was possession of methamphetamine and the fact that defendant was also violating parole had no effect on the investigation or prosecution of the meth offense. *People v Sours*, ___ Mich App ___ (Docket No. 326291, 5/10/16).

> **Unpublished:** Error to score 15 points under OV 19 where the trial court relied solely on the conduct of the co-perpetrators (applying the *Gloster* rule); additionally, it would appear more likely than not that the co-perpetrators sought the victims' phones due to the value of the phones and not with intent to interfere with the rendering of emergency services. *People v Patrick*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2016 (Docket No. 325867).

APPELLATE REVIEW OF SENTENCE

Upward Departure Affirmed

In what appears to be dicta as the Court of Appeals granted leave solely as to the scoring of OV 9, and did not find error in the scoring of OV 9, the Court concluded that the upward departure sentence was reasonable and would therefore preclude the need for resentencing had there been error in the scoring of OV 9. *People v Ambrose*, ___ Mich App ___ (Docket No. 327877, 10/25/16).