SENTENCING LAW UPDATES

WAYNE COUNTY CRIMINAL ADVOCACY PROGRAM

November 17, 2017, Anne Yantus[1]

NEW FROM THE MICHIGAN LEGISLATURE

Reduction of Probationary Term: For most but not all offenders placed on felony probation, the probation department may seek reduction of the probationary term after the defendant has served one-half the term. The court shall hold a hearing after notifying the prosecutor, defense counsel, defendant and the victim. The victim has a right to be heard during the hearing. The court must provide notice of at least 28 days to all of the above parties before reducing or terminating the period of probation. Defendants who are convicted of certain offenses (including domestic violation third offense, second- and fourth-degree criminal sexual conduct, assault with intent to do great bodily harm or suffocation) are not eligible for this relief. Also, individuals who are subject to a mandatory probation term, e.g., those convicted of aggravated stalking or a listed offense under SORA, both requiring "not less than five years" of probation under MCL 771.2a, are ineligible for relief. 2017 PA 10, amending MCL 771.2(2), effective June 29, 2017.

> *Note*: The sentencing court retains authority to "amend the [probationary] order in form or substance at any time" under MCL 771.2(5), although this new amendment apparently precludes reduction of the term before ½ is served. If the court reduces a defendant's probationary term under subsection (2), the period by which that term was reduced must be reported to the department of corrections." MCL 771.2(5).

Penalty for Technical Violations of Probation: Beginning January 1, 2018, a probationer who commits a technical violation of probation and is sentenced to a temporary period of incarceration may be incarcerated for a maximum of 30 days for each technical violation. Technical violations that arise out of the same transaction shall be treated as a single violation. No jail credit is given for time served on a previous technical violation. "Technical probation violation" refers to any violation that is not a violation of the law, although it does not include the consumption of alcohol for an individual convicted of drunk driving and does not include violation of a no-contact order. The 30-day provision does not apply if the probationer has committed three or more technical violations during the probationary period. Moreover, the 30-day provision does not apply to those placed on probation for stalking, aggravated stalking and domestic violence. The court may extend the temporary incarceration to 90 days if the individual has been convicted of a technical violation and is awaiting placement in a treatment program. The sentencing court retains the authority to revoke probation even for technical violations. 2017 PA 9, adding MCL 771.4b, beginning January 1, 2018.

New Statutory Diversion for Victims of Human Trafficking: If an individual can show that he or she committed a violation of MCL 750.448 (soliciting or accosting), MCL 750.449 (prostitution), MCL 750.450 (aiding and abetting sections 449, 449a and 450), MCL 750.462 (individual under 16

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forced to house of prostitution), or a local ordinance substantially corresponding to these statutes as a direct result of being a victim of human trafficking, the court may defer proceedings without entering a judgment of guilt and may place the individual on probation. Upon fulfillment of the terms and conditions of probation, the court shall discharge the individual and dismiss the proceedings without a judgment of guilt. Both the prosecutor and defendant must consent to deferral and probation. MCL 750.451c.

Wrongful Conviction Compensation: Effective March 29, 2017, an individual who was imprisoned and later exonerated may file suit to receive $50,000 per year for each year of wrongful confinement. 2016 PA 343.

Lifer Parole – No Successor Judge Veto: Effective March 21, 2017, a successor judge may file a written objection to the parole of an individual serving a life sentence, but that objection is no longer controlling and the parole board may act contrary to the objection. The sentencing judge, however, if still in office, may veto parole for an individual serving a life sentence if the written objection is filed within 30 days of receipt of notice of the public hearing. 2016 PA 354, amending MCL 791.234(see subsection 8c).

Minor in Possession Penalty: Effective January 1, 2018, possession of alcohol, first-offense, is now a civil infraction. Second and subsequent offenses remain misdemeanors. 2016 PA 357 (SB 332), amending MCL 436.1703.

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."

> *Note*: The revised court rule seems to put an end to a continuing debate over whether the harmless error rule applies to the untimely filing of a habitual notice or the prosecutor's failure to file a proof of service. See *People v Walker*, 234 Mich App 299 (1999) (failure to file proof of service found to be harmless error where defendant had actual notice); *People v Cobley*, 463 Mich 893 (2000) (resentencing where prosecutor failed to prove it served timely notice of habitual offender notice); *People v Muhammad*, 498 Mich 909 (2015) (vacating unpublished COA decision that found harmless error where prosecutor failed to serve timely notice of habitual offender notice) *People v Swift*, 500 Mich 877; 885 NW2d 476 (2016), lv den 500 Mich 950 (3-17-17) (oral argument heard and leave to appeal subsequently denied in a case where the habitual offender notice was served in the district court, but only an unsigned copy was filed in the circuit court, and asking whether there was error and whether the harmless error rule could apply).

RECENTLY DECIDED CASES

Third Felony-Firearm Enhancement: A defendant who has two prior felony-firearm convictions and is again convicted of felony-firearm is a third felony-firearm offender and may be sentenced as such even though the two prior convictions arose out of the same transaction. *People v Wilson*, 500 Mich 521; __ NW2d __ (7/25/17), overruling *People v Stewart*, 441 Mich 89; 490 NW2d 327 (1992).

Felony-Firearm: No Federal Convictions: The trial court improperly imposed a five-year mandatory sentence for felony-firearm second offense where the defendant's prior felony-firearm conviction was a conviction for using a firearm to commit a violent crime under 18 USC 924(c)(1)(A). Michigan's felony-firearm statute requires "a second conviction under this subsection [MCL 750.227b]" in order to impose an enhanced sentence. *People v Pointer-Bey*, ___ Mich App ___ (Docket No. 333234, 10/10/17).

Fourth (Super) Habitual Offender: No Federal Convictions: The "listed prior felony" required for enhancement as a fourth habitual offender that carries a mandatory minimum term of twenty-five years does not include a federal conviction for armed bank robbery under 18 USC 2113(a). "Listed prior felony" is a specific statutory definition under MCL 769.12(6)(a) and does not include similar prior felony convictions from other jurisdictions. *People v Pointer-Bey*, ___ Mich App ___ (Docket No. 333234, 10/10/17).

Lifetime Electronic Monitoring: Lifetime electronic monitoring applies to ALL convictions of first-degree CSC except when a sentence of life without parole is imposed. Although the trial court's failure to order lifetime monitoring for a term-of-years sentence created an invalid sentence, the trial court lacked authority to modify the sentence after judgment had been entered and without timely motion of the parties. *People v Comer*, 500 Mich 278 (152713, 6/23/17), reversing in part *People v Comer*, 312 Mich App 538; 879 NW2d 306 (2015), and overruling in part *People v Harris*, 224 Mich App 597; 569 NW2d 525 (1997).

See also *People v Guzikowski*, __ Mich ___ (Docket No. 152028, 10/6/17) (vacating amended judgment of sentence entered six years and ten months after sentencing to add lifetime monitoring); *People v Guzikowski*, ___ Mich ___ (Docket No. 152026, 10/6/17) (vacating amended judgment of sentence entered six years and nine months after sentencing to add lifetime monitoring); *People v Johnson*. ___ Mich ___ (Docket No. 150799, 10/6/17) (vacating amended judgment of sentence entered five years and ten months after sentencing to add lifetime monitoring); *People v Richardson*, ___ Mich ___ (Docket No. 151808, 10/3/17) (vacating amended judgment of sentence entered five years and seven months after sentencing to add lifetime monitoring); *People v Robinson*, ___ Mich ___ (Docket No. 151028, 151029, 10/3/17) (vacating correction of judgment of sentence entered seven months after sentencing to add lifetime monitoring); *People v Thompson*, ___ Mich ___ (Docket No. 150010, 10/3/17) (vacating amended judgment of sentence entered one month after sentencing to add lifetime monitoring)..

Lifetime Electronic Monitoring & Motion for Relief from Judgment: The Supreme Court denied leave to appeal after hearing oral argument in a case that raised two questions: (1) whether defendant can 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 (2) whether he must demonstrate that he would not have pleaded guilty but for this mistake. The Court of Appeals decision, untouched by the Supreme Court's order, concluded that there was good cause and prejudice for the granting of a motion for relief from judgment, and defendant was entitled to withdraw the plea, where he was not advised of lifetime monitoring during the plea hearing in 2008. *People v Roark*, unpublished opinion per curiam of the Court of Appeals, issued October 20,2 015 (Docket No. 316467), lv den after oral argument 895 NW2d 178 (Mich, 2017).

Improper Correction of Sentence, Generally: In addition to the post-*Comer* orders vacating lifetime monitoring conditions added by the trial court after sentencing (see above), the Michigan Supreme Court has vacated judgments adding mandatory consecutive sentencing under MCL 768.7a(2) (felony committed while on parole) and a mandatory twenty-five year minimum term for a fourth habitual offender under MCL 769.12, where the trial court acted without authority after the original judgment of sentence had been entered. See *People v Luke*, ___ Mich ___ (Docket No. 152570, 10/6/17) (vacating amended judgment of sentence adding mandatory consecutive sentencing nine months after sentencing); *People v Williams*, ___ Mich ___ (Docket No. 154888, 10/3/17) (vacating judgment of sentence entered after *sua sponte* order for resentencing two months after sentencing to add mandatory minimum habitual offender sentence).

Juvenile LWOP: The trial judge committed an error of law by considering the four traditional goals of sentencing (goals for an adult offender) when imposing a life without parole sentence against a juvenile offender. The trial judge's decision also reflected no understanding that a life without parole sentence is reserved for "the rarest juvenile offender whose crime reflects irreparable corruption . . . ." The trial judge inappropriately focused on punishment, deterrence and protection of the public, and discredited the expert's testimony as to rehabilitation without explaining the basis of the court's fear that defendant could not internalize the lessons learned in a structured environment and apply them in a nonstructured world. The Court adopted and repeated much of the *Hyatt* decision's language about a heightened degree of scrutiny for life without parole sentences. *People v Garay*, 320 Mich App 29; ___ NW2d ___ (4/11/17).

Juvenile LWOP: The Michigan Supreme Court has granted leave to determine whether the trial court's decision to sentence a juvenile to life without parole "must be made by a jury beyond a reasonable doubt. *People v Skinner,* 312 Mich App 15; 877 NW2d 482 (2015), lv gtd 500 Mich 929; 889 NW2d 487 (2017).

Juvenile LWOP: The Supreme Court will also hear mini oral argument on whether "the conflict-resolution panel of the Court of Appeals [in *Hyatt*] erred by applying a heightened standard of review for sentences imposed under MCL 769.25." *People v Hyatt*, 500 Mich 929; 889 NW2d 487 (1/24/17). Decisions below: *People v Perkins & Hyatt,* 314 Mich App 140; 885 NW2d 900 (2016), superseded by *People v Hyatt*, 316 Mich App 368; 891 Nw2d 549 (2016).

Juvenile LWOP: For the crime of first-degree murder committed by an individual less than 18 years of age, the trial court must impose a maximum term of 60 years imprisonment if the case was final for appeals purposes on or before June 24, 2012, and a life sentence is not imposed at resentencing. MCL 769.25(4)(c); *People v Meadows*, 319 Mich App 187; 899 NW2d 806

(3/28/17). (If the case was not final on or before June 24, 2012, the trial court must impose a maximum term of "not less than 60 years" if a life sentence is not chosen. MCL 769.25(9).)

Presentence Report: Where the trial court agreed not to take challenged information into account when imposing sentence, it should have deleted the information for the presentence report and ensured that a corrected copy of the report was sent to the MDOC. *People v Ball,* 500 Mich 1019; __ NW2d __ (6/27/17).

Lack of Subject-Matter Jurisdiction for Resentencing: The trial court lacked subject-matter jurisdiction to resentence defendant while his application for leave to appeal was pending before the Michigan Supreme Court. The trial court lacked authority to grant relief on this basis pursuant to defendant's successive motion for relief from judgment (as successive motions must be based on a retroactive change in the law or new evidence under MCR 6.502(G)(2), but the trial court properly exercised its inherent authority to grant relief due to the lack of jurisdiction. Jurisdictional defects may be raised at any time. *People v Washington*, ___ Mich App ___ (Docket No. 336050, 9/12/17).

Consecutive Sentencing, Articulation of Reasons: The trial court, when imposing one or more discretionary consecutive sentences, must articulate on the record the reasons underlying its decision as to each consecutive sentence. The trial court's exercise of discretion is reviewed for an abuse of discretion. Where the court failed to articulate particularized reasons for seven consecutive sentences, remand for articulation of the reasons is required. Consecutive sentencing should be "reserved for those situations where so drastic a deviation from the norm is justified." *People v Norfleet*, 317 Mich App 649, 664-666; 897 NW2d 195 (Nov 2016).

In Mr. Norfleet's second appeal, he challenged the trial court's discretion, exercised on remand from the Court of Appeals, to make two of his seven sentences consecutive (previously the judge had ordered seven consecutive sentences). The Court of Appeals affirmed, finding that the trial court properly relied on defendant's extensive violent criminal history, multiple failures to rehabilitate, and his manipulation of other less culpable individuals in his on-going heroin distribution operation. *People v Norfleet (After Remand)*, __Mich App ___ (Docket No. 328968, 8/22/17).

Consecutive Sentencing, Defendant Not Incarcerated: Where defendant had been erroneously released from prison in 2011 and was not on parole or escape status when she committed two new offenses in 2013, the trial court erroneously ordered consecutive sentencing between the new sentences and the prior sentence because MCL 768.7a, by its terms, does not apply. *People v Parker*, 319 Mich App 410; 901 NW2d 632 (4/25/17).

Fine that Exceeds Plea Agreement: Where the parties bargained for a sentence that made no mention of a fine, the trial court erred in ordering a fine of $500 and should have offered an opportunity of plea withdrawal when it sentenced beyond the terms of the agreement. The Court of Appeals, in response, vacated the fine. *People v Foster*, 319 Mich App 365; 901 NW2d 127 (4/20/17).

Resignation from Public Office As Illegal Condition of Plea Bargain: For ex-state senator Virgil Smith, a majority of the Court of Appeals agreed with the trial judge (Judge Talon) that the

prosecution could not require a public official to resign from office and refrain from seeking public office as a condition of the plea bargain. Judges Deborah Servitto and Michael J. Kelly concluded that this particular term of the plea agreement was unconstitutional as it violated the separation of powers principle, was contrary to public policy, invaded the role of voters to decide on a candidate's moral and other qualifications, and created a potential for prosecutorial misuse of office. The prosecutor was not entitled to plea withdrawal given the failure of this condition where defendant detrimentally relied on the plea bargain by resigning from the Michigan Legislature (although he is now running for Detroit City Council) and revealing the location of the weapon as part of the bargain. Further, it would subvert the ends of justice to allow the prosecutor to withdraw the plea, with the only penalty being a return to the negotiation table, given the potential for prosecutorial abuse with this type of bargain. *People v Smith*, ___ Mich App ___ (Docket No. 332288, 8/22/17).

In dissent, Judge Michael Riordan would allow an elected officeholder, like any other citizen, to make choices about available options in a criminal matter. On the record before the court, there was no showing Senator Smith had been forced to resign and did not voluntarily choose to accept this condition of the bargain.

The Michigan Supreme Court will hear mini oral argument on three questions: (1) whether the prosecutor's inclusion of this provision in the plea agreement violates the separation of powers principle, (2) whether the validity of the provision was properly before the Court of Appeals where defendant had already resigned, and if so, whether the provision violates the separation of powers principle or public policy, and (3) whether the trial court abused its discretion by voiding a term of the agreement without offering plea withdrawal to the prosecutor. *People v Smith*, ___ Mich ___ (Docket No. 156353, 9/11/17).

No Costs if Prosecution Dismissed: Following the plain language of MCL 768.34, the Court of appeals held that a defendant whose case is abandoned or voluntarily dismissed by the prosecution may not be required to pay any costs including reimbursement to the county for court-appointed counsel fees. *People v Jose,* 318 Mich App 290; 896 NW2d 491 (12/13/16).

Court Costs Constitute a Tax, but a Permissible Tax: Costs authorized under MCL 769.1k(1)(b)(iii) amount to a "tax" because their purpose is to generate revenue, they benefit society rather than the individual defendant, and because the payor may not refuse to pay, but the tax does not violate the Distinct Statement Clause of Const 1963, art 4, sec 32 or the Separation of Powers provision of const 1963, art 3, sec 2. *People v Cameron*, 319 Mich App 215; 900 NW2d 658 (4/4/17).

State Costs Constitute a Tax, but a Permissible Tax: The minimum state costs, like court costs, constitute a "tax," but the tax does not violate separation of powers principles or the Distinct Statement Clause for the same reasons advanced in Cameron. While MCL 769.1j provides no guidance for the imposition of costs beyond the statutory minimum, the Court of Appeals will not address the lack of guidance where the trial court imposed the minimum assessment of $68. *People v Shenoskey,* ___ Mich App ___ (Docket No. 332735, 333375, 6/8/17).

Probation Oversight Costs Are Based on *Projected Income*: In a case where the trial court ordered defendant to obtain and maintain employment for at least 30 hours per week, the trial court did not err in ordering oversight costs of $240 for the 24-month probationary term as defendant's projected income, even assuming a job earning minimum wage, would significantly exceed $250 per month. *People v Shenoskey,* __ Mich App __ (Docket No. 332735, 333375, 6/8/17).

Probation Supervision Fee of $100 for Juvenile Invalidated: The Court of Appeals invalided a $100 probation supervision fee imposed against a juvenile placed on probation by the juvenile court in Washtenaw County, concluding that the fee was not a state cost, it was not the crime victim rights fee, and there was no authority for a general probation supervision fee (not tied to specific costs) in this setting. *In re Killich*, 319 Mich App 331; 900 NW2d 692 (4/20/17).

Twenty Percent (20%) Late Fee Not Unconstitutional*:* The twenty-percent late fee found in MCL 600.4803 is a penalty, not interest. Because the Legislature determines usury limits, the twenty-percent late fee set by statute cannot be deemed usurious. The statute does not violate due process as it provides a mechanism for the trial court to waive the penalty based on inability to pay. Moreover, there is no equal protection defect where the statute treats all persons the same. *People v Shenoskey*, ___ Mich App ___ (Docket No. 332735, 333375, 6/8/17).

Restitution for Extraordinary Police Investigative Costs: Where the police and fire departments responded to a trespassing incident that was designed as a political statement, restitution for routine overtime compensation and regular compensation of police and fire personnel, as well as for the purchase and maintenance of fire engines and other equipment, was impermissibly ordered by the trial court. The Crime Victims Rights Act, MCL 780.751 se seq, does not permit restitution for the general costs of criminal investigations and prosecutions. Moreover, the trial judge erred in adjusting the restitution calculations based on the court's "common sense" and experience, essentially leading to an arbitrary amount. But where defendant made a conscious, deliberate and calculated decision to persist in his conduct over a period of ten hours, causing an extended investment of resources beyond the general cost of investigating and responding to the incident, the government may be entitled to some restitution. On remand, the prosecution must establish with reasonable certainty any loss that went beyond an ordinary general cost of investigation and was directly caused by defendant's offense. *People v Wahmhoff,* 319 Mich App 264; 900 NW2d 364 (4-11-17).

Restitution for Dismissed Predicate Felony: Although the rule of *People v McKinley*, 496 Mich 410 (2014), precludes restitution for uncharged conduct, restitution is proper for a dismissed charge of home invasion second-degree where the charge served as the predicate felony for defendant's conviction of felony-firearm. *People v Bryant*, 319 Mich App 207; 900 NW2d 360 (3/30/17).

Restitution Agreement for Dismissed Charges: The *McKinley* rule does not render a restitution order unconstitutional when the parties agree to restitution for dismissed charges as part of the plea bargain. *People v Foster*, 319 Mich App 365; 901 NW2d 127 (4/20/17).

No Proportionality Challenge to Restitution: Review for proportionality under the *Milbourn* standard does not apply to restitution orders as the trial court has no discretion to order less than full restitution. A defendant may be ordered to pay full restitution for losses caused by a co-defendant where the restitution order is made payable jointly and severally. Moreover, restitution is not punishment, it is not a penalty, and there is no Sixth Amendment right to jury trial when determining the amount. *People v Foster*, 319 Mich App 365; 901 NW2d 127 (4/20/17).

Jail Sentence Reductions: Under MCL 801.257, a county jail prisoner may receive a one-quarter reduction of his or her sentence for good behavior, if approved by the trial judge (in addition to any sheriff's good-time credits given to the inmate under MCL 51.282). The one-quarter reduction is not limited to prisoners who have been granted work release or other forms of day parole. *People v Wilkins,* 500 Mich 996; 894 NW2d 607 (5/24/17).

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, 2016), cert den ___ S Ct __ (10/2/17).

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*, 316 Mich App 174; 891 NW2d 255 (2016).

MICHIGAN SENTENCING GUIDELINES

Plea Agreement to Low End of Guidelines: A defendant who pleads guilty pursuant to a *Cobbs* evaluation for a sentence at the low end of the sentencing guidelines range is entitled to a sentence at the low end of *properly* scored sentencing guidelines and may raise a mistake in the scoring post-sentencing despite defense counsel and the prosecutor's agreement at sentencing that the guidelines were properly scored. *People v Smith*, 319 Mich App 1; 900 NW2d 108 (2/21/17).

Advisory Guidelines: The sentencing guidelines are advisory in all applications and MCL 8.5 does not require a different result. The line between judge-found facts and those sufficiently admitted by the defendant "is unclear" and finality interests support adherence to the *Lockrdige* rule. *People v Steanhouse*, 500 Mich 453; ___ NW2d ___ (7/24/17).

Continued Importance of Guidelines Range: Sentencing courts must continue to consult the guidelines and take the range into account when imposing sentence. The guidelines "'remain a highly relevant consideration in a trial court's exercise of sentencing discretion.'" *People v Steanhouse, supra,* quoting *People v Lockridge*, 498 Mich 358, 391; 870 NW2d 502 (2015).

Departures from Range: The trial court must justify the sentence imposed in order to aid review by an appellate court. A departure sentence must be "reasonable." The appellate court reviews for reasonableness using an abuse of discretion standard that asks whether the trial court abused its discretion by violating the principle of proportionality. The test is whether the "'sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *People v Steanhouse, supra,* quoting *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). The sentence must be proportionate to the "seriousness of the circumstances surrounding the offense and the offender." *Steanhouse, supra,* quoting *Milbourn*, 435 Mich at 636.

Resentencing is required when the trial court abuses its discretion by imposing a disproportionate sentence or by "failing to provide adequate reasons for the extent of the departure sentence imposed[.]" *Steanhouse, supra.*

Left Undecided by *Steanhouse*: The *Steanhouse* court expressly did not decide whether the Court of Appeals *must* affirm a sentence that falls within correctly scored sentencing guidelines under MCL 769.34(10). *Steanhouse, supra* at n. 14.

OV 1 & 2: The trial court properly scored these variables for use and possession of a gun, although defendant pled guilty to unarmed robbery, where a co-defendant pled guilty to armed robbery and was assessed 15 points under OV 1 and 5 points under OV 2; moreover the trial judge heard the evidence at trial and found by a preponderance of the evidence that defendant possession a gun (despite the jury's acquittal of the felony-firearm charges). *People v Jackson*, ___ Mich App ___; ___ Nw2d ___ (Docket No. 332307, 7/25/17).

OV 4*:* The trial court properly scored ten points under OV 4 where the victim of domestic violence, assault with a dangerous weapon and unlawful imprisonment was shaking, crying and had difficulty communicating after the incident, she testified at trial that she feared she was going to die during the incident and wanted to look at pictures of her children as she died, her victim impact statement described nightmares and flashbacks, she was seeing a therapist, and she mentioned a daily struggle in terms of maintaining emotional stability. *People v Urban*, ___ Mich App ___ (Docket No. 332734, 8/31/17).

OV 4: Extending the rule of People v Calloway, 500 Mich 180 (2017), below, the Court of Appeals concluded that the trial court did not abuse its discretion in scoring OV 4, despite the lack of a victim impact statement, where the victim testified at trial that she was "scared for [her] life," "pretty shook up" and "everyday life was harder" due to the assault, and her body language and demeanor at trial evidenced reluctance and difficulty testifying including a request to close the preliminary examination to the public. Further, the victim was currently on disability for her anxiety and post-traumatic stress disorder and had digestive issues linked to the offense. *People v Wellman*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 332429, 8/3/17).

OV4 and 5*:* For both offense variables, the Michigan Supreme Court has held that points "may properly be scored . . . even absent proof that a victim sought or received, or intended to seek or receive, professional treatment." *People v Calloway,* 500 Mich 180; 895 NW2d 165 (5/19/17). The test is whether a preponderance of the evidence supports a finding of "serious" psychological injury,

with "serious" referring to "having important or dangerous possible consequences." Id. The trial court should consider the "severity of the injury and the consequences that flow from it, including how the injury has manifested itself before sentencing and is likely to do so in the future, and whether professional treatment has been sought or received." Id. The absence of professional treatment will not be dispositive. *Id.*

OV 5: The trial court did not err in finding serious psychological injury to the 24-year-old victim's mother and step-father where the mother was having a "very hard time dealing" with the death of her son, the incident had had a "tremendous, traumatic effect" on both parents, the incident "will change them for the rest of their lives," and the step-father had thought about it every day and likely would for the rest of his life. *People v Calloway,* 500 Mich 180; 895 NW2d 165 (5/19/17).

OV 7*:* The record amply supported the trial court's conclusion that the defendant's three to four hour behavior of holding the victim captive and emotionally and physically assaulting her with threats, a gun, his feet and a liquor bottle, and forcing her to put the gun in her mouth, was egregious and sadistic behavior going beyond the conviction offenses of unlawful imprisonment, assault with a dangerous weapon and domestic violence. *People v Urban,* ___ Mich App ___ (332734, 8/31/17).

OV 7: The trial court should not score this variable based on the victim's base level of fear or anxiety. In an order remanding the case to the trial court, the Michigan Supreme Court vacated that portion of the Court of Appeals opinion that concluded the shooting of the victim, twice while he was down, supported the scoring of OV 7 in a case involving assault with intent to murder. The Supreme Court noted that the trial court record "does not reveal an assessment of a base level of fear or anxiety associated with the offense of assault with intent to murder, and does not include a determination whether the defendant's conduct was intended to increase the victim's fear or anxiety by a considerable amount." The Supreme Court remanded to the trial court, directing the trial court to make "the determinations required under *Hardy* [*People v Hardy*, 494 Mich 430, 442-443 (2015).] *People v Roberson*, 500 Mich 929; 889 Nw2d 486 (1/24/17).

OV 8: There is no longer an "incidental movement" exception to the scoring of OV 8. All movement of the victim, "whether incidental to the offense or meaningfully deliberate," may suffice to score OV 8. Where the CSC victim was moved to a bedroom, the trial court "could reasonably determine" that the victim was moved to a place or situation of greater danger. *People v Barrera*, 500 Mich 14; 885 NW2d 295 (4/4/17), overruling contrary language in *People v Spanke*, 254 Mich App 642, 647 (2003), *People v Thompson*, 488 Mich 888 (2010), and *People v Dillard*, 303 Mich App 372, 379 (2013).

OV 9*:* In a short order remanding for resentencing, the Michigan Supreme Court found a misscoring of OV 9 where there was no basis to conclude from the facts found by the trial judge that "any victim of defendant's crime was placed in danger of physical injury or death or in danger of property loss." *People v Gutierrez,* 500 Mich 990; 894 NW2d 590 (5/17/17).

OV 9: The trial court did not err in assessing ten points for two or more victims where defendant stabbed one victim and admittedly waived his knife in the presence of at least two other individuals;

there was also testimony that several men were gambling in a dice game nearby. *People v Walden*, 319 Mich App 344; 901 NW2d 142 (4/20/17).

OV 13: The trial court may consider the misdemeanor offense of attempted resisting and obstructing an officer when scoring OV 13 because the guidelines direct the trial court to consider an attempt to commit a Class G offense (resisting and obstructing being a Class G offense) as a Class H felony, even if that direction applies to scoring the sentencing offense and not prior convictions. *People v Jackson,* ___ Mich App ___; ___ NW2d ___ (Docket No. 332307, 7/25/17).

OV 14: Where defendant brought heroin into a prison and delivered it to an inmate, the trial court properly concluded that defendant was the leader of a multiple offender situation. *People v Dickinson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 332653, 8/15/17).

OV 19: The trial court properly assessed twenty-five points as defendant's act of bringing heroin into a prison "inherently puts the security of a penal institution at risk." *People v Dickinson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 332653, 8/15/17).

APPELLATE REVIEW OF SENTENCE

Published Upward Departure Affirmed: The Court of Appeals affirmed a modest one-month departure above the sentencing guidelines range of 0 to 11 months (i.e., a sentence of one year in jail with five years' probation) for third-degree child abuse where the defendant "whupped" her son with a belt leading to injuries and scars on his legs and buttocks. The trial judge properly relied on a combination of the seriousness of the offense and the background of the offender, including the likely effect of the abuse on the son who later murdered another child and called 911 to report the stabbing and how he hated his life, had taken many pills and no one loved him; that defendant must have known the son's step-father also beat him; that defendant likely knew there was cocaine in the home and the step-father was using it; that the home was reported to be in an unsafe and deplorable condition with drug paraphernalia found in a bedroom; and that defendant may have been guilty of prior abuse and neglect of her children based on reported incidents against the children in New York. The Court of Appeals concluded that the trial court's factual findings were not erroneous and the court could have concluded that "the severity of the impact of defendant's conduct on the victim" was given inadequate weight under Offense Variable 4 (serious psychological injury). The Court of Appeals found a proportionate and therefore reasonable sentence. *People v Lawhorn,* ___ Mich App ___ (Docket No. 330878, 6/15/17).

Note: The *Lawhorn* panel recognized the now-advisory nature of an intermediate sanction range, but nevertheless reviewed the "departure" sentence for reasonableness. Slip Op at 6. In *People v Schrauben,* 314 Mich App 181, 195-196; 886 NW2d 173 (2016), the Court of Appeals recognized the trial court's discretion to impose an intermediate sanction with a range not exceeding 18 months, but treated the minimum prison term of 16 months as not a departure from the sentencing guidelines range of 0 to 17 months.

Published Upward Departure Affirmed: A split panel of the Court of Appeals (with Judges Boonstra and O'Connell in the majority) affirmed a "modest" departure sentence that exceeded the

sentencing guidelines range by 13 months where the trial judge relied on the seriousness of the crime (a knife assault to the abdomen leading to death), the fact that defendant was on bond for an aggravated assault when he committed the offense – a mere five days after posting bond, and the trial judge's belief that defendant lied at trial. The majority also found a proportionate sentence in light of the defendant's prior record and a personal protection order relating to the mother of defendant's children. In dissent, Judge Gleicher would have remanded for resentencing because the trial judge did not articulate legally relevant reasons for the departure, the Court of Appeals could not offer its own reasoning, and the trial judge had not explained why a departure sentence was a more proportional response. *People v Walden*, 319 Mich App 344; 901 NW2d 142 (4/20/17).

Published Downward Departure Affirmed: Without addressing the proportionality of the sentence or the appropriateness of the departure, the Court of Appeals affirmed a downward departure in a meth case where the trial court used advisory sentencing guidelines and gave the defendant the "benefit of the doubt" because he was "poisoning" himself. The Court of Appeals rejected the prosecutor's argument that the guidelines range must be considered mandatory when there is no judicial fact-finding in the scoring. *People v Rice,* 318 Mich App 688; 899 NW2d 752 (2/14/17).

Published Upward Departure *Reversed*: In a split opinion likely to capture the attention of the Michigan Supreme Court, two judges of the Court of Appeals (O'Brien and Hoekstra) agreed to reverse a sentence of 35 to 70 years imprisonment for second-degree murder where the minimum sentence constituted a departure of 15 years above the sentencing guidelines range of 12 to 20 years. The defendant had no scorable prior record and the majority concluded that most if not all of the trial judge's departure reasons were accounted for within the scoring of the offense variables. The sentencing guidelines are a "useful tool" and serve as a relevant "guidepost" when reviewing a departure sentence. Disagreeing with the dissenting judge (Boonstra) who would have divorced departure review from the guidelines, the majority concluded that the guidelines remain important in order to combat disparity in sentencing. Also, with reference to OV 6, the majority was "highly skeptical" that the trial judge could depart based on a finding of premeditation when the statutory conditions for scoring OV 6 were not present (i.e., information not presented to the jury which would support an additional finding of premeditation going beyond the conviction offense of second-degree murder). *People v Dixon-Bey*, ___ Mich App ___ (Docket No. 331499, 9/26/17).

PENDING IN THE MICHIGAN SUPREME COURT

SORA, HYTA & Punishment: The Michigan Supreme Court heard oral argument in December on 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, 307 Mich App 241; 859 NW2d 743 (2014), lv gtd 498 Mich 942; 872 NW2d 219 (2015).

Jury Trial for JLWOP Cases? The Michigan Supreme Court will decide whether the trial court's decision to sentence a juvenile to life without parole "must be made by a jury beyond a reasonable doubt. *People v Skinner,* 312 Mich App 15; 877 NW2d 482 (2015), lv gtd 500 Mich 929 ; 889 NW2d 487 (2017).

In the related *Hyatt* case, the Supreme Court will hear mini oral argument on whether "the conflict-resolution panel of the Court of Appeals erred by applying a heightened standard of review for sentences imposed under MCL 769.25." *People v Hyatt*, 500 Mich 929; 889 NW2d 487 (1/24/17). Decisions below: *People v Perkins & Hyatt,* 314 Mich App 140; 885 NW2d 900 (2016), superseded by *People v Hyatt*, 316 Mich App 368; 891 Nw2d 549 (2016).

Sexually Delinquent Person: In an order granting leave to appeal, the Supreme Court directed the parties to address (1) whether the crime of indecent exposure as a sexually delinquent person under MCL 750.335a(2)(c) requires a mandatory sentence of one day to life imprisonment or whether the sentencing court may impose a sentence within the applicable sentencing guidelines range, (2) whether the now advisory sentencing guidelines under *People v Lockridge* changes the answer, and (3) whether the Court of Appeals correctly decided *People v Campbell*, 316 Mich App 279 (2016) (mandatory sentence of 1 day to life controls over advisory sentencing guidelines for indecent exposure as a sexually delinquent person). *People v Arnold*, 500 Mich 964; 892 NW2d 369 (4/5/17).

Illegal Condition of Probation: The Michigan Supreme Court will hear mini oral argument on three questions: (1) whether the prosecutor's inclusion of a provision in the plea agreement that defendant, a state legislator, resign from office violates the separation of powers principle, (2) whether the validity of the provision was properly before the Court of Appeals where defendant had already resigned, and if so, whether the provision violates the separation of powers principle or public policy, and (3) whether the trial court abused its discretion by voiding a term of the agreement without offering plea withdrawal to the prosecutor. *People v Smith*, ___ Mich ___ (Docket No. 156353, 9/11/17).

FROM THE UNITED STATES SUPREME COURT

Sex Offender Restrictions: First Amendment protections preclude conviction under a North Carolina statute prohibiting registered sex offenders from accessing social networking websites. The defendant, a registered sex offender, posted a comment to Facebook that "God is Good!" following dismissal of a traffic ticket. The Supreme Court reversed his conviction for accessing a commercial social networking site as a registered sex offender, concluding that the broad wording of the statute did not withstand intermediate-level scrutiny and a state "may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture." *Packingham v North Carolina,* 137 S Ct 1730 (6/19/17).

Juvenile LWOP: Under the Antiterrorism and Effective Death Penalty Act (AEDPA), it was not objectively unreasonable for the Virginia state court to conclude that Virginia's geriatric release program (allowing a petition for conditional release after a juvenile has served 60 0r 65 years of a life sentence) satisfied the requirements of Graham v Florida, 560 US 48 (2010). This case does not decide whether the Virginia system violates the Eighth Amendment under Graham, but only whether the petitioner could satisfy the strict requirements for federal habeas corpus relief. *Virginia v LeBlanc*, 137 S Ct 1726 (6/12/17).

Consecutive Sentences: A federal sentencing judge may take into account one or more mandatory consecutive sentences for firearms convictions when imposing sentence for the predicate felony under 18 U.S.C. § 924(c). "Sentencing courts have long enjoyed discretion in the sort of information they may consider when setting an appropriate sentence." *Dean v United States*, 137 S Ct 1170 (April 3, 2017).

Refund of Fines and Costs: A state may not, consistent with due process, require a defendant to prove her innocence by clear and convicting evidence following reversal of the conviction in order to obtain a refund of fines, costs and restitution previously paid. *Nelson v Colorado*, 137 S Ct 1249 (April 19, 2017).

> *Note*: The *Nelson* decision may invalidate the case of *People v Diermier*, 209 Mich App 449, 451 (1995), where the Michigan Court of Appeals held that a defendant may not recover restitution erroneously paid to the victim pursuant to a restitution order later vacated on appeal because "it would be unreasonable to require the county to reimburse defendant for monies it paid which the county simply channeled to the victim." But the *Nelson* decision appears consistent with *People v Nance*, 214 Mich App 257, 259 (1995) (defendant is entitled to refund of fines and costs following reversal of his conviction; moreover, "a request for reimbursement does not require the bringing of a separate [civil] action.").

Tribal Convictions: Counselless tribal court convictions that complied with the Indian Civil Rights Act (providing for the appointment of counsel only when the sentence exceeds one year) may serve as predicate offenses for sentence enhancement purposes under federal law. The Sixth Amendment does not apply to tribal court convictions, and convictions valid when entered (whether under tribal law or not) retain that status for subsequent sentence enhancement purposes. Further, the Indian Civil Rights Act provides sufficient protections to ensure due process of law. *United States v Bryant*, 136 S Ct 1954 (2016).