SENTENCING LAW UPDATES

WAYNE COUNTY CRIMINAL ADVOCACY PROGRAM

November 9, 2018, Anne Yantus[1]

CONSIDERATION OF UNCONVICTED CONDUCT

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).

> *Debate Post-Nelson: Some commentators have suggested that the Nelson decision leads to the natural conclusion that facts arising out of acquitted conduct, dismissed charges or uncharged crimes may not be considered at sentencing. See 102 Crim Law Reporter 366 (1/17/18). The Michigan Supreme Court has granted mini oral argument to address the consideration of acquitted conduct at sentencing in People v Dixon-Bey*, 910 NW2d 303 *(5/4/18) , and People v Beck, 910 NW2d 298 (5/4/18).*

PENDING: Departure, Review & Acquitted Conduct: The Michigan Supreme Court will hear mini oral argument on three questions related to departure sentences: (1) to what extent the sentencing guidelines should be considered in reviewing a departure sentence on appeal, (2) whether the trial court erred in sentencing based on an independent finding of guilt of acquitted conduct, and (3) whether the trial court violated the principle of proportionality by relying on facts established by a preponderance of the evince that the jury did not find were proven by a preponderance of the evidence at trial. *People v Dixon-Bey*, 501 Mich 1066; 910 NW2d 303 (5/4/18), decision below: *People v Dixon-Bey*, 321 Mich App 490; 909 NW2d 458 (9/26/17).

PENDING: Departure, Review & Acquitted Conduct: In a case raising similar issues to *Dixon-Bey, supra*, the Michigan Supreme Court will hear mini oral argument addressing: "(1) the appropriate basis for distinguishing between permissible trial court consideration of acquitted conduct . . . and an impermissible 'independent finding of defendant's guilt' by a trial court on an acquitted charge, . . . and (2) whether the trial court abused its discretion by departing, from the guidelines range, where the jury acquitted the defendant of murder, but the court departed based on its finding by a preponderance of the evidence that the defendant had perpetrated the killing." *People v Beck*, __ Mich __; 910 NW2d 298 (5/4/18)

ALLEYNE & LOCKRIDGE

Cert Granted: Whether a mandatory five-year term of imprisonment, imposed for a violation of the offender's supervised release based on the sentencing judge's finding of new criminal conduct using a preponderance of the evidence standard at the revocation hearing, violates the Fifth and Sixth Amendment right to jury trial and due process in light

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of *Apprendi v New Jersey*, *United States v Booker*, and *Alleyne v United States*. *United States v Haymond*, 869 F3d 1153 (CA 10, 2017), cert granted __ S Ct __ (Docket No. 17-1672, 10/26/18).

Alleyne, Lockridge & Habeas: The Sixth Circuit concludes that the rule of *Alleyne v United States*, 570 US 99 (2013), clearly invalidated Michigan's mandatory sentencing guidelines scheme and a 2013 decision of the Michigan Court of Appeals that was released one and one-half months after *Alleyne* and found no constitutional error in the Michigan scheme was contrary to clearly established federal law as determined by the United States Supreme Court. The Court grants habeas relief. *Robinson v Woods*, ___ F3d ___ (Docket No. 16-2067; CA6, 8/24/18). *Note*: This decision grants habeas relief to a defendant who was pursuing his *direct* appeal when *Alleyne* was decided. For cases already final when *Alleyne* was decided, *Alleyne* is considered not retroactive. *In re Mazzio*, 756 F3d 487, 491 (CA 6, 2014).

***Lockridge* Not Retroactive:** The decision in *People v Lockridge*, 498 Mich 358 (2015), is not retroactive to cases on collateral review (i.e., motion for relief from judgment). The Michigan Supreme Court concluded that the decision in *Alleyne v United States*, 570 US 99 (2013), was a new rule not dictated by existing precedent, and *Lockridge* similarly articulated a new rule under the test of *Teague v Lane*, 489 US 288 (1989). Even applying the state law test for retroactivity, statewide reliance on the mandatory sentencing guidelines, the "incalculable" effect on the administration of justice and the lack of a rule that implicates the integrity of the fact-finding process all counselled against retroactive application to this 2002 conviction on collateral review. *People v Barnes*, ___ Mich ___ (Docket No. 156060, 7/9/18).

JUVENILE LIFE WITHOUT PAROLE

Juvenile LWOP: On leave granted, the Michigan Supreme Court concluded there is no additional fact-finding required at sentencing under MCL 769.25 before imposing a discretionary life-without-parole sentence on a juvenile convicted of first-degree murder. A life-without-parole sentence is authorized by the jury's verdict alone, and a jury is not needed at sentencing. While the sentencing judge must consider the *Miller* factors when selecting a sentence, these are mitigating factors that do not expose the defendant to a sentence that exceeds the sentence authorized by the jury's verdict. The trial court's determination of mitigating circumstances is more a question of mercy and moral judgment. Because the Sixth Amendment prohibits fact-finding that increases a sentence, not reduces it, there is no jury requirement for the imposition of a life-without-parole sentence for a juvenile in Michigan.

Granted, the trial judge must specify on the record the mitigating and aggravating circumstances it considered, but this refers to making a record. The statute does not require the sentencing judge to find any aggravating circumstances before imposing life-without-parole. Even if the trial judge makes a factual finding of an aggravated circumstance before imposing life-without-parole, the maximum penalty has not been increased and there is no violation of the Sixth Amendment.

"Irreparable corruption" is not a factual finding. It is more an absence of mitigating circumstances related to youth. The "irreparable corruption" standard is similar to the proportionality standard (where the trial court determines where on the continuum a given

case falls). "Whether a juvenile is irreparably corrupt is not a factual finding; instead, it is a moral judgment that is made after considering and weighing the *Miller* factors."

In reviewing the trial court's imposition of a life-without-parole sentence, there is no heightened standard of review. Instead, the traditional abuse of discretion standard applies, and the trial court's decision is accorded "some degree of deference" given the trial judge's sentencing experience and familiarity with the facts. An abuse of discretion occurs when the trial court chooses a sentence that falls outside the range of principled outcomes.

People v Skinner, ___ Mch ___ (6/20/18), reversing *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015), and reversing in part and affirming in part *People v Hyatt*, 316 Mich App 368; 891 Nw2d 549 (2016).

Juvenile LWOP: The provision in MCL 769.25a(6) that precludes an award of good time or disciplinary credits for juvenile lifers who are resentenced to a term of years is an unconstitutional violation of the Ex Post Facto Clause. *Hill v Snyder*, 900 F3d 260 (CA 6, 8-14-18).

The Sixth Circuit concluded that the decision of district judge Mark A. Goldsmith was "persuasive and correct." Judge Goldsmith had held that individuals sentenced to life without parole remain eligible to *earn* good time credits and disciplinary credits (where these are available, i.e., for offenses committed before 12-15-18), although the credits may not be *applied* to reduce a life sentence. The credits are nevertheless earned and cannot be eliminated under the Ex Post Facto Clause. *Hill v Snyder*, 308 F Supp 3d 893 (4/9/18).

The Michigan Court of Appeals adopted the district court's opinion (before the Sixth Circuit's decision) and likewise concluded that subsection 6 of MCL 769.25a, precluding an award of good time and disciplinary credits for those resentenced to a term of years as juvenile lifers, is an invalid ex post facto law. While defendants serving a life sentence cannot have the credits *applied* to their life sentences, they do in fact *earn* the credits and those credits may be applied to a life sentence that is subsequently converted to a terms of years. The Court of Appeals also concluded that judicial fact-finding at the resentencing hearing did not violate the Sixth Amendment or *Alleyne v United States*, 570 US 99 (2013). *People v Wiley*, ___ Mich App ___ (Docket No. 338870, *5/4/18*).

Juvenile LWOP: Resentencing remains the appropriate remedy despite the disqualification of the Oakland County Prosecutor's Office and appointment of a special prosecutor by the Michigan Attorney General where the Oakland County Prosecutor filed a timely motion for a life without parole sentence, and the Attorney General independently reviewed that decision and agreed to pursue a life sentence. The Attorney General had full authority to withdraw the motion for a LWOP sentence, yet chose to proceed, rendering any concerns about the Oakland County Prosecutor's decision irrelevant. *People v Hayes*, ___ Mich App __; ___ NW2d ___ (Docket No. 339543, 3/27/18).

Juvenile LWOP: The factors mentioned in *Miller v Alabama*, 567 US 460 (2012), must be considered when the sentencing court resentences a juvenile to a term of years in situations where the prosecutor does <u>not</u> seek a life sentence. The trial court must consider the attributes

of youth and failure to do so will be considered reversible error. There are no sentencing guidelines for the crime of first-degree murder committed by a juvenile, and a juvenile inmate's life expectancy will probably be lower than the estimated life expectancy of 64 years for the general prison population. The trial court must balance the four *Snow* factors (punishment, deterrence, reformation and protection of society). A juvenile's diminished culpability and greater prospects for reform would relate to reformation and protection of society. The diminished penological justifications for imposing the harshest penalty against a juvenile are also relevant to punishment and deterrence. The trial court failed to consider and balance the *Snow* factors, and erred in focusing overwhelmingly on the seriousness of the crime and the state's interest in punishment. The trial court failed to adequately consider the relevant factors of defendant's mental and educational limitations, cooperation with the police (he called the police, assisted them in finding the co-defendant and also confessed to his role), and post-sentencing behavior in prison. *People v Wines*, 323 Mich App 343; ___ NW2d __ (3/8/18).

OTHER RECENTLY DECIDED CASES

Plea Bargain May Not Contain Bar-to Office Provision: For ex-state senator Virgil Smith, the July 2018 decision of the Michigan Supreme Court may constitute a hollow victory. The Supreme Court held that (1) the plea bargain condition that Smith resign from public office was moot (he had already resigned), (2) the condition that barred him from seeking public office while on probation was unenforceable as against public policy (a ruling in his favor), but (3) the prosecutor had a right of plea withdrawal once the trial judge invalidated part of the plea bargain. The Court was split on why the bar-to-office provision violated public policy, with three justices (Viviano, McCormak and Bernstein) concluding that a bar-to-office agreement allows political considerations to enter into the prosecutor's charging decision, it interferes with the public's right to vote, and public office cannot be treated as private property to be bargained away for the personal benefit of the individual. Justice Clement, in an opinion that concurred as to plea withdrawal and mootness, and concurred more generally as to a violation of public policy, would conclude that the common law of contracts prohibits defendants from bargaining away the ability to run for office for something of value and agreements impairing elections are void as against public policy. *People v Smith*, ___ Mich ___; ___ NW2d ___ (No., 156353, July 26, 2018).

Two-Year Misdemeanors: The offense of felony-firearm is found in the Penal Code, and it requires a predicate felony. The Penal Code defines "felony" as an offense that is punishable by imprisonment in a state prison. The offense of maintaining a drug house, a two-year misdemeanor under the *Public Health Code*, may be used as a predicate felony for a felony-firearm charge under the *Penal Code*. *People v Washington*, 501 Mich 342; ___ NW2d ___ (Docket No. 156283, 6/12/18).

> *Note: Maintaining a drug house remains a misdemeanor for purposes of the Public Health Code, and would not constitute a felony for the purpose of consecutive sentencing under MCL 333.7401(3). People v Washington, supra at n 39.*

> *Note: Although the prosecutor in* Washington *urged the Court to overrule previous decisions of the Court of Appeals holding that a two-year misdemeanor offense under the Penal Code cannot*

support charges of felony-firearm or absconding on bond under the Penal Code (where both offenses require a predicate "felony"), the Supreme Court chose to leave these questions for another day. People v Washington, supra at n 51.

Sexually Delinquent Person: Prior to adoption of the legislative sentencing guidelines, an individual convicted as a sexually delinquent person could be sentenced to "one day to life" imprisonment, but this was an *optional* sentencing alternative that was not mandatory. It was also a sentencing option that was not modifiable once it was chosen (i.e., a sentence of two days to life was not permitted). Yet the question remains whether the legislative sentencing guidelines, which expressly included conviction as a sexually delinquent person for several underlying sex crimes, may have altered the sentencing universe for sexual delinquency sentencings. The Supreme Court does not decide this latter question. *People v Arnold*, ___ Mich ___ (Docket No. 154764, 7/19/18), overruling *People v Campbell*, 316 Mich App 279; 894 NW2d 72 (2016), overruling *People v Butler*, 465 Mich 940 (2001), and disavowing *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007).

SORA, HYTA & Punishment: After hearing oral argument twice in this case, the Michigan Supreme Court issued an order with a very narrow ruling: For a defendant who pleaded guilty with the hope/anticipation of receiving HYTA, including the statutory promise that there would be no civil disability attached following successful release from HYTA, and whose plea was entered before the Michigan Sex Offender Act was created, the "retroactive application of SORA deprived defendant of the benefits under HYTA to which he was entitled and therefore violated his constitutional right to due process." The Supreme Court analogized to breach of the plea bargain and concluded that "the *Santobello* principle applies with equal force to a statutory provision, such as HYTA, that induces a defendant to plead guilty by offering him certain benefits if he does so and satisfies other statutory conditions. *People v Temelkoski*, 501 Mich 960; 905 NW2d 593 (1/24/18), reversing 307 Mich App 241; 859 NW2d 743 (2014).

SORA Is Not Punishment or Unconstitutionally Vague: Adopting the Berrien County Prosecutor's efforts to distinguish earlier decisions of the Sixth Circuit and Michigan Court of Appeals that struck down portions of Michigan's SORA, a different panel of the Court of Appeals (Judges Krause, Markey and Riordan) concluded that the "registered to" and "assigned to" provisions relating to a defendant's failure to register telephone numbers and email addresses are not unconstitutionally vague and they exist despite the Court's earlier decision to strike down the "routinely used" language in *People v Sollaway*, 316 Mich App 174 (2016). The panel also concluded that the required registration of telephone numbers and email addresses under SORA does not constitute punishment and is sufficiently less onerous than the student safety zones and other restraints struck down in *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016), cert den ___ S Ct _ (10/2/17). *People v Patton*, ___ Mich App ___; ___ NW2d ___ (Docket No. 341105, 8/2/18).

Note: The Michigan Supreme Court will hear mini oral argument on (1) whether Michigan's SORA constitutes punishment, and (2) whether the defendants have been subjected to ex post facto punishment. People v Snyder, ___ Mich ___; 911 NW2d 467 (5/25/18); *People v Betts*, 92 NW2d 858 (6/27/18).

SORA and 6.500 Motion: In a case where the trial judge specified there would be no sex offender registration on the judgment of sentence, but later amended the order of probation to include sex offender registration, the original judgment of sentence controlled on the registration issue once defendant finished the probationary term. Defendant, who filed a motion to discontinue registration, was not required to pursue a separate motion for relief from judgment because the probationary order had already expired and he was not seeking relief from the original judgment of conviction and sentence. *People v Galloway*, ___ Mich ___ (Docket No. 156474, 10/24/18).

***Cobbs* Plea Evaluation and Departure Reasons:** A preliminary evaluation of the sentence under *People v Cobbs*, 443 Mich 276 (1993), does not exempt the trial court from its obligation to explain the basis for its departure from the sentencing guidelines range. *People v Williams*, 501 Mich 966; 905 NW2d 605 (1/24/18).

Presentence Report: Where a defendant raises an unpreserved challenge to the accuracy of the presentence report (here, the coverpage) for the first time on appeal, review is for plain error. *People v Brown*, ___ Mich App ___ (Docket No. 339318, 10/23/18).

Double Enhancement Permitted: When a defendant is convicted of domestic violence third offense based on two prior domestic violence misdemeanor convictions, the third offense is an "elevated" offense that amounts to a new substantive crime, not simply sentence enhancement. In that setting, the trial court did not err in also applying the habitual offender enhancement as well. *People v Stricklin*, 322 Mich App 533; 912 NW2d 601 (1/9/18).

Fourth (Super) Habitual Offender: Where defendant cited no authority for the proposition that he was entitled to written notice of the 25-year mandatory minimum term in the habitual offender notice, and where he had actual notice at a pre-trial hearing where he rejected a plea offer on the record, the argument lacks merit. *People v Head*, ___ Mich App ___ (Docket No. 334255, 3/27/18).

Habitual Offender Proof of Service: Although the prosecutor failed to file a proof of service as required by MCL 769.13(2), the error was harmless where defendant had actual notice and was not prejudiced by the error. *People v Head*, ___ Mich App ___ (Docket No. 334255, 3/27/18).

> *Note: The Michigan Supreme Court heard oral argument in October on habitual offender proof of service claims in People v Straughter*, 501 Mich 944; 904 NW2d 633 (12/27/17).

Probation Extension: In a split decision of the Court of Appeals, all three judges agreed that MCL 771.2(5) allows a trial judge to extend (or modify) the conditions of probation at any time within the statutory maximum period of probation (five years for a felony) so long as there has been no order discharging the defendant from probation. This rule would not preclude an extension of probation three months after the defendant's two-year probationary term for a felony conviction was scheduled to expire. Judge Cameron wrote for the majority and concluded that the difference in language between MCL 771.2 (extension or modification of probation "at any time") and MCL 771.4 (revocation of probation during the "probation period") meant that there was no conflict with the Court's earlier decision in *People v Glass*,

288 Mich App 399 (2010), where the Court concluded that probation revocation proceedings must be initiated during the "probation period." Judge O'Connell concurred and argued that a probationer has fewer due process rights than an individual facing conviction, and extension of probation "does not give rise to a comparable loss of liberty" as a revocation of probation would entail. Judge Jansen agreed that the extension of probation within the statutory period was proper, but argued that defendant must be given notice of the proposed extension and the reasons in support, and be offered an opportunity to be heard. *People v Vanderpool*, ___ Mich App ___; ___ NW2d ___ (Docket No. 337686, 8/7/18).

Parole Reversal: After the circuit court (Monroe) reversed the parole board's grant of parole for a third time, the parole board appealed and secured a reversal and order reinstating parole. The circuit court abused its discretion in denying parole based on a finding that the parole board had failed to consider a current and "meaningful" TAP (transition accountability plan), where the trial court simply created the requirement of a "meaningful" TAP and the parole board had in fact considered a TAP and updated information about the prisoner before granting parole. *In re Parole of Spears*, ___ Mich App ___ (Docket No. 340914, 6/26/18).

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 lack of jurisdiction. Jurisdictional defects may be raised at any time. *People v Washington*, 321 Mich App 276; ___ NW2d ___ (published 9/12/17), mini oral argument granted ___ Mich ___; 905 NW2d 597 (1/24/18).

Court Costs Constitute a Tax, but a Permissible Tax: According to the Court of Appeals, court 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. Nevertheless, 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). The Michigan Supreme Court will hear mini oral argument on these same questions. *People v Cameron*, ___ Mich ___ (Docket No. 155849, 3/9/18.)

Blanket Policy of Harsh Sentence Following Trial Overturned: In a published decision that notes an earlier unpublished decision reversing on the exact same ground (with the same judge), the Court of Appeals reversed Wayne Circuit Judge Quiana Lillard's imposition of a maximum guidelines sentence based on the judge's acknowledged policy of imposing a sentence at the top of the sentencing guidelines range for individuals convicted following trial. "We agree that a policy of sentencing all defendants who go to trial to the top of the guidelines is fundamentally inconsistent with the principle of individualized sentences." *People v Pennington*, ___ Mich App ___; ___ NW2d ___ (Docket No. 323231, 3/22/18), slip op at 8.

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*, 500 Mich 453; 902 NW2d 327 (2017), *quoting People v Lockridge*, 498 Mich 358, 391; 870 NW2d 502 (2015).

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. The Michigan Supreme Court has since decided to hear oral argument on this question. *People v Ames*, 501 Mich 1026; 908 NW2d 303 (3/21/18).

OV 3: While the trial court erred in assessing 25 points for a permanent incapacitating injury without evidentiary support (the medical expert could not say where the victim's neurological problems were due to the instant head injury or an earlier pre-natal stroke), the trial court properly assessed 25 points based on the victim's life-threatening injury as evidenced by subdural bleeding, repeated seizures and retinal hemorrhages that required airlifting the nine-week-old child to a larger hospital. *People v McFarlane*, ___ Mich App __; ___ NW2d ___ (Docket No. 336187, 8/7/18).

OV 7: The trial court erred in relying on the victim's leg fracture where there was no evidence connecting defendant to the fracture, but the court did not err in finding excessive brutality based on the victim's subdural hematomas and other injuries in a case of first-degree child abuse. *People v McFarlane*, ___ Mich App ___; ___ NW2d ___ (Docket No. 336187, 8/7/18).

OV 10: There is nothing within the wording of OV 10 that precludes the court from considering the victim's youth in a case of first-degree child abuse. The trial court properly considered the victim's youthfulness (nine weeks of age) in scoring this variable. *People v McFarlane*, ___ Mich App ___; ___ NW2d ___ (Docket No. 336187, 8/7/18).

OV 11: The trial court record does not support a finding that five additional sexual penetrations that occurred over a two-month period with the same victim arose from the sexual penetration giving rise to the sentencing offense. *People v Aguilar*, 501 Mich 985; 907 NW2d 583 (3/7/18).

OV 13: The trial court may not assess 25 points for a pattern of three or more crimes against the person unless the prosecution proves by a preponderance of the evidence that the crimes took place, defendant committed them, the crimes are felony crimes against a person, and they occurred within a five-year period of the sentencing offense. Where charges were dismissed pursuant to a plea agreement, but the record did not establish support that defendant committed a third crime against a person, it was error to assess 25 points. *People v Nelson*, ___ Mich ___; 914 NW2d 917 (7/27/18).

OV 13: The trial court may not score OV 13 for multiple convictions arising out of a single act when there is not "more than one felonious event." *People v Carll*, 322 Mich App 690; 915 NW2d 387 (1/23/18) (error to find pattern based on one incident of reckless driving that lead to one conviction of reckless driving causing death and three convictions of reckless driving causing

serious impairment). [Note, the *Carll* decision distinguished its facts from two earlier decisions where there were separate acts and/or separate incidents. See *People v Gibbs*, 299 Mich App 473; 830 NW2d 821 (2013) (three separate acts of robbery against three victims); *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001) (four convictions of making child sexually abusive material against two victims on two separate dates).]

OV 13: Where the trial court made no finding of a third felony offense, the trial court erred in assessing 25 points under OV 13. While this unobjected-to error would not normally necessitate resentencing as the range would change but defendant's sentence would fall within the correct range, defendant is nevertheless entitled to resentencing on a claim of ineffective assistance of counsel as the trial court would have had to recalculate the applicable grid and range had defense counsel objected. *People v McFarlane*, ___ Mich App ___; ___ NW2d ___ (Docket No. 336187, 8/7/18).

OV 19: This variable may be scored for assault on a jail inmate and attempting to smuggle drugs into the jail after the defendant's arrest for armed robbery. Although the offenses were not directly related to the armed robbery, defendant was in the "'administration of justice' phase of the sentencing offense when his conduct threatened the security of a penal institution." Moreover, "even if an unrelated fight between inmates might be found insufficiently related to the security of the penal institution at large, defendant's *retaliatory* attack on an inmate who had informed on him definitely threatened the security of the jail by causing disruption within the jail and by potentially discouraging other inmates from coming forward about security breaches they might witness." *People v Carpenter*, 322 Mich App 523; 912 NW2d 579 (1/9/18).

APPELLATE REVIEW OF SENTENCE

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*, 321 Mich App 490; ___ NW2d ___ (9/26/17), mini oral argument granted ___ Mich ___ (156746, 5/4/18).

Published Sentence Within Guidelines Affirmed: Defendant's sentence of 15 to 25 years imprisonment for first-degree child abuse was neither disproportionately severe nor cruel or unusual punishment where the sentence fell within the recommend range of the sentencing guidelines and defendant did not demonstrate unusual circumstances that made the sentence

disproportionate. *People v McFarlane*, ___ Mich App; ___ NW2d ___ (Docket No. 336187, 8/7/18).

MICHIGAN COURT RULES

Effective September 1, 2018, MCR 6.429(A) now permits the trial court to correct an invalid sentence on its own initiative within six months of entry of the judgment of sentence. The trial court must first give the parties an opportunity to be heard. The court rule continues to permit either party to move to correct an invalid sentence within specified time limits. This court rule amendment stems from the Court's earlier decision in *People v Comer*, 500 Mich 278; 901 NW2d 553 (6/23/17) (error to add lifetime monitoring after sentencing).

> *Note: The Court's six-month time-limit for the trial court's correction of an illegal sentence is actually more conservative than that proposed by the Michigan Judges Association, PAAM, the State Bar's Board of Commissioners and Timothy Baughman (most advocating for a rule with no time limit).*

NEW FROM THE MICHIGAN LEGISLATURE

Defendant Must Hear Victim's Allocution: The defendant must be physically present in the courtroom at the time of the victim's allocution unless the court has removed the defendant for disruptive behavior or for posing a threat to any individuals in the courtroom. 2018 PA 153, amending MCL 780.765; MCL 780.793, and MCL 780.825 (effective May 23, 2018) (Rebekah Bletsch law).

Destruction of Arrest Record: If charges are dismissed before trial, the arrest record shall be removed from ICHAT (Internet Criminal History Access Tool). Further, if the prosecutor agrees or both the court and prosecutor do not object within 60 days of the dismissal order, the arrest record, all biometric data and fingerprints shall be expunged or destroyed, the LEIN entry shall be removed, and the DNA sample shall be destroyed or expunged, except for DNA samples that must be retained by law (retention is required for all felonies, attempted felonies and select misdemeanors under MCL 28.176)). 2018 PA 65, 66, 67, amending MCL 764.26a, MCL 28.214 and MCL 28.243 (effective June 12, 2018). Note, an appellate court's reversal of a conviction for an individual who does not have more than one conviction requires destruction of the DNA sample under MCL 28.176(9) (with one exception for evidence relating to others).

Jail - Medical Probation: If following conviction and sentence the sheriff notifies the court in writing, with supporting documentation from a physician, that a jail inmate may be eligible for conditional release because the prisoner is (1) physically or mentally incapacitated due to a medical condition that renders the prisoner unable to perform basic daily living activities *and* the prisoner requires 24-hour care, or (2) the prisoner requires acute long-term medical treatment or services, the court *may* place the individual on medical probation. Before the court takes action, the sheriff must investigate the defendant's ability to pay for medical treatment (with or without insurance), the court must find the prisoner has a placement option such as home confinement or a medical facility, and the court must have conducted a public hearing after providing notice to the prosecutor and victim(s). 2018 PA 149, adding MCL 771.3g, (effective August 14, 2018).

Jail – Compassionate Release: If following conviction and sentence the sheriff notifies the court in writing, with supporting documentation from a physician, that a jail inmate has a life expectancy of less than six months, the court may grant compassionate release. Before the court takes this action, the court must make a finding that the prisoner's life expectancy is not more than six months, the sheriff must investigate the defendant's ability to pay for the placement, the court must conduct a public hearing with notice to the prosecutor and victim, the court must find the prisoner has a placement option, and the court must find that the prisoner's release "would not reasonably pose a threat to public safety or the prisoner." If the court grants compassionate release, it must enter an amended judgment of sentence specifying that the prisoner is released from the term of imprisonment earlier imposed. 2018 PA 146, adding MCL 771.3h (effective August 14, 2018).

Prison – Objective Parole: Public Act 339 moves Michigan's parole board in the direction of more objective parole decisions by requiring "objective, evidence-based release decisions" and authorizing departures from the parole guidelines for substantial and compelling *objective* reasons. Moreover, for individuals with a high probability of parole under the parole guidelines, the parole board is limited to eleven (11) factors when denying parole for substantial and compelling objective reasons. Those eleven factors include (1) prison behavior, (2) refusal to participate in prison programming (but not if *unable* to complete for reasons beyond the prisoner's control), (3) verified objective evidence of substantial harm to a victim that could not have been available for consideration at sentencing, (4) prisoner's threat to harm another person if released, (5) objective evidence of post-sentencing conduct, not scored within the parole guidelines, that prisoner presents a high risk to public safety if released, (6) prisoner is suspect in an unsolved case that is being actively investigated, (7) prisoner has pending felony charge or detainer, (8) failure to complete prison programming, if programming is not available in the community and the risk to public safety cannot be adequately managed in the community, (9) release of prisoner is barred by law, (10) insufficient parole plan submitted by prisoner to address prisoner's risks and needs (parole denial must provide detailed explanation of deficiencies), and (11) a psychological evaluation in the past three years indicating prisoner would present high risk to public safety if paroled. IN ADDITION, the public act specifies when the parole board must reconsider the individual for parole (if parole is denied for individuals with low, average and high-probability guidelines) and provides for detailed reporting to the legislature on parole decisions - both grants and denials - for individuals who scored high probability on the parole guidelines. All of the above relates to amendments to MCL 791.233e. The public act also inserts the sentence, "There is no entitlement to parole" in MCL 791.235, and requires inclusion of results from a "validated risk assessment instrument" in the parole eligibility report. 2018 PA 339, amending MCL 791.233e and MCL 791.235 (effective for crimes committed on or after December 12, 2018, but not including individuals serving life).

PENDING IN THE MICHIGAN SUPREME COURT

Must a Within-Guidelines Sentence Be Affirmed? The Supreme Court will hear mini oral argument on whether MCL 769.34(10), which requires affirmance of a sentence within the sentencing guidelines range absent error in scoring or inaccurate information, survives after the *Lockridge* decision. *People v Ames*, 501 Mich 1026; 908 NW2d 303 (3/21/18).

Are Court Costs an Unconstitutional Tax? The Supreme Court will hear mini oral argument on whether court costs constitute a tax and if so, whether the tax violates the Separation of Powers Clause or the District-Statement Clause of the Michigan Constitution. *People v Cameron*, 501 Mich 986; 907 NW2d 604 (3/9/18).

SORA, Punishment, Cruel or Unusual: Following the Court's narrow decision in *People v Temelkoski*, 501 Mich 960 (2018), the Supreme Court will now hear two cases raising similar questions: (1) does Michigan's SORA amount to punishment, and (2) whether the defendants have been subjected to ex post facto punishment. *People v Snyder*, 501 Mich 1078; 911 NW2d 467 (5/25/18); *People v Betts*, 912 NW2d 858 (6/27/18).

Service of Habitual Offender Notice: The Supreme Court will hear mini oral argument on several thorny questions related to proper service of the habitual offender notice: (1) Does harmless error analysis apply to violations of the habitual offender notice requirements of MCL 769.13? (2) May the prosecutor prove timely notice by means other than a proof of service? (3) Does providing the habitual offender notice in the district court satisfy the requirements of MCL 769.13? *People v Straughter*, 501 Mich 944; 904 NW2d 633 (12/27/17).

> *Note*: Although a recent amendment of MCR 6.112 addressed the timing of substantive amendments to the habitual offender notice, it did not address *service* of the habitual offender notice. There are currently several conflicting decisions on *service* and harmless error: 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); *People v Head*, ___ Mich App ___ (Docket No. 334255, 3/27/18) (prosecutor failed to file proof of service, but harmless where defendant had actual notice and no prejudice).

Jurisdictional Defects and 6.500 Motions: When a trial court improperly resentences a defendant while an application for leave to appeal is pending in the Michigan Supreme Court, is this a jurisdictional defect and may it be raised in a successive motion for relief from judgment? *People v Washington*, ___ Mich ___; 905 NW2d 597 (1/24/18) (granting mini oral argument) (October 2018 session).

OV 12 and Separate Acts: Although the Supreme Court's order granting mini oral argument does not indicate the precise argument to be considered under OV 12, the Court of Appeals' unpublished decision affirmed an assessment of ten points for two or more contemporaneous felony crimes against a person where defendant, who was convicted of assault with intent to do great bodily harm, felonious assault and several weapons offenses, fired three shots at the victims. The Court of Appeals concluded that only one shot was necessary to convict and therefore two shots constituted separate felonious criminal acts under OV 12. *People v Carter*,

___ Mich ___; 911 NW2d 803 (6/1/18), reviewing unpublished opinion per curiam of the Court of Appeals, issued June 27, 2017 (Docket No. 331142).

OV 19, Inappropriate Sentencing Comments and Judge Lillard: The Supreme Court will hear mini orals on (1) whether OV 19 was misscored (in a case where defendant provided no name at arrest and the trial judge concluded based on very little evidence that he conspired with a witness for the witness to commit perjury at the defendant's trial), and (2) whether defendant is entitled to resentencing due to inappropriate conduct of Judge Lillard at sentencing (including calling the defendant a "clown", taunting him and other inappropriate innuendos). *People v Walker*, ___ Mich ___; 911 NW2d 810 (6/1/18). See also MSC order of 9/5/18 expanding the grounds for the appeal. __ Mich __ (9/5/18).

> *Note: Judge Lillard is not the only judge with questionable sentencing behavior. The Michigan Supreme Court denied leave to appeal, with an eloquent dissent by Justice McCormack (Justice Bernstein joined in the dissent), in a case where Jackson County Circuit Judge John McBain expressed his personal wish that the defendant would have suffered a violent death instead of being arrested and convicted for a home invasion first degree that involved substantial destruction of a police officer's home. People v Mitchell*, __ Mich __; 911 NW2d 458 (2018).

Departure, Review & Acquitted Conduct: The Michigan Supreme Court will hear mini oral argument on three questions related to departure sentences: (1) to what extent the sentencing guidelines should be considered in reviewing a departure sentence on appeal, (2) whether the trial court erred in sentencing based on an independent finding of guilt of acquitted conduct, and (3) whether the trial court violated the principle of proportionality by relying on facts established by a preponderance of the evince that the jury did not find were proven by a preponderance of the evidence at trial. *People v Dixon-Bey*, 501 Mich 1066; 910 NW2d 303 (5/4/18), decision below: *People v Dixon-Bey*, 321 Mich App 490; 909 NW2d 458 (9/26/17).

Departure, Review & Acquitted Conduct: In a case raising similar issues to *Dixon-Bey, supra*, the Michigan Supreme Court will hear mini oral argument addressing: "(1) the appropriate basis for distinguishing between permissible trial court consideration of acquitted conduct . . . and an impermissible 'independent finding of defendant's guilt' by a trial court on an acquitted charge, . . . and (2) whether the trial court abused its discretion by departing, from the guidelines range, where the jury acquitted the defendant of murder, but the court departed based on its finding by a preponderance of the evidence that the defendant had perpetrated the killing." *People v Beck*, __ Mich __; 910 NW2d 298 (5/4/18)