

SENTENCING LAW UPDATES  
WAYNE COUNTY CRIMINAL ADVOCACY PROGRAM  
November 15, 2019, Anne Yantus<sup>1</sup>

CASES HEARD BUT NOT DECIDED BY THE MICHIGAN  
SUPREME COURT LAST TERM

The Michigan Supreme Court heard oral argument in several cases last term, but the Court ultimately chose not to decide several issues. The denial of leave to appeal in three cases leaves intact earlier Court of Appeals decisions that are not necessarily favorable to criminal defendants:

**Review of Within-Guidelines Sentence:** A sentence falling within the sentencing guidelines range must be affirmed absent a misscoring of the guidelines or consideration of inaccurate information. MCL 769.34(10); *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016) (concluding MCL 769.34(10) remains mandatory after *Lockridge*). See grant of mini oral argument and subsequent denial of leave to appeal in *People v Ames*, 501 Mich 1026 (2018); lv den \_\_\_ Mich \_\_\_; 926 NW2d 283 (June 26, 2019). (But note there is an exception for appellate review of constitutional challenges to a within-guidelines sentence. *People v Conley*, 270 Mich App 301; 715 NW2d 377 (2006).)

**Habitual Offender Proof of Service:** Failure to file a timely proof of service for the habitual offender notice may be harmless error if the defendant had actual notice and was not prejudiced. *People v Head*, 323 Mich App 526; 917 NW2d 752 (2018). See grant of mini oral argument and subsequent denial of leave to appeal in *People v Straughter*, 501 Mich 944 (2017); lv den \_\_\_ Mich \_\_\_; 930 NW2d 384 (July 19, 2019)

**Court Costs:** Court costs are a tax, but not an unconstitutional tax. *People v Cameron*, 319 Mich App 215; 900 NW2d 658 (2017). See grant of mini oral argument and subsequent denial of leave to appeal in *People v Cameron*, 501 Mich 986 (2018); lv den \_\_\_ Mich \_\_\_; 926 NW2d 785 (July 10, 2019).

*Chief Justice McCormack filed a concurring statement expressing concern over an issue raised by amicus Michigan District Judges Association: that a defendant's due process right to an impartial decision maker, see *Tumey v Ohio*, 273 US 510, 522 (1927), may be violated when a trial judge has an interest in court funding. "Assigning judges to play tax collector erodes confidence in the judiciary and may seriously jeopardize a defendant's right to a neutral and detached magistrate."*

*Justice McCormack added that "I expect we will see [this issue] brought directly to us before long."*

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## NEW FROM THE MICHIGAN LEGISLATURE

**Parole for Medically Frail Individual:** Effective August 21, 2019, MCL 791.235(10) and several related statutes were amended to permit the early parole of a medically frail prisoner to a medical facility under certain terms and conditions. Individuals convicted of a crime punishable by life without parole or convicted of first-degree CSC are ineligible. 2019 PA 13, 14 and 16.

**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 (ii) 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).

### MICHIGAN COURT RULES

Effective September 1, 2019, MCR 6.425(A) now requires the trial court to determine the dollar amount of restitution at sentencing. Should there be a dispute as to the proper amount or type of restitution, the court shall resolve the dispute using a preponderance of the evidence standard. The prosecutor bears the burden of demonstrating the amount of loss sustained by a victim as a result of the offense. MCR 6.425(E)(i)(f) and (2)(b) (effective 9/1/19).

Also effective September 1, 2019, the prosecutor, victim or defendant may file a post-judgment motion to amend the restitution order based on new or *updated* information. MCR 6.430. Defendant may appear via video technology during a hearing on a post-judgment motion to amend restitution. MCR 6.430(D); MCR 6.606(A) (as amended, effective 9/1/19).

### RECENTLY DECIDED CASES

**Acquitted Conduct at Sentencing:** "Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime." "We hold that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." The presumption of innocence and the right to notice, both embodied in the Due Process Clause of the Fifth Amendment and made applicable to the states through the Fourteenth Amendment, preclude consideration of acquitted conduct at sentencing. This rule does not preclude the sentencing court from considering *uncharged conduct* using a preponderance of the evidence standard, however. "When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard." *People v Beck*, \_\_\_ Mich \_\_\_ (Docket No. 152934, 7/29/19), slip op at 2, 18 and 22.

**Allocution:** Defendant was denied the right to meaningful allocution where the trial judge interrupted him without justification and did not provide him with further opportunity to speak. The Court applied plain error review (and found plain error) where defendant did not object at sentencing. *People v Bailey*, \_\_\_ Mich App \_\_\_ (Docket No. 342175, 9/24/19).

**Restitution:** The trial court must consider only the defendant's income, and not that of her husband, when assessing financial resources available to satisfy a restitution order. The trial

court is not limited to defendant's net income, *however*. *People v Spears-Everett*, \_\_\_ Mich App \_\_\_ (Docket No. 341860, 7/2/19).

**Restitution:** Defendant's claim that collection of restitution from him while in prison constituted a manifest hardship was not ripe for review where he claimed he did not have more than \$50 in his account and provided no evidence that the Department of Corrections was collecting restitution or violating MCL 791.220h. *People v Odom*, 327 Mich App 297; \_\_\_ NW2d \_\_\_ (3/12/19).

**Fines:** A criminal fine must be authorized by statute. *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014) Where the statute setting forth the crime of unlawfully driving away an automobile does not authorize a fine, the trial court erred by imposing a \$150 fine. *People v Veeder*, \_\_\_ Mich \_\_\_; 932 NW2d 610 (9/10/19). (Note, if the statutory penalty does not include a fine, fines may nevertheless be assessed as a condition of probation under MCL 771.3(2)(b).)

**DNA Assessment:** The \$60 DNA assessment does not apply if the defendant has previously submitted a DNA sample. MCL 28.176(3). If the defendant has previously submitted a sample, the trial judge may not order a new \$60 DNA assessment. *People v Veeder*, \_\_\_ Mich \_\_\_; 932 NW2d 610 (9/10/19).

**Attorney Fee Calculation:** The trial court must make findings of fact before assessing attorney fees in a given case. This rule differs from the no separate calculation rule for court costs under MCL 769.1k(1)(b)(iii). *People v Lewis*, 503 Mich 162; 926 NW2d 796 (12/27/18).

**Plea Bargains and Voluntary Pleas:** Defendant must understand the terms of a plea bargain in order to enter a voluntary plea and this is especially important where the first plea was withdrawn, a Cobbs evaluation was offered at the next pre-trial hearing, and there was no clarification at a still-later second plea proceeding whether the original agreement remained in effect or whether the Cobbs evaluation now controlled. In this setting, defendant is entitled to plea withdrawal. *People v Brinkey*, 327 Mich App 94; 932 NW2d 232 (2/14/19).

**Breach of Plea Bargain:** Where defendant provided false testimony, either during his brother's trial or during a post-conviction motion in his brother's case where he recanted the earlier testimony, defendant breached the terms of his plea bargain and the trial court properly granted the prosecutor's motion to rescind the sentence agreement. The sentence agreement required truthful testimony during the brother's "case," and this included the post-conviction motion as well as trial testimony. However, the trial court erred in reinstating defendant's original sentence (imposed before the sentence agreement was reached) without conducting the *Lockridge-Crosby* remand ordered by the Court of Appeals during defendant's first appeal. *People v Anderson*, 326 Mich App 747; 929 NW2d 835 (1/15/19).

**Felony-Firearm:** Where defendant was convicted of one count of felony-firearm and three additional felonies, but only one of those felonies was listed as the predicate offense, the trial court correctly order consecutive sentencing between the felony-firearm sentence and the sentence for the one listed felony. *People v Coleman*, 327 Mich App 430; \_\_\_ NW2d \_\_\_ (3/21/19).

**Sexually Delinquent Person and Sentencing Guidelines:** According to the Court of Appeals on remand from the Michigan Supreme Court, the legislative sentencing guidelines *do* offer another sentencing option for sentencing an individual convicted as a sexually delinquent person. *People v Arnold*, \_\_\_ Mich App \_\_\_ (Docket No. 325407, 6/11/19).

**SORA and Petition to Remove:** The defendant's petition for exemption from SORA should be reconsidered by the trial court, and that court should consider all of the information presented at an earlier hearing including text messages from the complainant. Moreover, any appeal from the trial court's decision will be by right under MCL 28.723a(6). *People v Bieszka*, 903 Mich 943; 921 NW2d 541 (1/25/19).

**Juvenile LWOP & Resentencing on Other Counts:** Where defendant was resentenced to a term of years on his conviction of first-degree murder, but the trial judge did not disturb the connected life-with-parole sentence for second-degree murder, the trial court erred in granting defendant's motion for relief from judgment with respect to the latter sentence. A sentence of life with parole is not precluded by *Miller v Alabama*. Moreover, the record did not support the conclusion that the trial judge relied on inaccurate information or a misunderstanding of the law with respect to the second-degree murder sentence, and hence that sentence was not shown to be invalid. Finally, defendant could not prevail on a claim that MCL 771.14 required preparation of the sentencing guidelines range for the second-degree murder conviction (on the theory that this sentence had become the controlling sentence) as defendant was first sentenced in 1987, long before the legislative sentencing guidelines took effect. *People v Williams*, 326 Mich App 514; 928 NW2d 319 (published 11/29/18), *application for leave held in abeyance* \_\_\_ Mich \_\_\_ (Docket No. 158853, 4/5/19 (held in abeyance pending *People v Turner*, \_\_\_ Mich \_\_\_; 924 NW2d 589 (4/5/19)).

**Resentencing Is Proper for Invalid Sentence:** Where defendant's sentence for Count II, second degree arson, was based on the higher sentencing guidelines range for Count I, and where the sentence for Count I was later reduced, defendant's sentence for Count II was based on inaccurate information and was thus invalid. The trial court had authority to resentence setting. *People v Gunn*, 503 Mich 908; 919 NW2d 402 (11/21/18).

**Resentencing or Rearticulation for Invalid Departure Reasons:** Where the Court of Appeals finds one or more insufficient departure reasons, it should remand to the trial court for resentencing or further articulation of the reasons for the departure sentence. *People v Steanhouse*, \_\_\_ Mich \_\_\_ (Docket No. 156900, 9/30/19), *vacating in part People v Steanhouse*, 322 Mich App 233; 911 NW2d 253 (2017).

**Probation – Right to Refuse:** A defendant may decline a sentence of probation in favor of incarceration. *People v Bensch*, \_\_\_ Mich App \_\_\_ (Docket No. 341585, 4/30/19).

**Probation Discharge - Successful Completion:** An order discharging an offender from probation constitutes a "successful" completion of probation, even if the offender had several violations of probation. "Successful" does not mean "perfect." *People v Parkmallory*, \_\_\_ Mich App \_\_\_ (Docket No. 342546, 5/16/19).

**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 differences 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 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*, 325 Mich App 493; 925 NW2d 914 (2018), MOAA granted \_\_ Mich \_\_; 928 NW2d 198 (6/7/19).

**Consecutive Sentencing and Parole:** The new sentence for a felony committed while on parole will usually commence on the date of sentencing when MCL 768.7a(2) and MCL 791.234 are considered together. This is not true, however, when the new sentence is a *jail* sentence and the old sentence is a prison sentence. In that setting, MCL 791.234 (which directs the MDOC to stack minimum and maximum sentences together) is no longer inapplicable. Pursuant to a straightforward application of MCL 768.7a(2), the new jail sentence begins when the defendant is paroled (i.e., re-paroled) from prison for the old offense or completes his or her maximum sentence for the old offense. *People v Beard*, \_\_ Mich App \_\_ (Docket No. 346383, 4/25/19).

**Consecutive Sentencing, Parolees and Jail Credit:** Adding one final nail to the coffin, the Court of Appeals held that a parolee arrested for a new felony offense is not entitled to jail credit for time detained in jail prior to sentencing, even if no parole detainer is filed, because the parolee is considered to be serving time against the original sentence. *People v Allen*, \_\_ Mich App \_\_ (Docket No. 343225, 10/1/19).

**Habitual Offenders and Early Parole:** Defendants who are sentenced as habitual offenders for offenses committed prior to enactment of Michigan's truth in sentencing laws in December 15, 1998 remain eligible to earn disciplinary or good-time credits, but the parole board may not parole them prior to their calendar minimum term (i.e., may not parole based on the date that would apply with disciplinary or good-time credits) without approval of the sentencing judge under MCL 769.12(4) (and MCL 791.233(1)(b)). The successor sentencing judge abused its discretion and abdicated its role and responsibility by refusing to consider defendant's request for early parole out of deference to the sentence imposed by the original sentencing judge 25 years earlier. The successor judge failed to engage in its own analysis, failed to make an independent determination and failed to consider the defendant's conduct in prison for the past 25 years, thus failing to exercise discretion which is itself an abuse of discretion. *People v Grant*, \_\_ Mich App \_\_ (Docket No. 344625, 9/19/19).

**Presentence Report:** Although the presentence investigator did not update the presentence report for resentencing beyond mention of one misconduct ticket, defendant submitted

documentation of voluntary programs he had completed and the trial court thus had the information, alleviating any potential error. Defendant also waived his request for a victim impact statement from a different victim (whom he claimed would have professed his innocence) where he presented no evidence that this other victim had or could have presented a victim impact statement. *People v Odom*, 327 Mich App 297; \_\_\_ NW2d \_\_\_ (3/12/19).

**Presentence Report:** Defendant’s varied challenges to the presentence report were not supported by an effective challenge and did not amount to plain error, including challenges to whether he was a “predator,” whether he “groped” and “fondled” (as opposed to “touched”) previous victims, and whether he was “unemployed” (which was true once incarcerated). The trial court did not abuse its discretion by including statements of the victim and his father in the presentence report, and defendant abandoned his challenge to the trial court’s refusal to attach a 100+ page defense-commissioned report to the presentence report. *People v Lampe*, 327 Mich App 104; 933 NW2d 314 (2/21/19).

**Improper Sentencing Comments:** The Michigan Supreme Court reversed and remanded for a new trial where the trial judge (Wayne Circuit Judge Qiana Lillard) coerced the verdict based on comments made to the jury. The Supreme Court also ordered retrial before a different judge based on the trial error and “unprofessionalism and bias displayed by the trial court against the defendant during sentencing.” The Court concluded that the conduct at sentencing was “well outside the bounds of what we consider as an appropriate way to conduct a sentencing hearing – even one involving a difficult person.” Judge Lillard had repeatedly baited defendant, calling him a clown and coward, after he told her eight times that he had nothing further to say. Further, when the defendant said “F--- you,” the judge replied, “Oh, you wish you could.” The judge suggested defendant liked being in prison and told him she would have sentenced more leniently but for his disrespect for the court. *People v Walker*, \_\_\_ Mich \_\_\_ (Docket No. 155198, 7/11/19).

**Consideration of Mitigating Circumstances at Sentencing:** A trial judge is not required to *expressly or explicitly* consider mitigating circumstances at sentencing (i.e., the court need not state on the record that it has considered mitigating circumstances). *People v Bailey*, \_\_\_ Mich App \_\_\_ (Docket No. 342175, 9/24/19).

## MICHIGAN SENTENCING GUIDELINES

**Scoring Multiple SIRs:** A recent UNPUBLISHED decision of the Court of Appeals suggests the trial court must score the guidelines for “each” crime having the highest crime classification. *People v Diepenhorst*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2018 (Docket No. 340552, 340643, 340644). This is consistent with the requirement in MCL 771.14(2)(e)(ii).

**Resentencing and New Objections:** In a case where the Court of Appeals remanded for resentencing due to error in the scoring of PRV 5, but did not limit the scope of the resentencing in any way, the trial court’s authority at resentencing included consideration of new challenges to OV 3 and OV10 that were put forth by the prosecutor. *People v Lampe*, 327 Mich App 104; 933 NW2d 314 (2/21/19).

**Lockridge and the Opportunity to Forego Resentencing:** Defendants have an opportunity to forgo resentencing as part of a Crosby remand, but they must timely act. Where defendant did not communicate his decision to avoid resentencing until the trial judge expressed his intention to grant resentencing and increase the sentence, the trial judge did not abuse its discretion in denying defendant's motion to withdraw from resentencing. *People v Odom*, 327 Mich App 297; \_\_\_ NW2d \_\_\_ (3/12/19).

**Lockridge, Resentencing and Presumption of Vindictiveness:** Where the Michigan Supreme Court remanded a case to the trial court for a Crosby hearing and the trial judge granted resentencing and imposed a higher sentence, there was no presumption of vindictiveness because the trial judge considered the case anew under a new standard (i.e., advisory guidelines versus mandatory guidelines). *People v Odom*, 327 Mich App 297; \_\_\_ NW2d \_\_\_ (3/12/19).

**Lockridge and Ex Post Facto Claims:** The retroactive application of *Lockridge* to a case pending on direct review when *Lockridge* was decided does not violate ex post facto laws. *People v Lampe*, 327 Mich App 104; 933 NW2d 314 (2/21/19); *People v Odom*, 327 Mich App 297; \_\_\_ NW2d \_\_\_ (3/12/19).

**Preservation of Guidelines Error:** Where defendant objected to the scoring of the sentencing guidelines via a proper motion to remand (which was denied by the Court of Appeals) and continued to object in his brief on appeal, the issue was properly preserved. *People v Carter*, 503 Mich 221; 931 NW2d 566 (5/7/19).

**Resentencing Due to Guidelines Error:** Where defendant properly preserved his challenge to the guidelines scoring and the trial court relied on an incorrect range at sentencing, defendant is entitled to resentencing. *People v Carter, supra*.

**OV 1 and 2:** Pepper spray is more than an irritant. It is a harmful chemical substance even if the injuries it inflicts are temporary. The trial court properly assessed 20 points under OV 1 and 15 points under OV 2 for a "harmful chemical substance." The Legislature intended to include temporary as well as permanent injuries under OV 1 and 2. *People v Savage*, \_\_\_ Mich App \_\_\_ (Docket No. 339417, 4/23/19).

**OV 2:** The trial court properly assessed one point under OV 2 for possession or use of "any other potentially lethal weapon" where defendant used a tire iron to break the windows of a parked car during an unarmed robbery. *People v Rodriguez*, \_\_\_ Mich App \_\_\_ (Docket No. 338914, 4/18/19).

**OV 3:** This variable is focused on the victim's injuries, not the defendant's actions. Although the three-year-old child suffered third-degree burns on his legs, there was no evidence of a life threatening injury (and no argument that the injury was permanently incapacitating). *People v Chaney*, \_\_\_ Mich App \_\_\_ (Docket No. 341723, 4/18/19).

**OV 3:** The trial court properly assessed ten points for bodily injury requiring medical treatment where the 13-year-old sexual assault victim was hospitalized overnight, suffered pain in his "butt," suffered bruised, cut and swollen ears, and received treatment to prevent sexually transmitted diseases. *People v Lampe*, 327 Mich App 104; 933 NW2d 314 (2/21/19).



**OV 4:** The Court of Appeals erred in affirming an assessment of 10 points under OV 4 “where the record fails to adequately support a finding that the victim suffered a *serious* psychological injury.” (According to the unpublished opinion of the Court of Appeals, one of the victims of the home invasion and armed robbery testified that the incident affected him psychologically to the point that he was contemplating seeking professional help.) *People v Miller*, \_\_\_ Mich \_\_\_ (Docket No. 159430, 9/20/19).

**OV 4:** The trial court properly assessed ten points in a case of bank robbery/armed robbery where the victim sought professional help because of anxiety caused by the offense and continues to suffer anxiety whenever entering a bank. *People v Odom*, 327 Mich App 297; \_\_\_ NW2d \_\_\_ (3/12/19).

**OV 4:** The trial court did not err in assessing ten points under OV 4 where the 13-year-old sexual assault victim had flashbacks and panic attacks, kept a knife under his bed, was angry, distrustful, afraid, defensive and hypervigilant, and had been in counseling for 1 ½ years as a result of the offense. *People v Lampe*, 327 Mich App 104; 933 NW2d 314 (2/21/19).

**OV 5:** Although the deceased victim’s wife suffered grief following her husband’s death, the record did not reflect serious psychological injury sufficient to score OV 5. *People v Bailey*. \_\_\_ Mich App \_\_\_ (Docket No. 342175, 9/24/19).

**OV 7:** The trial court erred in assessing 50 points for defendant’s use of a tire iron to smash the victim’s car windows before threatening to stab the victim if the victim did not turn over everything he had. Although use of the tire iron was not necessary for conviction of unarmed robbery, its use did not rise to the level of conduct that is “similarly egregious” to sadism, torture or excessive brutality for purposes of scoring OV 7. *People v Rodriguez*, \_\_\_ Mich App \_\_\_ (Docket No. 338914, 4/18/19).

**OV 9:** There were multiple victims sufficient for an assessment of ten points where there was another person standing in close proximity while defendant smashed the victim’s car windows with a tire iron, threatened to stab him and then proceeded to rob him. *People v Rodriguez*, \_\_\_ Mich App \_\_\_ (Docket No. 338914, 4/18/19).

**OV 10:** The trial court properly found predatory conduct and a vulnerable victim where defendant robbed a hotel early in the morning and approached the hotel clerk at a time when she was working alone. *People v Savage*, \_\_\_ Mich App \_\_\_ (Docket No. 339417, 4/23/19).

**OV 10:** The trial court properly assessed 15 points for predatory conduct where defendant engaged in pre-offense contact with the 13-year-old sexual assault victim (both in person and via Facebook), engaged in grooming behavior that included massages and putting his arm around the victim, and took advantage of the victim’s youth, naiveté and the fact that the victim was sleeping at the time of the offense. *People v Lampe*, 327 Mich App 104; 933 NW2d 314 (2/21/19).

**OV 11:** The trial court properly assessed fifty points for conduct occurring the same day, same place and during the same course of conduct, specifically a penetration leading to a concurrent of CSC third-degree conviction as well as an uncharged act of fellatio testified to by the

complainant. Nothing precludes the court from considering a concurrent CSC third-degree conviction when the sentencing offense is CSC third-degree (the penetration for the latter offense not being scorable). *People v Lampe*, 327 Mich App 104; 933 NW2d 314 (2/21/19).

**OV 11 and PRV 7:** Nothing precludes the trial court from assessing points for a conviction of third-degree CSC under both PRV 7 (concurrent felony convictions) and OV 11 (multiple penetrations). *People v Lampe*, 327 Mich App 104; 933 NW2d 314 (2/21/19).

**OV 12:** In a decision based on unusual facts, the Supreme Court found that all three gunshots fired through a door at the victim at chest level were used to convict defendant of assault with intent to do great bodily harm. Therefore, there were no additional acts going beyond the sentencing offense to support an assessment of ten points under OV 12. The Court acknowledged that defendant might have been charged with additional assaultive offenses based on the defendant's act of shooting into an apartment where there was also a young woman and child, but the prosecution relied on all three gunshots to prove the intent to do great bodily harm. Thus, the three gunshots were part of the sentencing offense. *People v Carter*, 503 Mich 221; 931 NW2d 566 (5/7/19).

**OV 12:** The trial court properly assessed five points for an uncharged act of felonious assault where defendant sprayed the hotel clerk's face with mace after robbing her of money and keys with a pneumatic gun. The trial court found that the jury relied on defendant's use of the gun to support the robbery and carjacking convictions, and the use of the pepper spray was an additional act. *People v Savage*, \_\_\_ Mich App \_\_\_ (Docket No. 339417, 4/23/19).

**OV 12:** Where it appears the trial court committed administrative error in failing to correct the scoring of OV 12, and where the error altered the correct range (in conjunction with another scoring error), resentencing is appropriate. *People v Rodriguez*, \_\_\_ Mich App \_\_\_ (Docket No. 338914, 4/18/19).

**OV 13** A conviction for attempted resisting and obstructing is not a felony and cannot be used to establish a pattern of "felonious" conduct under OV 13, thus reversing a contrary decision of the Court of Appeals. *People v Jackson*, \_\_\_ Mich \_\_\_; 930 NW2d 388 (07/19/19), reversing 320 Mich App 514; 907 NW2d 865 (2017). The Supreme Court nevertheless left to the trial court to decide in the first instance whether defendant's conduct in attempting to resist and obstruct under MCL 750.81d or MCL 750.479 establishes a pattern of felonious criminal activity under OV 13. *Id.*

**OV 15:** Fifty points may not be assessed for transporting methamphetamine across state lines with intent to deliver in Michigan where the record indicates possession for personal use only. The record reflects a small quantity of drugs, defendant's history of substance abuse, no indicia of possession with intent to deliver, no charge of delivery and a single pill that was crushed into fragments and found in defendant's pocket. *People v Davis*, 503 Mich 918; 920 NW2d 146 (12/7/18).

**OV 19:** By piecing together two orders of the Michigan Supreme Court, it appears the Court may be concerned with the assessment of ten points under OV 19 where the trial court made no record to support the scoring and the Court of Appeals assumed the scoring was proper because defendant relocated to another state (after the offense but before it was disclosed to the police).

The Supreme Court expressly vacated that portion of the Court of Appeals opinion addressing the scoring of OV 19, and directed the trial court not to assign points under OV 19 “without specifically articulating the basis for the assignment of any points.” *People v Hall*, \_\_ Mich \_\_; 909 NW2d 254 (155989, 4/4/18) and *People v Hall*, \_\_ Mich \_\_; 924 NW2d 242 (155989, 3/29/19).

### APPELLATE REVIEW OF SENTENCE

**Published Upward Departure Affirmed:** The trial judge relied on defendant’s serious criminal record, recidivism and the brazenness of his crimes, but the Court of Appeals focused on the prior record and recidivism, finding that six serious convictions since the age of 17, separated by only short periods of freedom, and with the instant offense committed while on parole, supported the trial court’s departure from the sentencing guidelines range. Both the trial court and Court of Appeals additionally referred to the sentencing guidelines range for a fourth habitual offender, which by analogy supported the sentence, although the range was inapplicable to defendant due to a notice error. *People v Odom*, 327 Mich App 297; \_\_ NW2d \_\_ (3/12/19).

**Published Upward Departure Affirmed:** The nine-year minimum sentence, a modest 13-month departure from a guidelines range of 57 to 95 months, was not disproportionate or unreasonable where defendant sexually assaulted a sleeping 13-year-old boy in his own home, leading the boy to keep a knife under his bed and to feel a loss of security in his home. Defendant was also a registered sex offender who had committed similar past sexual misconduct, which information he withheld when he groomed this particular boy. The trial court properly found these facts not adequately accounted for in the scoring of OV 4 and OV 10. *People v Lampe*, 327 Mich App 104; 933 NW2d 314 (2/21/19).

Unpublished Downward Departure Affirmed: The trial court’s sentence of three years’ probation with credit for 39 days served in jail and an additional 200 hours of community service was not an abuse of discretion where the judge offered a number of reasons either not considered by the guidelines or not adequately considered within the guidelines range of 36 to 71 months including a completely clean criminal record for young black man who had grown up in a difficult area and had demonstrated a successful employment history and employed ten other people. The trial court also noted the defendant’s immediate acceptance of responsibility following the drunk driving accident that led to death and his sincere remorse as expressed during a police recording. The court also noted his post-sentence conduct (this case involved resentencing) including enrollment in college courses and the completion of over 300 hours of community service and over 100 AA meetings before the resentencing. *People v Shoulders*, unpublished opinion per curiam of the Court of Appeals (Docket No. 342408, 3/28/19) (Wayne County case, affirmed by Murray, Gadola and Tukul).

### PENDING IN THE MICHIGAN SUPREME COURT

**Probation Extension:** The Supreme Court will hear oral argument on two questions stemming from a published Court of Appeals decision that upheld an extension of probation for a felony offense after the two-year probationary term was set to expire. The Supreme

Court has asked whether the circuit court had jurisdiction to extend the probationary term and whether the extension, without notice and a hearing, violated due process. *People v Vanderpool*, 325 Mich App 493; 925 NW2d 914 (2018), MOAA granted \_\_ Mich \_\_ (Docket No. 158486, 6/7/19).

**Restitution:** Does a failure to request an evidentiary hearing as to the amount of restitution waive the challenge (or is it merely issue forfeiture)? *People v Gilmore*, \_\_ Mich \_\_ (158716, 5/24/19).

**JLWOP and Resentencing on Lesser Counts:** The order granting leave to appeal does not mention juvenile life without parole, but the case involves a JLWOP sentence that was converted to a term of years. The trial court also granted defendant's successive motion for relief from judgment with respect to a life with parole sentence for AWIM and resentenced on that count. The Court of Appeals reversed, concluding that the sentence for the lesser count was not invalid and the Miller decision was not retroactive to non-JLWOP sentences. Moreover, MCL 769.25 and 25a do not provide a basis for relief on lesser counts. The Supreme Court has asked whether a "legal misconception" on one count renders other sentences from the same transaction invalid, whether the trial court has discretion to resentence on lesser counts or must await a motion for relief from judgment and find the criteria satisfied for that motion, and what parameters apply if the trial court has discretion to resentence in the first instance? *People v Turner*, \_\_ Mich \_\_ (158068, 4/5/19).

**JLWOP and Appellate Review:** On resentencing, the trial court re-imposed the sentence of life without parole against a juvenile defendant and the Court of Appeals affirmed. The Supreme Court has asked which party, if any, bears the burden of proof on Miller factors, whether the trial court properly considered the defendant's "chronological age and its hallmark features" by focusing on defendant's age of 17 years, 8 months rather than individual characteristics, whether defendant's "terrible" family and home environment and the lack of available treatment programs in the MDOC were negative factors in terms of potential rehabilitation (as opposed to mitigating or perhaps neutral factors)? *People v Masalmani*, \_\_ Mich \_\_ (Docket No. 154773, 4/5/19).

**SORA, Punishment, Cruel or Unusual:** Following the Court's narrow decision in *People v Temelkoski*, 501 Mich 960 (2018), the Supreme Court will whether SORA "as a whole" constitutes punishment, whether certain provisions constitute punishment and cannot be applied retroactively, and what is the remedy and can earlier versions of SORA be applied to avoid an ex post facto violation? *People v Betts*, \_\_ Mich \_\_ (Docket No. 148981, 6/19/19). See also *People v Snyder*, \_\_ Mich \_\_ (Docket No. 153696, 6/19/19) (now held in abeyance pending the decision in *Betts*).

**Advice on Consecutive Sentencing at Plea?** Granting mini oral argument on the defendant's application for leave, the Supreme Court will hear whether advice on discretionary consecutive sentencing is required during the plea hearing in order to ensure a voluntary plea. *People v Warren*, \_\_ Mich \_\_ (158065, 3/27/19).