MICHIGAN CRIMINAL CASE LAW UPDATE

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The burden of proof is on us.

FOURTH AMENDMENT

People v Towne, 505 Mich 865 (2019)

Facts: State police went to Mr. Towne's house to execute an arrest warrant for Mr. Towne's son. One of two cars at residence was in Mr. Towne's son's name. Mr. Towne's son had received mail there, too. Mr. Towne left the residence and declined request to search. One officer left to get search warrant. Two stayed and observed the home. One observed from the tree line of the property. Observing officers testified they smelled a strong scent of marijuana and spotted smoke coming from the chimney. The troopers entered the curtilage and peeked through back windows and saw people burning mass amounts of marijuana. They entered the residence and called the other police officer who changed search warrant to be marijuana related. Mr. Towne was charged with manufacturing marijuana.

COA: Originally denied leave, then on remand as leave granted affirmed conviction. On second remand, again affirmed convictions finding that officer on tree line was not in curtilage and met plain view exception.

MSC: Held that "the police officers violated Mr. Towne's constitutional right to be free from unreasonable search and seizure when they exceeded the proper scope of a knock and talk by approaching and securing his home without sufficient reason to believe the subject of the arrest warrant was inside the home."

- The evidence obtained during the search of Mr. Towne's home must be suppressed because the warrantless entry was a violation of the Fourth Amendment and "in this case, the benefit of deterring future police misconduct outweighs the cost of exclusion."

People v McJunkin, 505 Mich 883 (2019)

Facts: Owner of home/garage gives officers consent to search. In garage is Explorer driven by Mr. McJunkin. Mr. McJunkin was in driver's seat when officers approached. Officers search garage and Explorer and find evidence of one pot meth production.

COA: No fourth amendment issue.

MSC: vacates fourth amendment analysis citing, in part, *People v Mead*, 503 Mich 205 (2019)

- New Standard: a person may challenge an alleged Fourth Amendment violation if that person can show under the totality of the circumstances that he or she had a legitimate expectation of privacy in the area searched and that his or her expectation of privacy was one that society is prepared to recognize as reasonable.

People v Hughes, 504 Mich 855 (2019)

Facts: Mr. Hughes was convicted of armed robbery by jury. At trial, cellphone data was presented from a phone that was on Mr. Hughes when he was arrested. However, the phone was recovered pursuant to a search warrant for *a unrelated drug offense*. The search warrant for the phone was based on the officer's "opinion and experience" that "drug dealers use phones." Trial counsel objected that the cellphone data was prejudicial but *not* that it was seized illegally.

COA: Reviewing for plain error, the Court of Appeals found that there was no Fourth Amendment violation. They found that the police department had lawfully executed a search warrant for the cellphone, albeit for a different case involving Mr. Hughes. There was no authority that said "cellphone data lawfully seized for one case cannot be analyzed for another case without a separate warrant supported by probable cause."

MSC: Grants MOAA to consider validity of original search warrant, reasonable expectation of privacy of data w/r/t a separate case without a search warrant, whether search was lawful, and whether counsel was ineffective for failing to challenge search on Fourth Amendment grounds.

Argued in MSC on 10/7/20

People v Pagano, 505 Mich 938 (2019)

Facts: Unidentified 911 caller calls in. Says they saw a woman who appeared intoxicated at state park yelling at her kids then getting into car with kids. Reported she left parking lot and was on highway. Officer sees reported vehicle leave a convenience store parking lot and get back on road. No traffic violations. Pulls her over. Charged with open intox and operating while intoxicated with minors in vehicle. District court dismissed charges, circuit court affirmed; officer did not have reasonable and articulable suspicion to stop vehicle.

COA: Reversed and remanded for reinstatement of charges. **"There is no prohibition against an officer making a traffic stop solely on the basis of information provided by an informant."**

MSC: Full leave grant- whether the 911 call info amounted to reasonable suspicion that Ms. Pagano was intoxicated.

Argued in November 2020

EVIDENCE

People v Thorpe, 504 Mich 230 (2019)

Facts: Mr. Thorpe was convicted of three counts of CSC-II by jury. At his trial, an expert testified that **children only lie about sexual abuse 2% to 4% of the time.** This was stated on redirect to rebut testimony elicited on cross-examination that children can lie and manipulate. Defense counsel objected.

Mr. Harbison was convicted of one count of CSC-I, one count of attempted CSC-I, two counts of CSC-II, and one count of accosting a child for immoral purposes by jury. At his trial, an expert for the **prosecution "diagnosed" the complainant with "probable pediatric abuse"** without any physical findings to support that conclusion.

COA: Found no error warranting reversal in Mr. Thorpe's case. Found that the error in Mr. Harbison's case was not clear and obvious.

MSC: An expert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity. This error was not harmless. Also, examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury. This error was plain.

People v Bennett, 505 Mich 961 (2020)

Facts: Mr. Bennett was convicted of second-degree murder. At trial, he presented a self-defense and defense-of-others theory. State-of-mind was the key issue at trial. Rap videos were presented and admitted. Defense counsel objected. The prosecutor relied on those in closing to negate Mr. Bennett's defense. Trial court instructed the jury that it could rely on the videos to assess Mr. Bennett's motive.

COA: "[G]iven the strong evidence of guilt and the lack of evidentiary support for defendant's theory of self-defense or defense of others, we conclude that the error in admitting the music videos was not outcome determinative."

MSC: Admission of the rap videos was outcome determinative. Convictions vacated and remanded to Kent Circuit Court for new trial.

People v Taylor, 505 Mich 962 (2020)

Facts: In a decades-belated DNA testing case, Mr. Taylor was convicted of first-degree criminal sexual conduct by a jury. His DNA matched the complainant in the instant case and one other, Ms. D, whose statute of limitations had expired. Prosecutor asked Ms. D to testify in the instant case.

COA: Prosecutor provided advanced notice and a briefing that explained why Ms. D's testimony was in compliance with MRE 404(b). Part of that briefing was highlighting the similarities which under case law, must be "striking." Mr. Taylor argued that the admission was in error because the two acts were so dissimilar. COA found no abuse of discretion because trial court acknowledged similarities and dissimilarities in making decision.

MSC: MOAA: (1) whether other acts contained a "striking similarity" to the charged act and (2) wither other acts admissible under "doctrine of chances" and (3) whether admission was harmless

pending oral argument in the MSC

People v Juan Jose Del Cid (On Remand), __ NW2d __ (Docket No. 342402) (February 27, 2020)

Facts: In a CSC trial, the question was whether an examining physician may testify to a "diagnosis" of "*possible* pediatric sexual abuse" in the absence of supporting facts.

COA: The COA said, "no" citing prior MSC precedent which established that a physician's opinion that a complainant was sexually abused is admissible only if supported by physical findings. The fact that the physician in this case used the word "possibly" rather than "probably" is a distinction without a difference.

People v Fontenot, ____ Mich App ____, Docket No. 350391 (2020)

Facts: Interlocutory appeal from Circuit Court's denial of prosecutor motion in limine regarding Datamaster logs in OUIL case.

COA: The COA said, Datamaster logs are nontestimonial (not taking pursuant to litigation) and are business records. Ronayne Krause dissented saying they are unreliable.

CONFRONTATION

People v Olney, Docket No 343929 (2020)

COA II: MSC remand to consider whether MCL 768.27c applies at preliminary examination

- MCL 768.27c allows the admission of hearsay statements made to law enforcement concerning injuries, domestic violence, or other threats of violence.

MCL 768.27c unambiguously applies to trial and evidentiary hearings. Preliminary examination is an evidentiary hearing.

Confrontation clause does not apply at preliminary examination.

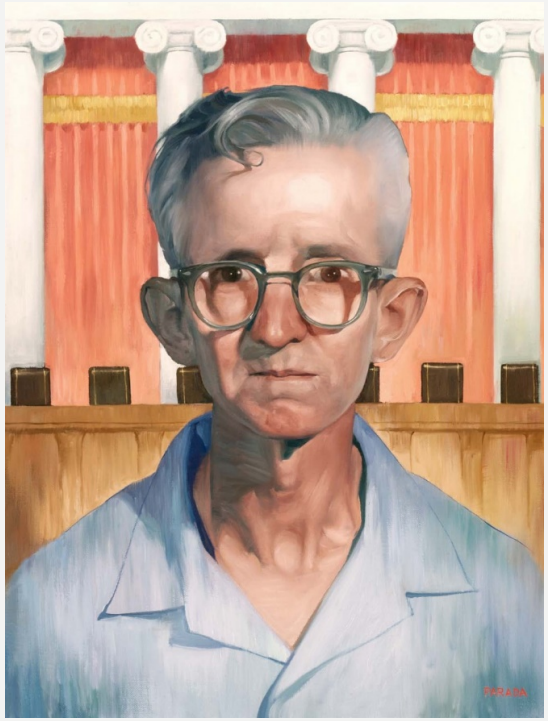
People v Jemison, ____ Mich ____ (2020) (Docket No 157812)

COA: Two-way video of a DNA expert is good enough.

MSC: No, it's not.

Face-to- face confrontation required under constitution unless witness unavailable and prior chance for cross-examination.

INEFFECTIVE ASSISTANCE OF COUNSEL
RIGHT TO COUNSEL



People v Valden White, __ Mich App __ (Docket No. 346901) (January 23, 2020)

Facts: Mr. White was convicted by jury of several firearms offenses. He claimed counsel was ineffective for failing to adequately advise him on a plea offer. He argued trial counsel failed to explain that Mr. White was "legally" guilty because of his confession to police. Mr. White obtained a *Ginther* hearing and the trial court found counsel had not been ineffective.

COA: Straightforward *Lafler* application. Where Mr. White maintained his innocence throughout pre-trial and trial, then a plea would have been perjury *and* the confession does not preclude a jury from acquitting. COA found counsel was reasonable.

MSC: Denied leave.

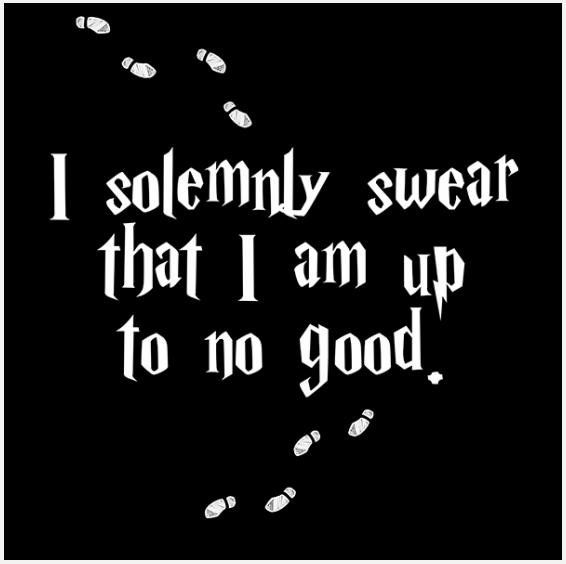
IDENTIFICATION

People v Sammons, 505 Mich 31 (2020)

Facts: Mr. Sammons and Mr. Ramsey were arrested for conspiracy to commit murder. The police placed them alone in separate interview rooms. The police then brought an eyewitness to the police station and showed the eyewitness each suspect. The eyewitness purportedly identified Mr. Sammons. Mr. Sammons tried to suppress the witness' id as suggestive, but the trial court denied the motion. Mr. Sammons was convicted. The Court of Appeals affirmed. Mr. Sammons filed an application for leave to appeal in the Michigan Supreme Court.

MSC: The Michigan Supreme Court said this was a suggestive identification because the eyewitness was shown each suspect singly. But this was not the end of the inquiry. It also found that it made any later identification of the suspect by the eyewitness were unreliable. And it found the error was not harmless given the remaining evidence against Mr. Sammons. It granted him a new trial.

PLEA PROCEEDINGS



People v Rydzewski, 331 Mich App 126 (2020)

Facts: Mr. Rydzewski pled no contest to several firearms related offenses. The plea terms stated "no mental health court." At preliminary examination, when the Court got to that term of the agreement, the Court stated that it may not be able to adhere to that specific term without first seeing the PSIR. The trial court then accepted the plea. In the PSIR, probation recommended mental health court. The court entered an order delaying jail pending Mr. Rydzewski's successful completion of mental health court. The trial court denied the prosecutor's motion to withdraw the plea. The prosecutor appealed.

COA: MCL 600.1090 and MCL 600.1093 do not require prosecutor consent to sentence to mental health court. This is different than MCL 600.1068(2) which covers drug court and *does* require prosecutor consent (see also, *People v Baldes*, 309 Mich App 651 (2015)).

People v Moss, 503 Mich 1009 (2020)

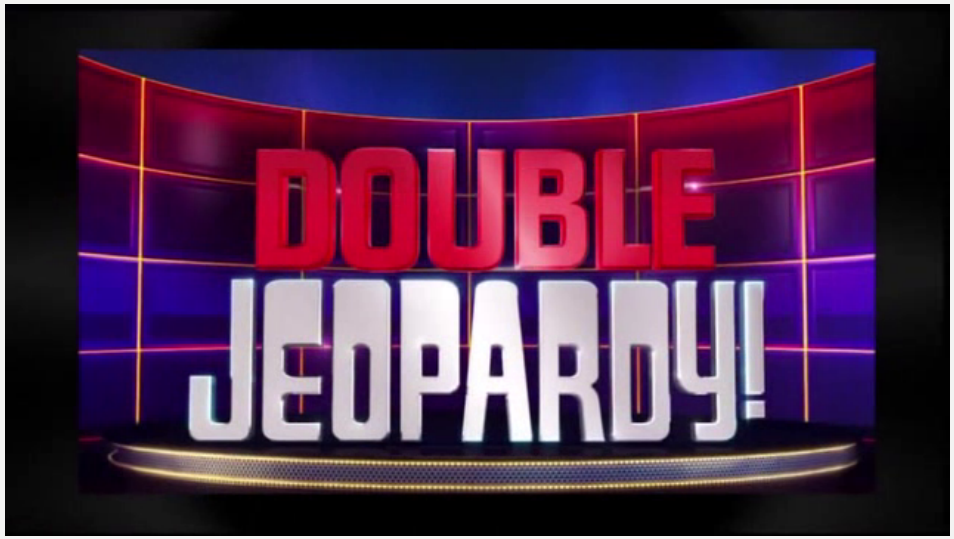
MSC: The Supreme Court, after holding arguments on the issue, entered an order remanding the case to the Court of Appeals for consideration as on leave granted to address "whether a family relation that arises from a legal adoption, see MCL 710.60(2) ('. . . After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons. . .') (1) is effectively a 'blood' relation, as that term is used in MCL 750.520b – MCL 750.520e; or (2) is a relation by 'affinity,' as that term is used in MCL 750.520b – MCL 750.520e, see *Bliss v Caille Bros Co*, 149 Mich 601, 608 (1907); *People v Armstrong*, 212 Mich App 121 (1995); P*eople v Denmark*, 74 Mich App 402 (1977)."

COA: Adoptive sister sufficient blood relation under Adoption Code.

People v Gilmore, Docket No. 158716 (2020)

- Whether a plea with restitution attached waives right to restitution hearing under *People v Gahan*, 456 Mich 264 (1997)
- Court must hold a restitution hearing even if defendant is open to pleading to underlying offense; cannot force a defendant to accept an unreasonable restitution amount to obtain other benefits of plea deal

DOUBLE JEOPARDY



People v Terrance, 504 Mich 963 (2019)

Facts: Mr. Terrance's girlfriend died by suffocation preceded by a severe beating. He was charged with and tried on first-degree premeditated murder and felony-murder for the death of his girlfriend. The predicate felony for felony-murder was torture. The jury acquitted on first-degree murder and second-degree murder. The jury hung on felony-murder.

The prosecutor charged Mr. Terrance again with felony-murder. Mr. Terrance pled to second-degree murder. Appellate counsel filed a motion to withdraw this plea, vacate his conviction, and dismiss the charge stating that it was a double jeopardy violation to convict him of second-degree murder, a charge for which he was acquitted at trial. The prosecutor agreed. The trial court granted the motion.

Then, the prosecutor charged Mr. Terrance with torture. Mr. Terrance moved to dismiss under double jeopardy and vindictive prosecution. The trial court denied the motion. Mr. Terrance appealed.

COA: Prosecution for torture violates issue preclusion of double jeopardy. The jury necessarily decided that Mr. Terrance was not the perpetrator of the assault that caused his girlfriend's death. **"Defendant may only be charged with torture in a second trial if there was evidence or argument at the first trial from which the jury could have concluded, even by inference, that defendant was guilty of torture despite the fact that he did not commit the murder. In this case, there was none."**

No prosecutorial vindictiveness.

MSC: Did the Court of Appeals err when it concluded that, by acquitting Mr. Terrance of first- and second-degree murder, the jury necessarily decided an issue of ultimate fact w/r/t torture in a second trial?

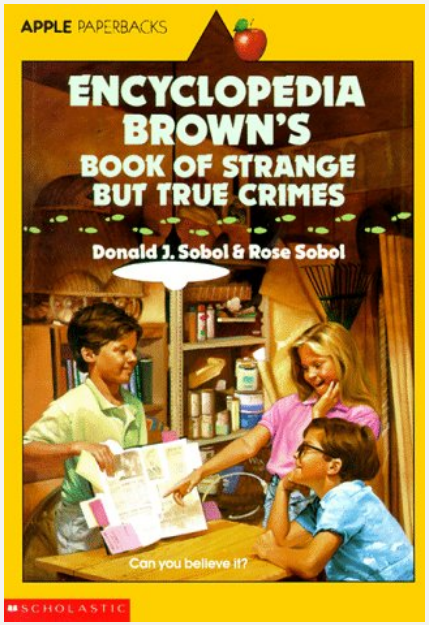
Argued in MSC on 10/8/2020

People v Barber, 505 Mich 937 (2019)

Facts: Mr. Barber was charged with assault by strangulation, and assault with intent to commit great bodily harm less than murder, both arising from MCL 750.84 as well as other offenses. He was convicted and argued on appeal that his convictions for both strangulation and AWIGBH arising from the same facts were precluded by the Double Jeopardy Clause.

COA: The Court agreed. While many statutes, including this one, include language that indicates that it does not prohibit punishment "for *any other* violation" arising from the same facts, these two offenses arise from the *same* statute and thus from the same violation. The Court thus believed that the legislative history of the statute indicates that Mr. Barber could only be convicted of either strangulation *or* AWIGBH, *but not both*.

CRIMES


APPLE PAPERBACKS
ENCYCLOPEDIA BROWN'S
BOOK OF STRANGE BUT TRUE CRIMES
Donald J. Sobol & Rose Sobol
Can you believe it?
SCHOLASTIC

People v Wood, 504 Mich 975 (2019)

Facts: Mr. Wood was convicted of jury tampering for distributing pamphlets in front of the courthouse to individuals he knew to be potential jurors. The pamphlets were from the Fully Informed Jury Association and explained jurors their rights including that they can "vote their conscience" and hang. The circuit court rejected Mr. Wood's statutory and First Amendment arguments.

COA: Affirmed his convictions in a published decision at *People v Wood,* 326 Mich App 561 (2018)

(1) a potential juror is a "juror" under the jury tampering statute. (2) jury tampering statute does not violate First Amendment rights, applying strict scrutiny.; state interest is "impartiality and integrity of jurors." (3) Not constitutionally overbroad or vague.

MSC: After a full leave grant, the MSC reversed the convictions. It found that individuals who are merely summoned for jury duty and have not yet participated in a case are technically not yet "jurors" for purposes of MCL 750.120a(1). Thus, when Mr. Wood talked to individuals who had been summoned for jury duty but had yet to participate in any court proceedings, they were not at that point "jurors." The Court thus avoided addressing the constitutional issues that the Court of Appeals had discussed.

People v Anderson, ___ Mich App ___ (Docket No. 345601) (March 10, 2020)

Facts: Mr. Kim was convicted of first-degree criminal sexual conduct after he penetrated the crease of the complainant's buttocks with his penis. Mr. Kim argued on appeal that this was not penetration for purposes of CSC-1 where there was no actual intrusion into the anal cavity.

COA: The court rejected Mr. Kim's claim. It noted that the Court already said that the "genital opening" of a female includes the labia based on the way the Legislature had drafted the CSC statute. The Court saw no reason to believe that the Legislature would have so broadly defined "genital opening" but at the same time restrict "anal opening" to the anal canal. It added that the statute broadly prohibits sexual intrusions of all types, regardless of the cavity entered and is **meant to protect a person's "bodily integrity."**

People v Bean, 504 Mich 975 (2019)
People v Hampton, 505 Mich 939 (2019)

Facts: Mr. Bean filed a motion to quash his CSC-I charge because it was based on the same facts that underly his second-degree child abuse charge. The circuit court denied and he appealed.

Mr. Hampton was convicted by jury of first-degree felony murder, first-degree child abuse. The first-degree child abuse was the predicate felony. Mr. Hampton admitted to police he killed his girlfriend, who had died by multiple stab wounds, but did not admit to killing their child, who suffered one stab wound to the chest.

COA: Where there is no separate act underlying the "other felony," the trial court abused its discretion denying Mr. Bean's motion to quash his CSC-I charge.

As for Mr. Hampton, the COA was bound by *P v Magyar*, a 2002 COA opinion, a single assaultive act constituting first-degree child abuse can be the predicate felony/facts for a murder conviction for the child.

MSC: Combined these two cases-*Bean* is full grant, *Hampton* is MOAA. *Bean* addressed the CSC-I statute and whether the other felony can be second-degree child abuse supported by the same facts; *Hampton* addresses felony-murder statute and whether predicate felony can be first-degree child abuse supported by the same facts.

Argued November 2020 in MSC

People v Wang, ____Mich ____, Docket No. 158013 (May 13, 2020)

MSC: Convictions for Medicaid fraud were reversed. It is insufficient evidence where Medicaid status was included in health chart without more to show that a.) examiner had knowledge of billing practice and/or b.) examiner had access to and reviewed paper chart

People v Kenny __ Mich App __,(Docket No. 347090) (May 21, 2020)

Facts: Mr. Kenny was in a store, removed the "spider wrap" and price labels from a TV that was on display, put it in a basket, used the restroom, and then retrieved his basket by passing the cash registers and beginning to head out of the store. He was apprehended and charged with first-degree retail fraud. He argued that he did not "steal" the TV because he never left the store with it and thus that jury instructions to the contrary were erroneous.

COA: Affirmed as the Court found that, reading the retail fraud statute, the crime is complete when a suspect takes store property within an intent to steal the property *whether or not the person has left the store* (though it might not be as easy a question if the suspect had not yet passed the cash registers)

PRE-TRIAL, TRIAL AND POST-TRIAL PROCEDURE

People v Brown, 937 NW2d 696 (February 7, 2020)

Facts: Mr. Brown had a preliminary examination. But after the prosecutor had presented his witnesses, the district court judge would not allow the defendant to call witnesses and bound Mr. Brown over to the circuit court, where a motion to quash was denied. Mr. Brown took an interlocutory application for leave to appeal to the MCOA, which was denied. Mr. Brown then applied for leave to appeal in the Michigan Supreme Court.

MSC: In an order, the Michigan Supreme Court cited MCL 766.12, which provides that "[a]fter the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he has any, shall be sworn, examined, and cross-examined …." The Court held that, because the district court judge did not permit Mr. Brown to call witnesses, the decision "fell outside the range of principled outcomes and constituted an abuse of discretion." It remanded the case to the district court to allow Mr. Brown to call witnesses at a new preliminary examination.

People v Spaulding, __ Mich App __ (Docket No. 348500 (June 25, 2020)

Facts: Mr. Spaulding was charged and convicted of aggravated stalking. He raised on appeal a claim of ineffective assistance of counsel due to his attorney's purported failure to tell him of his right to testify at trial.

COA: The Court of Appeals held that the record was silent on this point and Mr. Spaulding did not object when counsel rested the defense presentation and did not say anything at sentencing when allocuting. He also had not provided an offer of proof as to what he would have testified to. The Court said that "[s]imply failing to express a wish to testify, if there was an opportunity to do so, is sufficient to 'acquiesce in trial counsel's decision not to call a defendant to the stand.' " So the claim failed.

NOTE: The Court said that, even if not required, the wiser practice might have been for counsel to make a record of asking defendant whether he wished to testify.

People v Davis, __ Mich App __ (Docket No. 343432) (April 2, 2020)

Facts: At one point during a murder trial, the trial judge cleared the courtroom of individuals who the court felt were being disruptive (all of whom apparently there on behalf of the complainant). None of these individuals returned to the courtroom, but there was no evidence that the courtroom was ever "closed." Mr. Davis was convicted and appealed saying that his right to a public trial had been violated when the trial judge expelled these individuals from the courtroom.

COA: The Court of Appeals first noted the lack of an objection and the defense attorney's testimony at a remand hearing that he did not object to the judge clearing the courtroom of these individuals because he thought that the absence of these individuals might benefit Mr. Davis, who did not have anyone in the courtroom supporting him. Ultimately, the Court said that, since the trial court simply "cleared" the courtroom (even though it had told the ejected individuals not to come back) but did not "close" it, the right to public trial was not implicated. The Court further said that, even if the courtroom had been closed, Mr. Davis had failed to demonstrate on plain error review that the closure of the courtroom impacted the fairness of the proceeding, especially where it appeared to benefit Mr. Davis by making it less glaring that there was no one there to support him.

People v Furline, 505 Mich 16 (2020)

Facts: Mr. Furline and Mr. Jenkins were arrested and charged for a fire they set at a Home Depot store which allowed them to steal merchandise from the store during the ensuing confusion. Mr. Furline sought to sever his trial from Mr. Jenkins's trial as Mr. Jenkins was accusing Mr. Furline of having started the fire. The trial court denied Mr. Furline's motion. Both were convicted, but the Court of Appeals reversed finding that severance should have been granted. The prosecutor appealed to the Michigan Supreme Court.

COA: The Michigan Supreme Court reversed. It found that Mr. Furline's and Mr. Jenkins' defenses were not necessarily antagonistic. It noted that, "[w]hile the Court of Appeals characterized this case as asking the jury to choose 'which of the two was guilty … we emphasize that the prosecutor's case gave the jury a third option: 'both.'"

Argued in MSC November 2020

People v Kabongo

Batson case in MSC. Oral argument to consider wither *Batson* is automatic reversal or harmless error test.

Argued in MSC November 2020

DEFENSES

People v Reichard, 505 Mich 81 (2020)

Facts: Ms. Reichard was charged with open murder for assisting her boyfriend with an armed robbery that resulted in a stabbing death. Once bound over, Ms. Reichard asked the trial court to allow her to present a duress defense to felony-murder (the defense being that she had only participated in the armed robbery that led to the death because she was under duress from her boyfriend who had physically and sexually abused her). The trial court granted the motion and the prosecutor took an interlocutory appeal.

MSC: The Michigan Supreme Court held that allowing Ms. Reichard to present an affirmative defense (duress) to the armed robbery charge that could serve as the predicate offense for felony-murder was proper. It held that, generally, if an affirmative defense is applicable to the predicate felony to felony-murder, the defense should be allowed.

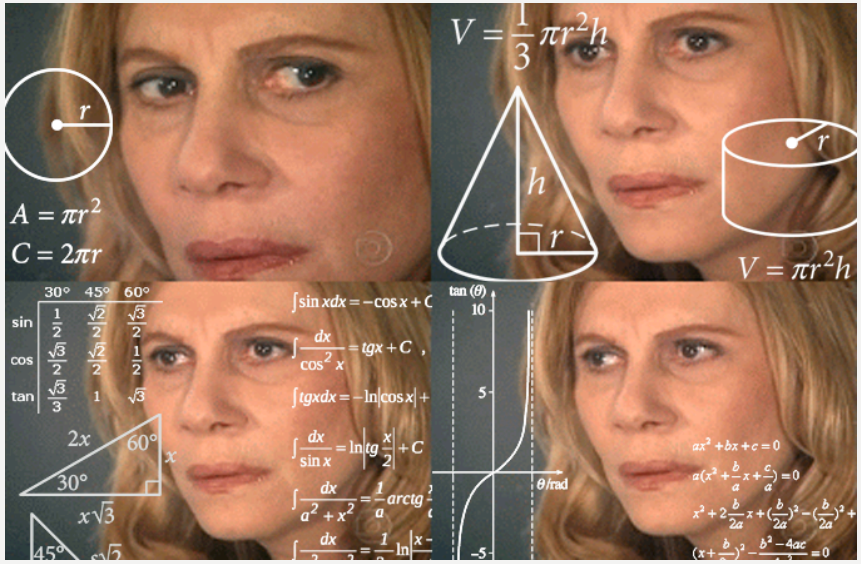
People v Flynn, Docket No. 346668 (unpub, August 20, 2020)

Facts: Unrebutted expert testimony of Ms. Flynn's legal insanity.

COA: Ronayne Krause concurns but writes separately to say she believes Ms. Flynn presents a "clear cut" case of legal insanity *AND* that *Carpenter,* 464 Mich 223 (2001) "may no longer reflect a state-of-the-art understanding of mental illness or the devastating effect of imprisoning mentally ill individuals."

MSC: Flynn and are pending in MSC.

JURY INSTRUCTIONS



People v Haynie, 943 NW2d 383 (2020)

Facts: Mr. Haynie requested instruction for assault and battery as a lesser included offense of assault with intent to murder. That request was denied but he did receive instructions for GBH.

COA: Assault and battery is not a necessarily included lesser offense of assault with intent to murder. Rather, the Court concluded that misdemeanor assault and battery is a cognate lesser offense of assault with intent to commit murder because all of the elements of misdemeanor assault and battery are not included within the greater offense of assault with intent to murder. 327 Mich App 555 (2019)

- Judge Gleicher dissented and would have held that assault and battery is a lesser included offense of AWIM.

MSC: In an order, reversed the part of the Court of Appeals' opinion that addressed the jury instructions. It assumed without deciding that assault and battery is a lesser included offense of assault with intent to commit murder. It then held that the trial court erred by refusing the give the requested jury instruction because a rational view of the evidence supported a conviction for assault and battery.

People v Rajput, 940 NW 2d 67 (2020)

Facts: Mr. Rajput testified that victim reached for his co-defendant's gun. Co-defendant fired it. Thus, multiple gunshots were fired at victim's car in self-defense. Trial court denied self-defense instruction because Mr. Rajput pointed to someone else as perpetrator of the homicide. Court also denied testimony from investigative subpoena witness to support self-defense claim.

COA: Affirmed.

MSC: Reversed. Mr. Rajput presented sufficient evidence to support instruction and of relevance of witness testimony. **Whether he/co-D were initial aggressors or could have fled were issues for the jury.** Remanded to COA to consider admissibility of witness testimony under MRE and harmlessness of all of the above.

FUNDING FOR EXPERTS

People v Propp, 330 Mich App 151 (2019)

Facts: The question at trial was whether Mr. Propp intended to kill his wife or whether death was an unintended result of erotic asphyxiation. Appointment of expert on erotic asphyxiation was denied for lack of factual basis for defense. Mr. Propp was convicted of first-degree murder.

COA: Mr. Propp did not present a sufficient factual basis to support appointment of government-funded expert on erotic asphyxiation. Mr. Propp waived the issue of a fair trial because defense counsel again tried to present expert, prosecutor objected, and defense counsel said it would develop evidence to justify the witness and never did. Finally, it is not an equal protection violation to require an indigent defendant to present why an expert witness is necessary before funding is provided.

MSC: MSC lv app filed which is still pending.


SENTENCING

People v Beck, 504 Mich 605 (2019)

- **Due process precludes increase of a sentence based on a sentencing judge's finding by a preponderance of the evidence that Mr. Beck had committed the crime the jury had acquitted him of.**
- Cases that cite *Beck:*
  - *People v Roberts,* applying the same to OV9
  - *People v Stokes*, acquitted conduct in PSIR is not an issue
  - *People v Barnes*, alleged conduct is still fine.

People v Betts, Docket No. 148981

- This case was heard last term as a MOAA with *Snyder*. It is now being heard on its own to answer whether SORA requirements amount to punishment. Full leave grant heard in October 2020

People v Manning, Docket No. 160034

- MOAA on whether Mr. Manning's successive 6.500 is "based on a retroactive change in law," where the law relied on does not automatically entitle him to relief; and whether *Miller v Alabama*, 567 US 460 (2012) and *Montgomery v Louisiana*, 136 S Ct 718 (2016) should be applied to 18 year old defendants convicted of murder and sentenced to mandatory life without parole under the 8th amendment of US or Michigan Constitutions.

Oral argument held in November 2020

People v Dumback, 330 Mich App 631 (2020)

- Ms. Dumback was scored 100 points for OV 3 for failure to stop at scene of accident when at fault and resulting in death (MCL 257.617(3)).
- COA held "results in the death of another individual" is an element of the offense, not a penalty enhancement. Therefore, OV-3 cannot be scored.

People v Posey, ___ Mich App ___ (2020)

- MCL 769.34(10) lives on unless MSC decides to overturn *Scrauben* and *Ames*.

People v Derek Smith, ___ Mich ___(2020)

- Felony firearm must run consecutively with a felony conviction wherein the jury necessarily finds that the defendant possessed a firearm (in Mr. Smith's case, that did not include AWIGBH).

QUESTIONS?

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2021 BEGINS IN 4 WEEKS