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## *How to Avoid Forfeiture and Waiver and Preserve Challenges to the Scoring of the Sentencing Guidelines*

For years, some prosecutors have argued that errors in scoring the sentencing guidelines are “waived” for the purposes of appellate review if defense counsel did not raise each specific error at sentencing. Recently the Michigan Supreme Court has expressed interest in addressing the merits of that argument. See, for example, *People v. Hershey*, 495 Mich. 1003 (2014) (scheduling oral argument on whether to grant the application on the issue of “whether the defendant waived his challenges to the scoring of [specific offense variables]”), later dismissed on the defendant’s motion, \_\_ Mich. \_\_; 858 N.W. 2d 461 (2015); *People v. Wilding*, \_\_ Mich. \_\_; 860 N.W. 2d 619 (2015) (ordering supplemental briefing on the issue of “whether the defendant waived his objections to the scoring of the offense variables”).

The doctrines of waiver and forfeiture, if applied, can bar claims on appeal or alter the standard under which claims are reviewed, exposing a defendant to a more severe punishment than is provided for under the correctly scored sentencing guidelines. This is unjust and is not what the Legislature intended.

This article is intended to remind practitioners about these issues and to offer some advice for both trial attorneys and appellate attorneys on how to best preserve your client’s right to challenge sentencing errors in the trial and appellate courts.

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## ***What is Waiver?***

Waiver is “the intentional relinquishment or abandonment of a known right.”<sup>1</sup> Appellate review is not available where an issue has been waived because the error has been extinguished.<sup>2</sup>

The general rule is that there is a broad array of statutory provisions, court rule provisions, and even constitutional rights that are subject to waiver.<sup>3</sup>

## ***What is Forfeiture?***

Forfeiture, on the other hand, is not deliberate; rather it is the failure to make a timely assertion of a right.<sup>4</sup> Where an error has been forfeited, it is subject to limited review.<sup>5</sup>

## ***Mich. Ct. R. 6.429(C) and M.C.L. 769.34(10)***

Mich. Ct. R. 6.429(C) and M.C.L. 769.34(10) provide that a defendant can challenge scoring on a guidelines variable *as long as* the challenge is raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand.<sup>6</sup>

At the time that *People v. Kimble*, 470 Mich. 305 (2004), was decided, the former version of Mich. Ct. R. 6.429(C) would have precluded relief on direct appeal due to the failure to make the same objection at sentencing that was being advanced on appeal. The Supreme Court still granted relief to Mr. Kimble, holding that he would nevertheless be entitled to relief under Mich. Ct. R. 6.500 *et seq.*, where his trial attorney’s failure to object to the scoring of any points under OV 16 was ineffective assistance of counsel (“good cause” under Mich. Ct. R. 6.508(D)(3)(a)) and a minimum term of sentence outside the correct guidelines range was an invalid sentence (a specifically listed “actual prejudice,” at Mich. Ct. R. 6.508(D)(3)(b)(iv)).<sup>7</sup> The Court then immediately amended Mich. Ct. R. 6.429(C) to mirror M.C.L. 769.34(10).<sup>8</sup>

## ***What is the Effect of Defense Counsel Stating at Sentencing That There Are No Errors, Additions, or Corrections to Be Made to the Presentence Report or That the Guidelines Are Correctly Scored?***

Recently, in *People v. Hershey*, 303 Mich. App. 330, 334 (2013), the Court of Appeals held that scoring errors were not waived where there had been *no discussion of any kind* regarding the scoring of the sentencing guidelines, but where defense counsel had stated that he had “no additions or corrections” to the presentence report. The Court of Appeals

further held that the scoring errors were not forfeited because appellate counsel had raised them in a motion for resentencing pursuant to M.C.L. 769.34(10).

In *Wilding*, the question is whether defense counsel’s statement that the sentencing guidelines were *correctly scored* extinguishes any errors that were actually made in the scoring of those guidelines.<sup>9</sup>

## ***What Trial Attorneys Can Do to Prevent Waiver or Forfeiture and Preserve Their Clients’ Rights***

The best practice for trial attorneys to preserve their clients’ rights regarding challenges to the scoring of the guidelines would be to file a sentencing memorandum in advance of the sentencing. In the memorandum, in addition to explaining why the variables should be scored in the manner asserted, the memorandum should include the following language, or something like it:

Counsel believes the variables scored as asserted within are correctly scored, however, it is not counsel’s intention to waive any errors or available arguments.

As an alternative, depending upon the jurisdiction, a similar qualification can be made on the record at the time of sentencing.

## ***What Appellate Attorneys Can Do to Preserve Their Clients’ Rights***

Because it is not clear how the Michigan Supreme Court will ultimately decide the waiver/forfeiture issue, it is essential that appellate attorneys raise sentencing errors in accordance with M.C.L. 769.34(10) and Mich. Ct. R. 6.429(C). This means that where an error was not raised at sentencing, or not challenged on the proper ground, appellate counsel should file a motion to correct an invalid sentence/for resentencing in the trial court or a motion to remand in the Court of Appeals raising the error.

In addition, it is important to always raise ineffective assistance of counsel in cases where trial counsel failed to raise the error on the proper grounds at sentencing. This should be done from the first time appellate counsel is raising the scoring error whether that be in a timely trial court motion or in a motion to remand. In the event the Supreme Court does hold that counsel’s failure to raise errors at sentencing waives or forfeits the error for the

purpose of appellate review, the only remaining vehicle to raise such errors on appeal will be through ineffective assistance of counsel claims.

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### **Endnotes**

1. *People v. Carines*, 460 Mich. 750, 762-763 N 7 (1999); *United States v. Olano*, 507 U.S. 725, 732-733 (1993).

2. *Olano*, 507 U.S. at 733-734.
3. *New York v. Hill*, 528 U.S. 110, 114 (2000).
4. *Carines*, 460 Mich. at 762-763 N 7; *Olano*, 507 U.S. at 732-733.
5. *Carines*, 460 Mich. at 763-764 (forfeited error is reviewed under the plain error standard); *Olano*, 507 U.S. at 733.
6. See also *People v. McGraw*, 484 Mich. 120, 131 (2009); *People v. Kimble*, 470 Mich. 305, 310-311; (2004).
7. *Kimble*, 470 Mich. at 313-314.
8. *Kimble*, 470 Mich. at 314, fn. 7.
9. *Wilding*, 860 N.W. 2d at 619.

## **Legislative and Policy Updates**

### ***Passed by Michigan House of Representatives***

- **HB 4467** – Allow more dangerous adult prisoners at Baldwin private prison. Passed 57-33. Previous contract to house juvenile offenders here was revoked by Gov. Granholm in 2005.
- **HB 4069** – Revise criminal defendant “youthful trainee status”. Passed 38-0. To make 21 to 23-year-old offenders eligible for this status, which provides a mechanism for not including the offense on a youth’s permanent record
- **HB 4135** – Revise criminal defendant “youthful trainee status”. Passed 38-0. To require (not just allow) that if an offender assigned to “youthful trainee status” is convicted for a serious felony while in this program, the “trainee” status must be revoked.

### ***Introduced in the House and Senate***

- **HB 4536/ SB 291** – Wrongful imprisonment compensation act. Provide compensation and other relief for individuals wrongfully imprisoned for crimes; to prescribe the powers and duties of certain state governmental officers and agencies; and to provide remedies.

### ***Policy Updates***

- The Michigan Council on Crime and Delinquency (MCCD) and other organization in Michigan and other states have launched an initiative to raise the age of juvenile court jurisdiction from 17 years to 18 years. Michigan remains one of the few states that

prosecutes all 17-year-olds as adults. For more information, visit [www.raisetheagemi.org](http://www.raisetheagemi.org).

- **Governor Snyder makes initial appointments to the Criminal Justice Policy Committee.** In April the Governor announced the appointment of 17 members to this committee, which was established in 2015. It is responsible for reviewing current sentencing guidelines, exploring alternatives to incarceration, promoting rehabilitation programs, and making recommendations to the legislature. The Commission includes the attorney general, representatives of the legislature, and 12 members appointed by the Governor, including Barbara Levine, associate director of research and policy for Citizens Alliance on Prisons and Public Spending (CAPPS).

*Prepared by Frank Dennis of the Tri-County Re-entry Coalition (TReC), a non-profit organization of volunteers who mentor returning citizens in Clinton, Eaton, and Ingham Co., Michigan. If you have questions or comments, contact Frank at [fgdennis@msu.edu](mailto:fgdennis@msu.edu)*

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## **DUI Defense: When it Comes to Michigan's Drunk Driving Laws, Everything Old is New Again!**

Last October, Michigan's law makers presented a bill to Governor Snyder, which, among other things, made it unlawful to refuse not just the preliminary breath test (PBT), but also any field sobriety test requested by the officer. The law change meant that suspects could no longer voluntarily refuse tests like the alphabet or walk and turn without being issued a ticket. Specifically, PA 315 removed the phrase "preliminary breath test" and replaced it with the new phrase "preliminary roadside analysis."

The Act then went on to define "preliminary roadside analysis."<sup>1</sup> According to the Act, a preliminary roadside analysis specifically includes a PBT and the "observation of a field sobriety test." It was claimed that the observation of these unspecified field sobriety tests would allow police officers to determine the presence of alcohol, a controlled substance, any other intoxicating substance, or any combination of those substances, in a driver's body.<sup>2</sup>

Unknown to the Legislature, the Act also effectively suppressed the presentation of field sobriety testing evidence during trials. Because PBT results had always been inadmissible at trial, when the language was changed from "preliminary breath test" to "preliminary roadside analysis," the results of a "preliminary roadside analysis" also became inadmissible. Since field sobriety tests were included in the definition of "preliminary roadside analysis," this same law inadvertently made those same field sobriety tests inadmissible at trial.<sup>3</sup>

This issue was immediately pointed out in the October 2014 SADO Newsletter.<sup>4</sup> The Prosecuting Attorneys Association of Michigan (PAAM) also took notice and attempted to fix the law. However, by the end of the year, the Legislature refused to make changes. Upon the effective date of the Act, the defense bar immediately began filing motions seeking to have any field sobriety tests in a drunk driving case suppressed. Most attempts were successful, which led to great plea offers in many circumstances.

Unfortunately, it was only a matter of time until the full impact was realized by the Legislature. Effective April 9, 2015, Michigan's drunk driving

laws were essentially put back to where they were prior to the October 2014 amendment, meaning field sobriety tests are again admissible at trial. However, instead of changing the law back to its pre-October 2014 version, the Legislature again utilized a new term: "preliminary chemical breath analysis." The new definition removes the observation of field sobriety tests, which means they are no longer excluded from trial. It also limits the testing to a chemical breath analysis, which seems to preclude the use of roadside saliva testing, such as with the Drager 5000. This may be another unintended consequence of imprecise and ill-considered language usage.

Michigan's lawmakers have shown a knack of late for drafting bad laws. In our most recent special election, prop one was defeated by the largest margin of any proposition in modern history. Perhaps they will learn a lesson and consult with the experts before drafting, voting on and presenting bills to Gov. Snyder.

The Act that ostensibly made field sobriety tests inadmissible had an effective date of January 15, 2015. The Act reversing that change appears to have been given immediate effect, specifically the date of the Governor's signature, which was April 9, 2015. The question then is, what happens to those cases with an arrest date between the two? In attacking the suppression of field sobriety tests, many prosecutors steadfastly argued that the law was not retroactive to arrests made prior to the effective date of the amendment. It will be interesting to see if those same prosecutors take a contrary position with this new amendment. An argument can be made that statutes are presumed to operate prospectively unless a contrary intent is clearly manifested.<sup>5</sup>

There is also the issue of retroactivity. The Supreme Court tests retroactive legislation against three constitutional standards: due process, equal protection of the law, and impairment of the obligation of contracts.<sup>6</sup> With this particular law, it is the constitutional standard of due process that might be adversely impacted. A defendant's right to due process may be violated when "[t]he retroactive application of an unforeseeable interpretation of a criminal statute" works to the defendant's detriment.<sup>7</sup> Considering how poor performance on

field sobriety tests may adversely impact an accused, this factor is certainly satisfied.

However, a defendant is not “deprived of ‘due process of law in the sense of fair warning that his or her contemplated conduct constitutes a crime’” when judicial interpretation of an applicable statute does not have “the effect of criminalizing previously innocent conduct.”<sup>8</sup> In this particular instance, it would appear that the retroactive application may actually decriminalize certain activity in that a driver is no longer legally obligated to submit to field sobriety tests other than the preliminary breath test.

An argument can be made that depending on how the law and its impact are interpreted, the retroactive application violates due process.

***by Patrick T. Barone &  
Ryan Ramsayer***



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***Ryan Ramsayer is a senior associate at the Barone Defense Firm where he has been employed since 2009. However, his dedication to defending the rights of his fellow citizens began long before he began practicing law. As a member of the United States Marine Corps Infantry, he honorably served in Afghanistan. Mr. Ramsayer now uses his combat-tested determination to fight on a new battlefield—the courtroom—where he continues to distinguish himself among his peers. He can be reached at [r Ramsayer@baronedefensefirm.com](mailto:r Ramsayer@baronedefensefirm.com).***

### ***Endnotes***

1. PA 315 (2014) (defining “preliminary roadside analysis” under the new section M.C.L. 257.43a.)
2. Id.
3. Barone & Ramsayer, “Recent Amendments to Michigan OWI Law Pave Way for More Drugged Driving Arrests.” Criminal Defense Newsletter, Volume 38, Number 1 (October 2014); [https://www.sado.org/cdn/10404\\_38cdn01.pdf](https://www.sado.org/cdn/10404_38cdn01.pdf)
4. Id.
5. *Franks v. White Pine Copper Division*, 422 Mich. 636, 671 (1985).
6. Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, Cal. Law Rev., Vol. 48, Issue 2 (1960). Internal citations omitted.
7. *People v. Barbara Johnson*, 302 Mich. App. 450 at 464 (2013) (citation omitted).
8. Id. at 465, quoting *Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964) (emphasis omitted).

## ***Michigan Indigent Defense Commission***

The Michigan Indigent Defense Commission (MIDC) has been busy this spring, drafting proposed minimum standards, creating a survey for counties, and continuing to connect with indigent defense providers around the state. While there is much work to be done, progress has been made in terms of information gathering and laying the groundwork for improvements to indigent defense in Michigan.

The Commission met most recently on April 14, 2015 at the State Bar of Michigan board room in Lansing. David Carroll from the 6<sup>th</sup> Amendment Center was a special guest at the meeting. Mr. Carroll is a nationally recognized expert on indigent

defense standards and structures. Mr. Carroll founded the 6<sup>th</sup> Amendment Center in 2012, a nonpartisan, non-profit organization to assist state and local governments meet the constitutional imperative to provide competent lawyers to the indigent accused. Mr. Carroll was the primary author of the National Legal Aid and Defender Association’s report on Michigan’s indigent defense services, “*A Race to the Bottom – Speed & Savings over Due Process: A Constitutional Crisis*,” and provided assistance to Governor Snyder’s Indigent Defense Advisory Committee. Mr. Carroll continues to work in an advisory capacity with the MIDC pursuant to a grant from the Department of Justice.

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He gave a presentation to the Commission about the history of the right to counsel and insights for moving forward in Michigan.

Executive Director Jonathan Sacks provided a report to the Commission about the work being done by staff. As part of his report, Mr. Sacks described the initial minimum standards that have been drafted for the Commission's consideration. The MIDC Act sets forth the process for proposing minimum standards, which will involve a series of proposals over time. The first set of proposals cover the following areas: Education and Training of Defense Counsel; the Initial Client Interview; Investigation and Expert Witnesses; and Timing for Appointment of Counsel. The MIDC has Committees that are currently drafting and reviewing these four proposed standards. The Committees meet regularly and have MIDC staff liaisons assigned to each group for administrative and technical assistance.

It is estimated that the full Commission will review the work done by the Committees and discuss the proposed standards at the June 9, 2015 MIDC meeting in Lansing. Thereafter, the proposals will be distributed for comments by the criminal justice community before the public hearing, which is estimated to occur at the time of the August 18, 2015 MIDC meeting. The timeline is ambitious, but all of the Committees are working diligently. Information about attending the public hearing, which is open to the public, will be on the MIDC website, [www.michiganidc.gov](http://www.michiganidc.gov), which is set to launch later this spring. Visit the link and enter your email address to be notified of the website's launch.

The MIDC is also in the process of finalizing a survey to be distributed to all Circuit and District Courts in Michigan. The MIDC Act requires data collection from indigent defense providers. This first survey will help identify the types of delivery systems used in each county, factors used to determine eligibility for assigned counsel services, the timeframe for appointments of counsel and information about meetings with clients, training for assigned counsel, expenditures on indigent defense, and case tracking methodology. The survey will be distributed through the State Court Administrator's Office and the responses will be analyzed this summer. A summary of the survey results will be made available to the public after it has been completed. The primary author of the survey is incoming MIDC Research Director Dr. Jonah Siegel, a sociologist with a specialty in criminal justice issues.

MIDC staff continues to connect with practitioners regularly. Jonathan Sacks spends time every week meeting with criminal defense attorneys, court administrators, and judges, widely seeking input for improving indigent defense services. Mr. Sacks also attended a train-the-trainer event for CDAM's trial college at the end of April. As a career-public defender and former supervisor of public defenders, Mr. Sacks hopes to engage the newest group of indigent criminal defense attorneys in Michigan. Mr. Sacks was also recently appointed to the State Bar of Michigan's "Modernizing the Regulatory Machinery" Committee of the 21<sup>st</sup> Century Task Force, dedicated to building economic resilience and capacity in the delivery of legal services.

Marla McCowan, the Director of Training, Outreach and Support, maintains her position on the Wayne County Criminal Advocacy Program Board of Directors, a program delivering mandatory training to one of the largest assigned-counsel rosters in Michigan. Ms. McCowan also continues in her position on the Education Committee for the Criminal Defense Attorneys of Michigan, and was elected to the CDAM Board of Directors this spring. Ms. McCowan was also recently appointed to the State Bar of Michigan's "Building a 21<sup>st</sup> Century Practice" Committee of the 21<sup>st</sup> Century Task Force, working toward developing and maintaining professional excellence in a dynamic marketplace.

State Office Administrator and Legislative Director Marcela Westrate was appointed to the State Bar of Michigan "Affordability of Legal Services" Committee of the 21<sup>st</sup> Century Task Force, working on new tools for breaking through the access barrier. She will participate in training later this spring to ensure MIDC is in full compliance with the document retention policy and the Freedom of Information Act. Transparency and accountability remain at the core of facilitating the MIDC mission.

*by Marla McCowan*  
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## ***Public Service Announcement: SADO Attorneys Speak to Receptive Audience at National Lifers of America Event***

On April 23, 2015, SADO attorneys spoke to a group of approximately 150 inmates at an event organized by the National Lifers of America (NLA) Chapter 1023, at Muskegon Correctional Facility. SADO Attorneys Marilena David-Martin, Patricia Selby, and Jessica Zimbelman, spoke to the group on a variety of topics, including the appellate process, new and existing projects and resources offered by SADO, changes in court procedures and practices, the status of challenges to juvenile lifer laws, the DNA statute (MCL 770.16), and commutations.

The Muskegon Correctional Facility staff was extremely welcoming and friendly and allowed us to have an efficient and productive visit; the NLA Chapter Members went above and beyond by decorating the auditorium with flowers from their own greenhouse and allowing the attorneys to sit on the comfortable chairs.

Special thanks goes to Sharon Haner, Special Activities Director, who graciously coordinated the visit and to Warden Burt for allowing SADO to visit. Also to William Hall, John Scott, Efran Paredes, Jr.,

Kenneth Nixon, and Michael Perry, the very dedicated committee members of the NLA who were responsible for organizing this event and to reaching out to SADO. Sorry if we missed anyone! And to all of those in attendance, thank you for your attention, your thoughtful questions, and the courtesy you exhibited during our visit.

***Community Outreach: SADO is able to engage in important community outreach because of the commitment to service by the leadership and due to the desire of staff to engage in community outreach in addition to, and never in lieu of, their standard job functions. If your organization would like to request SADO's presence at a future event, please send your request to Marilena David-Martin at [mdavid@sado.org](mailto:mdavid@sado.org) or by mail at 645 Griswold, Suite 3300, Detroit, MI 48226. We are unable to fulfill all requests.***

### **Spotlight On: Alanna P. O'Rourke**



***Please tell us about your background, how long you have been a criminal defense lawyer, what brought you into criminal defense, and where you practice.***

I spent my childhood growing up around the world and lived in various countries in Africa, Asia and Europe. Many of these countries were without due process or constitutional rights, including the presumption of innocence, to protect individuals. These experiences enabled me to develop an appreciation of people from different cultures and strengthened my commitment to public service and civil justice.

I moved to Detroit in 1992 and obtained a Bachelor of Arts in History from Wayne State University. My interest in criminal defense and constitutional law was further developed when I researched and wrote my undergraduate thesis on the Whiskey Rebellion of Pennsylvania in 1794 and the first treason trials in the United States.

I began working as a civil and criminal trial paralegal in 1996. By 1998, I was working as a trial and appellate paralegal in criminal defense and have never looked back. In 2006, I made a decision to take my career further and enrolled in night school at the University of Detroit Mercy School of Law. During law school, I focused on constitutional law, criminal law, research and writing classes and participated in pro bono clinics - a natural outcome of my personal and professional experiences.

I have been a criminal defense lawyer for four and a half years in Detroit mainly handling appointed and retained cases at the trial level in state court. I further provide research and writing services to attorneys at the trial and appellate level in state and federal court. I have recently been admitted as a MAACS roster attorney for indigent criminal appeals and am looking forward to developing my appellate practice.

***Please tell us about one of your interesting or unusual cases, what the issues were and whether expert witnesses were needed.***

I successfully represented a legal permanent resident who was accused of Attempted False Pretenses over \$20,000.00, but less than \$50,000.00

involving credit card fraud. There were serious immigration consequences associated with the charges facing my client had he been convicted. My client consistently maintained his innocence and refused all plea offers from the prosecution. The case required meticulous organizational skills and attention to detail, as there were multiple fraudulent credit card charges over nearly a week, in numerous stores around the metro-Detroit area.

Identification was the main issue. However, most of the stores only retain video/digital recordings for 30 to 60 days. The warrant was not issued until almost six months after the incident, and consequently, no recordings from the store were available to prove that my client had not made the purchases. There were also problems obtaining information from the complainant organization and its affiliates, although I eventually managed to obtain favorable information, including a voice recording made by an unknown person - clearly not my client - about the credit card, and an internal memorandum noting that the signatures on the sales slips did not match my client's signature.

My client and I decided that a voice recognition expert and a handwriting expert were unnecessary as there was a voice recording of my client contacting the credit card company regarding the fraudulent use of his card, and valid signatures from my client on sales slips that post-dated the incidents available for comparison. I consulted with a memory perception/identification expert and consulted with an identification theft and fraud expert. Neither witness presented in-court expert testimony, but I used information and strategies I learned from the experts in my examination and cross-examination of some of the witnesses.

### ***What are some things criminal defense practitioners should watch for?***

Make sure you stay in regular contact with your

client and their family, if necessary, and communicate with them to obviate possible unreasonable expectations. Obtain discovery from as many sources as possible that are applicable to your case; there are often unexplored avenues of favorable information that are available to defense counsel. Be aware of the new types of IAC claims that the appellate courts are recognizing and do your best to make sure you do not fall within those parameters. Appointed trial and appellate counsel have the unenviable position of battling inadequate funding and resources. I am optimistic about the recent changes to the leadership of the indigent defense system and have high hopes for reform in the near future.

### ***Do you have any specific advice for new attorneys?***

Your reputation will follow you around throughout your entire legal career - make sure it is a good one! You should develop and maintain effective, professional relationships with judges, opposing counsel, court personnel, clients and family. Find at least one good mentor - or, ideally, several mentors (so that you can compare styles and techniques) - and spend as much time as you can in the courtroom observing your mentor and other attorneys. The initial time you invest will make you a better lawyer in the end.

Try to second chair as many cases as you possibly can - there is no substitute for live, in-court experience, which cannot be taught in books. I am a firm believer in continuing education and recommend attending as many seminars, courses, classes and CLE credits as you can every year so that you stay current on new developments in the law. Finally, make sure you are managing your time and are effectively using the available resources.

***by Neil Leithauser  
Associate Editor***

## **Trial Court Successes: April, 2015**

**James R. Samuels** secured a favorable plea-agreement for his juvenile client by convincing the prosecutor to drop adult-designation in a case charging three counts of CSC1. The client instead pled, as a juvenile, to CSC2.

**Barry F. Poulson** secured a favorable plea-agreement for his client, where the client pleaded guilty to the one-year misdemeanor of lewd and lascivious conduct instead of the fifteen-year felony of CSC3.

**Jennifer J. France** got a kidnapping count and a conspiracy to kidnap count dismissed for her client following a preliminary examination.

**Charlotte Steffen-Ramirez**, following a bench trial before 3<sup>rd</sup> Judicial (Wayne County) Circuit Judge Michael M. Hathaway, obtained verdicts of not guilty of CSC1, not guilty of two counts of CSC2, and not guilty of unlawful imprisonment; the client was convicted of two counts of CSC4.

***by Neil Leithauser  
Associate Editor***

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## ***Doe v. Snyder: The US District Court for the Eastern District of Michigan Finds Certain Provisions of Michigan's Sex Offender Registration Act Unconstitutional***

The federal district court declared unconstitutional, and enjoined enforcement of, four provisions of the Michigan's Sex Offender Registration Act in *Doe v. Snyder*, \_\_\_F. Supp. 3d (#2:12-CV-11194, decided 3-31-15). First, M.C.L. 28.725(1)(f) (requiring a SORA registrant to "report in person and notify the registering authority . . . immediately after . . . establish[ing] any electronic mail or instant message address, or any other designations used in internet communications or postings[]") and M.C.L. 28.727(1)(i) (requiring a registrant to report "[a]ll electronic mail addresses and instant message addresses assigned to . . . or routinely used by the individual") are unconstitutionally overbroad. "[W]hile SORA's internet reporting provisions serve the significant governmental interest of protecting minors and investigating sexual crimes, . . . ambiguity in the reporting requirements and the requirement to report 'in person' render the provisions not narrowly tailored and, therefore, unconstitutional." Second, M.C.L. 28.734 and M.C.L. 28.735, which "make[] it a crime for a registrant to work, loiter, or reside within a student safety zone[,] are unconstitutionally vague because "registrants are forced to choose between limiting where they reside, work, and loiter to a greater extent than is required by law or risk violating SORA." "SORA does not provide sufficiently definite guidelines for registrants and law enforcement to determine from where to measure the 1,000 feet distance used to determine the exclusion zones, and neither the registrants nor law enforcement have the necessary data to determine the zones even if there were a consensus about how they should be measured[.]" additionally, "SORA's present definition of 'loiter' is sufficiently vague as to

prevent ordinary people using common sense from being able to determine whether [the p]laintiffs are, in fact, prohibited from engaging in the conduct from which [they] have refrained." Third, M.C.L. 28.727(1)(h), requiring a registrant to report "[a]ll telephone numbers registered to . . . or routinely used by the individual[.]" is unconstitutionally vague because "the commonly accepted meaning of the term[] . . . 'routinely' [does] not provide sufficient guidance to law enforcement or registrants" to determine "when the reporting requirements are triggered." Lastly, M.C.L. 28.725(1)(g) (requiring a registrant to "report in person and notify the registering authority . . . immediately after . . . [t]he individual purchases or begins to regularly operate any vehicle[]") and M.C.L. 28.727(1)(j) (requiring a registrant to report "any motor vehicle, aircraft, or vessel owned or regularly operated by the individual") are unconstitutionally vague because "the commonly accepted meaning of the term[] 'regularly' . . . [does] not provide sufficient guidance to law enforcement or registrants" to determine "when the reporting requirements are triggered."

***(Editor's note: Case summary provided by the Michigan Judicial Institute. The Attorney General's Office will be appealing this decision and the ACLU will be filing a cross-appeal. Follow the case developments by visiting the ACLU website at: <http://www.aclumich.org/SORainfo>. There you will find additional resources regarding the implications of this opinion, including a FAQ Fact Sheet for Registrants and a Legislative Fact Sheet for practitioners.***

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### **Report and Studies**

#### ***Study of Flawed Studies***

A recent article studied flaws, errors, fraud, the inadequacies of peer-review, and the problem of non-reproducibility in research studies. The authors quoted Richard Horton, the editor of the medical journal *The Lancet*, as saying, "Much of the scientific literature, perhaps half, may simply be untrue."

The authors noted that a group of researchers recently published their findings concerning their

efforts to reproduce the results of 100 of the "biggest experiments" in psychology; the researchers were able to only replicate results in 39 of the experiments. In another attempt to replicate results of cancer-research findings for potential drug trials, researchers could replicate only 11% of the findings.

The authors stated that many scientific studies done and published annually "are poorly designed, redundant, or simply useless," and do not properly reduce biases. A study that analyzed 300 research

papers about epilepsy was cited; the results of that study concluded that 71% of the articles were characterized as having “no enduring value,” and 55.6% of those were said to be “inherently unimportant.” One estimate concluded that about \$200 billion spent on research globally “is routinely wasted.”

Exaggerated claims of research results and confusion between causation and correlation published in university press releases can contribute to exaggerated news coverage, which, in turn, can ultimately distort the available evidence bases used for later research.

Harvard professor Sheila Jasanoff was quoted as saying that science is socially constructed and “[s]cientific knowledge, in particular, is not a transcendent mirror of reality.” Also, she said, science “is embedded in social practices, identities, norms, conventions, discourses, instruments and institutions – in short, in all the building blocks of what we term the social.” The authors pointed-out that science is done by people, people are flawed, and “science will, inevitably, be flawed.”

**Sources:** Julia Belluz and Steven Hoffman, “Science is often flawed. It’s time we embraced that,” [vox.com](http://www.vox.com), May 13, 2015: <http://www.vox.com/2015/5/13/8591837/how-science-is-broken>

### ***DNA from Microbiome May be Used to Identify Individuals***

A recent study, published in May 2015, in the *Proceedings of the National Academy of Sciences*, suggests that the collective DNA of an individual’s microbiome, that is, the microbes colonized in an individual’s body -- or “gut print,” according to recent

articles -- may reveal details of an anonymous participant’s health, diet, ethnicity, and, eventually, possibly identity.

The National Institutes of Health (NIH) maintains a public database of human microbiome DNA in the Human Microbiome Project (HMP). The articles describe studies that show that, although the NIH has attempted to exclude an individual’s DNA from the HMP database, short tandem repeats – sequences used in forensic comparisons – were present in the database. The article noted that it is still unclear whether or not the presence of human DNA in the microbiome samples could provide a precise DNA signature, but with “the rise of publicly available DNA databases,” the likelihood is increased. For example, the articles pointed out that human-genomic researchers, using genealogy databases, were able to name five of the ‘anonymous’ participants in the international 1,000 Genomes project. Still, “the odds of identifying someone on the basis of their microbiome is low.”

**Sources:** Ewen Callaway, “Microbiomes raise privacy concerns,” [nature.com](http://www.nature.com/news/microbiomes-raise-privacy-concerns-1.17527), May 11, 2015: <http://www.nature.com/news/microbiomes-raise-privacy-concerns-1.17527> Ewen Callaway, “Microbial DNA in Human Body Can Be Used to Identify Individuals,” [scientificamerican.com](http://www.scientificamerican.com/article/microbial-dna-in-human-body-can-be-used-to-identify-individuals/?print=true), May 13, 2015: <http://www.scientificamerican.com/article/microbial-dna-in-human-body-can-be-used-to-identify-individuals/?print=true> Francosa, E. A. et al, “Identifying personal microbiomes using metagenomics codes,” *Proc. Natl Acad. Sci.*, May 11, 2015: <http://www.pnas.org/content/early/2015/05/08/1423854112>.

**by Neil Leithauser**  
**Associate Editor**

## **Surveillance News**

### ***ACLU Phone App Records Police Contact***

In a perhaps reverse-surveillance development, the ACLU, Southern California branch, has developed and released for California residents a phone-app that automatically forwards video of a police-encounter to the ACLU, as well as alerting other app-users nearby that an incident is occurring. Several ACLU branches in other states (Missouri, New York, and Oregon) have similar apps.

**Sources:** Andrew Tarantola, “California ACLU chapter unveils police-monitoring video app,” [engadget.com](http://www.engadget.com/2015/04/30/california-aclu-chapter-unveils-police-monitoring-video-app/), April 30, 2015: <http://www.engadget.com/2015/04/30/california-aclu-chapter-unveils-police-monitoring-video-app/>; *CaliforniaACLU*: <https://www.mobilejusticeca.org/>

**by Neil Leithauser**  
**Associate Editor**

### ***Connecticut: Decisions Expanding 8<sup>th</sup> Amendment Rights Don't Bar Mandatory Minimums for Juveniles***

The Connecticut Supreme Court held that the U.S. Supreme Court's trilogy of decisions expanding the Eighth Amendment protections for juvenile offenders doesn't prohibit the imposition of mandatory minimum sentences for crimes committed before an offender's 18<sup>th</sup> birthday. The court decided that the Eighth Amendment's requirement that sentencing judges consider the features of youth that make juveniles less culpable is satisfied by a judge's authority to impose a sentence between a mandatory minimum and a statutory maximum and to impose concurrent sentences. *State v. Taylor*, 2015 BL 65699 (Conn., No. SC 19222, 03-17-15); full text at [http://www.bloomberglaw.com/public/document/State v Taylor G No SC 19222 2 015 BL 65699 Conn Mar 17 2015 Court](http://www.bloomberglaw.com/public/document/State_v_Taylor_G_No_SC_19222_2_015_BL_65699_Conn_Mar_17_2015_Court)

### ***Eighth Circuit: Addition of Charges After Successful Appeal Did Not Raise Presumption of Vindictiveness***

The Court of Appeals for the Eighth Circuit held that a presumption of vindictiveness is not supported by the government's addition of new charges following a defendant's successful appeal, even where there is no newly discovered evidence underlying the new charges. *United States v. Chappell*, 2015 BL 64866, (8<sup>th</sup> Cir., No. 13-1748, 03-11-15); full text at [http://www.bloomberglaw.com/public/document/United States v Chappell No 131 748 2015 BL 64866 8th Cir Mar 11 2](http://www.bloomberglaw.com/public/document/United_States_v_Chappell_No_131_748_2015_BL_64866_8th_Cir_Mar_11_2)

### ***Massachusetts: Juvenile Offender Serving Life in Prison Gets Attorney, Expert at First Parole Hearing***

The Massachusetts Supreme Judicial Court held that the constitutional requirement that juvenile offenders serving life in prison be given a meaningful opportunity for release demands the additional procedural protections of appointed counsel, appointed experts, and judicial review in connection with the offenders' initial parole hearings. *Diatchenko v. District Attorney for the Suffolk District*, 2015 BL 78327 (Mass., No. SJC-11688, 03-23-15); full text at [http://www.bloomberglaw.com/public/document/Diatchenko v District Attorney for the Suffolk District No-SJC116](http://www.bloomberglaw.com/public/document/Diatchenko_v_District_Attorney_for_the_Suffolk_District_No-SJC116)

### ***Florida: Florida Supreme Court Says Long Term Can Be Equivalent to De Facto Life Sentence***

The Florida Supreme Court held that the Eighth Amendment's limits on sentences of life imprisonment without parole for crimes committed by offenders less than 18 years old applies to sentences to terms of years that are the "functional equivalent" of life without parole. The court held that sentences of this nature (30 years plus a consecutive 60 years for other offenses) amounted to de facto life sentences without parole in violation of the 8<sup>th</sup> Amendment. *Henry v. State*, 2015 BL 74540, (Fla., No. SC12-578, 03-19-15); full text at [http://www.bloomberglaw.com/public/document/Henry v State No SC12578 2015 BL 74540 Fla Mar 19 2015 Court O](http://www.bloomberglaw.com/public/document/Henry_v_State_No_SC12578_2015_BL_74540_Fla_Mar_19_2015_Court_O)

### ***Georgia: Consent in Implied-Consent Laws Can't be Used to Circumvent McNeely***

The Georgia Supreme Court held that a man who submitted to a blood draw after being told that his license would be automatically suspended under the state's implied-consent law if he refused, didn't voluntarily waive his Fourth Amendment rights. The court stated that motorists who acquiesce to the test thinking that they have no other choice, haven't freely consented to the warrantless search. Mere compliance with statutory implied-consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant. *Williams v. State*, 2015 BL 85849 (Ga., No. S14A1625, 03-27-15); full text at [http://www.bloomberglaw.com/public/document/Williams v State No S14A1625 2015 BL 85849 Ga Mar 27 2015 Court O](http://www.bloomberglaw.com/public/document/Williams_v_State_No_S14A1625_2015_BL_85849_Ga_Mar_27_2015_Court_O)

### ***First Circuit: Government Gets Second Chance to Offer Sufficient Evidence of Conspiracy***

The First Circuit held that the Fifth Amendment's double jeopardy clause doesn't bar the government from reprosecuting a defendant for a smaller, more focused drug conspiracy following an appellate holding that the government failed at an earlier trial to present sufficient evidence of a larger, overlapping drug conspiracy. The prior convictions were reversed due to a material variance and not

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due to the insufficiency of the evidence. *United States v. Szpyt*, 2015 BL 95695 (1st Cir., No. 13-1543, 04-03-15); full text at <http://www.bloomberglaw.com/public/document/United States v Szpyt No -131543 2015 BL 95695 1st Cir Apr 03 2015>.

***New York: N.Y. Suspect's 'Selective Silence' at Interview Can't be Used in Prosecution's Case-in-Chief***

The New York Court of Appeals held that the prosecution can't put on evidence in its case-in-chief that an arrestee "selectively answered some police questions but not others." The court stated that a "defendant who agrees to speak to the police but refuses to answer certain questions may have the same legitimate or innocent reasons for refusing to answer as a defendant who refuses to speak to the police at all." *People v. Williams*, 2015 BL 97844, (N.Y., No. 34, 04-07-15); full text at <http://www.bloomberglaw.com/public/document/People v Williams No 34 2015 BL 97844 NY Apr 07 2015 Court Opinion>

***First Circuit: Appeal Waiver Doesn't Block Challenge to Unconstitutional Supervised Release Terms***

The First Circuit held that a man whose plea deal for failing to register as a sex offender included a general waiver of the right to appeal was not barred from challenging a special condition of supervised release regarding contact with minors that effectively blocked him from having a meaningful relationship with his nine-year-old son. *United States v. Del Valle-Cruz*, 2015 BL 96790 (1st Cir., No. 13-1050, 04-06-15); full text at <http://www.bloomberglaw.com/public/document/United States v Del ValleCruz No 131050 2015 BL 96790 1st Cir Apr>

***Second Circuit: Southern Union Doctrine Does Not Govern Restitution Award for Illegal Lobster Harvest***

The Second Circuit held that the rule that juries, not judges, must make any factual finding used to boost a fine beyond its statutory maximum doesn't apply to the calculation of restitution awards. The court stated that restitution is a restorative remedy that compensates victims for the market value of their loss and, therefore, can't be said to have increased the defendant's punishment beyond the "statutory maximum." *United States v. Bengis*, 2015 BL 107773, (2d Cir., No. 13-2543-cr(L), 04-16-15);

full text at <http://www.bloomberglaw.com/public/document/United States v Bengis No 132543crL 2015 BL 107773 2d Cir Apr 16>

***Tenth Circuit: Suppression Judges Don't Need Reason to Reconsider New Evidence and Arguments***

The Tenth Circuit held that prosecutors who lose suppression rulings after failing to present essential evidence or make critical legal arguments don't need an excuse for the lapses to get district judges to reconsider in light of the unrepresented evidence or unmade arguments. The court stated that when "suppressed evidence later turns out to have been constitutionally obtained; application of the exclusionary rule provides no meaningful deterrence [of police misconduct]." *United States v. Huff*, 2015 BL 104671 (10th Cir., No. 13-3216, 04-14-15); full text at <http://www.bloomberglaw.com/public/document/United States v Huff No 133216 2015 BL 104671 10th Cir Apr 14 2015>.

***Tenth Circuit: Two-Hour Blockade of 20 Vehicles in Search for Bank Robbery Was Reasonable***

The Tenth Circuit held that police didn't act unreasonably when they swarmed a crowded intersection and detained 20 vehicles for over two hours as they systematically removed passengers at gunpoint while searching for a man who had robbed a bank just minutes earlier. The court stated that the public interest in apprehending an armed robber outweighed the intrusions on private liberty. *United States v. Paetsch*, 2015 BL 99180, (10th Cir., No. 13-1169, 04-08-15); full text at <http://www.bloomberglaw.com/public/document/United States v Paetsch No 131169 2015 BL 99180 10th Cir Apr 08 2>

***Arkansas: Defense Counsel Need Not Tell Client About Prosecutor's Inquiry Short of Plea Deal***

The Arkansas Supreme Court held that the Sixth Amendment's standards for effective assistance of counsel don't require defense counsel to tell clients that the prosecution asked counsel whether the defense was interested in plea bargaining. The prosecutor provided an affidavit stating that there was no plea offer, and only a formal offer triggers counsel's duty to inform the defendant. *Leach v. State*, 2015 BL 102906 (Ark., No. CR-15-35, 04-09-15); full text at <http://www.bloomberglaw.com/public/document/Leach v State 2015 Ark 163 Court Opinion>

## Training Events

The **Ingham County Bar Association (ICBA)** will present its **“Motion Call Wednesday Educational Event”, Wednesday, June 3, 2015.** All attendees are expected to be present between 8:15am and 8:30 a.m. and the group will be seated promptly at 8:30 a.m. Motion Call Wednesday is an educational event hosted by the Educational Programs Committee of the Ingham County Bar Association Young Lawyers Section. At this event, a group of young lawyers, law students, and current or aspiring paralegals will view Judge Joyce Draganchuk's morning criminal or afternoon civil docket. After the conclusion of the docket, the Judge will answer questions regarding her decision-making process, her judicial philosophy, and share tips and tricks for the practice of law. Judge Draganchuk has valuable insight and experience that she is willing to share with young attorneys and law students about the practice of criminal law and her perceptions of criminal practice before her and in Ingham County generally. This educational opportunity is a must-attend event for all who do or may practice criminal law in Ingham County. If you plan to attend the upcoming MCW-Criminal Docket on June 3, 2015, please email [chris@equalfootinglaw.com](mailto:chris@equalfootinglaw.com)

The **Prisons and Corrections Section of the State Bar of Michigan (SBM)** will present their **“Annual Conference on Mental Illness and Incarceration: Helping Families, Prisoners, and Attorneys Navigate the MDOC,” Saturday June 6, 2015 from 9am-12:30pm in Lansing, Michigan.** Presenters will provide information and practical tips for attorneys and family members with clients or loved ones in the MDOC, with a special focus on mentally ill prisoners. Topics include: how to ensure the PSIR includes only relevant information; MDOC mental health programs; and the use of segregation and detention. Presenters include: Jessica Zimbelman, Assistant Defender, State Appellate Defender Office; Keith Barber, Legislative Corrections Ombudsman; Sofia Nelson, Skadden Fellow, ACLU. Visit the Prisons and Corrections website for further information on cost and registration details or contact Jessica Zimbelman at [Jzimbelman@sado.org](mailto:Jzimbelman@sado.org)

The **Oakland County Bar Association Criminal Law Committee (OCBA)** will present **“Anatomy of a Criminal Case - Year XVII: A Brown Bag Lunch Lecture Series,”** from 11:30am - 12:30pm at the Oakland County Bar Center, 1760 S Telegraph Road, Suite 100, Bloomfield Hills, Michigan on the following dates: **June 16, 2015 - Understanding the New Probable Cause Conference; July 21, 2015 - Ins**

**and Outs of Criminal Appeals; September 15, 2015 - Know Your Judge: Circuit Court; October 20, 2015 - Veteran's Court; November 17, 2015 - Dealing with the Difficult Client; January 19, 2016 - Understanding the Pre-Sentencing Investigative Report and the Scoring of Guidelines; February 16, 2016 - Understanding the Role of Community Corrections and March 15, 2016 - Know Your Judge: District Court.** This series is \$10.00 per lecture or \$80.00 for all 10 lectures for OCBA members. Seminar fees for non-OCBA members, all walk-ins and video viewers are \$20.00 per lecture. For more information, call 248-334-3400 or fax registration to 248-334-7757, or register at [www.ocba.org](http://www.ocba.org)

The **National Association of Criminal Defense Lawyers (NACDL)** will present its **“5th Annual West Coast White Collar Conference,” June 17-19, 2015 at the Paradise Point Resort in San Diego, California.** The focus will be on pure substance, the hottest topics, and offering our attendees the best faculty in the practice of white collar defense, while also providing great networking events and activities. For additional information and registration visit [www.nacdl.org](http://www.nacdl.org)

The **Macomb County Bar Association (MCBA)** will present its **“Criminal CLE - Drunk Driving and Field Sobriety Test Training,” June 22, 2015 beginning at 11:30am at the 16<sup>th</sup> Circuit Court Jury Room in Mount Clemens, Michigan.** The cost is \$45.00 and online registration will only be available until June 18, 2015. For additional information and registration visit [http://www.macombar.org/events/event\\_list.asp](http://www.macombar.org/events/event_list.asp)

The **Criminal Defense Attorneys of Michigan (CDAM)** will present its **“2015 Summer Training,” July 11, 2015 from 9am-5pm at the Otsego Club in Gaylord, Michigan.** For additional information and registration visit [www.cdamonline.org/](http://www.cdamonline.org/).

**SADO's Criminal Defense Resource Center (CDRC) & Western Michigan University's Thomas M. Cooley Law School (WMUTCLS)** through a grant from the **Michigan Commission on Law Enforcement Standards (MCOLES)** will offer a FREE **“Sentencing Law Update Seminar,” on Friday, July 17, 2015 from 1 - 3 p.m.** This seminar will provide updates on recent case law and statutory changes to the Michigan legislative sentencing guidelines and Michigan sentencing law. It is presented by Jacqueline McCann - Assistant

Defender of the State Appellate Defender Office and Principal Author of the Defender Sentencing & Post-Conviction Book. **Space is limited and reservations are required.** For registration information and online registration use the following links: **Auburn Hills - LIVE:** <https://www.eventbrite.com/e/sentencing-law-update-auburn-hills-live-tickets-16804143646> **Grand Rapids - SIMULCAST:** <https://www.eventbrite.com/e/sentencing-law-update-grand-rapids-simulcast-tickets-16804200817> and **Lansing - SIMULCAST:** <https://www.eventbrite.com/e/sentencing-law-update-lansing-simulcast-tickets-16804307135> For additional information contact Heather Waara at [hwaara@sado.org](mailto:hwaara@sado.org)

The **National Association of Criminal Defense Lawyers (NACDL)** will present its “58th Annual Meeting & Seminar: High Altitude Trial Skills from the Masters of Advocacy,” July 23-26, 2015 at the Westin Denver Downtown Hotel in Denver, Colorado. This unique seminar will allow participants to watch acclaimed trial lawyers use their proven techniques in LIVE DEMOs with real jurors, and learn how to develop fact-based theories and supporting themes that will resonate with jurors throughout trial. Interactive lectures will also include effective opening and closing statements, and creating cross-examinations that work, with the use of real witnesses during the seminar. For additional information and registration visit [www.nacdl.org](http://www.nacdl.org)

The **Criminal Defense Attorneys of Michigan (CDAM)** will present its “2015 Trial College: Train the Trainer,” Saturday, July 25, 2015 from 10am-2pm at the Radisson Hotel in Downtown Lansing, Michigan. CDAM invites members in good standing to attend a training session for faculty for Trial College and trial practice faculty. You must have a minimum of 7 years practice experience to participate in this training. Attendance at this program does not automatically qualify you to be faculty. If you would like to teach, are committed to helping others and willing to invest the time needed to train and participate in the programs, we hope to see you at the training! For additional information and registration visit [www.cdamonline.org/](http://www.cdamonline.org/)

**SADO's Criminal Defense Resource Center (CDRC) & Western Michigan University's Thomas M. Cooley Law School (WMUTCLS)** through a grant from the **Michigan Commission on Law Enforcement Standards (MCOLES)** will offer a FREE “Advanced Topics in Pleas & Sentencing Seminar,” on Friday, July 31, 2015 from 1 - 3 p.m. This seminar will provide training on current issues relating to the scoring of the statutory sentencing guidelines (including particularly difficult questions posed on the MJJ sentencing guidelines scoring Q and A webpage as well as other cutting edge scoring questions) and issues that affect the validity of a guilty or no contest plea presented by Anne Yantus - Managing Attorney of the State Appellate Defender Office. **Space is limited and reservations are required.** For registration information and online registration use the following links: **Auburn Hills - SIMULCAST:** <https://www.eventbrite.com/e/advanced-topics-in-pleas-sentencing-auburn-hills-simulcast-tickets-16804494696>; **Grand Rapids - LIVE:** <https://www.eventbrite.com/e/advanced-topics-in-pleas-sentencing-grand-rapids-live-tickets-16804374336> and **Lansing - SIMULCAST:** <https://www.eventbrite.com/e/advanced-topics-in-pleas-sentencing-lansing-simulcast-tickets-16804543843>. For additional information contact Heather Waara at [hwaara@sado.org](mailto:hwaara@sado.org).

The **Criminal Defense Attorneys of Michigan (CDAM) and Thomas M. Cooley Law School (TMCLS)** will present its “2015 Criminal Defense Trial Practice College,” August 10-15, 2015 in Lansing, Michigan. The tuition fee is \$1,000-double occupancy accommodations at the Radisson Hotel in downtown Lansing, Michigan; or \$1,250 -single occupancy. The fee includes course materials, hotel accommodations and all meals except dinners. For additional information and registration visit [cdamonline.org/](http://cdamonline.org/) or call 517-579-0533.

The **Criminal Defense Attorneys of Michigan (CDAM)** will present its “Advanced Criminal Defense Practice Conference,” November 12-14, 2015 at the Park Place Hotel Plaza in Traverse City, Michigan. Additional information and registration will be forthcoming.

## U.S. Supreme Court: Selected Opinion Summaries

### PRETRIAL MOTIONS AND PROCEDURES

- Search and Seizure
- Appellate Review

*Torrey Dale Grady v. North Carolina*

575 U.S. \_\_\_\_; \_\_\_\_ S.Ct. \_\_\_\_; \_\_\_\_ L.Ed.2d. \_\_\_\_  
(#14-593, 03-30-14)

The petition for certiorari was granted. The judgment of the Supreme Court of North Carolina

was vacated, and the case was remanded for further proceedings. The defendant argued that the monitoring program for recidivist sex offenders, which required the wearing of a tracking device, violated his Fourth Amendment rights. North Carolina dismissed the defendant's appeal concluding that the monitoring did not entail a search within the meaning of the Fourth Amendment. That theory is inconsistent with USSC precedent. A state conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements. In concluding otherwise, North Carolina apparently placed decisive weight on the fact that the state's monitoring program was civil in nature. The program is plainly designed to collect information, and it does so by intruding physically on the subject's body; therefore, it constitutes a Fourth Amendment search.

## **PRETRIAL MOTIONS AND PROCEDURES**

### **– Search and Seizure – Drug Dogs**

***Rodriguez v. United States***  
**575 U.S. \_\_\_\_; \_\_\_\_ S.Ct. \_\_\_\_; \_\_\_\_ L.Ed.2d. \_\_\_\_**  
**(#13-9972, 04-21-15)**

The United States Supreme Court reversed and vacated the judgment of the Eighth Circuit and remanded for further proceedings. The USSC held that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission" of issuing a ticket for the violation.

## **U.S. Court of Appeals: Selected Sixth Circuit Opinion Summary**

### **POST-TRIAL MOTIONS AND APPEALS**

#### **– Habeas Corpus – Federal**

***John F. Smith, Jr. v. Charlotte Jenkins,***  
***Warden***  
**\_\_\_\_ F.3d \_\_\_\_**  
**(#13-4269, 04-23-15)**  
**Guy, Clay, WHITE**

The Sixth Circuit reversed the judgment of the district court for the Southern District of Ohio and remanded with instructions to enter a conditional writ of habeas corpus giving the State of Ohio six months to retry or dismiss the involuntary-manslaughter charge, and further provided that if the state chooses to dismiss the charge, it shall resentence Smith on the remaining felonious-assault conviction.

The court held that Smith did not procedurally default his *Strickland* claim and that Smith's habeas petition should have been granted because his trial attorney did not function as counsel guaranteed by

the Sixth and Fourteenth Amendments. Smith was convicted of felonious assault and involuntary manslaughter after a fight in which Smith punched another man. The man died five days later due to diabetic ketoacidosis. Smith's trial counsel failed to present any evidence regarding the victim's metabolic state or explore the nature of the cause of death, diabetic ketoacidosis. The victim died from complications relating to inadequate management of his diabetes. The prosecutor argued that he was unable to manage his diabetes due to his disorientation from the assault. The brain injuries suffered from the punch (the victim fell and then hit his head) were not fatal in and of themselves. The court found that it was clear that competent counsel would explore the severity, extent, and history of the victim's diabetes, the management of it, as well as the possible consequences of such mismanagement. Trial counsel's failure to conduct such an investigation, coupled with no reasonable and deliberate determination that investigation was not warranted, lead to the conclusion that counsel was constitutionally deficient.

## **U.S. District Court: Selected Opinion Summary**

### **POST-TRIAL MOTIONS AND APPEALS**

#### **– Habeas Corpus**

### **PRETRIAL MOTIONS AND PROCEDURE**

#### **– Sufficiency of *Miranda* Warnings**

### **– Use of Statements Obtained in Violation of *Miranda* Warnings**

***Samantha Bachynski v. Millicent Warren***

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**\_\_\_ F.Supp. \_\_\_  
(#10-13762, 03-30-15)  
Lawson**

Conditionally granted the writ of habeas corpus and ordered that the respondent shall release the petitioner from custody unless the State brings her to trial again within seventy days, subject to the exclusions from such period allowed by U.S.C. § 3161(h).

The court found that the New Baltimore police officers initiated contact with the petitioner after she had invoked her right to counsel, and they engaged in conduct that they should have known was reasonably likely to elicit an incriminating response from her. It is undisputed that the petitioner twice

asked for counsel when police interrogated her. It is settled law that if the accused invokes her right to counsel, the interrogation must stop until an attorney is present. Telling the petitioner that her boyfriend was making a statement, after she refused to make a statement without an attorney, was a practice that the officers “*should have known* w[as] reasonably likely to elicit an incriminating response.” The statement should have been suppressed. The state court’s ruling that no constitutional violation occurred was an unreasonable application of *Edwards v. Arizona* and *Rhode Island v. Innis*. The admission of the petitioner’s ensuing confession at trial was unlawful and prejudicial. The petitioner has established that she is in custody in violation of her federal constitutional rights.

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**Michigan Supreme Court: Selected Order Summaries**

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**COUNSEL – Ineffectiveness Of**

***People v. Elias Gonzalez-Raymundo*  
\_\_\_ Mich. \_\_\_ (#150814, 04-10-15)  
JAMES CZARNECKI**

The application for leave to appeal is considered and denied.

Justice Young would grant leave to appeal, Justice Markman dissented and would have granted leave to assess whether the defendant, a non-English-language speaker, is entitled to a new trial because his counsel and not the defendant waived his right to a simultaneous translation of the proceedings. The defendant received the assistance of an interpreter throughout the trial, but the interpreter did not provide simultaneous translation because counsel wanted to avoid any change of prejudice.

**PRETRIAL MOTIONS AND PROCEDURE**

**– Search and Seizure**

***People v. Todd Randolph Van Doorne*  
\_\_\_ Mich. \_\_\_ (#150548, 04-10-15)  
BRUCE BLOCK**

In lieu of granting leave to appeal, the case was remanded to the Court of Appeals for consideration as on leave granted. On remand, the Court of Appeals shall address whether the “knock and talk” procedure conducted in this case is consistent with the US Const, Am IV, as articulated in *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

**POST-TRIAL MOTIONS AND APPEALS**

**– New Trial**

**– Newly Discovered Evidence**

***People v. Dawan Tyner*  
\_\_\_ Mich. \_\_\_ (#149800, 04-17-15)**

**MICHIGAN INNOCENCE CLINIC  
DAVID MORAN**

In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed and the case is remanded to the Wayne Circuit Court for proceedings consistent with its April 12, 2012, order granting the defendant’s motion for a new trial and relief from judgment.

The Court of Appeals erred by substituting its own opinion of the credibility and veracity of the witnesses for that of the trial court. The trial court held that three statements by a witness constituted excited utterances and they would make a different result reasonably probable on retrial. The trial court ordered a new trial based on the newly discovered evidence.

**COUNSEL – Right To – For Appeal**

***People v. Anthony Evans*  
\_\_\_ Mich. \_\_\_ (#150517, 04-28-15)  
PRO PER**

In lieu of granting leave to appeal, the case was remanded to the Wayne Circuit Court for the appointment of substitute appellate counsel. The circuit court granted original appointed appellate

counsel's motion to vacate the order of appointment, but denied the defendant's motion for new appellate counsel. Even though counsel represented in his motion that there were no valid grounds for either a plea withdrawal or an appeal of the sentence, he did not accompany his motion with legal analysis "referring to anything in the record that might arguably support the appeal," and the trial court did not make a finding that the "case is wholly frivolous."

## **SENTENCING AND PUNISHMENT**

### **-- Guidelines -- Departure Reasons -- Upward Departure Reversed**

***People v. Robert Edward Rathman***  
\_\_\_ Mich. \_\_\_ (#150221, 04-28-15)  
**MAACS - ROBERT BOYD, III**

In lieu of granting leave to appeal, the sentence was vacated and the case remanded to the trial court for resentencing. The defendant's minimum guidelines called for an intermediate sanction of 0 – 17 months. An intermediate sanction does not include a prison term even if the minimum prison sentence is within the guidelines range. Here, the trial court did not articulate a substantial and compelling reason for imposing a prison term of 12 – 48 months. On remand, the trial court shall sentence the defendant within the guidelines range, or articulate on the record a substantial and compelling reason for departure.

## **PRETRIAL MOTIONS AND PROCEDURE**

### **-- Search and Seizure**

***People v. Israel A. Velez***  
\_\_\_ Mich. \_\_\_ (#148528, 04-29-15)

## **MAACS - ARTHUR LANDAU**

In lieu of granting leave to appeal, the matter was remanded to the Court of Appeals for consideration as on leave granted. The Court of Appeals denied the delayed application for leave to appeal for lack of merit on the grounds presented. See also, *People v. Cotto* (Docket No. 148532), which was remanded to the Court of Appeals with identical facts as this case.

## **GUILTY PLEAS -- Sentencing Aspect SENTENCING AND PUNISHMENT**

### **-- Resentencing**

***People v. Miguel Alejandro Martinez-  
Vasconcel***  
\_\_\_ Mich. \_\_\_ (#150711, 05-01-15)  
**MATTHEW HERMAN**

In lieu of granting leave to appeal, the Michigan Supreme Court vacated the sentence of the Kent Circuit Court, and remanded the case to the trial court for resentencing. The plea agreement provided for a sentence within a range of 0 – 18 months. The trial court was required to impose an intermediate sanction as defined by M.C.L. 769.31(b), which may not exceed a jail term of 12 months unless the trial court states on the record a substantial and compelling reason to sentence the defendant to prison. M.C.L. 769.34(4)(a). Here, the trial court sentenced the defendant to a term of imprisonment without any acknowledgment on the record that this was a departure from the plea and sentence agreement. On remand, the trial court shall sentence the defendant to an intermediate sanction, or provide the defendant an opportunity to withdraw the plea.

# **Michigan Court of Appeals: Selected Opinion Summaries**

## **MISCELLANEOUS**

### **-- Statutory Interpretation**

***People v. Gregory Grinius Green***  
\_\_\_ Mich. App. \_\_\_ (#321823, 04-14-15)  
**PC: Owens, Markey, Servitto  
MICHAEL NICHOLS**

The Court of Appeals reversed and remanded the case to the trial court for further proceedings.

The Court reversed the trial court's order that the same vial of blood that was tested by the MSP lab be retested by the MSP using the same analyst. There is no basis in M.C.L. 257.625a for the retesting

of the blood sample and MCR 6.201 provides the trial court only with the authority to order that the defendant be given the opportunity to test the vial of blood.

## **ECONOMIC PENALTIES -- Costs**

***People v. Jason Thomas Juntikka***  
\_\_\_ Mich. App. \_\_\_ (#318300, 04-21-15)  
**PC: O'Connell, Fort Hood, Gadola  
SADO - JESSICA ZIMBELMAN**

The Court of Appeals vacated the portion of the court's order imposing the probation enhancement

fee and remanded for further proceedings. The trial court erred in imposing a \$100 probation enhancement fee to cover items such as “gloves so that the probation agents may test bodily fluids more safely.” The court concluded that M.C.L. 771.3(2)(d) does not independently authorize trial courts to impose any assessment and the probation enhancement fee was not statutorily authorized as a cost specifically incurred in the defendant’s case.

## **MISCELLANEOUS**

– Statutory Interpretation

## **POST-TRIAL MOTIONS AND APPEALS**

– Prosecutorial Appeal

*People v. Demond Earl Davis*

\_\_\_ Mich. App. \_\_\_ (#319436, 04-21-15)

**PC: Gleicher, Cavanagh, Fort Hood  
MAACS - GERALD FERRY**

The Court of Appeals reversed the trial court’s dismissal, without prejudice, of the charges against the defendant. The circuit court lacked statutory authority to dismiss the case over the prosecutor’s objection. An initial examination supported the defendant’s current incompetency but revealed that the defendant potentially could be rendered competent to stand trial within 15 months if treated. The defendant remained in jail because there were no vacancies at the psychiatric facility. The trial court determined that the delay in treatment made it impossible to have the defendant ready for trial within the statutory period and dismissed the charges. At the hearing, the court denied the prosecutor the opportunity to present additional evidence, ruling that competency is a “judicial decision” and would be made solely on the stipulated CFP report. While the report was admissible, it was not to the exclusion of other evidence. Absent a hearing at which the prosecutor could present evidence, the court improperly rendered any decision regarding the defendant’s continued incompetence. Neither statutory nor constitutional grounds supported dismissal of the charges based on delay. Ordering the defendant’s segregation in the jail or releasing the defendant to his family’s care on house arrest would have served the same purpose without violating the statutory provisions.

## **MISCELLANEOUS**

– Statutory Interpretation

## **COUNSEL – Ineffectiveness Of**

– Failure to Investigate and/or  
Present Defense

## **SENTENCING AND PUNISHMENT**

– Guidelines – Scoring

– Scoring of Prior Record Variables  
(PRVs) – PRV 7

*People v. Floyd Phillip Allen*

\_\_\_ Mich. App. \_\_\_ (#318560, 04-30-15)

**PC: Beckering, Borrello, Gleicher  
MAACS - JOHN UJLAKY**

The Court of Appeals affirmed the defendant’s conviction of failing to comply with SORA, but vacated his sentence and remanded for resentencing. Defense counsel’s failure to file a witness list fell below an objective standard of reasonableness. After the prosecutor’s request for discovery, the trial court issued a pretrial order, signed by defense counsel, which required the defendant to produce a witness list within 14 days of trial. Failure to follow the trial court’s order cannot be considered sound trial strategy and such a failure clearly fell below an objective standard of reasonableness. However, the defendant has failed to establish prejudice from this failure. There was substantial evidence supporting the charge of failing to register.

The trial court erred as a matter of law by sentencing the defendant to a maximum term that was 1-1/2 times the longest term of 7 years proscribed in M.C.L. 28.729(1)(b). The plain language of the statute clearly directs a court to enhance a sentence by increasing the longest term proscribed for “a first conviction” of the subsequent offense, not a second conviction.

Additionally, the trial court erred, as the prosecution conceded, in scoring PRV 7 at 10 points because the defendant was not convicted of multiple felonies or convicted of a subsequent felony. M.C.L. 777.57(1)(b). The defendant is entitled to resentencing.

## **Michigan Court of Appeals:**

## **Selected Unpublished Opinion Summaries**

### **ECONOMIC PENALTIES – Costs**

*People v. D’Sean Hatten*

Unpublished opinion of 03-05-15

(Court of Appeals #319417)

**PC: Riordan, Murphy, Boonstra  
NEIL LEITHAUSER**

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Affirmed the defendant's convictions and sentences, but remanded to the trial court for further proceedings to establish a factual basis for the \$600 in costs imposed, or to alter that figure, if appropriate. The trial court failed to explain its reasons for imposing court costs under *People v. Sanders*, 296 Mich. App. 710 (2012), overruled by *People v. Cunningham*, 496 Mich. 145 (2014). The imposition of court costs requires an assessment of its factual basis.

## **SENTENCING AND PUNISHMENT**

### **– Corrections**

***People v. Dakota Lynn Shananaquet***

**Unpublished opinion of 03-17-15**

**(Court of Appeals #318251;**

**318252; 318378; 320342)**

**PC: Saad, Owens, Kelly**

**MARIAN KROMKOWSKI**

Affirmed the defendant's convictions and remanded to the trial court for the sole purpose of correcting a clerical error in the defendant's sentencing documents.

Remanded to correct the judgment of sentence for the defendant's convictions pursuant to M.C.L. 750.356a and M.C.L. 750.157p, so that the judgment is consistent with the amended information filed by the prosecution with regard to those charges.

## **SENTENCING AND PUNISHMENT**

### **– Resentencing**

***People v. Grady Hudson***

**Unpublished opinion of 03-17-15**

**(Court of Appeals #318732)**

**PC: Donofrio, Riordan, Gadola**

**MICHAEL McCARTHY**

Vacated and remanded for reinstatement of the defendant's original sentence.

The defendant appealed from a sentence imposed following the grant of a motion for resentencing. The trial court erred in both removing the defendant's habitual offender designation from the judgment of sentence and resentencing the defendant. The Court of Appeal's original decision regarding the validity of the defendant's sentence constrained both the trial court and this Court from revisiting the issue. This Court's prior decision affirming the validity of the defendant's sentence was not clearly erroneous and did not create an injustice. Thus, the law of the case doctrine precluded further review of the defendant's original sentence and the lower court erred in resentencing the defendant.

## **JURY – Conduct of Voir Dire**

***People v. Marvin Keith Banbury***

**Unpublished opinion of 03-17-15**

**(Court of Appeals #319058)**

**PC: Gleicher, Cavanagh, Fort Hood**

**MICHAEL McCARTHY**

Reversed and remanded for a new trial.

The trial court plainly erred and committed reversible error when it administered the incorrect jury oath prior to trial. The oath administered did not require the jurors to swear or affirm that they would justly decide the questions submitted to them or render a true verdict based on the evidence introduced and in accordance with the instruction of the court. MCR 2.511(H)(1). Additionally, the oath did not comply with M.C.L. 768.14. This affected the defendant's substantial right to be tried by an impartial jury, and the error affected the fairness, integrity, and public reputation of the proceedings. Retrial is permitted as the jury was not properly sworn and jeopardy did not attach.

## **PROBATION – Revocation– Hearing**

### **– Right to Present and**

### **Cross-Examine Witnesses**

***People v. Lenard James***

**Unpublished opinion of 04-28-15**

**(Court of Appeals #319661)**

**PC: Beckering, Cavanagh, Saad**

**SADO - JEANICE DAGHER-MARGOSIAN**

Vacated the sentence and remanded for a proper probation violation hearing and any other appropriate proceedings. The defendant was not afforded the minimal due process protections provided by MCR 6.445(E)(1). None of the witnesses were sworn, nor was he given the opportunity to cross-examine any of the witnesses against him. The proceedings appeared to begin as an arraignment, and ended with the trial court imposing a sentence, without finding a violation of probation or an express finding that the defendant's probation should be revoked. The court noted that the defense counsel indicated that the hearing was an arraignment only, which the DOC officer agreed with and corrected the court's assertion that the defendant had been arraigned on the alleged violations. After the testimony, the trial court, with no forewarning, sentenced the defendant on the original conviction. The trial court abused its discretion by revoking the defendant's probation. It also failed to comply with the minimal procedures set forth in MCR 6.445(E)(1). The court also noted that the sentence imposed was a departure from the guidelines and the court gave no explanation for its departure. The failure to justify the departure would represent an independent basis for reversing the defendant's sentence in this case.

# Training Calendar

Complete details on the training events listed below appear at page 13 of this month's newsletter.

|                      |                                         |                                                                |
|----------------------|-----------------------------------------|----------------------------------------------------------------|
| June 3, 2015         | Motion Call Wednesday                   | ICBA - Lansing, MI                                             |
| June 6, 2015         | Mental Illness and Incarceration        | SBM - Lansing, MI                                              |
| June 16, 2015        | Probable Cause Conference               | OBCA - Bloomfield Hills, MI                                    |
| June 17-19, 2015     | White Collar Conference                 | NACDL - San Diego, CA                                          |
| July 11, 2015        | CDAM Summer Training                    | CDAM - Gaylord, MI                                             |
| June 22, 2015        | Drunk Driving/Field Sobriety Training   | ICBA - Mount Clemens, MI                                       |
| July 17, 2015        | Sentencing Law Update                   | MCOLES-WMUTCLS-CDRC<br>Lansing, Grand Rapids, Auburn Hills, MI |
| July 21, 2015        | Ins and Outs of Criminal Appeals        | OBCA - Bloomfield Hills, MI                                    |
| July 23-26, 2015     | High Altitude Trial Skills              | NACDL - Denver, CO                                             |
| July 25, 2015        | CDAM Train the Trainer                  | CDAM - Lansing, MI                                             |
| July 31, 2015        | Advanced Topics in Pleas and Sentencing | MCOLES-WMUTCLS-CDRC<br>Lansing, Grand Rapids, Auburn Hills, MI |
| August 10-15, 2015   | CDAM Trial College                      | CDAM - Lansing, MI                                             |
| September 15, 2015   | Know Your Judge: Circuit Court          | OBCA - Bloomfield Hills, MI                                    |
| October 20, 2015     | Veteran's Court                         | OBCA - Bloomfield Hills, MI                                    |
| November 12-14, 2015 | CDAM Fall Conference                    | CDAM - Traverse City, MI                                       |
| November 17, 2015    | Dealing with the Difficult Client       | OBCA - Bloomfield Hills, MI                                    |
| January 19, 2016     | Pre-Sentencing Investigative Report     | OBCA - Bloomfield Hills, MI                                    |
| February 16, 2016    | Role of Community Corrections           | OBCA - Bloomfield Hills, MI                                    |
| March 15, 2016       | Know Your Judge: District Court         | OBCA - Bloomfield Hills, MI                                    |

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