

Features

Marilena David-Martin.....	1
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Departments

From Other States.....	7
Online Brief Bank	6
Reports and Studies	4
Spotlight On: Marla R. McCowan.....	2
Surveillance News.....	5
Training Calendar.....	18
Training Events.....	10
Trial Court Successes.....	3

Appellate Courts

Michigan Court of Appeals	
Published Opinion Summaries.....	14
Unpublished Opinion Summaries.....	15
Michigan Supreme Court	
Leave Granted Summary	14
Order Summaries.....	13
United States Court of Appeals	
Opinion Summaries	12
United States Supreme Court	
Certiorari Granted Summary.....	11
Opinion Summaries	11

Marilena David-Martin is the New CDRC Manager

The State Appellate Defender Office is pleased to announce that Marilena David-Martin has been named the Manager of SADO's Criminal Defense Resource Center. Marilena is a dedicated appellate attorney at the State Appellate Defender Office. From 2009 to 2012, she launched and managed SADO's Crime Lab Unit, a federal grant funded unit tasked with



analyzing the impact of potentially faulty Detroit Crime Lab evidence on criminal convictions following the shocking 2008 Detroit Crime Lab closure. The Crime Lab Unit was highly successful, obtaining new trials for five clients. As an Assistant Defender, Marilena has achieved outstanding results for her clients, including exceptional resentencing results where she successfully advocated for the immediate release of five clients from prison custody and one client from jail in 2014 alone. As Chair of SADO's Client and Public Outreach Committee, she launched "Family Outreach Night," a successful program aimed at helping families and friends of the incarcerated understand the appellate process and to navigate the Michigan Department of Corrections. Under her leadership, the Committee has also launched a "Re-Entry Project" and searchable re-entry service database that will help match reentering individuals with the resources and services they need to successfully transition back into society.

(continued)

Marilena is the 2014 recipient of the Regeana Myrick Outstanding Young Lawyer Award from the Young Lawyer's Section of the State Bar of Michigan, awarded for her overwhelming commitment to public service, exemplary service to the State Bar, and exceptional professional accomplishments, and the 2014 Justice for All award from the Criminal Defense Attorneys of Michigan, awarded for her contribution to the criminal defense community through her work on the Detroit Crime Lab project.

She has conducted trainings for the Criminal Defense Attorneys of Michigan and the Prisons and Corrections Section of the State Bar, and served on the Council of the Appellate Practice Section from 2011 to 2014 as a member of the section's Good

Deeds Committee. She is a member of the Michigan Appellate Bench Bar 2016 Planning Committee.

Marilena is also an active member of the community. She volunteers for the National Multiple Sclerosis Society and is the captain of an annual fundraising team that has raised over \$65,000 from 2009-2014, and counting. Marilena also regularly volunteers at the Ronald McDonald House of Detroit, and with various agencies that serve Detroit's homeless community, and with the Detroit Parade Company as a "Clown Wrangler" for America's Thanksgiving Parade. Marilena lives with her husband, Alessandro, in the City of Detroit. In her free time she can be found playing volleyball, hanging out with children who are not her own, watching baseball and bad movies with her husband, reading, and bike riding around the City.

Spotlight On: Marla R. McCowan



Please tell us something about your background in criminal defense, your time at SADO and as Manager of the Criminal Defense Resource Center (CDRC).

(Marla, left, at the 2015 spring CDAM Conference ending one of her final training events for the CDRC).

After graduating from law school in 1997 I was hired as one of the *pro se* law clerks in the U.S. District Court for the Eastern District of Michigan. Near the end of my one year clerkship, a friend of mine forwarded an advertisement for a position as an Assistant Defender at SADO. I had never practiced law before and did not know anything about SADO, other than knowing that some of the best habeas petitions I saw as a clerk were written by SADO lawyers. My supervisor suggested that I apply, so I did. I was accepted in June of 1998 after the first interview by way of a very fun conversation with (then) Director James Neuhard. Budget cuts in 1999 required me to take the status as a Special Assistant Defender, and I was grateful that my boss Norris Thomas let me stay involved in SADO cases as much as my time would allow.

In that first year I learned as much as possible from some of the best criminal defense attorneys in Michigan. Neil Fink let me work on cases with him, including second charring trials, which was not only

the greatest legal education anyone could dream of but it was also beyond inspiring. I also worked with Brian Legghio and I can't say enough nice things about him. Brian taught me the most important principle that a criminal defense attorney needs to know: you can outwork a county prosecutor. He taught by example.

When I returned to SADO full time I never forgot the work ethic that was modeled for me, and it never occurred to me that cases should be treated differently whether the client was paying (or not). I was lucky enough to be surrounded by the smartest and hardest working criminal defense attorneys at SADO, and they were always generous with their time. While I learned from many, I owe much of what I learned as an Assistant Defender to Susan Meinberg. She has had so much patience with me over the years.

I used my experience from federal court to start contributing to the *Defender Habeas Book* in 2008. By 2011 I was interested in learning more about SADO's Criminal Defense Resource Center, and Director Dawn Van Hoek hired me to be the Manager of that unit. I am extremely thankful to Dawn for the opportunity to lead this amazing department that she created years ago. Once again I found myself surrounded by an amazingly talented group of people every day: Bill Moy, Eric Buchanan and Heather Waara. They work tirelessly to make life easier for criminal defense attorneys around Michigan. They are the best. I've also gotten to work with many great attorneys outside of the office on a regular basis, and I give the highest praise to the

Frank Murphy Research Group: Kelly McDoniel, Neil Leithauser, Bill Schooley and Mike Skinner. All of them made my job as CDRC Manager a really fantastic experience.

You are soon to embark on another important road in the area of indigent criminal defense. Please tell us about that.

Jonathan Sacks is the first Executive Director of the new Michigan Indigent Defense Commission. He hired me to be the Director of Training, Outreach and Support, effective March 30th. I have been fortunate enough at SADO and CDRC to have gained experience over the last few years in training criminal defense attorneys. I've done this by way of managing training grants awarded to SADO, working with the Criminal Defense Attorneys of Michigan, and learning specifically about training public defenders from Jon Rapping of Gideon's Promise based in Atlanta, Georgia. I will be using my experience and skills as a public defender and trainer to help inform standards for indigent defense. We will also provide training, support and resources to attorneys taking appointed cases at the trial level around the state. I have been a public defender at the appellate level for more than 16 years. My new position is a natural extension of a good amount of the work I have been doing for a long time, and builds upon the experience I've gained at SADO and CDRC in public defense, training and support.

What is the best advice you can offer new attorneys?

The most important thing that I ever learned and that I tell new attorneys is: listen to your clients. Clients do not always use precise legal terminology but they always know when something was unfair, incorrect or wrong. Clients can also feel frustrated, anxious and overwhelmed when they meet with you while in custody and they often think of additional things to tell you after your meeting. If you are going to ask your client to write things down to give to you for your review, take time to read it and put yourself in their place. Norris used to say that there are two types of legal issues: "gut" issues and "legal recognition" issues. "Gut" issues are things that just seem wrong (bad lineup, no attorney at a hearing, prosecutor used to be client's defense counsel, etc.). Legal recognition issues tend to be more technical in nature (evidentiary rules, scoring sentencing guidelines, etc.). Clients are a great source of information about "gut" issues. Really listen to their story and think about how you can help.

Farewell?

Though I am excited for my new opportunity with the Michigan Indigent Defense Commission, I am sad to leave SADO. I've had a wonderful 16 years here, and I am grateful for all that I've learned from my colleagues and clients. I plan to continue contributing to the *Criminal Defense Newsletter* and to stay active in this defense community that I so passionately cherish. Wish me luck!

***by Neil Leithauser
Associate Editor***

Trial Court Successes: February, 2015

We continue our series on trial court victories that are reported in the Forum, SADO's online community for criminal defense attorneys.

Michael J. Nichols won a not guilty jury verdict for his client in a moving violation causing death case in the 12th Judicial (Jackson) District Court.

Mitchell T. Foster secured a resentencing – following a sentencing variable correction for his client in the 51st Judicial (Mason County) Circuit Court. The new sentence was a reduction from a three-year minimum to a two-year minimum, and the client was then eligible for Boot Camp.

John W. Ujlaky obtained a stipulated agreement from the prosecutor, in response to the

defendant's post-conviction motion, for an additional 453 days of sentence credit and for vacating the lifetime monitoring conditioning. The agreement was approved and ordered by 54th Judicial (Tuscola County) Circuit Court Judge Amy Grace Gierhart.

Jennifer J. France obtained a dismissal of both charged counts of operating under the influence of a controlled substance prior to the scheduled day of trial.

Suzanna Kostovski won not guilty verdicts in a case in the 3rd Judicial (Wayne County) Circuit Court charging first-degree murder, assault with intent to murder, and felony firearm.

***by Neil Leithauser
Associate Editor***

Reports and Studies

False Memories May Be Easily Created

A study by Julia Shaw, of the University of Bedfordshire in the UK, and Stephen Porter, of the University of British Columbia, published in Psychological Science, suggests that the creation of false memories in adults may be easily accomplished. The study, "Constructing Rich False Memories of Committing Crime," tested 60 university students who were subjected to three 40-minute interviews over several weeks.

The students were presented with stories about two events the students allegedly experienced between the ages of 11 and 14. Only one of the events, however, actually occurred. The researchers supported the false story with some accurate factual details, which the researchers obtained from cooperating family members. Thirty of the students were given a story about a prior criminal event, and other students were given a story about a prior emotional event (such as a personal injury, or loss of a sum of money).

Of the students told they had committed a prior crime, 71% were found to have developed a false memory. Of the students being told of a prior emotional event, 76.67% were found to have formulated a false memory.

The researchers concluded that by incorporating some true details into the false story, the student received enough familiarity with the 'event' to make it seem plausible. "In such circumstances, inherently fallible and reconstructive memory processes can quite readily generate false recollections with astonishing realism," Ms. Shaw said, and, "we had some participants recalling incredibly vivid details and re-enacting crimes they never committed."

Ms. Shaw said that, "All participants need to generate a richly detailed false memory is 3 hours in a friendly environment, where the interviewer introduces a few wrong details and uses poor memory retrieval techniques." She also was quoted as saying that by "empirically demonstrating the harm 'bad' interview techniques – those which are known to cause false memories – can cause, we can more readily convince interviewers to avoid them and to use 'good' techniques instead."

Source: "People can be convinced they committed a crime that never happened," [sciencedaily.com](http://www.sciencedaily.com), January 15, 2015: <http://www.sciencedaily.com/releases/2015/01/150115102835.htm>

Study Shows Memory Accuracy Increases When Witnesses Close Eyes

Recent research at Surrey University in the UK suggests that if a witness closes her or his eyes when recalling an event, then accuracy of the recall is increased by 23%. Some UK police manuals already suggest asking witnesses to close their eyes. Also, if there is a rapport built with the witness, then the results are further optimized. Experimental psychologist Robert Nash was quoted as saying, "Although closing your eyes to remember seems to work whether or not rapport has been built beforehand, our results show that building rapport makes witnesses more at ease with closing their eyes. That in itself is vital if we are to encourage witnesses to use this helpful technique during interviews."

Source: "Covering eyes can help witnesses recall crimes, study finds," [theguardian.com](http://www.theguardian.com), January 15, 2015: <http://www.theguardian.com/law/2015/jan/16/covering-eyes-help-witnesses-recall-crimes>

New Study Show Recidivism Low for Violent Offenders

A December 1, 2014 study by the Citizens Alliance on Prisons and Public Spending (CAPPS), "Paroling people who committed serious crimes: What is the actual risk?" found that for greater than 99.1% of the homicide (murder and manslaughter) and sex-crime offenders paroled between 2007 through the first quarter of 2010, did not return to prison for a similar crime within three years of parole. For example, of 820 paroled homicide offenders, two individuals (0.2 percent) returned to prison for a new homicide. Of 4,109 paroled sex offenders, 32 individuals (0.8 percent) returned to prison for a new similar crime. In contrast, robbery offenders had a higher rate of return to prison at 4.4% (or 179 of 4,110 paroled during that time-frame).

The findings in the recent study echo the findings in an earlier 2009 CAPPS study, "Denying Parole at First Eligibility: How Much Public Safety does it Actually Buy?" In that study, which examined recidivism of parolees over a 14-year period from 1986 to 1999, the data showed that of 6,673 sex offenders paroled, 204 (3.1%) returned to prison for a new sex crime, and, of 2,448 homicide offenders paroled, 14 (0.5%) returned to prison for a new homicide.

The 2014 study asked, since research has shown that “there is no correlation between keeping people incarcerated longer and their likelihood of reoffending ... Why, then, do we deny release to thousands of people who have served their minimum sentences? What are the costs and benefits?”

The study concluded that it costs about \$20 million for each 1,000 prisoners to be incarcerated, and that we cannot afford to keep parole-eligible individuals locked up that are not a risk to public safety; also, funds are diverted to maintaining incarceration from areas where the funds could be used to reduce victimization and to prepare the offenders for release. The study acknowledged that while about 95% of all parolees do not reoffend, 5% do. The study also concluded that parole determination should not be based merely upon the type of offense, but should utilize more individualized and evidence-based criteria.

Sources: http://www.mlive.com/lansing-news/index.ssf/2014/12/very_few_violent_offenders_on.html; <http://www.capps-mi.org/wp-content/uploads/2014/12/CAPPS-Paroling-people-who-committed-serious-crimes-11-23-14.pdf>

Study Examines Body-Shape Measurements Used for Identification

A biometric technique developed at the University of Adelaide that uses body-

measurements, and called “body recognition,” is said, by the developers, to be as accurate for identification purposes as facial-recognition and fingerprint-analysis.

The technique, developed by a research team examining measurements of 4,000 U.S. armed forces personnel, uses eight facial and eight body measurements – including overall height, and distance from hip-bones to feet, wrist to elbow, jaw-line, and chest and pelvic width – to obtain an identification by narrowing the probability of a duplicate to a claimed certainty rate of one in one quintillion.

The technique, which is accurate regardless of the clothing worn by the suspect, the developers say, has application in criminal cases, which “usually involve a deliberate attempt to cover the face.”

Source: Victoria Woollaston, “Forget fingerprints, crimes could be solved by BODY SHAPE: Just 8 measurements are needed to identify criminals – even through clothes,” *dailymail.co.uk*, January 19, 2015: <http://www.dailymail.co.uk/sciencetech/article-2916665/Forget-fingerprints-crimes-solved-BODY-SHAPE-Just-8-measurements-needed-identify-criminals-clothes.html>

by Neil Leithauser
Associate Editor

Surveillance News

FBI Says Warrants Not Needed For Cell-Tower Simulators Used In Public Areas

A recent article describing law enforcement use of “Stingrays,” or cell-site simulators, or ISMI catchers -- that can capture cell-phone calls and texts and locations and identities of cell-phone users -- reported on a letter from Senate Judiciary Committee Chairman Patrick Leahy and Senator Chuck Grassley to the Attorney General, expressing their concerns in response to a statement from the FBI that warrants were not necessary for use of the device in public areas. That is, the FBI believes there is an exception to the warrant requirement where “the technology is used in public places or other locations at which the FBI deems there is no reasonable expectation of privacy.”

Source: <http://arstechnica.com/tech-policy/2015/01/fbi-says-search-warrants-not-needed-to-use-stingrays-in-public-places/>

Hand-Held Radar Sensors Used Without Warrants

An article in *USAToday* described law enforcement use of Range-R units, which are hand-held sensors manufactured by L-3 Communications. The \$6,000.00 devices have apparently been in use for several years (article notes that the U.S. Marshall’s service has already spent \$180,000.00), although the use has been largely unknown. The device can detect movement – even as slight as breathing through walls, and to a distance of about 50 feet.

The article referenced a United States 10th Circuit Court of Appeals decision [*United States v. Denson*, decided December 30, 2014 (Docket No. 13-3329)], as being one of the first to mention use of the technology. In *Denson*, the Marshalls had an arrest warrant for a parole violator, but had no search

warrant. The Range-R was utilized without a warrant to verify that someone was present inside before the officers ever entered the home,. The Court of Appeals upheld the use of the device, partly because there were other indicators that signaled someone was present inside, and due to a lack of detailed information about the device's capabilities. The court did recognize the potential dangers: "It's obvious to us and everyone else in this case that the government's warrantless use of such a powerful tool to search inside homes poses grave Fourth Amendment questions ... We don't doubt for a moment that the rise of increasingly sophisticated and invasive search technologies will invite us to venture down this way again - and soon ... We don't

doubt that the use of such devices could well wind up undoing the justification for a good number of protective sweeps in the future. But we lack enough information to reach that result in this case."

Sources: Brad Heath, "new police radars can 'see' inside homes," [USAtoday.com](http://www.usatoday.com/story/news/2015/01/19/police-radar-see-through-walls/22007615/), January 20, 2015: <http://www.usatoday.com/story/news/2015/01/19/police-radar-see-through-walls/22007615/>; <http://www.range-r.com/FAQ/index.htm>

*by Neil Leithauser
Associate Editor*

Online Brief Bank

Subscribers to the Criminal Defense Resource Center's online resources, found at www.sado.org, have access to more than 1,800 appellate pleadings filed by SADO Attorneys in the last five years. The brief bank is updated regularly and is open to anyone who wants to subscribe to online access. On our site, briefs are searchable by keyword, results can be organized by relevance or date, and the pleadings can be filtered by court of filing. Below is a sample of some of the questions presented in briefs added to our brief bank in the last few weeks:

BB 243683: THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS BY ALLOWING THE PROSECUTOR TO PRESENT EVIDENCE OF APPELLANT'S INVOLVEMENT IN FOUR OTHER HOME INVASIONS, WHERE THE SHEER NUMBER OF OTHER ACTS RESULTED IN UNFAIR PREJUDICE; AND BY DENYING A MISTRIAL WHERE A PROSECUTION WITNESS TESTIFIED TO MEETING APPELLANT "WHEN HE GOT OUT OF PRISON, LIKE, A COUPLE SUMMERS AGO."

BB 244193: THE TRIAL JUDGE ERRONEOUSLY SCORED OV 13 AT 25 POINTS WHERE OV 13 REQUIRES PROOF OF A CONTINUING PATTERN OF FELONIOUS CRIMINAL ACTIVITY, AND DEFENDANT HAD NO PRIOR SCORABLE FELONY CONVICTIONS WITHIN FIVE YEARS OF THE CURRENT OFFENSES, AND ALL THREE CURRENT OFFENSES WERE COMMITTED AGAINST A SINGLE COMPLAINANT IN ONE CRIMINAL EPISODE.

BB 244253: WHERE DEFENDANT WAS CHARGED UNDER BOTH MCL 750.425, A SPECIFIC STATUTE THAT FIT THE PARTICULAR FACTS OF THE CASE, AND THE COMBINATION OF MCL 750.422 AND 750.157, THE PROSECUTION ABUSED ITS CHARGING DISCRETION IN VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS.

BB 244253: DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND IMPARTIAL JURY US CONST, AM VI. CONST 1963, ART 1, §20 WHERE HIS CO-DEFENDANT WAS SHACKLED IN FULL VIEW OF THE JURY AND DEFENDANT'S ATTORNEY'S MOTION TO SEVER THE TRIALS WAS DENIED.

BB 244303: DEFENDANT WAS DEPRIVED OF HIS RIGHTS TO BE PRESENT AND TO HAVE COUNSEL PRESENT DURING ALL STAGES OF TRIAL WHEN THEY WERE NOT GIVEN NOTICE OF AND WERE NOT PRESENT DURING THE HEARING ON THE MATERIAL WITNESS WARRANT.

BB 244303: DEFENDANT IS ENTITLED TO RESENTENCING WHERE OFFENSE VARIABLE 19 WAS ERRONEOUSLY SCORED, RESULTING IN AN IMPROPERLY INFLATED GUIDELINES RANGE. DEFENDANT'S STATE AND FEDERAL DUE PROCESS RIGHTS TO BE SENTENCED ON ACCURATE INFORMATION WERE DENIED.

BB 244930: THE TRIAL COURT IS PERMITTED TO GRANT CREDIT FOR TIME SERVED IN PRISON IN ILLINOIS. DEFENDANT SHOULD HAVE BEEN GIVEN MORE CREDIT FOR TIME SERVED.

BB 244930: THE JUDGMENT OF SENTENCE SHOULD BE AMENDED TO DELETE THE \$25,000 BOND FORFEITURE FEE BECAUSE THE BOND WAS NOT FORFEITED.

From Other States

Utah: Bad Stop Requires Suppression of Evidence Found During Arrest on Outstanding Warrant

The Utah Supreme Court held that when police officers discover outstanding arrest warrants for suspects that they have unconstitutionally detained, the admissibility of evidence found during searches incident to the arrests is governed by the inevitable discovery exception to the Fourth Amendment's exclusionary rule rather than the taint analysis that other courts apply in this situation. The court stated that a strong indication that the US Supreme Court did not intend for the attenuation analysis to apply in the warrant scenario is the existence of a different doctrine that applies in cases involving parallel lines of investigation: the inevitable discovery exception. *State v. Strieff*, 2015 BL 12219 (Utah, No. 20120854, 01-16-15); full text at http://www.bloomberglaw.com/public/document/State_of_Utah_Respondent_v_Edward_Joseph_Strieff_Jr_Petitioner_No

Tenth Circuit: Defendant Didn't Waive Batson Rebuttal by Waiting Until After Trial to Mount Attack

The Tenth Circuit held that a criminal defendant did not forfeit his right to rebut the government's purported nondiscriminatory reasons for striking a potential juror by waiting until after he was convicted and had filed a motion for a new trial. Although the delay did not require forfeiture, it was not without consequences. The court stated that it would limit its inquiry in these tardy *Batson* attacks to the information that was before the district court during voir dire. *United States v. Vann*, 2015 BL 11034, (10th Cir., No. 13-2190, 01-16-15); full text at http://www.bloomberglaw.com/public/document/United_States_v_Vann_No_132190_2015_BL_11034_10th_Cir_Jan_16_2015

First Circuit: Entrapment Ruling Brackets Circumstances in Which Solicitation Becomes 'Inducement'

The First Circuit held that a bribery sting operation did not merit an entrapment jury instruction. The court held that in analyzing whether there was improper inducement, the

method of purportedly inducing a defendant is more important than the number of solicitations. *United States v. Gonzalez-Perez*, 2015 BL 18052 (1st Cir., No. 12-1743, 01-23-15); full text at http://www.bloomberglaw.com/public/document/United_States_v_GonzalezPerez_No_121743_2015_BL_18052_1st_Cir_Jan

Ninth Circuit: The Ninth Circuit Joins the Majority in Split on Whether Deadline on Court is Mandatory

The Ninth Circuit held that a federal court deciding whether to allow a prisoner to file a second or successive petition can still allow the prisoner to proceed even if the court has missed the 30-day statutory deadline for granting or denying the motion. The court also held that the US Supreme Court's recent narrowing of qualifying predicates under the Armed Career Criminal Act does not justify a second or successive petition to challenge an ACCA sentence. *Ezell v. United States*, 2015 BL 16257 (9th Cir., No. 14-71696, 01-23-15); full text at http://www.bloomberglaw.com/public/document/Ezell_v_United_States_No_1471696_2015_BL_16257_9th_Cir_Jan_23_2015

Georgia: Homeowner Consent Didn't Extend to Locked Room

The Georgia Supreme Court held that the police could not rely on the doctrine of third-party consent to justify breaking into a suspect's locked bedroom where the homeowner did not have a key to the room. The court said that the person giving consent has to have joint access or control of the area that the police want to inspect. *State v. Colvard*, 2015 BL 12173 (Ga. No. S14A1347, 01-20-15); full text at http://www.bloomberglaw.com/public/document/State_v_Colvard_No_S14A1347_2015_BL_12173_Ga_Jan_20_2015_Court_Op

Eighth Circuit: AEDPA Finality Isn't Defined by Intricate State Rules

The Eighth Circuit held that the one-year deadline for filing a federal habeas petition does not start to run until the 30-day period for filing a direct appeal has expired, even if the defendant was not entitled to appeal his conviction under state law

because of the terms of his guilty plea. *Camacho v. Hobbs*, 2015 BL 13595 (8th Cir., No. 13-3584, 01-21-15); full text at [http://www.bloomberglaw.com/public/document/Camacho v Hobbs No 133584 2015 BL 13595 8th Cir Jan 21 2015 Court](http://www.bloomberglaw.com/public/document/Camacho_v_Hobbs_No_133584_2015_BL_13595_8th_Cir_Jan_21_2015_Court)

Ninth Circuit: Freezing Trust Account Entitles Inmate to Notice

The Ninth Circuit held that due process principles described in *Mathews v. Eldridge*, 424 U.S. 319 (1976), entitled an inmate to notice that the Oregon prison system was freezing \$65,353.94 in his prison trust account to pay the costs of his incarceration. The inmate had received a large settlement in a lawsuit against a drug manufacturer. *Shinault v. Hawks*, 2015 BL 15281, (9th Cir., No. 13-35290, 01-22-15); full text at [http://www.bloomberglaw.com/public/document/Shinault v Hawks No 1335290 2015 BL 15281 9th Cir Jan 22 2015 Court](http://www.bloomberglaw.com/public/document/Shinault_v_Hawks_No_1335290_2015_BL_15281_9th_Cir_Jan_22_2015_Court)

Delaware: Reverse-Batson Error Requires New Trial

The Delaware Supreme Court held that a judge's determination that an African American defendant did not engage in racial discrimination by exercising his first 14 peremptory strikes against white jurors undermined the judge's determination that the 15th strike against a white juror was discriminatory. The proper remedy for the judge's erroneous denial of the defendant's peremptory strike was a new trial. *McCoy v. State*, 2015 BL 13746 (Del., No. 558 2012, 01-20-15); full text at [http://www.bloomberglaw.com/public/document/McCoy v State No 558 2015 BL 13746 Del Jan 20 2015 Court Opinion](http://www.bloomberglaw.com/public/document/McCoy_v_State_No_558_2015_BL_13746_Del_Jan_20_2015_Court_Opinion)

Wisconsin: Erroneous Denial of Substitute Judge Isn't Harmless

The Wisconsin Supreme Court held that a violation of a defendant's state statutory right to a substitute trial judge is not subject to harmless-error analysis, which would nullify the defendant's statutory right to substitution of the judge. *State v. Harrison*, (Wis., No. 2013AP298-CR, 01-22-15); full text at [http://www.bloomberglaw.com/public/document/State v Harrison 2015 WI 5 Court Opinion](http://www.bloomberglaw.com/public/document/State_v_Harrison_2015_WI_5_Court_Opinion)

New Hampshire: Lone Officer Shouldn't Have Frisked Passenger

The New Hampshire Supreme Court held that a state trooper lacked sufficient reason to frisk the passenger of a car where the trooper stopped the car after observing the driver litter and subsequently seized the butt of a marijuana cigarette from the driver. The trooper's reasons of being outnumbered

by two motorists, the lack of eye contact by the passenger, and her lying that she had not been drinking in the car did not make it reasonable for the trooper to believe that the passenger was armed and dangerous. *State v. Broadus*, 2015 BL 14866, (N.H., No. 2013-757, 01-22-15); full text at [http://www.bloomberglaw.com/public/document/State v Broadus No 2013757 2015 BL 14866 NH Jan 22 2015 Court Opi](http://www.bloomberglaw.com/public/document/State_v_Broadus_No_2013757_2015_BL_14866_NH_Jan_22_2015_Court_Opinion)

Nevada: Discovery of Warrant Won't Purge Evidence of Taint of Bad Stop

The Nevada Supreme Court held that a police officer's detention of a pedestrian to run a warrants check after the suspicion underlying the stop had dissipated violated the Fourth Amendment and required suppression of the evidence (handgun) that the officer found during a later search incident to the arrest on the warrant. The court chose to limit its ruling to stops of pedestrians. *Torres v. State*, 2015 BL 21390, (Nev., No. 61946, 01-29-15); full text at [http://www.bloomberglaw.com/public/document/Torres v State No 61946 2015 BL 21390 Nev Jan 20 15 Court Opini](http://www.bloomberglaw.com/public/document/Torres_v_State_No_61946_2015_BL_21390_Nev_Jan_20_2015_Court_Opinion)

Massachusetts: Prosecution for Cyber Harassment Didn't Violate Free-Speech Rights

The Massachusetts Supreme Judicial Court held that a couple who emailed threats against their neighbor and lured others to join unwittingly in the campaign of harassment with a series of false online posts were not engaging in constitutionally protected speech. The First Amendment does not provide a defense to a criminal charge of harassment simply because the defendants used words to carry out their illegal plot. *Commonwealth v. Johnson*, (Mass., No. SJC-11660, 12-23-14); full text at [http://www.bloomberglaw.com/public/document/Commonwealth v Johnson 470 Mass 300 2014 Court Opinion](http://www.bloomberglaw.com/public/document/Commonwealth_v_Johnson_470_Mass_300_2014_Court_Opinion)

Sixth Circuit: Rejection of State Filing Over Unpaid Fees Won't Count as Failure to Exhaust Remedies

The Sixth Circuit held that a prisoner did not fail to exhaust his state remedies for purposes of having his federal habeas petition heard just because his direct state appeal was denied over a failure to pay overdue fees, taxes, costs and other expenses from a different matter. The court stated that access to the courts cannot be contingent on wealth. *Clifton v. Carpenter*, 2014 BL 363081, (6th Cir., No. 13-5402, 12-24-14); full text at [http://www.bloomberglaw.com/public/document/Clifton v Carpenter No 135402 2014 BL 363081 6th Cir Dec 24 2014](http://www.bloomberglaw.com/public/document/Clifton_v_Carpenter_No_135402_2014_BL_363081_6th_Cir_Dec_24_2014)

Pennsylvania: Witness Who Refuses to Talk Isn't Available for Cross

The Pennsylvania Supreme Court held that a defendant's Sixth Amendment confrontation rights were violated when the state was allowed to put into evidence a four-year-old sex abuse complainant's forensic interview after she took the stand on direct and refused to speak. The fact that the witness curled up in a fetal position and kept intoning that she wanted to go home made it clear that there was no realistic opportunity to engage in effective cross-examination. *In re N.C.*, 2014 BL 351562 (Pa., No. 5 WAP 2014, 12-15-14); full text at http://www.bloomberglaw.com/public/document/In_re_NC_No_5_WAP_2014_BL_351562_Pa_Dec_15_2014_Court_Opinio

Pennsylvania: State Has Burden of Going Forward at Suppression

The Pennsylvania Supreme Court held that a defendant charged with a possessory crime has "automatic standing" to file a motion to suppress, which means that he does not need to prove as a preliminary matter that he had a reasonable expectation of privacy before the prosecution's burden of production is triggered. The prosecution cannot simply sit on its hands and force the defendant to admit his connection to the contraband or the area searched. *Commonwealth v. Enimpah*, 2014 BL 364525 (Pa., No. 84 MAP 2013, 12-29-14); full text at http://www.bloomberglaw.com/public/document/Commonwealth_v_Enimpah_No_84_MAP_2013_2014_BL_364525_Pa_Dec_29_20

Seventh Circuit: Suspect Detained by Armed Officers During Search of Home Was in Custody

The Seventh Circuit held that a suspect who was handcuffed while more than a dozen armed officers executed a search warrant at his home and then was confined to a small bedroom for three hours of questioning was "in custody" for purposes of *Miranda v. Arizona*. Although the suspect was told that he wasn't under arrest and the interrogation wasn't antagonistic, these factors did not outweigh the coercive nature of the detention. The court stated that the overwhelming display of force inside a single-family home would have led a reasonable person to believe that he was not free to leave. *United States v. Borostowski*, 2014 BL 367921 (7th Cir. No. 13-3811, 12-31-14); full text at http://www.bloomberglaw.com/public/document/United_States_v_Borostowski_No_133811_2014_BL_367921_7th_Cir_Dec

Ninth Circuit: Ban on Proximity to All Sexy Materials Violates the First Amendment

The Ninth Circuit held that a term of supervised release that purports to bar a convicted child molester from possessing material depicting any sexually explicit conduct and from patronizing places where such depictions are available violates the former inmate's First Amendment right to access non-pornographic depictions of adults. The court found that the conditions deprived the defendant of more liberty than is reasonably necessary to accomplish the goals of supervised release. *United States v. Gnirke*, 2015 BL 99 (9th Cir., No. 13-50101, 01-02-15); full text at http://www.bloomberglaw.com/public/document/United_States_v_Gnirke_No_1350101_2015_BL_99_9th_Cir_Jan_02_2015

Fifth Circuit: Officers Making "Hot Pursuit" Entry May Still Have to Knock and Announce

The Fifth Circuit held that circumstances that make it reasonable for police officers to make a warrantless "hot pursuit" entry do not necessarily make it reasonable for the officers not to knock and announce their identity and purpose. It also held that any reasonable officer would know this and, accordingly, denied qualified immunity to a police officer and his chief in a federal civil rights lawsuit. *Trent v. Wade*, 2015 BL 4828, (5th Cir., No. 13-10960, 01-09-15); full text at http://www.bloomberglaw.com/public/document/Trent_v_Wade_No_1310960_2015_BL_4828_5th_Cir_Jan_09_2015_Court_Op

Massachusetts: Law Firm Can't be Ordered to Give up Client's Mobile Phone

The Massachusetts Supreme Judicial Court held that a law firm need not comply with a grand jury subpoena duces tecum directing it to surrender a client's mobile phone so prosecutors can mine the data in the phone for evidence of a crime being investigated by the grand jury. The court held that the phone was shielded from compulsory disclosure by the attorney-client privilege. *In re Grand Jury Investigation*, 2015 BL 4434 (Mass., No. SJC-11697, 01-12-15); full text at http://www.bloomberglaw.com/public/document/In_re_a_Grand_Jury_Investigation_No_SJC11697_2015_BL_4434_Mass_Ja

District of Columbia Circuit: Domestic Abuse Victim's Statement to Police Was Testimonial Where Emergency Was Over

The District of Columbia Court of Appeals held that a police officer's recital to a jury of what a non-

testifying domestic-assault complainant said to him after he arrived at her apartment and asked "What happened?" violated a defendant's Sixth Amendment right to confront adverse witnesses. The officer's open-ended questions signaled that the police were conducting a criminal investigation. *Andrade v. United States*, 2015 BL 3093 (D.C. Cir., No. 13-CM-224, 01-08-15); full text at [http://www.bloomberglaw.com/public/document/Andrade v United States No 13CM224 2015 BL 3093 DC Jan 08 2015 Co](http://www.bloomberglaw.com/public/document/Andrade_v_United_States_No_13CM224_2015_BL_3093_DC_Jan_08_2015_Co)

Eleventh Circuit: Prisoners Might be Entitled to Obtain Santeria Supplies

Training Events

The **National Association of Criminal Defense Lawyers (NACDL)**, will present its "8th Annual Forensic Science & the Law Conference: Making Sense of Science," April 16-19, 2015, at the Cosmopolitan Hotel in Las Vegas, Nevada. In the modern world, you need to know and understand the evolving forensic sciences in order to effectively represent your clients. Attend this one-of-a-kind CLE seminar and leave with a better understanding of a wide-array of forensic evidence to add to your arsenal of tools to win your next case. If it involves forensic evidence in a criminal case - we've got you covered at this fantastic CLE, with the biggest national names. For additional information and registration visit www.nacdl.org

The **National Association of Criminal Defense Lawyers (NACDL)**, will present its "6th Annual Post-Conviction Conference: Science, Cell Phones & Social Media - Finding & Using Evidence of Innocence in Post-Conviction Cases," Thursday, April 30, 2015, in Orlando, Florida. This year's program first addresses statistics for lawyers – a necessary foundation to both understand and challenge many varieties of forensic evidence. Experts will also provide state-of-the-art instruction on topics essential for today's post-conviction litigation: low level DNA mixture interpretation and cell phone tower evidence. In addition, our experienced faculty will focus on all aspects of finding and working with experts, including conducting direct and cross examination of experts in post-conviction hearings. The cutting edge instruction then extends to investigation, in a session on innovative strategies for finding evidence of innocence through social media and other online sources. This training is free of charge to approved participants. For more information and questions about eligibility to attend, contact NACDL Resource

From Unapproved Sources

The Eleventh Circuit ruled that an inmate may go forward with a Religious Freedom Restoration Act lawsuit alleging that prison officials violated his right to religious expression when they blocked him from receiving Santeria beads, necklaces, and cowrie shells that have been ceremonially soaked in animal blood. *Davila v. Gladden*, 2015 BL 4403, (11th Cir., No. 13-10739, 01-09-15); full text at [http://www.bloomberglaw.com/public/document/Davila v Gladden No 1310739 2015 BL 4403 11th Cir Jan 09 2015 Cou](http://www.bloomberglaw.com/public/document/Davila_v_Gladden_No_1310739_2015_BL_4403_11th_Cir_Jan_09_2015_Cou)

Counsel Vanessa Antoun at (202) 465-7663 or vantoun@nacdl.org

The **National Association of Criminal Defense Lawyers (NACDL)** and the **New York State Association of Criminal Defense Lawyers (NYSACDL)**, will present its "1-day Conference on Criminal Conspiracy," May 15, 2015, at the Millennium Hilton Hotel in New York, New York. The program will introduce the major evidentiary, elemental, and constitutional challenges that criminal defense attorneys face when their clients are charged with conspiracy and provide you with arguments and sources to use in tackling these difficult cases. For additional information and registration visit www.nacdl.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

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. Additional information and registration will be forthcoming.

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

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 <http://www.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: Select Certiorari Granted Summary

CONSTITUTIONAL RIGHTS

-- Cruel and/or Unusual Punishment

Glossip v. Gross
cert grt'd ___ U.S. ___;
___ S.Ct. ___; ___ L.Ed.2d. ___
(#14-6244, 01-23-15)

The United States Supreme Court granted certiorari as to whether: (1) it is constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug

has no pain relieving properties and cannot reliably produce deep, coma-like unconsciousness, and (b) it is undisputed that there is a substantially, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious; (2) the *Baze*-plurality stay standard applies when states are not using a protocol substantially similar to the one that the Supreme Court considered in *Baze*; and (3) a prisoner must establish the availability of an alternate drug formula even if the state's lethal-injection protocol, as properly administered, will violate the Eighth Amendment.

U.S. Supreme Court: Select Opinion Summaries

MISCELLANEOUS

-- Statutory Interpretation

Holt v. Hobbs
___ U.S. ___; 135 S.Ct. 853; ___ L.Ed.2d. ___
(#13-6827, 01-20-15)

The United States Supreme Court reversed the judgment of the Eighth Circuit and remanded the case for further proceedings.

In this RLUIPA case, the petitioner is a devout Muslim inmate who wanted to grow a beard while incarcerated in Arkansas. The Arkansas Department of Corrections prohibits its prisoners from growing beards based on prison safety. The Supreme Court held that the Department's grooming

policy: (1) substantially burdened the prisoner's exercise of religion, (2) did not further the Department's compelling interest in preventing prisoners from hiding contraband, (3) was not the least restrictive means of preventing prisoners from hiding contraband, (4) was not the least restrictive means of preventing prisoners from disguising their identities, and (5) was underinclusive with respect to security risks.

COUNSEL -- Choice/Removal/Substitution

Christeson v. Roper
___ U.S. ___; 135 S.Ct. 891; ___ L.Ed.2d. ___
(#14-6873, 01-20-15)

The Supreme Court held that the district court abused its discretion in denying the petitioner's

second request for substitution of federally appointed counsel under the “interests of justice” standard. Reversed the judgment of the Eighth Circuit, and remanded the case for further proceedings.

The petitioner’s first federal habeas petition was dismissed as untimely. Because his appointed attorneys – who had missed the deadline – could not be expected to argue that he was entitled to the equitable tolling of the statute of limitations because of their conflict of interest, the petitioner requested

substitute counsel who would not be laboring under a conflict of interest. The district court denied the motion and the Eighth Circuit affirmed. In doing so, they contravened the Court’s decision in *Martel v. Clair*, 565 U.S. ____ (2012). Petitioner’s first attorneys acknowledged the nature of their conflict, which were contrary to their client’s interest and manifestly served their own professional and reputational interest. *Clair* makes clear that a conflict of this sort is ground for substitution.

U.S. Court of Appeals: Select Sixth Circuit Opinion Summaries

EVIDENCE – Proof of Other Crimes (Similar Acts) – To Show Motive, Intent, Etc.

***United States v. Samuel Richardson*
____ F.3d ____
(#13-2287, 02-06-15)
Guy, CLAY, White**

The Sixth Circuit held that the district court erred in admitting evidence of the defendant’s 1998 conviction under Rule 404(b) for the purpose of demonstrating intent, and abused its discretion in finding that the probative value of the evidence on the issue of intent was not substantially outweighed by its prejudicial impact. The error was not harmless; therefore, the defendant is entitled to a new trial.

The government offered the evidence of the defendant’s prior conviction of drug distribution to show his intent to distribute crack in this case. Rule 404(b) permits prior bad acts evidence to be used to show intent. However, the district court erred in finding that the defendant’s prior distribution was probative of his intent to distribute in this case. There was no evidence on the facts of the prior case and, without more, it is difficult to see how the prior conviction is probative of his intent to distribute some thirteen years later. Under these circumstances, the court found it incredible that the jury properly considered the evidence “only for his intent” and did not engage in propensity reasoning.

This was a circumstantial case. The only direct evidence that the defendant may have intended to distribute the narcotics was the officers’ testimony that while handcuffed to a hospital bed, the defendant admitted that he occasionally sold crack –

testimony which, the court noted, the jury was free to disbelieve. Because the jury could have found the defendant guilty of the lesser charge of possession, there is a reasonable possibility that its decision to find him guilty of possession with intent to deliver was influenced by the evidence of his prior conviction.

POST-TRIAL MOTIONS AND APPEALS – Habeas Corpus – Federal COUNSEL – Ineffectiveness Of – Failure to Investigate and/or Present Defense

***Grumbley v. Burt*
____ F.3d ____
(#13-1260, 01-27-15)
Daughtrey, Rogers, DONALD**

Reversed the district court’s finding that Grumbley’s trial counsel was not ineffective for failing to move to suppress evidence illegally seized from his home, and remanded with instructions to grant the petitioner a conditional writ of habeas corpus.

The only Fourth Amendment issue on appeal is whether the arrest was legal because the officers had consent to enter the home in the first place, as the state now contends. The state did not provide a factual basis in the state courts for its present contention that the officers had consent to enter the home. Therefore, the Sixth Circuit concluded that the officers lacked consent to enter the home. Because the state cannot point to any other record testimony supporting the convictions, the petitioner was prejudiced by his counsel’s errors. These errors were not harmless.

Michigan Supreme Court: Select Order Summaries

INSTRUCTIONS -- Character Evidence

People v. William Lyles, Jr.

___ Mich. ___ (#150040, 02-06-15)

DANIEL RUST

The application for leave to appeal is considered. Oral arguments are to be scheduled addressing whether it is more probable than not that the failure to properly instruct the jury regarding evidence of the defendant's good character was outcome determinative.

GUILTY PLEAS -- Withdrawal Of -- After Sentencing

People v. Cody Jason-Christopher Patton

___ Mich. ___ (#150006 & 11, 02-06-15)

GERALD FERRY

The motion to add a new issue was granted. In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Macomb Circuit Court to provide the defendant the opportunity to withdraw his plea because the trial court failed to adhere to the court's sentence evaluation provided at the plea hearing or to allow the defendant to withdraw his plea. The Court was not persuaded that the standards set forth in *People v. Hill*, 221 Mich. App. 391, 398 (1997), require reassigning the case to a different judge. The trial court is further ordered to determine whether the defendant is indigent and, if so, to appoint counsel to represent him in connection with the remand proceedings.

GUILTY PLEAS -- Plea Negotiation

People v. Mantrese Datrell Smart

___ Mich. ___ (#149040, 01-30-15)

DANIEL BREMER

As the parties concede, MRE 410(4) does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority. It only requires that the defendant's statement be made "in the course of plea discussions" with the prosecuting attorney. In lieu of granting leave to appeal, the Michigan Supreme Court overruled the Court of Appeals statement to the contrary in *People v. Hannold*, 217 Mich. App. 382, 391 (1996).

ECONOMIC PENALTIES -- Costs

People v. Heather Lynn Peer

___ Mich. ___ (#150133, 02-03-15)

PRO PER

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Court of Appeals for reconsideration of the defendant's issue regarding the Gladwin Circuit Court's assessment of court costs. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *People v. Konopka* (Docket No. 319913). After *Konopka* is decided, the Court of Appeals shall reconsider the defendant's issue in light of *People v. Cunningham*, 496 Mich. 145 (2014), M.C.L. 769.1k (as amended effective 10/17/14), and *Konopka*. It shall then deny or grant the application on this issue, or otherwise exercise its authority under Mich. Ct. R. 7.216(A)(7).

SENTENCING AND PUNISHMENT

-- Presentence Reports -- Correction

People v. Ondrea Sherrod Strong

___ Mich. ___ (#149979, 02-03-15)

PRO PER

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Wayne Circuit Court, which shall, if it has not already done so, make the corrections to the presentence report specified in that court's April 17, 2013 order and forward a copy of the amended presentence report to the Department of Corrections.

SENTENCING AND PUNISHMENT

-- Guidelines

-- Scoring Offense Variables (OVs)

-- OV 13

People v. Christopher Lee Bennett

___ Mich. ___ (#149264, 02-04-15)

PRO PER

In lieu of granting leave to appeal, the Michigan Supreme Court vacated the sentence of the Oakland Circuit Court and remanded the case to the trial court for resentencing. As the prosecuting attorney concedes, the defendant should not have been assessed 25 points for offense variable (OV) 13. The conspiracy offense for which he was convicted is not a crime against a person under M.C.L. 777.43(1)(c), as it is a crime against public safety. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range or, if it cannot follow its preliminary sentence evaluation under *People v. Cobbs*, permit him to withdraw his plea.

Michigan Supreme Court: Select Leave Granted Summary

MISCELLANEOUS

– Statutory Interpretation

People v. Nevin Hughes
___ Mich. ___ (#150042, 02-04-15)
JOHN GOLDPAUGH

The application for leave to appeal is granted.
The parties shall address: (1) whether the

Disclosures by Law Enforcement Officers Act, M.C.L. 15.391, *et seq.*, precludes the use of false statements by a law enforcement officer in a prosecution for obstruction of justice; and (2) whether the waivers signed by the defendants bar the use of their statements in a criminal prosecution as violative of state or federal rights against self-incrimination. PAAM and CDAM are invited to file briefs amicus curiae.

Michigan Court of Appeals: Select Opinion Summaries

MISCELLANEOUS

– Statutory Interpretation

People v. Joseph Harry Blackmer
___ Mich. App. ___
(#318858, 02-10-15)
PC: O'Connell, Sawyer, Markey
ROBERT DUNN

The Court of Appeals affirmed the defendant's conviction and sentence.

The defendant argued on appeal that the prosecution was barred by the statute of limitations. The defendant was incarcerated in Indiana between 1982 and 2013. The statute was tolled because he "did not usually and publicly reside within" Michigan. The trial court properly determined that the statute of limitations was tolled from the time the defendant left Michigan in 1982 and properly denied the defendant's motion to dismiss.

MISCELLANEOUS

– Statutory Interpretation

SENTENCING AND PUNISHMENT

– Sex Offenders Registration Act (SORA)

– Exemptions

People v. Evans Costner, III
___ Mich. App. ___
(#316806, 02-19-15)
PC: Boonstra, Donofrio, Gleicher
CHERYL CARPENTER

Affirmed the trial court's order denying the defendant's motion to be removed from Michigan's sex-offender registry.

The statute allows an exception to registration if the "petitioner was not more than 4 years older than

the victim." M.C.L. 28.728c(14)(a)(ii). The age difference between the defendant and the victim was 4 years and 23 days. The defendant argued that the "birthday rule" discussed in *People v. Woolfolk* supported his position that he was only four years older than the victim. His reliance on *Woolfolk* is misplaced as that case only pertained to the proper method to calculate a person's age. Specifically, it addressed when a person attains the next age of his or her life. This concept has no application in this case. The defendant is 4 years and 23 days older than the victim, thus, he is more than 4 years older, and he cannot satisfy the statutory requirements.

INSTRUCTIONS – Self-Defense

People v. Jason Eric Triplett
___ Mich. App. ___
(#318051, 02-19-15)

PC: Beckering, Borrello, Gleicher
SADO - MICHAEL MITTLESTAT

Affirmed the defendant's convictions and sentences.

The trial court did not err when it refused to give the self-defense jury instruction for the charge of CCW. Self defense is not a defense to CCW. Because a defendant's purpose for concealing a weapon cannot be a defense against CCW, then it would be no defense if a defendant concealed a weapon for the purpose of self defense.

MISCELLANEOUS

– Statutory Interpretation

People v. Michael Brian Putman
___ Mich. App. ___
(#318788, 02-19-15)
PC: Murray, Hoekstra, Wilder
JONATHAN SIMON

Affirmed the defendant's convictions and sentences.

The trial court did not err in its administration of the oath to witnesses. There is no particular form or language necessary when swearing a witness. MRE 603. Witnesses need not raise their right hands when taking an oath to testify truthfully and such oaths need not be prefaced with any particular formal words. The oath given by the trial court (do you promise to testify truthfully) was sufficient to awaken the witnesses' consciences and impress the witnesses' minds with the duty to testify truthfully.

PROSECUTOR -- Credibility of Witnesses

People v. James Graham Cooper, Jr.

___ Mich. App. ___
(#318159, 01-22-15)

PC: Murray, Saad, Kelly
SADO - RANDY DAVIDSON

The Court of Appeals affirmed the defendant's convictions and sentences.

The mere disclosure of a plea agreement with a prosecution witness, which involves a provision for truthful testimony, does not constitute improper vouching or bolstering by the prosecutor, provided the prosecutor does not suggest special knowledge of truthfulness. Because the prosecutor did not make any additional comments about the credibility of the witnesses, there was nothing improper about the

questioning. Furthermore, because the prosecutor asked no questions of the witnesses that bolstered either witness's credibility, any objection defense counsel could have made would have been futile.

WITNESSES -- Privileged Communications -- Psychologist-Patient

People v. Brandon William Carrier

___ Mich. App. ___
(#322020, 01-27-15)

PC: Murphy, Meter, Servitto
MARCUS GARSKE

Reversed the circuit court's grant of the defendant's motion to exclude the testimony of the specialist and the 911 recording, and remanded to the circuit court.

Although the defendant's communications were generally privileged, the privilege was effectively waived or lost to the extent that the defendant voiced threats of physical violence against reasonably identifiable third persons as to whom he had the apparent intent and ability to carry out the threats in the foreseeable future. M.C.L. 330.1946(1). Testimony at trial concerning threats falling within the parameters of M.C.L. 330.1946(1) is not excludable on the basis of privilege. For purposes of clarity on remand, testimony regarding portions of the defendant's communications that provide context to any threats is also not barred by privilege.

Michigan Court of Appeals: Select Unpublished Opinion Summaries

COUNSEL -- Ineffectiveness Of -- Failure to Investigate and/or Present Defense

People v. Earl Robert Kranz
Unpublished opinion of 02-10-15
(Court of Appeals #304853)
PC: Owens, Beckering, Kelly
SADO - RANDY DAVIDSON

After remand, reversed the defendant's convictions of six counts of CSC I, one count of CSC II, and one count of aggravated indecent exposure, and remanded for a new trial.

Defense counsel's failure to seek the admission of the documentary evidence was not sound trial strategy and fell below an objective standard of reasonableness. The evidence, which counsel was aware of, would have been admissible at trial and would have attacked the witnesses' credibility more effectively than merely cross-examining the

witnesses. This evidence was vital to the defense as the prosecution's case hinged solely on the credibility of the witnesses. But for this error, a different result would have been reasonably probable. Therefore, the defendant is entitled to a new trial.

ECONOMIC PENALTIES -- Restitution

*People v. Betsy
Louise Kwansy*
Unpublished opinion of 02-10-15
(Court of Appeals #306784)
PC: Servitto, Owens, Gleicher
PRO PER

Vacated the restitution order and remanded for entry of a new order of restitution that requires the defendant to pay \$1,200 in restitution.

Restitution is assessed for any victim "of the defendant's course of conduct that gives rise to the conviction...." M.C.L. 780.766(2). The conduct that gave rise to the criminal charges was three \$400

ATM withdrawals. While there was additional evidence at trial concerning charges that the defendant likely made on the victims' credit card without their permission, the defendant was not charged with or convicted of the unauthorized charges or for any amounts other than the ATM withdrawals.

WITNESSES – Impeachment

-- Criminal Acts

-- Use of Prior Convictions

People v. Jovan Winbush

Unpublished opinion of 02-10-15

(Court of Appeals #318213)

PC: O'Connell, Sawyer, Markey

SADO - DESIREE FERGUSON

Reversed and remanded for a new trial.

The trial court erred when it allowed the jury to hear evidence that the witness had been convicted of murder and, in this particular case, the error was not harmless. It is undisputed that the crime of murder has no elements of dishonesty, false statement, or theft. The fact that a witness committed a murder is not admissible for the purpose of attacking a witness's credibility. A party may not use a prior conviction to attack a witness's credibility on the basis of bias if MRE 609 bars admission of that evidence. This case was a credibility contest. The witness's testimony corroborated that the defendant was not involved in the robbery and attempted to break it up. The prosecutor repeatedly used the nature of the crime to contend that the jury could not believe the witness in this case. Considering the nature of the case, the nature of the error, and the prosecutor's repeated use of the improper evidence, the court concluded that it is more probable than not that the improper admission undermined the reliability of the verdict.

SENTENCING AND PUNISHMENT

-- Consecutive Terms -- Felony Firearm

PRETRIAL MOTIONS AND PROCEDURE

-- Identification

-- Photographic Showups

People v. Alexander Isaiah Ansari

Unpublished opinion of 02-12-15

(Court of Appeals #318524)

PC: Fort Hood, Jansen, Gadola

JONATHAN SIMON

Affirmed the defendant's convictions, but remanded for the ministerial task of amending the judgment of sentence.

The photographic array was not "so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification" because the array contained photos that fairly represented the defendant's physical features. The defendant's facial features, including facial hair, are strikingly similar to four of the other photographed men, and the defendant's skin tone is similar to four of the other men pictured. Additionally, it is difficult to distinguish the exact nature and thickness of the defendant's hairstyle, i.e., dreadlocks verses braids, compared with the other men pictured.

The trial court erred in imposing the defendant's felony-firearm sentence consecutive with the sentences for his assault with intent to commit murder convictions. The amended information indicates that the defendant's first-degree murder charge was the only predicate felony for his felony-firearm charge. The prosecution concedes that this matter should be remanded to correct the judgment of sentence.

SENTENCING AND PUNISHMENT

-- Resentencing

SENTENCING AND PUNISHMENT

-- Guidelines -- Scoring

-- Scoring of Offense Variables (OVs)

-- OV 16

People v. Lakeisha Nicole Gunn

Unpublished opinion of 02-17-15

(Court of Appeals #318065)

PC: Murray, Hoekstra, Wilder

SADO - CHARI GROVE

Affirmed the defendant's convictions but vacated her sentence on count II (placing an offensive or injurious substance in or near real property with intent to injure or damage property, M.C.L. 750.209(1)(b)) and remanded for resentencing on that count only.

The judgment of sentence incorrectly identifies the conviction offense on count II as placing an explosive substance in or near real property, M.C.L. 750.207(2)(b). The defendant was charged with and convicted of violating M.C.L. 750.209(1)(b). Remanded for correction of the judgment of sentence.

The amount of damage was limited to \$800; accordingly, OV 16 supports a score of one point. The trial court erred in assessing five points for OV 16. This error does not affect the defendant's OV placement level; therefore, the defendant is not entitled to resentencing.

SENTENCING AND PUNISHMENT

-- Departures

--Proportionality Review

People v. Aaron Antwaun Robinson

Unpublished opinion of 02-17-15

(Court of Appeals #319226)

PC: Saad, Owens, Kelly

MICHAEL FARAONE

Affirmed the defendant's convictions, but remanded for resentencing so that the trial court may articulate the justification for the extent of the departure from the recommended guidelines range.

The trial court failed to specifically state how the extent of the departure was proportionate. The trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines. On remand, the trial court shall articulate how its sentence was more proportionate than the guidelines.

SENTENCING AND PUNISHMENT

-- Correction

People v. Hassan Adel Mohsen

Unpublished opinion of 02-19-15

(Court of Appeals #318769)

PC: Cavanagh, Meter, Shapiro

ELTON MOSLEY

Affirmed, but remanded for the ministerial task of correcting clerical errors.

The trial court erred by citing the incorrect subsection on the defendant's order of probation and on the form relating to the claim of appeal and appointed counsel. This error was clerical and not prejudicial to the defendant. Remanded for citations to the proper subsection of the statute.

SENTENCING AND PUNISHMENT

-- Presentence Reports -- Correction

People v. Byron Richard Root

Unpublished opinion of 02-19-15

(Court of Appeals #318826)

PC: Murphy, Meter, Servitto

GARY STRAUSS

Affirmed the defendant's convictions and sentences, but remanded for the ministerial task of correcting the PSIR.

The trial court adjusted the scoring of OV 3 and 4 to zero points during sentencing as agreed upon by the parties. However, the PSIR was not amended to

reflect this change. Remanded for the correction of the PSIR to reflect the change in scoring.

OFFENSES -- Assault -- Felonious

-- Sufficiency of Evidence

People v. Corey Lamont McClure

Unpublished opinion of 01-22-15

(Court of Appeals #317995)

PC: Murray, Saad, Kelly

JAMES CZARNECKI

Reversed the defendant's three felonious assault convictions, affirmed his remaining convictions, and remanded for resentencing if necessary.

Felonious assault is a simple assault aggravated by the use of a weapon. Any object can be a weapon as long as the object may be considered dangerous in its use. A victim's apprehension of an object alone cannot transform it into a dangerous weapon. Here, the gun was a toy gun that was not capable of being fired. The prosecution presented insufficient evidence for a reasonable jury to find the defendant guilty of felonious assault because it did not establish that he used a dangerous weapon, which is a required element of the crime.

COUNSEL -- Waiver Of

People v. Jimmy Aldaoud

Unpublished opinion of 01-27-15

(Court of Appeals #318555)

PC: Murray, Saad, Kelly

SADO - KATHERINE MARCUZ

Vacated the defendant's convictions and remanded for a new trial because the trial court failed to substantially comply with the requirements of *People v. Anderson*, 398 Mich. 361 (1976) and Mich. Ct. R. 6.005(D)(1), in permitting the defendant to represent himself at trial. This was structural constitutional error requiring reversal.

Not once throughout the course of the proceedings did the trial court personally inform the defendant of "the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation." Mich. Ct. R. 6.005(D)(1). Accordingly, there was no substantial compliance. The trial court did not comply with the requirement that the defendant provide a knowing, intelligent, and voluntary waiver. This requires reversal, without regard to the defendant's apparent knowledge of the charges against him and the potential sentences.

Training Calendar

Complete details on the training events listed below appear at page 10 of this month's newsletter.

April 16-19, 2015	Forensic Science and Law Conference	NACDL - Las Vegas, NV
April 30, 2015	Post-Conviction Conference	NACDL - Orlando, FL
May 15, 2015	Criminal Conspiracy	NACDL - NYSACDL - New York, NY
June 17-19, 2015	White Collar Conference	NACDL - San Diego, CA
July 11, 2015	CDAM Summer Training	CDAM - Gaylord, MI
July 23-26, 2015	High Altitude Trial Skills	NACDL - Denver, CO
August 10-15, 2015	CDAM Trial College	CDAM - Lansing, MI
November 12-14, 2015	CDAM Fall Conference	CDAM - Traverse City, MI

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