STATE APPELLATE DEFENDER OFFICE
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Features

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Appellate Courts

Michigan Criminal Defense Lawyer's Guide to the DSM-5 for Substance Use Disorders

Introduction

As lawyers involved in the criminal justice system, we often have first-hand knowledge of the deleterious impact of substance use disorders, especially those involving controlled substances. We also know from experience that many crimes are committed in the backdrop of the misuse of drugs and alcohol. And with some crimes, such as operating while intoxicated, alleged drug and alcohol misuse is an element of the offense. The misuse of drugs and alcohol can also have a significant impact on sentencing.

While not all persons accused or convicted of a crime involving misuse meet the diagnostic criteria for alcohol or drug disorder, an arrest or criminal conviction involving controlled substances is certainly a factor to be considered in a diagnosis. This is because when the use of a particular substance causes the person using them to become entangled in the criminal justice system, they are at least beginning to manifest the kind of behavior consistent with a substance use disorder.

The best way to determine if a client has a substance use disorder is to have the client assessed by a competent psychologist or psychotherapist. At the conclusion of the evaluation, the therapist will prepare a substance use evaluation (SUE), formerly called a substance abuse evaluation (SAE). With the notable exception of evaluations prepared for driver license restoration appeals, there is not generally a standard SUE form. There are many different formats, but a good SUE typically follows the structure of a psychological evaluation performed by a clinical psychologist. The SUE should include the reason for the referral; the offender's family, criminal, substance use and mental health history; treatment history; a diagnosis; a detailed explanation for the diagnosis; recommendations; and if warranted, a description of the recommended treatment plan.

Consequently, during the evaluation of the patient, the therapist will collect a biographical history, including information relative to the patient/offender's background, work and personal history, education, medical history, family relationships, past mental health diagnosis and treatment for the patient and patient's family, if any, and past substance use. In addition to the biographical/medical background, one or more pen and paper tests will be given. It is important that the evaluator utilize psychometric testing instruments that are reliable and valid in measuring substance use disorders. At the completion of the initial interview, and after a review of the assessments, the therapist will form an opinion and offer a diagnosis and treatment plan. The diagnosis will almost certainly be based on the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).

Should you decide not to refer the client for a "private" evaluation, then the law in Michigan requires that all persons be ordered to undergo substance use screening. Specifically, the statute[1] reads as follows:

> [t]he court shall order the person to undergo screening and assessment by a person or agency designated by the office of substance abuse services to determine whether the person is likely to benefit from rehabilitative services, including alcohol or drug education and alcohol or drug treatment programs.

However, some courts will substitute a private SUE for the NEEDS assessment. This saves the client money and might also make him or her eligible for immediate sentencing.

Consequently, whether via a private SUE or as part of a NEEDS assessment, attorneys handling criminal cases, including intoxicated driving offenses, will at some point be confronted with a DSM diagnosis. Accordingly, it is important for all practitioners to be familiar with the manner in which a substance use disorder is diagnosed.

The DSM-5 Manual Explained

The DSM-5 is a compendium setting forth a standardized classification system for mental health disorders, and many consider it to be the most authoritative guide available. As such, the DSM contains "descriptions, symptoms, and other criteria for diagnosing mental disorders. It provides a common language for clinicians to communicate about their patients and establishes consistent and reliable diagnoses that can be used in the research of mental disorders."[2]

Translated into over twenty languages, referred to by clinicians from multiple schools, as well as by researchers, policy-makers, criminal courts, and third-party reimbursement entities, the Diagnostic and Statistical Manual of the American Psychiatric Association enjoys a nearly hegemonic status as the reference for the assessment and categorization of mental disorders of all types - not only in the United States, but increasingly in Europe and more recently Asia.[3] The first edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-I[4]) was officially released in 1952.[5] The DSM-II was published in 1968.

By the 1970s,"substantive advances in psychometric instruments for quantitative psychiatric assessment, such as rating scales and checklists for anxiety and depression, had become something of a standard in mental health research and practice."[6] This led to the publication of the DSM-III in 1980. The DSM-III was considered a "turning point" in psychiatry because many of the modifications incorporated into the DSM-III constituted a veritable paradigm shift.[7] The next two editions of the DSM set forth further refinements and attempts to encapsulate additional advances in the diagnosis and treatment of mental health disorders. While its significance and authority continues to increase with each new edition, most practitioners agree that the DSM-5 will eventually be supplanted by a DSM-6, which will in turn be supplanted by a DSM-7 and so on.

Important Changes in DSM-5 Regarding Substance Use Disorders

The DSM-5 was first published in 2013. According to the DSM-5, "the essential feature of a substance use disorder is a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems." These clusters include more specific categories, such as impaired control, social impairment, risky use, and pharmacological criteria.

Previously, the DSM-IV contained only two possible diagnoses for an alcohol use disorder; a person either suffered from an alcohol abuse disorder or an alcohol dependence disorder. The criteria to establish that an offender's use was consistent with an alcohol dependence disorder was, however,

confusing. Before the DSM-5, diagnostic criteria considered Alcohol Abuse on the continuum leading to Alcohol Dependence. Although this can be possible, clinicians and researchers realized that the two diagnoses are not independent categories but rather exist within a continuum. Consequently, these two diagnoses are not currently used and substantial changes were made to the diagnostic criteria with the latest manual version.

The approach of the DSM-5 now looks at the issue of the misuse of alcohol and drug use as existing on a spectrum of severity. Thus, it essentially collapses the two former diagnoses together. Now, clients are assessed by global alcohol and/or drug use severity, which can range anywhere from mild, which means having "only" the presence of 2-3 symptoms, 305.00 (F10.10), or moderate, with 4-5 symptoms, 303.90 (F10.20), or severe, having 6 or more symptoms, 303.90 (F10.20).

There are 10 total possible symptoms, and the DSM-5 dictates that a symptom is scored only "if there is a problematic pattern of alcohol use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period":

> (1) alcohol being taken in larger amounts or times than intended; (2) unsuccessful attempts to stop or cut down use; (3) cravings; (4) continued use despite bad consequences and outcomes (such as a prior drunk driving arrest); (5) giving up other important social or occupational activities to pursue or because of alcohol use; (6) use despite facing health consequences.

The remaining three symptoms involve issues of tolerance and withdrawal.

The symptoms listed above address alcohol only. Practitioners should know that the way of categorizing drug use disorders has changed in similar ways as those described for alcohol and that the diagnostic criteria are also similar.

Substance Use Evaluations in the Defense of Intoxicated Driving Cases

As indicated, referring your client for a substance use evaluation (SUE) might be part of the comprehensive approach to an intoxicated defense strategy. This may be done early in the case as part of a mitigation defense, and might also be necessary after a conviction as part of a driver license restoration. In either event, any diagnosis of a substance use disorder should be based on the DSM-5 criteria.

There are many psychotherapists specializing in substance use disorders who can prepare this SUE. As previously mentioned, in addition to the clinical interview, the most common written tests, or "measures" are the MAST (Michigan Alcohol Screening Test), the DAST (Drug Assessment Screening Test) and/or the SASSI (Substance Abuse Subtle Screening Inventory). The purpose of these tools is to assist the evaluator in determining if the client meets the criteria for a diagnosis for alcohol or drug use disorders. Evaluators assess both alcohol and drug problems simultaneously during an evaluation.

In Michigan, all courts use the NEEDS assessment for this purpose. This assessment contains 130 questions, 129 of which can be answered yes/no. Of the 130 questions, 46 are directly related to alcohol and/or drug use. The government, particularly in the courts, is the only place a NEEDS assessment would be administered for this purpose. It is a simple standardized test that probation officers, sometimes with little or no mental health training, can administer and score. The NEEDS assessment is not used by private therapists.

Another reason to refer a client for a SUE is as part of the case work up for a driver license restoration. Practitioners should note that, as of the date of this writing, the current Michigan Substance Use Disorders Evaluation form is dated 01/02/14 and requests the evaluator to provide the outdated DSM-IV diagnosis.[8] This can be tricky for the evaluator, as current best practices inform a licensed mental health or substance use practitioner to provide the most current diagnosis used in the field.

Further complicating this issue is the fact that most health care agencies nationally are turning to the use of the ICD-10 (International Statistical Classification of Diseases and Related Health Problems) diagnostic categories for mental health and substance use disorder. The ICD is a publication by the World Health Organization (WHO). Like the DSM, the ICD contains codes for various diseases and mental health disorders, including substance use disorders.[9] Until the country unifies its use of these diagnoses, and until the State of Michigan updates the standard Substance Use Disorder Evaluation form, the discrepancy will remain a problem.

However, provided the evaluator uses and makes reference to the DSM and manual number (i.e., DSM-IV or DSM-5) following the diagnosis code, this may not be a problem, but it has been reported to attorneys during driver license appeals by hearing officers that some of the officers have their own personal preferences for the diagnosis, leading to anxiety and confusion in the hearing. Overall, the new DSM-5 coding system is now widely accepted, easy to use and understand, and important to know for the informed lawyer defending OWI cases and handling driver license restoration.

An additional benefit of referring your client for a substance use evaluation to a highly qualified private psychologist who specializes in substance use disorders is the uncovering, if relevant, of co-occurring disorders. Co-occurring disorders are other substance abuse or mental health issues that are comorbid with the potential alcohol use disorder. A well-trained clinician will recognize the existence of other disorders and offer recommendations for the appropriate types and levels of treatment. Such recommendations are invaluable for the client (and the attorney) in that the client may then receive properly matched care for a potentially complex set of substance and mental health related difficulties. In addition, receiving treatment prior to sentencing can assist the client with minimizing the impact of stress, chemical withdrawal, relapse and trauma that might emerge during the legal process.

Additionally, the existence of such co-occurring disorders may impact the way the client is presented to the court at sentencing. The fact that a client is now aware of the co-occurring disorder, and is treating it, may help demonstrate a significant change in circumstances, particularly when the client is a repeat offender who has never had such treatment. Knowledge and treatment of the co-occurring disorders can also help with issues of client management while the case is pending.

Conclusions

Although the DMS-5 has been in circulation since 2013, many mental health practitioners still use the DSM-IV diagnosis codes. Other therapists use the ICD-10, while the courts use the NEEDS, often then diagnosing based on the DSM. Consequently, it is important for practitioners to understand how the various disorders are characterized in the DSM as well as the criteria used in fashioning a diagnosis. It is often helpful to collaborate with an experienced therapist and then to monitor the client as they follow through on the recommended treatment plan. Doing so will help ensure the clients success both while on bond and, if necessary, while on probation.

by Patrick T. Barone, Esq. & Elizabeth A. Corby, PhD, CP, PAT

Patrick T. Barone *is the founding partner at the Barone Defense Firm, with offices in Birmingham and Grand Rapids. Mr. Barone exclusively handles the defense of intoxicated driving cases, including those involving serious injury or death. He is the author of the two-volume treatise Defending Drinking Drivers and is an adjunct professor of law at WSU/Cooley Law School. Since 2009, the Firm has been included in US News & World Report's America's Best Law Firms. Mr. Barone has an "AV" rating from Martindale-Hubbell, is rated "Seriously Outstanding" by Super Lawyers, and "Outstanding/10.0" by AVVO. Mr. Barone is also a 2017 candidate for ASGPP Board Certification in Psychodrama, Sociometry and Group Psychotherapy. Find him on the web: www.BaroneDefenseFirm.com.*

Dr. Elizabeth A. Corby *is a Clinical Psychologist providing evaluation and psychotherapy services to individuals, couples and families. After obtaining her Ph.D. in Clinical Psychology, she was a postdoctoral clinical fellow within the School of Medicine at Wayne State University, and subsequently on faculty at WSU within the Department of Psychiatry and Behavioral Neurosciences within the School of Medicine. Dr. Corby has also completed post-doctoral training in and received certification from the Beck Institute for Cognitive Therapy and is a board-certified practitioner in Psychodrama, Sociometry and Group Psychotherapy. She is also the co-founder of the Michigan Psychodrama Center where she leads psychodrama workshops for therapists, lawyers and other professionals. Dr. Corby's individual and group psychotherapy practice is located in Royal Oak. In addition to her clinical work, Dr. Corby provides Substance Use Evaluations for use in criminal matters and driver license restoration cases. She may be reached on the web at www.drcorby.com.*

Endnotes

1. MCL 257.625b(5).
2. http://www.dsm5.org/about/Pages/faq.aspx (last checked 10/27/16).
3. Kawa, *A brief historicity of the Diagnostic and Statistical Manual of Mental Disorders: Issues and implications for the future of psychiatric canon and practice*, Philosophy, Ethics, and Humanities in Medicine, 7:2 (January, 2012).
4. The American Psychiatric Association changed the traditional Roman numeral to an Arabic numeral with the DSM-5. See http://www.dsm5.org/about/Pages/faq.aspx (last checked 10/27/16)
5. Kawa, 7:2.
6. *Id*.
7. *Id*.
8. http://www.michigan.gov/documents/sos/SOS258_Substance_Use_Evaluation_Form_404465_7.pdf (last checked 10/27/16).
9. http://www.who.int/classifications/icd/en/

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https://www.facebook.com/sadomich

Citizens Alliance on Prisons and Public Spending (CAPPS)

Legislative Updates: Smart and Safe Parole Reform And Judicial Veto Bill

Smart and Safe parole reform (HB 4138) passed the House in June and is pending in the Senate Government Operations Committee. The bill is expected to move in the lame duck session, which ends December 3, 2016. We will be sending updates to supporters when we need calls and emails sent in support of this reform.

HB 4138: Making the Criminal Justice System Work As Intended

HB 4138 defines "substantial and compelling reasons" for the parole board to deny release to low-risk prisoners who have served their minimum sentences. Among the many reasons to support it are increased fairness; objectivity and consistency in administrative decision-making; and corrections' cost-savings through population reduction.

Another important reason to support the bill is that HB 4138 makes the criminal justice system work like it is supposed to. Every segment of the system has its own role to play in setting the punishment for crime. These roles are designed to be complementary but not overlapping. The parole board's use of subjective, boilerplate reasons to continue the incarceration of people who score low risk on the parole guidelines undermines the fundamental division of responsibility within the system.

The **Legislature** sets the boundaries of punishment. It establishes the maximum punishment for each type of crime. It also enacts sentencing guidelines for judges to follow in selecting the appropriate minimum sentence in individual cases. Finally, in 1992, it enacted parole guidelines for the parole board to follow in deciding at what point between the minimum and maximum the person should be released. The Legislature determined that prisoners who have good institutional records and are at low risk for reoffending should be paroled when they have served their minimums unless there are substantial and compelling reasons not to release them.

The **prosecution** affects the punishment by selecting the charge in the first instance, by deciding whether to also charge defendants with prior felony convictions as habitual offenders, by negotiating guilty pleas in more than 90 percent of all cases, and by its advocacy at the sentencing hearing. The prosecution can choose to appeal to a higher court if it feels the sentence is too low.

The **sentencing court** calculates the application of the sentencing guidelines to the individual defendant. It considers the facts of the offense, the defendant's prior criminal record, and the arguments about aggravating and mitigating factors made by the parties. The court then selects the minimum sentence it believes to be appropriate for punishment.

The minimum sentence sets a prisoner's earliest release date. The earliest release date is the time the judge and the parties believe the defendant will actually serve unless he or she accumulates numerous misconducts in prison or otherwise appears to be at risk for reoffending. When a judge imposes a sentence of 2-10 or 1-14 or 5-20 years, no one intends for the defendant to be incarcerated to the statutory maximum. That is why plea

negotiations, sentencing guidelines and advocacy at sentencing hearings are all aimed at determining the minimum.

The **parole board's** role is to assess the prisoner's current risk for reoffending at the point when he or she has served the minimum sentence and become eligible for parole. Its role is not to effectively resentence someone because a board member, the media or the public feels the minimum sentence wasn't long enough. Yet the data show that hundreds of prisoners each year who score low risk on the parole guidelines are denied release based on subjective conclusions used to justify extending the person's punishment.

Parole board resentencing undermines the roles of the legislative and judicial branches of government. The Legislature developed both sentencing and parole guidelines to promote objective decision-making and reduce disparity in the treatment of similar people at both the front and back ends of the punishment process. These two sets of guidelines are designed to work in tandem. There is no point in trying to guide the discretion of judges in setting minimum sentences if the parole board can override judicial decisions at will and without consequence.

Judges, in turn, work hard to set fair, individualized punishment. If they err, their decisions can be overturned by an appellate court. They are entitled to rely on the expectation that:

a) The parole board will act within its area of expertise by reviewing the person's institutional record and current risk assessments.
b) The parole board will not supplant the judicial role by adding years of incarceration beyond the minimum sentence when there is no public safety reason to do so.

There is no reason for anyone to want the parole board to have unfettered discretion in low-risk cases.

- The definitions of substantial and compelling reasons in HB 4138 were negotiated in a multi-stakeholder workgroup and address a number of specific concerns the prosecutors raised. These definitions reserve discretion to the parole board to identify and act on any unique individual risk indicators not captured by the guidelines.

- Prosecutors have already had multiple opportunities for input on the defendant's punishment.

- Anyone, including judges, prosecutors and victims, can provide relevant information for the parole board's consideration.

- Prosecutors and victims retain the right to appeal board decisions with which they disagree.

- The bill was made prospective in response to county and sheriffs' concerns about the number of additional parolees who will return to their homes.

HB 4138 is a balanced bill that respects the roles of all segments of the criminal justice system. It recognizes that determining the appropriate punishment for crime depends on multiple perspectives and multiple points in time. Above all it implements the longstanding legislative intent to make sentencing and parole decisions objective, even-handed and risk-based so that no one spends more time in prison than is necessary for fair punishment and public safety.

by Barbara Levine
CAPPS Associate Director for Research and Policy

Judicial Veto Bill Moves Forward

CAPPS is very happy to report that the judicial veto reform bill (HB 5273) passed the Senate Judiciary Committee on September 6, 2016, by a bipartisan 4-0 vote. CAPPS has worked for many years to advance this reform. The bill now goes to the full Senate for consideration.

HB 5273, sponsored by Rep. Dave Pagel (R-Oronoko Twp.), eliminates the authority of successor sentencing judges to veto grants of parole to lifers.

The bill will still allow the sentencing judge to veto parole as long as he or she is still sitting in the court where the prisoner was convicted. The successor judge would still be notified and able to express an opinion, but that opinion would no longer be controlling. The Michigan Judges Association and the American Friends Service Committee's Michigan Criminal Justice Program are among the organizations supporting the bill.

First National Survey Of Crime Victims

CAPPS works closely with the Alliance for Safety and Justice (ASJ), a national organization. CAPPS and ASJ are working together to better address the needs of crime survivors, especially those in communities hardest hit by crime and violence.

ASJ conducted an in depth survey on the views of crime survivors called *Crime Survivors Speak*. It is the first national report on victims' views on safety and justice. The survey found that victims of crime support rehabilitation and prefer investments in crime prevention and treatment to more spending on prisons and jails.

Alliance For Safety Releases Video Highlighting Misplaced Spending On Incarceration Over Education

ASJ premiered *What You Invest In Grows*, to highlight the nation's misplaced spending priorities and to re-imagine how we could invest the $80 billion spent each year on incarceration. Over the last three decades, Michigan increased spending on corrections more than five times as much as it did on public education according to the US Department of Education. Click here to watch the video *What We Invest In Grows or visit* . http://2015capps.capps-mi.org/2016/10/new-asj-video-highlights-failed-investments-in-incarceration-over-education/

For more information about these bills, go to www.Michiganlegislature.org or to www.capps-mi.org.

If you would like to join CAPPS's efforts, please contact Seema Singh at (517) 482-77757 or Laura Sager, executive director, at lmsager@capps-mi.org or select "Join" on the CAPPS website home page in the upper right corner.

Spotlight On: Jonathan B.D. Simon

Please tell us something about your background, where you practice, your areas of practice, and how long you have practiced criminal defense.

I obtained a Bachelor of Philosophy from Monteith College in 1979 before it was closed down by Wayne State University. I then obtained my JD in 1983 from the Detroit College of Law before it moved to East Lansing. While in law school, I interned in the appellate section of the Wayne County Prosecutor's Office, and then began ghost writing criminal appeals. Since becoming a lawyer, I have practiced primarily major criminal and light civil trial and appellate matters throughout the tri-county area.

Please tell us about one of your interesting cases.

I was appointed to represent a retired member of the United States armed forces, who was convicted of first-degree criminal sexual conduct and sentenced to a lengthy term of incarceration. After the Michigan Court of Appeals affirmed his conviction, I was twice able to obtain remands from the Michigan Supreme Court to the Court of Appeals, which, on the second remand, reversed and remanded the matter for a new trial. I then tried the case. When the jury was unable to reach a verdict, the client pled nolo contendere to second degree criminal conduct and was released.

Did the case require expert testimony?

No. I relied on my cross examination of the nurse examiner.

What trends have you noticed in Michigan law?

That as the years go by, the Legislature seems to create more new laws to make life more difficult.

How can our criminal justice system be improved?

Eliminate the wasteful bureaucracy known as the MIDC [Michigan Indigent Defense Commission] and spend the money instead to provide Westlaw and ICLE memberships to all practitioners who accept assigned criminal cases.

What specific advice do you have for new lawyers?

Find a good mentor and don't be afraid to ask questions.

by Neil Leithauser
Associate Editor

Trial Court Successes: October, 2016

Below are trial court victories of our subscribers as reported on SADO's Forum—an online community for criminal defense attorneys. Subscribers are encouraged to submit their stories of success on SADO's Forum and/or directly to Associate Editor Neil Leithauser at nleithauserattorney@comcast.net. SADO's CDRC Subscription information is available by contacting Heather Waara at hwaara@sado.org.

Michael A. Faraone secured a reduction in a minimum term for his client, from 171 months to 132 months, October 6, 2016, in the 4th Judicial (Jackson County) Circuit Court in an assault with intent to rob while armed case.

James Sterling Lawrence won a not guilty verdict from a jury in a domestic violence case October 7, 2016, in the 23rd Judicial District Court (Taylor); the jury deliberated for about five minutes.

Susan K. Walsh was successful in getting OV 10 and OV 19 amended for a client in the 16th Judicial (Macomb County) Circuit Court, resulting in a reduction in the minimum sentence from 36 to 22 months. In the 23rd Judicial (Alcona County) Circuit Court, **Ms. Walsh** also secured an amended scoring of OV 19 for a client resulting in a lowered minimum sentence, from 12 years to 10 years.

Adil Haradhvala obtained dismissal of a felony fake prescription-form charge at the preliminary examination, October 24, 2016, in the 41-B Judicial District Court (Clinton Township).

Legal Aid Assistant Defender **James A. Parker** won a not guilty verdict in an assault with intent to murder case tried in a bench trial in the 3rd Judicial (Wayne County) Circuit Court.

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 are some of the questions presented in briefs added to our brief bank in the last few weeks. For confidentiality purposes, names of clients and witnesses have been removed.

BB 282171: Judge Strong erred by refusing to accept Defendant's guilty plea.

BB 281908: Defendant must be resentenced because the sentencing judge wrongly thought he was required to impose a maximum term in keeping with the *Tanner* two-thirds rule.

BB 281908: Because the evidence did not show that Defendant's tongue actually touched the complaining witness's genitals, the evidence was insufficient to convict him of first-degree criminal sexual conduct.

BB 282172: Defendant is entitled to resentencing because the minimum term was an unreasonable and disproportionate upward departure from the recommended guidelines range.

BB 282299: Even if this appeal were justiciable, the prosecutor's voided plea conditions violated the Michigan constitution's separation of powers.

BB 282376: The circuit court erred when it resentenced Defendant to impose a lifetime tether because MCL 750.520n(1) does not require lifetime electronic monitoring for a first degree criminal sexual conduct conviction unless the offense involved a victim who is younger than 13 and a defendant who is older than 17.

BB 282417: The evidence was insufficient to prove that Defendant and the complainant were members of the "same household," and was thus insufficient to prove first-degree criminal sexual conduct.

BB 282973: The trial court reversibly erred by failing to respond to defendant's objection to information contained in the presentence report; this error requires resentencing as a matter of due process, US Const, Ams V, XIV; const 1963, Art 1, § 17.

BB 282991: The trial court plainly erred in denying Defendant credit for time served in the instant case, in violation of his federal and state statutory and constitutional due process rights.

BB 283074: Defendant entered an involuntary plea in violation of the state and federal due process protections.

BB 283310: The admission of Defendant's statements violated due process because his waiver of his constitutional rights was not voluntary. He should be granted a new trial on all counts.

BB 283408: Defendant was not advised fully as to the offense he was pleading to; thus his plea was involuntarily entered in violation of the state and federal due process clauses

BB 283639: Defendant should have been allowed to withdraw his plea where his attorney was constitutionally ineffective when he failed to review fully the discovery received before advising him to enter into a plea.

BB 283804: The imposed life without parole sentence violates Defendant's Eighth Amendment and Due Process rights where the court failed to adhere to individualized sentencing, failed to properly consider and apply the *Miller* factors, and failed to apply the proper standard of review.

BB 283831: The sentence is invalid because the trial court did not have authority to reject defendant's offer on the record to plead guilty as charged when prosecutor explained that the sentences would run concurrently, and then, later, accept the plea and sentence defendant to consecutive sentences on all 12 counts; overriding the prosecutor's charging decision was a violation of the separation of powers, violating Defendant's right to due process under the law; US Const, Ams V, XIV; Const 1963, Art 1, § 17

BB 283831: Defendant is entitled to resentencing because his sentence minimum term was an unreasonable and disproportionate upward departure from the recommended guidelines range.

BB 283831: The order of restitution granting compensation to law enforcement employees who were performing their duties and where there is nothing in the record to support either the actual loss or defendant's obligation to pay restitution to the designated individual is invalid.

BB 283841: Defendant was denied due process of law by the unduly suggestive one-photo lineup procedure.

BB 283841: Defendant was denied a fair trial by the prosecution's failure to produce an important res gestae witness; the witness was endorsed and the prosecution failed to exercise due diligence to produce the witness; defendant was entitled to the missing witness instruction; defendant was severely prejudiced and is entitled to a new trial.

BB 283808: Defendant is entitled to plea withdrawal because the trial court abused its discretion in denying this request, which was made before sentencing; due process requires that defendant be allowed to withdraw her plea in the interests of justice

BB 283708: Because Defendant did not waive and was thereby deprived of the right to counsel at his guilty plea and sentencing, his plea was involuntary and must be withdrawn.

Reports and Studies

Artificial Intelligence "Judges" Predict Case Outcomes

British computer scientists at University College London have developed artificial intelligence software potentially capable – with a 79% accuracy rate -- of weighing legal evidence and determining questions of right and wrong. The scientists used an algorithm to review data from 584 torture and degrading treatment cases in the European Court of Human Rights. The Court was established in 1959 by the European Convention on Human Rights and rules "on the applications of individuals or sovereign states alleging violations of the civil and political rights" set forth in the Convention. Most applications filed with the Court are filed by individuals.

Judgments in the court are required to follow a specified format, which the scientists found made them "particularly suitable for a text-based analysis." The judgments must provide: "an account of the procedure followed on the national level, the facts of the case, a summary of the submissions of the parties, which comprise their main legal arguments, the reasons in point of law articulated by the Court and the operative provisions." Only cases decided on the merits, and not procedurally dismissed in early stages of the application, could be examined; dismissed applications are not reported,

so text-based analysis of those applications is not possible.

The artificial intelligence "judge," using textual content of the case decisions, reached the same result as the Court of Human Rights in 79% of the cases examined. The lead researcher in the study, Dr. Nikolaos Aletras, was quoted in a recent article as saying, "We don't see AI replacing judges or lawyers, but we think they'd find it useful for rapidly identifying patterns in cases that lead to certain outcomes." The authors found that "the formal facts of a case are the most important predictive factor" and stated that this conclusion was consistent with "the theory of legal realism suggesting that judicial decision-making is significantly affected by the stimulus of facts."

The authors noted that there are "two opposing ways of making sense of judicial-decision-making: legal formalism and legal realism." Formalists were described as having provided "a legal model of judicial decision-making, claiming that the law is rationally determinate: judges either decide cases deductively, by subsuming facts under formal legal rules or use more complex legal reasoning than deduction whenever legal rules are insufficient to warrant a particular outcome." Realists were described as having "criticized formalist models, insisting that judges primarily decide appellate cases by responding to the stimulus of the facts of the case, rather than on the basis of legal rules or doctrine, which are in many occasions rationally indeterminate." The authors found that a "rather robust correlation between the outcomes of cases and the text corresponding to fact patterns contained in the relevant subsections (in the Court's judgments) coheres well with other empirical work on judicial decision-making in hard cases and backs basic legal realist intuitions."

The authors described their study as the first study on predicting case outcomes utilizing textual information, in contrast to earlier studies, which focused more on non-textual information, such as "the nature and the gravity of the crime or the preferred policy position of each judge."

Sources: *Chris Johnston, "Artificial intelligence 'judge' developed by UCL computer scientists," guardian.com, October 23, 2016: https://www.theguardian.com/technology/2016/oct/24/artificial-intelligence-judge-university-college-london-computer-scientists. Abstract: https://peerj.com/articles/cs-93/.* Nikolaos Aletras, Dimitrios Tsarapatsanis, Daniel Preoţiuc-Pietro, and Vasileios Lampos, "Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective," peerj.com, October 24, 2016: https://peerj.com/articles/cs-93.pdf

by Neil Leithauser
Associate Editor

Michigan Supreme Court Implements Prisoner E-filing Pilot Program

On November 2, 2016, the Supreme Court ordered implementation of a Prisoner Electronic Filing Program between the Supreme Court's Clerk's Office and the Michigan Department of Corrections to enable electronic transmission of authorized documents between the Court and the MDOC. See Administrative Order 2016-3. Initially, two correctional facilities, the St. Louis Correctional Facility and the Carson City Correctional Facility, will participate in the pilot program; additional facilities may join later.

During the initial phase of the program, filings by prisoners will be limited to applications for leave to appeal in criminal cases. The U.S. Postal Service will be utilized for future filings in a case if a prisoner is transferred from a facility with e-filing capability to a non-capable facility. For filing documents, a prisoner will present the filings to MDOC staff to be scanned and sent to the Court; the original documents will be returned to the prisoner, who must keep the documents in their original form in case the Court later requires them to be produced. If an electronically filed document is accepted by the Court, the Clerk's Office will e-serve TrueFiling registered parties to the litigation. If a pleading is rejected by the Clerk's Office, either due to lack of jurisdiction or because the pleading does not substantially comply with the court rules, the MDOC will be notified, given the reasons for the rejection, and it must then notify the prisoner as soon as practicable.

Link to AO-2016-3: http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2002-37_2016-11-02_FormattedOrder_MSCPrisonerEFilingPilot.pdf.

by Neil Leithauser
Associate Editor

One-Half of Americans in Facial-Recognition Databases

A recent study at the Georgetown Law's Center on Privacy and Technology found that over 117 million adult Americans are now in law enforcement face recognition network databases. At least 26 states allow law enforcement agencies to use driver's license and ID photos for facial recognition of suspects, and 16 allow the FBI to use the biometric database. The recent study recognizes the real benefits of face recognition technology used by well-meaning law enforcement agents to catch fugitives and violent criminals, but notes that use of the databases is also largely unregulated. The authors found no state requiring a search warrant or providing any limitation, for example, to only serious crimes being investigated. Of the agencies examined, only four had a publicly available policy relating to use of the technology.

The authors stated that, historically, fingerprint and DNA databases have been created from information taken in criminal arrests or investigations; the database created by the FBI from driver's license and ID photos "primarily includes *law-abiding Americans*." (Emphasis in original.) The study reported that the Pinellas County Sheriff's Office runs 8,000 searches monthly on the 7 million registered drivers in Florida, without any need for a showing of reasonable suspicion; also, according to the county public defender, the Sheriff's office has never disclosed, as *Brady*-material, the use of such biometric searches.

The authors found that law enforcement users of the technology generally do little to guarantee accuracy. Only two departments, one in California and one in Washington, required accuracy tests of the technology as a condition of purchase. The study suggests that African Americans would be disproportionately affected, due in part to racially-based error in the programs (as suggested by an FBI co-authored study), and to African Americans being disproportionately reflected in mugshot databases due to "disproportionately high arrest-rates."

The authors found there is little protection of free speech. For example, of the 52 agencies using face recognition technology, only one had an express policy prohibiting its employees from using the technology to track individuals engaging in political, religious or other free speech activities.

Increasingly, police departments are using live-feed surveillance video for real-time facial recognition, for example, of pedestrians walking on the street. "Nearly all major face recognition companies offer real-time software."

The authors recommended that legislatures enact laws to regulate law enforcement use of face recognition technology; that reasonable suspicion be required prior to a database search; that mugshots, not driver's licenses, "should be the default photo databases for face recognition, and they should be periodically scrubbed to eliminate the innocent"; and that a court order based upon probable cause should be required for driver's license and ID database searches, except in cases of identity theft and fraud.

Further, communities should determine whether to allow real-time facial face recognition technology because, given the pervasiveness of surveillance video and police-worn body cameras, use of real-time face recognition technology "will redefine the nature of public spaces." National standards and accuracy testing should be developed, and the testing should include regular testing for algorithmic bias relating to gender, race, and age. Also, use of the technology to track people based on political or religious affiliation should be prohibited.

Sources: *Kevin Collier, "Study: 1 in 2 American Adults Already In Facial Recognition Network," vocative.com, October 18, 2016: http://www.vocativ.com/368572/facial-recognition-databases/. Clare Garvie, Alvaro Bedoya, and Jonathan Frankle, "The Perpetual Line-up: Unregulated Police Face Recognition in America, perpetuallineup.org, October 18, 2016: https://www.perpetuallineup.org/. Daniel Victor, "Study Urges Tougher Oversight for Police Use of Facial Recognition," nytimes.com, October 18, 2016: http://www.nytimes.com/2016/10/19/us/a-virtual-lineups-of-average-citizens-created-by-software.html?_r=0*

Security Risks in Biometric Scanning

"Every time you unlock your smartphone, use a fingerprint scanner at the airport, or upload a photo with facial recognition to Facebook, your physical attributes are scanned and scrutinized against a template." The templates allow the ease of accessing secure information without the need for memorized and hackable passwords; however, a recent article cautions that "unlike a password, if a person's biometrics are hacked, they can't be changed."

Some large-scale hacks have already occurred. The article notes that in December, 2014, a security breach at the Office of Personnel Management involved personal information, including fingerprint data, of about 22 million people.

Source: *Chiara Sottile, "As Biometric Scanning Use Grows, So Does Security Risk," nbcnews.com, July 24, 2016: http://www.nbcnews.com/tech/tech-news/biometric-scanning-use-grows-so-do-security-risks-n593161.*

Yahoo Scanned Emails for Government

A Reuters report October 4, 2016, claimed that Yahoo built a system at the direction of a federal law enforcement agency to scan the content of emails for hundreds of millions of Yahoo Mail accounts. Reuters reported that Yahoo CEO Marissa Mayer's decision to initiate the system led to the departure from Yahoo of its chief information security officer, Alex Stamos (who is now security chief at Facebook). Bulk data transfers from private companies to government agencies have occurred before, but experts stated this was the first time a company had "either such a broad directive for real-time Web collection or one that required the creation of a new computer program." Google, Microsoft, Facebook and Apple all denied having implemented similar programs. Following the Reuters report, and an article in Fortune, a Yahoo spokesperson contacted Fortune to claim the article was "misleading."

Source: *Robert Hackett, "What to Make of Yahoo's Email-Scanning Allegations," fortune.com, October 5, 2016: http://fortune.com/2016/10/05/yahoo-email-scanning-report/. http://fortune.com/2016/10/04/yahoo-mail-spying-software/.*

UK Requires Internet Providers to Keep Histories of Users

A recent report states that the Draft Communications Data Bill (called by critics the "snoopers' charter"), initially proposed in 2012, has now – after several unsuccessful tries – become law in the United Kingdom. Among the law's provisions are requirements for service providers to keep users' real-time histories – calls, texts and web-browsing – for up to one year, to decrypt data upon demand by the government, and disclose security features in new products before the products are launched; additionally, the government can hack devices or large-scale systems to search data.

Sources: *Zach Whittaker, "Britain has passed the 'most extreme surveillance law ever passed in a democracy,'" zdnet.com November 17, 2016: http://www.zdnet.com/article/snoopers-charter-expansive-new-spying-powers-becomes-law. Steve Ranger, "Despite hacking and snooping fears, web surveillance legislation sails forward," zdnet.com, June 8, 2016: http://www.zdnet.com/article/despite-hacking-and-snooping-fears-web-surveillance-legislation-sails-forward/.*

by Neil Leithauser
Associate Editor

From Other States

Third Circuit: Bail Policies Affecting Low-Risk Defendants and Threaten Equal Justice

Before reaching the merits of the case, the Third Circuit cited to statistics that show that 54 percent of those jailed awaiting trial in New York City were there because they could not afford bail of $2,500 or less. This flaw in the judicial system was highlighted in this case where the defendant missed the birth of his first child, lost his job and pled no contest instead of going to trial so he would not lose his home and his vehicle. His plea resulted in a procedural bar from his constitutional claims alleging malicious prosecution. While the court did not blame state authorities, it hoped that planned bail reform efforts would ensure equal justice stating, "[i]t seems anomalous that in our system of justice, the access to wealth is what often determines whether a defendant is freed or must stay in jail." *Curry v. Yachera,* 2016 BL 286194 (3d Cir., No. 15-1692, 9/1/16; full text at http://www.bloomberglaw.com/public/document/Curry_v_Yachera_No_151692_2016_BL_286194_3d_Cir_Sept_01_2016_Cour.

New Jersey: Prosecutor's Efforts to Provoke Mistrial Triggered Double-Jeopardy Bar to Retrial

A prosecutor's flagrant and persistent efforts to provoke a mistrial by engaging in "woefully unprofessional" conduct including making

inadmissible, improper and prejudicial statements about the evidence created a double-jeopardy bar against retrying a man whose conviction was reversed due to that misconduct under a rarely invoked rule blocking retrials when a prosecutor successfully and deliberately goads the defense into moving for a mistrial as held in *Oregon v. Kennedy,* 456 U.S. 667 (1982). *State v. Zisa,* N.J. Super. Ct. Law Div., No. 10-10-01812-I, 8/23/16; full text at http://src.bna.com/ibq.

Third Circuit: Woman Out on Bond Was Still "Seized" For Purposes of Malicious Prosecution Suit

A woman was "seized" for purposes of asserting a Fourth Amendment Malicious-prosecution claim even though she was out on bond and was not subject to any travel restrictions where she was required to fly from her home in California to Pennsylvania for twelve pretrial conferences in one year, she was under the cloud of very serious charges, she was required to post unsecured bail of $50,000 and she was told she would forfeit the bond if she did not attend all court proceedings. The Third Circuit found these to be "constitutionally significant restraints" and a "continuing seizure." *Black v. Montgomery County,* 2016 BL 282138, 3d Cir., No. 15-3399, 8/30/16; full text at http://www.bloomberglaw.com/public/document/Black_v_Montgomery_County_No_153399_2016_BL_282138_3d_Cir_Aug_30.

D.C. Circuit: Prosecutor's Misstatement of Law in Closing Required Murder Conviction Reversal

The Third Circuit held that the prosecutor's statement during closing argument that the jury could not consider the decedent's "intent or anything else," misstated the law in this case where defendant was part of an unofficial military hazing gang that subjected the decedent to an initiating beating and during the beating asked the decedent if he wanted to participate and he responded in the affirmative. The decedent had sickle cell anemia and died from complications resulting from injuries to his head and heart. Defendant's second degree murder conviction was reversed on the ground that in spite of the court's accurate instructions on the law it did not cure the "very real chance" that the prosecutor's statement led some jurors to believe they could not consider the decedent's "consenting behavior at all," when that behavior was relevant to the malice element of second-degree murder. *United States v. Williams,* 2016 BL 287661, D.C. Cir., No. 12-3029, 9/2/16; full text at http://www.bloomberglaw.com/public/document/United_States_v_Williams_No_123029_Consolidated_with_133058_2016_.

Training Events

LOCAL Training Events

December 2, 2016 - Michigan Law Update

The 2016-2017 CAP Seminars are scheduled for the following dates at the Coleman A. Young Municipal Center (C.A.Y.M.C.) on the following Fridays this fall: December 2, 2016 - Michigan Law Update; January 13, 2017 - US Supreme Court Update; January 27, 2017 - Evidence; February 10, 2017 - Social Media; February 24, 2017 - Interlocutory Appeals; March 24, 2017 - Treatment Facilities & Specialty Courts. **All CAP Seminars will begin at 1:30pm on each scheduled day.** For additional information or questions visit www.capwayne.org

December 2, 2016 - Put Your Best Defense Forward - A Primer for Juvenile Court on Trial Work

The Children's Law Section presents "Put Your Best Defense Forward - A Primer for Juvenile Court Trial Work" on Friday, December 2, 2016, from 8:30am-4:30pm at the Double Tree Hotel, 42100 Crescent Boulevard in Novi, Michigan. The Children's Law Section invites attorneys who represent parents and children in the juvenile court to attend this exciting trial practice conference, which will focus on tips and strategies to address the unique issues that arise in defending child welfare and juvenile delinquency cases. Participants will have the opportunity to ask questions and offer input regarding ways to address cases moving through the court system. For additional information contact Stephanie Cardenas at scardenaslaw@gmail.com or 616-916-9547.

December 8-9, 2016 – Developing Persuasive Mitigation in Juvenile Lifer Cases

The State Appellate Defender Office and Criminal Defense Resource Center will present a two-day training for criminal defense attorneys representing juvenile lifers in resentencing proceedings following *Montgomery v Louisiana.* Panelists will include national and local experts on the topic of juvenile

sentencing mitigation. Training will take place at the WMU-Cooley Law School in Auburn Hills, Michigan from 9am-5pm each day. Online registration available here: https://sadojlwop.eventbrite.com

February 18-20, 2017 - 40th Mid-Winter Ski Conference

This popular event is returning for its fortieth year. The revamped program, with conference sessions that are closer together in time on Sunday, will again be offered this year for members who want to attend the conference for only a single day. The Shanty Creek Resort is offering reduced all-inclusive rates, with ski and non-ski packages, and room-only rates for conference participants. For additional information about the conference, contact Opolla Brown at obrown@waynecounty.com or call 313-224-5731.

February 21, 2017 - Informational Session for Friends and Family of the Incarcerated

The State Appellate Defender Office will host its next Informational Session for Family and Friends of the Incarcerated from 5:30-7:00pm in Lansing. SADO staff will be on hand to address the process of appealing a conviction and how an appeal is different from the trial or plea proceedings, and will inform attendees about the visiting policies of the MDOC and how to communicate and stay connected with incarcerated loved ones. Specific topics may vary slightly depending on what attendees wish to discuss. This free session is open to all, including attorneys and professionals. Next sessions include: May 16, 2017 in Detroit; August 15, 2017 in Lansing and December 5, 2017 in Detroit. Light refreshments will be provided. If you plan to attend, please call 313-256-9833 at least two days in advance to RSVP. See flyer for details, http://www.sado.org/content/pub/10779_2017-Family-Outreach-Calendar.pdf. For questions about the event, or to RSVP, please contact Marilena David-Martin at mdavid@sado.org or call 313.256.9833.

March 16-18, 2017 - CDAM's 2017 Spring Conference

The Criminal Defense Attorneys of Michigan (CDAM) will present its 2017 Spring Conference at the Troy Marriott in Troy, Michigan. Additional information and registration will be forthcoming.

NATIONAL Training Eents

January 15-18, 2017 - Advanced Criminal Law: Winning Strategies for the Defense

NACDL's 37th Annual Advanced Criminal Law Seminar will be held on January 15-18, 2017 at the St. Regis Resort in Aspen, Colorado. Now in our 37th year, NACDL's Advanced Criminal Law Seminar is often described as "An experience to Remember!" Presented in cooperation with NACDL and Victor Sherman, there is nothing else like this ultimate networking and CLE event for the criminal defense bar. Intended for both veteran and young lawyers, it is bar-none the best criminal defense seminar in the country set in the best ski town in Colorado. Our featured speaker will be retired Phoenix police captain Carroll Cooley, the officer who arrested Ernesto Arturo Miranda in 1963. For additional information and registration visit https://www.nacdl.org/Aspen/

January 19-22, 2017 - Appellate Defender Training

The National Appellate Defender Training (ADT) offers an intensive, four-day learning experience designed specifically for attorneys who represent indigent defendants in criminal and delinquency appeals in the state and federal court systems. The National Juvenile Defender Center joins as sponsor for a Juvenile Skills Writing Track, where defenders who work on cases involving juveniles can improve their advocacy skills. This national skills training brings together court and appellate public defenders at the state and federal levels, assigned counsel, contract defenders, and Criminal Justice Act private attorneys for a multi-day program. Training flyer is available here: http://www.nlada.org/sites/default/files/pictures/FlyerADT2017-3.jpg For additional information and registration visit http://www.nlada.org/2017NationalAppellateDefenderTraining

February 4, 2017 - Summit on Public Defense

The American Bar Association is pleased to announce its 12th Annual Summit on Public Defense. The Summit is the premier daylong conference on public defense provision, structure, and innovation and is hosted by the Standing Committee on Legal Aid and Indigent Defendants (SCLAID)—the ABA's oldest standing committee. The 12th Annual Summit will be held on Saturday, February 4, 2017 at the Miami-Dade College in Miami, Florida. Additional information and registration will be forthcoming.

March 15-18, 2017 - Techshow 2017

The American Bar Association will present its Techshow 2017 in Chicago at the Hilton. Technology is becoming fully integrated in the practice of law. Our legal work is now more dependent on the use of technology, in and out of the office. It helps us to

practice more efficiently, serve clients more effectively, and better manage our daily lives. As technology evolves, it can be difficult to stay informed of the latest advancements. With so many different options to choose from it can be difficult knowing what's the most suitable to you and your practice. The ABA Techshow Conference and Expo is where lawyers, legal professionals, and technology all come together. For three days, attendees learn about the most useful and practical technologies available. Our variety of CLE programming offers a great deal of education in just a short amount of time. For additional information and online registration visit http://www.techshow.com/

Michigan Supreme Court: Selected Order Summaries

Kent Circuit Erred when it Denied Defendant's Request for Ginther Hearing

In lieu of granting leave to appeal, the Supreme Court vacated the order of the Kent Circuit Court denying Defendant's motion for relief from judgment and remanded the case to the trial court for a *Ginther* hearing for a determination of whether the defendant was denied the effective assistance of appellate counsel on direct appeal due to counsel's failure to file an application for leave to appeal on the defendant's behalf and challenge the scoring of Offense Variable 13. *People v. David Franklin;* __Mich.__ (#152295, 9-29-16); In Pro Per. **COUNSEL-Ineffectiveness Of-On Appeal.**

Roscommon Circuit Must Direct Probation to Delete Challenged Information in PSIR

In lieu of granting leave to appeal, the Supreme Court remanded to the Roscommon Circuit Court for consideration of the defendant's issue regarding the assessment of court costs. On remand, because the trial court determined that it would not take the challenged information in the PSIR into account at sentencing, the trial court must direct the probation officer to delete the challenged information from the PSIR as required by MCR 6.425(E)(2)(a) and assure that a corrected copy of the report is prepared and transmitted to the MDOC. *People v. Robert Baker;* __Mich.__ (#150972, 9-29-16); SADO - Jacqueline Ouvry. **ECONOMIC PENALTIES- Costs, SENTENCING AND PUNISHMENT-Presentence Reports-Correction.**

Emmet Circuit Erred When it Scored OVs 12 and 13

In lieu of granting leave to appeal, the Supreme Court vacated the sentences of the Emmet Circuit Court and remanded for resentencing. The trial court erred in assigning points for Offense Variables 12 and 13. Because the amendment of the guidelines would change the applicable guidelines range, the defendant is entitled to resentencing. *People v. Jeffrey Prater;* __Mich.__ (#151620, 10-05-16); SADO - Erin Van Campen. **SENTENCING AND PUNISHMENT- Guidelines-Scoring-Scoring Offense Variables (OVs).**

Kent Circuit Must Direct Probation to Delete Challenged Information in PSIR

In lieu of granting leave to appeal, the Supreme Court remanded to the Kent Circuit Court for consideration of the defendant's issue regarding the assessment of court costs. On remand, the trial court must also strike from the presentence report any information that was objected to at sentencing and determined by the trial court to be inaccurate or irrelevant as required by MCR 6.425(E)(2). *People v. Gregory Arnold;* __Mich.__ (#151978, 9-27-16); In Pro Per. **ECONOMIC PENALTIES- Costs, SENTENCING AND PUNISHMENT-Presentence Reports-Correction.**

Roscommon Circuit Erred in Scoring OV 11

In lieu of granting leave to appeal, the Supreme Court vacated the sentence of the Roscommon Circuit Court and remanded for resentencing. The trial court erred by assigning 50 points under Offense Variable 11 for penetrations that did not arise out of the particular sentencing offense. Because the amendment of the guidelines would change the applicable guidelines range the defendant is entitled to resentencing. *People v. David Sutton;* __Mich.__ (#151849, 9-21-16); MAACS - Arthur Landau. **SENTENCING AND PUNISHMENT- Guidelines-Scoring-Scoring Offense Variables (OVs)- OV 11.**

Calhoun Circuit Erred in Scoring OV 4

In lieu of granting leave to appeal, the Supreme Court vacated the sentence of the Calhoun Circuit Court and remanded for resentencing. The trial court erred by assigning 10 points for OV 4 where there was no record support that the complainants

suffered psychological injury and the complainant merely stated that she was fearful at the time of the crime. Because the amendment of the guidelines would change the applicable guidelines range the defendant is entitled to resentencing. *People v. Jack Wine, Jr.;* __Mich.__ (#151411, 9-21-16), MAACS - Daniel Bremer. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring Offense Variables (OVs)-OV 4.**

Alpena Circuit Erred in Failing to Score the Offense Variables and For Departing from the Guidelines for Reasons that Could Have been Scored Under the OVs

In lieu of granting leave to appeal, the Supreme Court vacated the sentence of the Alpena Circuit Court and remanded for resentencing. The trial court erred when it failed to assign any points to the Offense Variables but departed from the sentencing guidelines range in part because of the defendant's pattern of prior narcotics offenses. The PSIR supported a score of 10 points for OV 13. Even though the guidelines are now advisory, the scoring of the guidelines is mandatory and the OVs must be assigned the highest number of points applicable. Because the amendment of the guidelines would change the applicable guidelines range the defendant is entitled to resentencing. *People v. Raymond Geddert;* __Mich.__ (#151280, 9-21-16), SADO – Jessica Zimbelman. **SENTENCING AND PUNISHMENT-Guidelines-Appellate Review-General Rules-Scoring-Scoring Offense Variables (OVs) OV 13, SENTENCING AND PUNISHMENT-Departures-Departure Reasons.**

Michigan Court of Appeals: Selected Opinion Summaries

St. Joseph Circuit Erred When it Accepted Defendant's Plea to Child Abuse

In this case of first impression, the Court of Appeals held that a mother's pre-natal drug use cannot support a conviction for first-degree child abuse because the statute requires the victim to be a "child" and does not specifically include fetuses within the statutory definition of "child." M.C.L. 750.136b makes no reference to fetuses or to conduct that harms a fetus. Likewise, the definitions of "child" and of "person" found in the statute do not specifically include fetuses. The Court of Appeals noted that when the Legislature has created protection for fetuses in the past it has done so by clearly and specifically including embryo, fetus, unborn quick child, or other similar terms in the statutory language instead of by including fetuses within the statutory definition of "person." Because a fetus is not a "child" for purposes of the statute, defendant cannot be guilty of first degree child abuse based solely on the fact that she used methamphetamine while pregnant and the trial court erred when it accepted her plea and her conviction; sentence must be vacated. *People v. Melissa Jones;* __Mich. App.__ (#332018, 9-29-16); SADO - Jeanice Dagher-Margosian. **MISCELLANEOUS-Statutory Interpretation-Rules of Statutory Interpretation, OFFENSES-Child Abuse, GUILTY PLEAS-Factual Basis.**

Lapeer Circuit Properly Included Loss of Accumulated Sick, Personal, and Vacation Time in Restitution Order

Under M.C.L. 780.766(4)(c) of the Crime Victim's Rights Act, a crime victim is entitled to restitution for loss of accumulated sick, personal and vacation time used to recuperate from injuries where the victim lost the ability to use and be paid for taking that time in the future and he lost the ability to be paid for that time upon termination of his employment. The fact that loss of accumulated sick, personal and vacation time is not expressly listed in the Act is not dispositive because the Act contains a non-exhaustive list of types of restitution available. The time used to recuperate falls within the definition of "income loss" even though the victim was paid by his employer for the time he used because when the victim used his leave time he suffered a monetary loss. *People v. Dakota Lee Turn,* __Mich. App.__ (#327910, 10-11-16); MAACS - John Ujlaky, **MISCELLANEOUS-Statutory Interpretation, ECONOMIC PENALTIES-Restitution-Extent of Loss.**

New Trial Required Where Oakland Circuit Erred When it Denied Defendant's Motion to Suppress Seizure of Defendant's Wallet, Cell Phone and Keys

A new trial was ordered where the prosecution failed to establish that the admission of evidence regarding the items seized in violation of the Fourth Amendment was harmless beyond a reasonable doubt. The totality of the circumstances indicated that defendant had a legitimate expectation of privacy with regard to the search of his mother's home where he resided with his mother and had the ability to control the area searched and items seized. The mother's consent to search her apartment for the limited purpose of uncovering illegal drugs did not constitute consent to seize any item and the seizure of the wallet, keys and cell phone, therefore, fell outside of the scope of the consent. The seizure did not fall under the plain view exception because the incriminating nature of the items seized was not immediately apparent. Where defendant's probation conditions were not a part of the record there was insufficient evidence to conclude that the officers had reasonable suspicion that a probationer "subject to a search condition" was engaged in criminal activity. The Court rejected the prosecutor's reliance on *U.S. v. Knights*, 534 U.S. 112 (2001), for the argument that the officers were only required to have reasonable suspicion that criminal activity was occurring in order to conduct the search and declined to expand the holding in *Knights* to include items that are not incriminating in nature. The items did not fall under the scope of the inevitable discovery doctrine because the officers were not in the process of obtaining a warrant and to allow seizure in this instance would create an exception that would engulf the warrant requirement. The text messages taken from the phone were fruit of the poisonous tree and their admission was highly prejudicial to the defense and vital to the prosecution's case requiring a new trial. *People v. Gary Mahdi,* __Mich. App.__ (#327767, 10-11-16); SADO - Christine A. Pagac, **PRETRIAL MOTIONS AND PROCEDURE-Search and Seizure.**

Wayne Circuit erred when it Ordered Destruction of Defendant's Biometric Data and Arrest Card

In this appeal regarding an issue of first impression analyzing the 2012 amendment to M.C.L. 28.242, the Court of Appeals reversed the trial court's order for destruction of the defendant's biometric data and arrest card. The defendant sought the destruction of these items after the prosecutor requested entry of an order of *nolle prosequi* in the district court of second degree criminal sexual conduct charges under M.C.L. 750.520c(1)(1) (person under 13 years of age) after a preliminary examination had been held and the defendant was arraigned in the district court. The court rejected the prosecutor's argument that the defendant was required to file a writ of mandamus against the Michigan State Police seeking destruction of the documentation and held that the defendant need only file a motion in the district court under M.C.L. 28.243. The court held, however, that the circuit court lacked jurisdiction to order destruction of the data because the defendant had been arraigned in district court. The court held that deletion of the language "in circuit court" from the statute reflected the Legislature's intent to change the scope of the statute and therefore arraignment in the district court was all that was necessary to bar destruction of the data. The court also held that due to the clear and unambiguous language of the statute the trial court did not have discretion to order the destruction in the interest of justice. *People v. John Guthrie, III;* __Mich. App.__ (#327385, 9-22-16); Raymond Correll. **POST TRIAL MOTIONS AND APPEALS-Return of Fingerprints, MISCELLANEOUS-Statutory Interpretation-Rules of Statutory Interpretation.**

Iosco Circuit Abused its Discretion When it Denied Attorney Fees Because Defendant did not Prevail on Appeal

Assigned appellate attorney Mitch Foster filed a petition for a reasonable fee after the Iosco Circuit Court denied part of his fee request because the defendant's leave application was denied for lack of merit in the grounds presented and because Iosco is a "poor county." The court held that the trial court's policy of not paying a reasonable attorney fee and expense reimbursement for work done on behalf of a defendant because of the outcome of the appeal was unreasonable and an abuse of discretion. The court noted that one of its orders denying an application for leave is not necessarily a final decision but may simply be a statement that the matters asserted were not worthy of further expenditure of judicial resources. Also, notwithstanding the trial court's abuse of discretion, at least one of the arguments made by Foster were actually determined to have some level of merit by the Supreme Court as they remanded the case for a *Crosby* hearing after defendant filed a pro se application. The court remanded the matter for further proceedings consistent with its opinion and ordered the case reassigned to a different trial judge. *People v. David Boudrie, Sr.;* __Mich. App.__(#327707, 9-22-16); Mitchell T. Foster, Bradley R. Hall. **COUNSEL-Compensation.**

Michigan Court of Appeals: Selected Unpublished Opinion Summaries

Genesee Circuit Erred When it Sentenced Defendant on Misscored Guidelines

Affirmed the defendant's convictions but remanded for possible resentencing. The trial court erred in calculating the defendant's guidelines range after corrections to the scoring were made. Trial counsel stipulated to the incorrect range and waived the error. Trial counsel's performance was ineffective in this regard. The defendant is entitled to relief. Remanded for resentencing, if the defendant chooses to seek resentencing under *Lockridge*. *People v. Ervin Jovan Marks, Jr.*, Unpublished opinion of 09-01-16 (COA# 327039); SADO - Desiree Ferguson. **SENTENCING AND PUNISHMENT-Guidelines-Appellate Review - General Rules, COUNSEL-Ineffectiveness Of-At Sentencing.**

Saginaw Circuit Erred When it Sentenced Defendant to Consecutive Terms

Affirmed the defendant's convictions, but vacated his consecutive sentences for the CSC I convictions and remanded for resentencing on those offenses. The CSC I statute provides that the trial court "may order a term of imprisonment under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." M.C.L. 750.520b(3). The evidence in this case did not establish any timeline for the assaults. The complainant's testimony did not establish that the penetrations that formed the basis for the CSC I convictions grew out of a continuous time sequence and had a connective relationship that was more than incidental. No evidence supports that the CSC I convictions arose from the same transaction. *People v. Michael Eric Flores,* Unpublished opinion of 08-23-16 (COA# 326936); SADO - Kristin Lavoy. **SENTENCING AND PUNISHMENT- Consecutive Terms-Error in Imposition.**

New Trial Required Where Wayne Circuit Erred When it Admitted Prior Acts Evidence

Vacated the defendant's convictions and sentences and remanded for a new trial. The trial court abused its discretion in allowing in 404(b) evidence of sexual harassment testimony, failure to register under SORA, prior convictions and prior arrest. The evidence was not determinative to the charges and there was no physical evidence of a sexual assault – this was highly prejudicial and confused the relevant and material issues of the case. This case is a clear example of evidence admitted in violation of MRE 403. The evidence likely had a significant effect on the trier of fact and was used as a basis to convict the defendant. It was overwhelming and worked to deprive the defendant of a fair trial. *People v. Lavere Douglas-Le Bryant*, Unpublished opinion of 08-23-16(COA# 325569); MAACS - Jonathan Simon. **EVIDENCE-Proof of Other Crimes-(Similar Acts)-To Show Motive, Intent, Etc.**

Crosby Proceeding Required Where St. Clair Circuit Imposed a Departure Sentence Prior to Lockridge

Remanded for further proceedings. On appeal, the prosecutor argued that the trial court erred in imposing an unreasonable sentence of one year in the county jail where the sentencing guidelines range was 29 to 57 months in prison. The defendant was sentenced before the "substantial and compelling reason" standard was overturned by *Lockridge*. The appropriate remedy is a *Crosby* remand. *People v. Tommy Vernell Taylor*, Unpublished opinion of 09-15-16 (COA# 326741); David Heyboer. **POST-TRIAL MOTIONS AND APPEALS-Prosecutorial Appeal, SENTENCING AND PUNISHMENT-Departures-Departure Reasons.**

Remand Required Where Wayne Circuit Imposed Departure Sentence Without Considering that Guidelines are now Advisory

Affirmed defendant's conviction but remanded because the trial court imposed an upward departure sentence before *Lockridge* and *Steanhouse* were decided. The trial court must have an opportunity to consider the fact that the sentencing guidelines are now advisory and that sentencing decisions are now subject to the standard of reasonableness articulated in *Steanhouse* and rooted in the *Milbourn* principle of proportionality. *People v. Fernandez Ellen,* Unpublished opinion of 09-27-16 (COA# 325627); SADO - Jacqueline McCann **SENTENCING AND PUNISHMENT-Departures-Departure Reasons.**

Remand Required Where Wayne Circuit Used Judicially Found Facts to Score the Guidelines

Remand for a *Crosby* proceeding was required where the jury did not find facts to support the scoring of all of OV 3 beyond a reasonable doubt. Because the PSIR used at defendant's original sentencing was supplemented with documentation about his good conduct while incarcerated at his resentencing, the trial court did not abuse its discretion in refusing to order an updated PSIR before resentencing defendant as the original PSIR was reasonably updated under the circumstances. Defendant was not entitled to remand before a different judge where he failed to show that the judge in this case was actually and personally biased against him and there was no indication in the record that the sentences imposed were the result of any such bias or prejudice. *People v. Alfred Ollison;* Unpublished opinion of 09-27-16 (COA# 327492) MAACS - Nicholas Vendittelli. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring Offense Variables (OVs), SENTENCING AND PUNISHMENT-Presentence Reports-Duty to Update, SENTENCING AND PUNISHMENT-Resentencing-Right of Defendant to Different Judge.**

Kent Circuit Did Not Err When it Sentenced Juvenile to Life Without Parole

The Court of Appeals affirmed defendant's sentence of life without parole. According to the conflict panel in *People v. Hyatt*, __Mich. App.__(#325741 06-21-16), the judge and not a jury must make the factual findings mandated by *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and those findings do not violate the Sixth Amendment. When weighing the *Miller* factors, a trial court must begin with the understanding that, in all but the rarest circumstances, a life without parole sentence will be disproportionate. The trial court did not clearly err when it found that the defendant's age did not weigh in favor of parole where the trial court considered the defendant's age only as one of several factors and also considered defendant's maturity, mental acuity and intelligence level. The trial court, as the final arbiter on the credibility of witnesses, did not err when it found that defendant's assertion that he suffered abuse from his parents was not credible where defendant's PSIR stated that his parents did not abuse him and that he had a good relationship with his parents. The trial court also did not err when it found that peers did not pressure defendant into committing the crime, in spite of the fact that there were gang symbols in his cell, because as to this particular crime there was no evidence to support that defendant was pressured. Thus, the trial court did not clearly err with respect to its findings on the *Miller* factors, and it did not abuse its discretion in sentencing defendant to life without parole. *People v. Mike Zuniga;* (on reconsideration) Unpublished opinion of 09-29-16 (COA# 324157) SADO - Valerie R. Newman. **JUVENILES PROSECUTED AS ADULTS—Mandatory Adult Sentencing-Life Without Possibility of Parole.**

Genesee Circuit Erred When it Accepted Defendant's Plea to Failure to Comply With SORA

M.C.L. 28.727(1)(i) (which requires an individual to report email addresses that are routinely used by them) and M.C.L. 28.725(1)(f) (which requires individuals to make an immediate and in-person report of any electronic mail or instant message address or any other designations used in internet communications or postings) conflict with one another and require an individual to either guess as to which provision will apply to them or face the consequences of being non-compliant. Also, a provision requiring all email addresses to be reported would render nugatory a provision requiring only some email addresses to be reported and the terms "routinely used" independently render M.C.L. 28.717(1)(i) unconstitutionally vague and a violation of due process. Where a defendant could not have abided by both asserted provisions of SORA, neither provision can be found constitutional as written and defendant's conviction must be vacated. *People v. Harold Wilson;* Unpublished opinion of 10-04-16 (COA# 326299) MAACS - Jessica R. Mainprize-Hajek. **CONSTITUTIONAL RIGHTS- Due Process, SENTENCING AND PUNISHMENT-Administrative Action-Sex Offenders Registration Act (SORA)-Constitutional Considerations, CONDITIONS OF CONFINEMENT-Parole-Sex Offenders.**

Berrien Circuit Erred When it Denied Defendant's Motion to Suppress Evidence Found by Canine Sniff in a Traffic Stop

Factors used by the trial court were not sufficient to find that the officer had a reasonable suspicion, based on articulable facts, to prolong the traffic stop beyond the time necessary to complete the purpose of the traffic stop in order to conduct the canine sniff. The Court of Appeals attributed little significance to the officer's observations of defendant and the passenger being nervous because they were "very quiet, sitting still, low in the seats" and "very assured in their gestures." Criminal history alone was also found to be insufficient to give rise to the requisite reasonable suspicion to prolong a traffic stop. Defendant's statement that he was taking his aunt to the casino to work and then later his statement that he was taking his aunt to gamble, although inconsistent, do not rise to the level of

inconsistency so as to be deemed clearly untruthful or highly implausible where arguably some people might view gambling as a form of income generation. While driving a car owned by a third-party and the car's emitting a strong odor of a masking scent when combined with other factors can contribute to a finding of reasonable suspicion, here, the officer gave conflicting testimony regarding the odor of the vehicle and the car had been properly registered and had not been reported missing or stolen. The court found that the totality of the information gleaned by the officer amounted to nothing more than rank speculation and served more to resolve any suspicions raised than to aggravate them and the court refused to condone illegal searches based on intuition, a hunch, a gut feeling, strange vibes, or other irrelevant and improper characteristics rather than sufficient articulable facts. The ultimate discovery of contraband did not serve to validate the illegal search and seizure. *People v. Leslie Malone, Jr.;* Unpublished opinion of 10-04-16 (COA# 329989) Donald Sappanos. **PRETRIAL MOTIONS AND PROCEDURE-Search and Seizure-Automobiles, PRETRIAL MOTIONS AND PROCEDURE-Search and Seizure-Drug Dogs, PRETRIAL MOTIONS AND PROCEDURE-Search and Seizure-Motion to Suppress.**

Wayne Circuit Erred When it Failed to Score Guidelines

Affirmed Defendant's convictions but remanded for resentencing where the trial court failed to consider defendant's applicable sentencing guidelines range before imposing sentence and failed to score the offense variables and the prosecutor conceded error. *People v. Emmanuel Beverly,* Unpublished opinion of 09-20-16 (COA# 326199); SADO - Jacqueline McCann. **SENTENCING AND PUNISHMENT-Guidelines-Appellate Review-General Rules, SENTENCING AND PUNISHMENT-Scoring-Scoring Offense Variables (OVs).**

Kent Circuit Erred When it Joined Defendants' Cases for Trial

In this consolidated CSC I case, the court of appeals held that although there was sufficient evidence to find that the complainants' were mentally incapable of consenting to a sexual relationship, Defendant Parsley was entitled to a new, separate trial. The charges against each of the defendants were not logically related to each other, there was no large area of overlapping proof, and each defendant could attain his own goal by committing his own individual offenses. There was no evidence that the defendants shared a similar motive or employed a similar method, there was no commonality of evidence and the defendants' charges did not present a series of connected acts, Mich. Ct. R. 6.120(B)(1). Also, the offenses were not based on the same conduct or transaction. Joinder (here made on the court's own motion) was improper because the defendants' charges were not related as that term is defined for purposes of joinder Mich. Ct. R. 6.121(A). *People v Parsley,* Unpublished opinion of 9-20-16 (COA# 327924) MAACS - John D. Roach, Jr. **PRETRIAL MOTIONS AND PROCEDURE-Joinder and Severance-Joinder of Defendants, OFFENSES-Criminal Sexual Conduct-Sufficiency of Evidence.**

Monroe Circuit Erred When it Sentenced Defendant to an Indeterminate Sentence of 25 to 70 years for Indecent Exposure by a Sexually Delinquent Person

Defendant was convicted of both aggravated indecent exposure and indecent exposure by a sexually delinquent person. The court of appeals vacated defendant's conviction for aggravated indecent exposure as a violation of double jeopardy. The court also vacated defendant's 25 to 70 year sentence for indecent exposure by a sexually delinquent person based upon the holding in *People v. Campbell,* __Mich. App.__(#324708, 7-14-16). *Campbell* held that after the decision in *Lockridge,* trial courts must sentence a defendant convicted of indecent exposure by a sexually delinquent person consistent with the requirements of M.C.L. 750.335a(2)(c) to one day to life. *People v. Lonnie Arnold;* Unpublished opinion of 9-22-16 (COA# 325407) SADO - Marilena David-Martin. **CONSTITUTIONAL RIGHTS-Double Jeopary-Multiple Punishments, SENTENCE ENHANCEMENT-Sexual Delinquency, SENTENCING AND PUNISHMENT-Indeterminate Sentence.**

Resentencing Required where Ingham Circuit used Judicial Fact Finding to Score the Guidelines

Affirmed the Defendant's convictions, but remanded for resentencing pursuant to *Lockridge* where the parties agreed that the trial court scored several guidelines based upon judicially found facts in violation of the Sixth Amendment. Defendant was also entitled to correction of his judgment of sentence where the trial court erroneously ordered that his sentences for the AWIGBH and CCW convictions run consecutively to his sentence for the felony-firearm conviction. *People v. Shetoan Coates;* Unpublished opinion of 9-22-16 (COA# 327501) SADO - Kristin Lavoy. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring Offense Variables**

(OVs), SENTENCING AND PUNISHMENT-Consecu-tive Terms-Felony Firearm.

Affirmed the defendant's convictions, but remanded for resentencing where the jury convicted defendant of home invasion and two murders for a single killing and the trial court recognized the impropriety and vacated one of the murder convictions but still scored PRV 7 at 20 for two or more subsequent or concurrent convictions. Because the amendment lowered the minimum sentencing guidelines ranges, remand for resentencing under the principles of *Lockridge* was required. *People v. Taranda Carson, Jr.;* Unpublished opinion of 10-13-16 (COA# 326410) MAACS - Ronald D. Ambrose. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring Prior Record Variables (PRVs)-PRV7.**

Remand Required Where Wayne Circuit Sentenced Defendant Without Recognizing That the Guidelines are now Advisory

Affirmed the defendant's convictions, but remanded for a *Crosby* proceeding to determine whether the trial court would have imposed materially different sentences had it known of the advisory nature of the guidelines. The court of appeals stated that the trial court could consider judicially found facts when scoring the guidelines and sentencing the defendant as long as the trial court's findings are supported by a preponderance of the evidence. *People v. Matthew Baker;* Unpublished opinion of 10-13-16 (COA# 327356) MAACS - Gary Strauss. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring Offense Variables (OVs).**

Resentencing Required Where Wayne Circuit Failed to Explain Why Departure Sentences were Proportional

Affirmed the defendant's convictions but remanded for a third resentencing applying the post-*Lockridge* standards. In the first two remands for resentencing the trial court failed to adequately explain the 180 month minimum sentence when the correct guideline level was 9 to 46 months. The court of appeals found that the sentence was not reasonable and noted that the only connection made by the trial court between the reasons justifying the departure and the proportionality of the departure length were based on application of "unprecedented and arbitrary mathematical formulas" that violated the purpose of the proportionality requirement which is to minimize idiosyncrasies. The court of appeals directed the trial court to indicate why the departure sentence more adequately reflects the seriousness of the crime committed and the extent of the defendant's criminal history than the sentence recommended by the guidelines and cautioned that statutory authority to impose a life sentence does not mean that it is proportional to the circumstances of every case. The court did not address defendant's argument for resentencing before a different judge because the sentencing judge had since retired. *People v. Lavagas Drain;* Unpublished opinion of 10-13-16 (COA# 327601) MAACS - Michael McCarthy. **SENTENCING AND PUNISHMENT-Guidelines-Departures-Departures Proportionality Review.**

Resentencing Required Where Wayne Circuit Misscored OV 3 and Amendment to Scoring Changed Grid Level

Remand for resentencing was required where the trial court erroneously scored OV 3 at 10 points for bodily injury requiring medical treatment based upon the victim's mother having the victim tested for sexually transmitted diseases. The court held that the phrase "bodily injury" does not encompass possible injury. Therefore, because it was undisputed that the victim did not become infected with a sexually transmitted disease, there was insufficient record evidence to support the score. The court also held that OV 3 requires factual causation and therefore the prosecutor could not use the medical record that documented a vaginal injury to score this variable because there had been no finding regarding the cause of the victim's vaginal injury. Because the amendment lowered the minimum sentencing guidelines ranges, remand for resentencing was required. *People v. Vernon Richardson;* Unpublished opinion of 10-13-16 (COA# 327729) MAACS - Melvin Houston. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring Offense Variables (OVs)-OV3.**

Remand Required where Oakland Circuit used Judicial Fact Finding to Score the Guidelines

Affirmed the defendant's convictions, but remanded for a *Crosby* proceeding to determine whether the trial court would have imposed materially different sentences had it known of the advisory nature of the guidelines where the court used judicial fact-finding to score OVs 4, 7 and 10 and the reduction in the scoring resulted in a reduced guidelines range. *People v. David Croskey;* Unpublished opinion of 10-18-16 (COA# 327724) MAACS - Deborah Choly. **SENTENCING AND PUNISHMENT-Guidelines-Scoring-Scoring Offense Variables (OVs).**

Training Calendar

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

December 2, 2016	Michigan Law Update	CAP - Detroit, MI
December 2, 2016	Put Your Best Defense Forward	CLS - SBM - Novi, MI
December 8-9, 2016	Mitigation in Juvenile Lifer Cases	CDRC - Auburn Hills, MI
January 13, 2017	US Supreme Court Update	CAP - Detroit, MI
January 19, 2017	Appellate Defender Training	NLADA - New Orleans, LA
January 19-22, 2017	Advanced Criminal Law	NACDL - Aspen, CO
January 27, 2017	Evidence	CAP - Detroit, MI
February 4, 2017	Summit on Public Defense	ABA - Miami, FL
February 10, 2017	Social Media	CAP - Detroit, MI
February 18-20, 2017	40th Mid-Winter Ski-Conference	CLS - SBM - Bellaire, MI
February 21, 2017	Informational Session for Family and Friends	SADO - Lansing, MI
February 24, 2017	Interlocutory Appeals	CAP - Detroit, MI
March 15-18, 2017	Techshow 2017	ABA - Chicago, IL
March 16-18, 2017	CDAM's 2017 Spring Conference	CDAM - Troy, MI
March 24, 2017	Treatment Facilities & Specialty Courts	CAP - Detroit, MI

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